

Lawyers *in the* Dock

Learning from Attorney Disciplinary
Proceedings

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Chapter 8

Restoring Trust

Reading the disciplinary cases presented above could easily breed cynicism about the possibility of changing such behavior. All but one of the lawyers were convinced they had done nothing wrong. Few could have been identified as potential rule violators in advance; indeed, all but one had practiced law successfully, some for many decades. The disciplinary process not only failed to reform them, it actually made them more self-righteous. I do not see these stories, however, as grounds for despair, for resigned acceptance that any barrel will contain a few bad apples. The costs of lawyer betrayal are too high for clients, the legal profession, the legal system, society, and even the lawyers themselves. I wrote these case studies in the belief that only by understanding the social, structural, and psychological conditions of lawyer deviance can we take effective steps to rebuild the trust that is the essential foundation of our legal system. The responses to all forms of deviance (street and white-collar crime, terrorism) too often fall into two common traps: more regulation (“there oughta be a law”) and harsher penalties (“lock ‘em up and throw away the key”). This final chapter looks for alternatives. I begin with an overview of the troubling behaviors, seeking commonalities across the cases. Then I consider conventional modes of social control: tinkering with the norms,

inculcating them more effectively, identifying potential deviants, and deterring violations. On the basis of these case studies, as well as the literature on lawyer discipline (and deviance generally), I have become convinced that the potential gains from ex post social control are severely limited. Therefore, I conclude by exploring a variety of structural changes that might reduce the opportunities and incentives for lawyers to betray trust.

I. What Went Wrong

I have borrowed this heading from Lawrence Dubin's 1985 video profiling four disciplined lawyers, which was one inspiration for this book.¹⁰²³ Like his, my cases are very diverse, in both the actions committed and the underlying character traits. That insight, of course, is the starting point of modern criminology. Ethical rules, like criminal laws (indeed, all laws), are socially constructed categories, which sweep into their nets a wide variety of highly disparate behaviors. For each crime, there is no typical perpetrator, no phrenological or sociopathic marker. Yet there are some revealing similarities among actors and actions (in both how they practiced law and how they responded to the disciplinary process).

Occam told us to keep it simple. *Cherchez l'argent* is at least as good a rule of thumb as its racier original. Look for greed or need (which often are indistinguishable).¹⁰²⁴ Almost all lawyers practice in order to make money.¹⁰²⁵ (I provoke embarrassed laughter when I kid my first-year students that most are in law school because they want a secure place in the middle class and can't add or stand the sight of blood.) All of the lawyers I studied were upwardly mobile (except perhaps Cardozo). Despite an undistinguished academic record, Kreitzer had constructed a money-making machine that used inexperienced associates and lay employees to settle large numbers of tort claims at minimal cost. When cash flow became a problem, he paid insurance claims adjusters kickbacks to expedite payment. The recurrence of his cancer and the burden of his children's college tuition may have increased his need. Drawn to the Big Apple's bright lights, Muto found he could make more as a "per diem" lawyer than he had ever earned upstate and quickly saw he could double or triple that income by working for "travel agencies." Furtzaig was motivated to generate

¹⁰²³ Dubin (1985).

¹⁰²⁴ This is a less jargon-ridden, but perhaps more faithful, way to capture the behavior Donald Cressey (1953) called "non-shareable financial problems."

¹⁰²⁵ Chusmir (1984) (lawyers have high "need achievement"); Houston (1992).

money for his firm, not himself. Indeed, to forestall the wrath of his demanding father figure, Warren Estis, he spent \$60,000 of his own money to resolve mistakes he had made by taking on too much responsibility. Cardozo and Brashich chose to settle Babette Hecht Rose's trust dispute in a way they believed would entitle them to a contingent fee: a third of her \$1.75 million. Yet Cardozo conceded he would have claimed in quantum meruit even if his client had lost. "I don't work for nothing. Not with this kind of money involved." Brashich could not (or would not) comply with a court order to repay Ljubica Callahan \$263,000. Byler urgently needed Morgan's \$53,000 IRS refund to pay work and household expenses. Byler and Brashich were constantly trying to raise their hourly rates. Wisehart took Lipin's case on a contingent fee (as he must have done for most of his employment discrimination clients). Stonewalling by the Red Cross and its lawyers forced him to invest thousands of hours in discovery. He had to win in order to collect; by establishing both liability and perhaps punitive damages, the smoking gun in the purloined papers promised he would win big.

The lawyers' motives, however, were by no means purely mercenary. Law is a helping profession (despite what critics say). Lawyers offer unconditional loyalty to clients, just as doctors and therapists do to patients, soldiers to their country, and priests to penitents. Lord Brougham famously wrote that the advocate "knows but one person in all the world, and that person is his client." David Melinkoff depicted lawyers responding to "the saddest of all human cries: 'Who will help me?'" Charles Fried defined the lawyer as "friend."¹⁰²⁶ Most lawyers come to believe in most of their clients (if not in everything those clients say).¹⁰²⁷ Law practice would be intolerable otherwise. Lawyers derive psychic benefits from client dependence. They come to want, and expect, gratitude. A divorce client said of a letter that her lawyer had written to her estranged husband's lawyer, "It kind of let me feel that finally . . . I'd found a knight in shining armor."¹⁰²⁸ Babette Hecht told her son Toby that she "loved Ben [Cardozo] to death." Toby agreed that his mother saw Brashich and Cardozo as "knights on white horses." Deborah mocked them as her mother's "latest sympaticos." During my own year practicing family law, I was struck by the transference of my (female) clients both to me and to the (male) judges who granted their divorces.

¹⁰²⁶ All these are discussed critically in Luban (1984).

¹⁰²⁷ Robert Nelson (1985) found that large-firm lawyers rarely perceive fundamental moral conflicts with their clients.

¹⁰²⁸ Sarat & Felstiner (1986).

Muto expressed the lawyer's need most poignantly:

Virtually every one of my clients is overjoyed and happy with my services. There's no greater feeling than seeing a man's case being granted and having him shake my hand and saying she-she, thank you in Chinese—bowing to me and just grabbing my hand. It's heartening to take a walk through Chinatown as I did with my daughter a couple of weeks ago on a Sunday afternoon, and going into a store and having someone come up to me and shake my hand and saying thank you, Muto. Thank you, thank you, lawyer.

Kreitzer's personal injury victims depended on him to secure their often desperately needed compensation. Byler derived enormous satisfaction from helping his good friend Morgan, displaying both his technical expertise and dedication. He expected gratitude in return, not defiance, threats from Morgan's brother, a disciplinary complaint, and a lawsuit. Babette and three of her children unquestioningly paid Cardozo and Brashich the \$375,000 they demanded. Ljubica was so grateful to Brashich that she compromised his \$263,000 debt for a conditional \$75,000 and never even sought to recover that. Lawyers threatened with discipline generalize the dependence of clients to argue that they are performing an essential service to society, which will suffer most if they are suspended or disbarred.

Some lawyers take identification with clients to an extreme. Wisheart and Lipin became a *folie à deux*. Wisheart hired Lipin as a paralegal in her own lawsuit. He passionately championed her cause, expressing his strong emotional investment through repeated attacks on opposing counsel, Referee, and judges. At the same time, Wisheart hid behind Lipin: *she* took the papers; *she* should tell opposing counsel it had been a mistake; *she* made the copies; *she* kept one for herself, which *she* might release to the press. He put the most scurrilous accusations against Moskowitz into *Lipin's* mouth in order to evade responsibility.

Once these lawyers committed themselves to an action, they found it difficult to change course. Instead, they constructed an alternative reality, which made their conduct acceptable, laudable, even imperative. This often required profound self-deception. Kreitzer insisted that he diligently pursued his clients' interests. Muto maintained that he did quality work for grateful clients and was praised by judges—even that he could get on a plane. Both denied that their cases required any more work than they invested.

Byler convinced himself that Morgan had assigned him the entire refund. He was so self-righteous he could not even acknowledge Morgan's disagreement. Byler offered his representation of Moor-Jankowski as evidence of a client grateful for high quality work—even though Moor-Jankowski challenged his fee! Even after being disciplined for his representation of Babette Hecht, Brashich invoked it as justification for the fee he charged Ljubica. Wisheart's rationalizations for retaining and using the papers did not pass the laugh test.

Many of these lawyers blamed others. Kreitzer and Muto sought to shift responsibility to uncooperative clients for their own failure to pursue cases vigorously, file papers in a timely manner, and appear at hearings. Muto even claimed that clients sent impersonators, although he could not explain why. Byler sought to discredit Morgan as a chronic tax evader—precisely the problem for which Morgan had hired Byler. Kreitzer blamed subordinates for neglect and mistakes, even employees he instructed to engage in unauthorized practice of law. Several lawyers accused judges of misconduct. Muto cited immigration judges' different rates in granting asylum and insisted that some disliked him personally (true) and treated him unfairly (false). Brashich assailed Emanuelli and had a character witness testify that all upstate surrogate judges were biased against New York City lawyers. And Wisheart systematically moved to recuse *every* judge who had ruled against him or might do so, concocting bizarre conspiracy theories about their alleged biases.

The most striking trait shared by these otherwise diverse lawyers—and the most surprising, given their professional identity—was their conviction that they were above the law. Kreitzer felt entitled to pay kickbacks for settlements because other lawyers did so. Muto felt no obligation to appear at hearings if he would have to drive long distances. He expected judges to give special consideration for his fear of flying, even though he did not disclose it. He felt no obligation to file papers on time or even to seek an extension. He claimed special treatment because his mother was dying but told no one. Furtzaig forged legal documents he knew would be discovered, perhaps in order to be caught—a form of professional suicide, fortunately less catastrophic than his contemplated leap from an office window. Brashich and Byler defied orders to repay disputed fees. Wisheart was the most colorful:

I insist on being heard. If you are going to send me to The Tombs because I want to be heard, you go ahead and do it.

It says "In God We Trust" up there. We do not trust in this Court as it is presently constituted.

This had its calculated effect of so infuriating Moskowitz that she recused herself. Many of these lawyers remained convinced of their righteousness throughout the disciplinary hearing. The ethical mandate to advocate vigorously creates a *déformation professionnelle*, making it impossible for lawyers, like bulldogs, to let go. The very traits and technical skills that made Byler, Brashich, and Wisheart effective lawyers also made them tragically self-destructive before the DDC.

II. Character Is Destiny

Ever since Heraclitus, writers have commented on the persistence of personality.¹⁰²⁹ Lawyers typically become embroiled in disciplinary proceedings in the middle of their careers, not at the beginning. Habit is their tragic flaw, not inexperience.¹⁰³⁰ None of the lawyers in this book was a novice; all had practiced more than 10 years, some more than 40. The acts for which they were disciplined were not aberrational. Muto repeatedly promised to reform—beginning with his application for readmission following suspension—but could not do so. Only a bureaucratic structure could correct his fatal disorganization. Kreitzer's lawyer protested that many clients were *not* complaining—but that hardly proved they had been well served. The inevitable errors Furtzaig made as a result of overwork forced him to engage in ever more compromising cover-ups. He so feared displeasing his father figure that he seriously contemplated suicide. Brashich's treatment of Ljubica bore troubling similarities to the way he had just treated Babette. He bragged to me that because he was a Serb he always fought. Byler's fee dispute with Morgan resembled his earlier dispute with Moor-Jankowski. In both of those, and throughout the disciplinary proceeding, he was compulsively self-righteous. And Wisheart constantly attacked the integrity of judges, before, during, and after his representation of Lipin.

The legal profession and the legal academy have a limited repertoire of solutions to these problems. First, they tweak the rules (an unsurprising

¹⁰²⁹ Daicoff (1997–1998); Regan (2007). A recent study of medical malpractice claims concluded that "physician characteristics can be used to distinguish between more and less malpractice-claims-prone physicians": Rolph et al. (2007: 149).

¹⁰³⁰ For a phenomenological study of the contrasting habitus of two lawyers, see Scheffer (2007).

choice for lawyers). The ABA and state and specialist bars devote an extraordinary amount of energy to revising the official norms.¹⁰³¹ Almost all the voluminous academic writing on the subject addresses the content of those norms. As a common law lawyer, I acknowledge, of course, that there are cases at the margins, which clarify and modify the rules. But the rules and their application are clear in the vast majority of breaches, including those in this book. Second, reformers argue that the problem is ignorance. In response to Watergate—whose perpetrators were lawyers from the president on down—the ABA required accredited law schools to mandate instruction in professional responsibility.¹⁰³² The compulsory course tends to be unpopular (as I know, having taught it for most of the last 34 years). State bars also require the Multistate Professional Responsibility Examination—which most law students pass after cramming for one weekend. And state continuing education requirements often include refresher courses in ethics.¹⁰³³ Although many commentators retain an unsubstantiated and unwarranted faith in the power of exhortation and instruction,¹⁰³⁴ the limited empirical data suggest that compulsory instruction only increases cynicism.¹⁰³⁵ Indeed, the exercise seems about as productive as Article 3 of the Chinese education law: “In developing the socialist educational undertakings, the state shall uphold Marxism-Leninism, Mao Tse-tung Thought and the theories of constructing socialism with Chinese characteristics as directives and comply with the basic principles of the Constitution.”¹⁰³⁶

Ignorance does *not* seem to be the problem.¹⁰³⁷ As Ado Annie sings in *Oklahoma*, “It ain’t so much a question of not knowin’ hut to do/I knowed what’s right an’ wrong since I’ve been teen.” Studies of decision making have found that those with more experience encounter greater difficulty in learning from their mistakes.¹⁰³⁸ Larger firms are professionalizing the ethical guidance they offer members.¹⁰³⁹ Surveys find that even

¹⁰³¹ Abel (1981; 1989: 142); Schneyer (1989).

¹⁰³² “A law school shall require that each student receive substantial instruction in: . . . (5) the history, goals, structure, values, rules, and responsibilities of the legal profession and its members.” ABA Standard 302(a)(5).

¹⁰³³ N.Y. Comp. Code R. & Regs. Tit. 22, § 1500.22(a) (2003).

¹⁰³⁴ E.g., Powell (1994: 288); Re (1994: 124–30).

¹⁰³⁵ Carlin (1966); Patton (1968); Pipkin (1979); Goldberg (1979); Zemans & Rosenblum (1981); ABA Center for Professional Responsibility (1986).

¹⁰³⁶ Mitchell Landsberg, “Marx Loses Currency in New China,” Los Angeles Times A1 (6.26.07).

¹⁰³⁷ Daicoff (1997) (responses to hypotheticals).

¹⁰³⁸ Schoemaker (2006).

¹⁰³⁹ Compare Lazega (2001) with Chambliss (2006).

solo and small firm practitioners are conscious of encountering ethical dilemmas with some frequency. Few consult the rules, which they find divorced from reality (suggesting that the law school courses that teach the rules can have little effect). But lawyers do seek ethical guidance.¹⁰⁴⁰ Both Byler and Wisehart turned to colleagues. The advice they received, however, merely confirmed their own bad instincts.¹⁰⁴¹ Muto learned to work for travel agencies from David Rodkin, his first New York City employer. Among the solo and small firm lawyers Leslie Levin interviewed, one “recounted stories about an earlier employer, a sole principal, from whom he ‘learned how to break every rule in the universe.’” Another learned billing abuse in a large firm. When a third encountered the first client who wanted to pay cash under the table in a real estate transaction, she consulted three lawyer relatives, all of whom told her, “That’s just how it works sometimes. Just make sure that you’re not in the room where the cash is happening, you know? Go get a cup of coffee.”¹⁰⁴² Indeed, Jerome Carlin found that “office climate” tended to produce less, rather than more, ethical behavior.¹⁰⁴³ For years, lawyers have paid and received fees for referring cases, in blatant disregard of ethical rules.¹⁰⁴⁴ Lawyers consistently disregard the conflict of interest with their clients inherent in the contingent fee.¹⁰⁴⁵ The problem seems to be that lawyers develop schemas for routine action and then rationalize an ethical justification.¹⁰⁴⁶ As lawyers, not surprisingly, they are very good at doing so.

III. Discipline as Social Control

Self-regulation lies at the core of every profession. Everett Hughes, a pioneering sociologist of the professions, observed that the “colleague group . . . will stubbornly defend its own right to define mistakes, and to say in the given case whether one has been made.” The layperson looks to the profession for pure technique, but “to the people who practise it, every occupation tends to become an art.” Artistry can be judged only by the adept,

¹⁰⁴⁰ Levin (2004–2005: 335, 362–68); Schiltz (1998: 713).

¹⁰⁴¹ But see Economides & O’Leary (2007).

¹⁰⁴² Levin (1998: 890–93).

¹⁰⁴³ Carlin (1966: tables 73–78).

¹⁰⁴⁴ 71 ABAJ 48–49 (February 1985).

¹⁰⁴⁵ Levin (2004–2005: 336).

¹⁰⁴⁶ Levin (2004–2005: 376), citing Scott Plous, *The Psychology of Judgment and Decisionmaking* 30, 219 (1993).

who possess an esoteric knowledge of ritual.¹⁰⁴⁷ Police form a silent blue wall when charged with abuse.¹⁰⁴⁸ Doctors refuse to report or testify against those accused of malpractice.¹⁰⁴⁹ Hospitals ignore whistleblowers.¹⁰⁵⁰ The military tries combat-related offenses in courts martial staffed by combat veterans. When outsiders condemn such self-dealing, back-scratching, taking care of their own, asking "*quis custodet ipsos custodes?*" occupational groups reluctantly establish regulatory bodies with nominal independence, just as the British Medical Association (the doctors' trade-union) separated from the General Medical Council.¹⁰⁵¹ But even independent agencies must be staffed by professionals who have acquired the same knowledge and experienced much the same socialization process as those they judge.¹⁰⁵²

Lawyer self-regulation has been severely criticized for decades. One fatal flaw is that, even more than most forms of social control, it is almost entirely reactive. There are no cops on the beat, CCTVs photographing license plates, random drug checks, or financial audits. As a result, the "dark figure" of uncorrected misconduct totally overshadows the few who are caught. Control depends almost entirely on clients complaining. But few do: only 2 percent of the dissatisfied clients of English solicitors complained, in the only empirical study yet conducted on the subject.¹⁰⁵³ Clients do not know the ethical rules. Much lawyer conduct is (deliberately) hidden from them. Lacking the expertise to evaluate

- 1047 Hughes (1951: 322, 324-25).
 1048 After the California Supreme Court ruled that disciplinary records were confidential, the California legislature failed to pass bills backed by the Los Angeles Chief of Police, which could have overturned the decision, swayed by lobbying by the Professional Peace Officers Association, Police Officers Research Assn of California, the Orange County Sheriff, and the Los Angeles Police Protective League, as well as dozens of police officers from around the state. Patrick McGreevy, "Effort to Open Files on Police Thwarted," Los Angeles Times B1 (6.27.07).
 1049 Medical Economics (8.28.61); Bernstein v. Alameda-Contra Costa Medical Ass'n, 293 P.2d 862 (Cal. App. 1956) (local medical society expelled complaining doctor). Not much has changed in the last half century. Christopher Lee, "Study Finds Gaps Between Doctors' Standards and Actions," Washington Post A8 (12.4.07); "Falling Short of Professional Standards," New York Times A20 (12.24.07) (editorial); Campbell et al. (2007b).
 1050 Tracy Weber and Charles Orenstein, "No One Would Listen," Los Angeles Times (10.16.07); "Report Criticizes Kaiser for Lack of Action," Los Angeles Times B1 (1.26.08).
 1051 See also Powell (1986).
 1052 E.g., ABA Special Committee (1970); Nader & Green (1976); Gilb (1956); Marks & Cathcart (1974); Shuchman (1968); Steele & Nimmer (1976); Tisher et al. (1977); Guttenberg (1994); Rhode (2000: 158-65); Zacharias (2002); Barton (2003).
 1053 Abel (1988: 252). On the passivity of clients, see Hunting & Neuwirth (1962: 107-08); Rosenthal (1974: 31, 43-44, 47-48); Felstiner (1997: 125-26); Hosticka (1979); Steele & Nimmer (1976: 955-57).

competence, they rely on imperfect signals of quality: firm size, office location and décor, formal credentials, the lawyer's dress and personality. Some clients—like Ljubica Callahan and all the Hechts except Deborah—are so grateful to and dependent on their lawyers that they refuse to complain even when shown the harm. Others, like Lipin, actively seek to benefit from the violation. There is a systematic mismatch between the harms clients most commonly suffer (primarily neglect) and the willingness of disciplinary authorities to impose significant penalties.¹⁰⁵⁴ Such bodies typically act only when neglect becomes chronic.¹⁰⁵⁵ Commentators are rightly skeptical about the capacity of discipline to address the problem of incompetence.¹⁰⁵⁶

Only 13 percent of a survey of American clients and just 17 percent of English knew where to complain.¹⁰⁵⁷ But why should the few who did bother to take the trouble? As in all criminal prosecutions, victims lose control once they file a complaint. They usually hear nothing about what is happening (often the very grievance they had against their lawyer). The outcome takes years, especially because lawyers are highly motivated to fight (given the stakes and their personalities) and are able to do so (having acquired the skills and resources). Rarely does the process produce compensation for the victim. Muto's clients were the exception because immigration judges had made disciplinary complaints a prerequisite to reopening asylum petitions. Any attempt to lower these obstacles to client complaints would provoke fierce opposition from lawyers, who fear (with some justification) that the grievance process already is abused by cranks and deadbeats trying to evade paying their bills (Byler's allegation against Morgan). The English Law Society requires all solicitors to create an in-firm grievance mechanism and tell clients about it, but compliance has been grudging and spotty.¹⁰⁵⁸ The Law Society also has made "inadequate

¹⁰⁵⁴ Royal Commission on Legal Services (1979: vol. 1: 312–14; vol. 2: 233, 244, 254).

¹⁰⁵⁵ Compare *Friday v. State Bar*, 144 P.2d 564, 569 (Cal. 1943) (en banc) (suspending a disrespectful, incompetent lawyer for six months), and *Fla. Bar v. Neale*, 384 So.2d 1264, 1265 (Fla. 1980) (per curiam) (refusing to discipline malpractice), with *In re Albert*, 212 N.W.2d 17, 21 (Mich. 1973) (per curiam) (years suspension for a lawyer who neglected five clients), and *Comm. on Legal Ethics v. Mullins*, 226 S.E.2d 427, 432 (W.Va. 1976) (suspending negligent attorney indefinitely). See also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 335 n.1 (1974) (requiring "consistent failure to carry out the obligations" or "a conscious disregard for the responsibility owed to the client"); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1273 (1973) (requiring "more than a single act or omission").

¹⁰⁵⁶ Frankel (1977); Martyn (1981); Spaeth (1988).

¹⁰⁵⁷ Steele & Nimmer (1976: 962–63); Royal Commission (1979: vol. 1: 292; vol. 2: 263).

¹⁰⁵⁸ Abel (2003: 359); Christensen et al. (1999).

professional services” a disciplinary offense: solicitors may have their costs disallowed and be directed to rectify the error and pay up to £30,000 compensation.¹⁰⁵⁹ But in 1999 the Office for the Supervision of Solicitors was so underfunded and understaffed that it told new complainants their files would not even be opened for 12 months.¹⁰⁶⁰ And a decade earlier, the California disciplinary procedure completely shut down for lack of money.¹⁰⁶¹

Clients may be more motivated to sue for malpractice, which offers the possibility of significant compensation. Like disciplinary complaints, these claims disproportionately target small firms (though not solo practitioners, perhaps because they have no partners to share liability), personal injury and real estate practitioners, more rather than less experienced lawyers, and litigation rather than transactional work, and they occur mostly because of missed deadlines.¹⁰⁶² The deterrent effect of malpractice liability is mediated by insurers, who seek to hold down rates by monitoring the insured.¹⁰⁶³ However, the market for lawyer malpractice insurance seems even more imperfect than insurance markets generally.¹⁰⁶⁴ Only Oregon requires insurance; estimates of the proportion of lawyers uninsured in other jurisdictions range from 25 to 50 percent.¹⁰⁶⁵ The legal profession’s failure to mandate insurance is inexcusable. The English Law Society required solicitors to insure more than 40 years ago. Because the Society operated its own monopolistic mutual insurer, attempts to experience-rate premiums have fomented sharp conflicts based on firm size and substantive area.¹⁰⁶⁶

If it is difficult to encourage clients to file more complaints, then who else might bring them? Unlike clients, lawyers know the rules and observe much of each others’ conduct. But they are both too reticent and too ready to complain. Some remain silent by reason of collegiality. In Missouri, 34 percent of rural lawyers and 71 percent of urban lawyers said they would report misconduct, but only 11 and 27 percent had ever

¹⁰⁵⁹ Abel (2003: 355, 357); Moorhead et al. (2000b).

¹⁰⁶⁰ Abel (2003: 378); Moorhead et al. (2000a).

¹⁰⁶¹ Fellmeth (1987a; 1987b; 1987c).

¹⁰⁶² Gates (1984; 1985-1986).

¹⁰⁶³ Wycoff (1962) (doctors); Galante (1986: 8); Baker & Simon (2002).

¹⁰⁶⁴ Pfennigstorf (1980: 237 n.8); Galante (1985a; 1985b; 1985c); Winchurch (1987).

¹⁰⁶⁵ Snider (1986); Fellmeth (1987b: 9, 26). With the encouragement of the ABA, which adopted a Model Court Rule on Insurance Disclosure in 2004, at least 23 states now require some form: www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf.

¹⁰⁶⁶ Abel (1988: 258-60; 2003: 381-93).

done so.¹⁰⁶⁷ Professionals (including judges) file less than a tenth of all grievances in the United States¹⁰⁶⁸ and just 14 percent in Britain.¹⁰⁶⁹ We saw Ann Hsiung's reluctance to complain against Muto, whom she barely knew. Lawyers are no more eager to wash dirty linen in public than are members of other collectivities. Warren Estis was unusual in complaining against Furtzaig, his protégé; but the misconduct was blatant, and the firm potentially liable to clients. The ABA has urged states to mandate a duty to disclose.¹⁰⁷⁰ But subordinates understandably are afraid to complain against superiors in their firms because many jurisdictions treat employment as "at will" and offer no protection against retaliation.¹⁰⁷¹ Lawyers also may file too many complaints, or unfounded ones, in order to gain tactical advantage over an adversary.¹⁰⁷² We saw that Wisheart and WGM moved to disqualify each other, and Wisheart made similar motions in other cases. Muto objected (wrongly) that the complaints against him came from the Lord and Taylors of practice, trying to put his Filene's Basement operation out of business.

Judges are less likely to be either overprotective or vindictive. Immigration judges complained against Muto for multiple reasons: solicitude toward his clients, who risked losing legitimate asylum petitions; anger at him for wasting their time; and frustration at their own lack of disciplinary procedures. When Deborah Hecht's refusal to pay their fees forced Cardozo and Brashich to petition the Surrogate, Judge Emanuelli criticized them for failing to present Babette with alternative settlements that would have produced a lower fee. Judge Moskowitz dismissed Lipin's case because of her and Wisheart's misconduct. In the aftermath of Hurricane Katrina, Judge Arthur L. Hunter, Jr., of the Orleans Parish

¹⁰⁶⁷ Landon (1982: 482).

¹⁰⁶⁸ Steele & Nimmer (1976: 973). An unusual example is a federal judge who complained about an Assistant U.S. Attorney to both the state bar and the U.S. Attorney General. Adam Liptak, Federal Judge Files Complaint against Prosecutor in Boston, *N.Y. Times* (7.3.07).

¹⁰⁶⁹ Royal Commission (1979, vol. 1: 315) (1973–1978).

¹⁰⁷⁰ ABA Commission on Professionalism (1986); ABA Commission on Evaluation of Disciplinary Enforcement (1991).

¹⁰⁷¹ *Wieder v. Skala*, 609 N.E.2d 752 (N.Y. 1992); *Bohatch v. Butler & Binion*, 977 S.W.2d 543 (Tex. 1998); *Balla v. Gambro, Inc.*, 145 Ill.2d 492 (1991); *Jacobson v. Knepper & Moga, P.C.* 195 Ill.2d 371 (1998); *Kelley v. Hunton & Williams*, 1999 U.S. Dist. Lexis 9139 (E.D.N.Y.); Griffin (2006).

¹⁰⁷² Victor (1986) (Cadwalader, Wickersham & Taft against Skadden); Frank J. Prial, "A Year After Settling the Johnson Estate, Lawyers Still Battling over Ethics," *New York Times* § 1 p. 18 (5.7.87) (Milbank, Tweed against Sullivan & Cromwell); E. R. Shipp, "Court Faults New York Law Firm for Unethical Behavior in a Suit," *New York Times* § 1 p. 20 (6.28.87) (Patterson, Belknap, Webb & Taylor against Sullivan & Cromwell).

Criminal District Court, criticized both prosecution and defense for inadequate representation.¹⁰⁷³ But many ethical violations are invisible to judges: Kreitzer's neglect of clients and participation in the ten percent scheme, Byler's appropriation of Morgan's IRS refund, even Furtzaig's forgery of court documents. And some judges are prone to forgive lawyers. District of Columbia Superior Court Judges protected the lawyers they appointed as guardians and conservators of incompetents.¹⁰⁷⁴ Judge Hamilton explained, "You have to be careful about barring someone from cases. It may be the person's only source of practice." Judge Lopez preferred to let attorneys withdraw because removal could hurt their reputations. And when a lawyer sought to excuse years of failing to submit mandatory reports on the ground that her computer had crashed and she needed surgery, Presiding Judge Long responded, "I understand." Lawyers and judges are no more likely than clients to expose the "dark figure."

Even were complaints to increase significantly, however, other problems would remain. Much of the discontent with lawyer discipline stems from its lenience.¹⁰⁷⁵ Like most regulatory processes, it exhibits radical attrition between filing and punishment. New York City offers better historical data than most jurisdictions.¹⁰⁷⁶ Between 1905 and 1920, the Association of the Bar of the City of New York (ABCNY) investigated 8,500 complaints but sanctioned only 260 lawyers (3 percent), just 16 lawyers a year in a bar with more than 15,000. Between 1925 and 1935, the ABCNY received 22,800 complaints, held 900 hearings (3.9 percent), found 314 guilty (1.4 percent), suspended 39 (0.2 percent) and disbarred 108 (0.5 percent). In 1958-1959 it received 1,429 complaints, heard 85 (5.6 percent), suspended 4 (0.3 percent) and disbarred 4 (0.3 percent). Between 1958-1959 and 1972-1973 it received 30,810 complaints, heard 663 (2 percent), suspended 200 (0.6 percent) and disbarred 178 (0.6 percent). In 1983 it received 8,766 complaints, prosecuted 491 (5.6 percent), suspended 86 (1 percent), and disbarred 65 (0.7 percent). Data from Kansas,¹⁰⁷⁷ California,¹⁰⁷⁸

¹⁰⁷³ Ann M. Simmons, "New Orleans Judge Fights Poor Defense," *Los Angeles Times* A12 (6.27.07).

¹⁰⁷⁴ Leonnig et al. (2003).

¹⁰⁷⁵ Goode (1967).

¹⁰⁷⁶ Blaustein (1951: 265-66); Martin (1970: 184, 201, 213); Brown (1938: 213-14); Sam Roberts, "When Secrecy Seems More like Professional Courtesy," *New York Times* § 4 p. 8 (12.1.85); Abel (1988: tables 36a, b).

¹⁰⁷⁷ Mills (1949: 81).

¹⁰⁷⁸ State Bar of California (1939: 5); Phillips & McCoy (1952: 97-98); Blaustein & Porter (1954: 256); Myrna Oliver, "Bar's Disciplinary Policies at Root of Dispute over Dues," *Los Angeles Times* § 1 p. 3 (12.16.85); Abel (1988: table 34a).

Chicago,¹⁰⁷⁹ England,¹⁰⁸⁰ Scotland,¹⁰⁸¹ Northern Ireland,¹⁰⁸² and Australia¹⁰⁸³ display similar patterns. Factors that would aggravate punishment for ordinary crime—such as substance abuse and marital and financial difficulties—mitigate sanctions for professional misconduct.¹⁰⁸⁴ Even disbarment—the capital punishment of lawyer discipline—is far from final. Many of those disbarred continue to practice in other jurisdictions or successfully apply for readmission.¹⁰⁸⁵ Both specific and general deterrence are diminished by secrecy. Oregon is the only American jurisdiction to make all complaints public.¹⁰⁸⁶ Others publicize only those complaints that eventuate in a public reprimand, suspension, or disbarment. Social control agencies independent from the profession are more stringent. Between 1892 and 1913, the English Supreme Court (which then regulated solicitors) imposed punishment in 83 percent of the matters it heard; among those whose punishment was specified, it suspended 15 percent and struck 56 percent off the Roll. But in a 20-year period (1919–1939), soon after the Law Society obtained the power to discipline, it punished only 36 percent of those tried.¹⁰⁸⁷ When disciplinary authority was transferred from the Chicago Bar Association (1969–1970) to the independent Attorney Registration and Disciplinary Commission (1974–1975), the proportion of complaints investigated increased from 17 to 43 percent, and the proportion heard from 3.5 to 13.5 percent.¹⁰⁸⁸ When the Law Society transferred discipline to the independent Solicitors Complaints Bureau, complaints doubled, the new adjudication committee heard four to six times as many as its predecessor, and the Solicitors Disciplinary Tribunal punished twice as many.¹⁰⁸⁹

¹⁰⁷⁹ Phillips & McCoy (1952: 115); Blaustein & Porter (1954: 261).

¹⁰⁸⁰ Abel (1988: 252–54).

¹⁰⁸¹ Royal Commission (1980).

¹⁰⁸² Royal Commission (1979).

¹⁰⁸³ New South Wales Law Reform Comm'n (1980).

¹⁰⁸⁴ Tisher et al. (1977: 97–98); Cook (1986).

¹⁰⁸⁵ Mills (1949: 81) (half of those disbarred in Kansas; a quarter of those admitted were disbarred again); ABA Special Committee (1970); Phillips & McCoy (1952: 120, 122, 124).

¹⁰⁸⁶ Jeannine Guttman and Brad Bumsted, "Public Access to Disciplinary Hearings Varies," *Cincinnati Enquirer* E6 (10.21.86). The Solicitors Disciplinary Tribunal opened all hearings in England, but most complaints never get that far. Abel (2003: 358).

¹⁰⁸⁷ Abel (1988: 250).

¹⁰⁸⁸ Powell (1976: 46–47).

¹⁰⁸⁹ Abel (2003: 357).

Similar effects have been observed in Queensland¹⁰⁹⁰ and Western Australia.¹⁰⁹¹

The criticisms advanced above—that too little unethical behavior is named, blamed, claimed,¹⁰⁹² and punished—assume that more social control would be better.¹⁰⁹³ If that is the view of most outsiders, however, many lawyers believe just the opposite—that discipline is unfair, oppressive, and counterproductive. In the 1950s, solo practitioners complained that the Chicago Bar Association

represent[s] the layman against the lawyer, rather than the lawyer's view. . . . We feel they're dominated by a small group of blue-blood lawyers . . . [who] represent the railroads and insurance companies. . . . The big difference between the large firm lawyer and the average practitioner is that the big firms give out more bullshit, superfluity, and unnecessary research.¹⁰⁹⁴

Criminal defense lawyers rightly believe that they are disciplined frequently, whereas prosecutors routinely condone police perjury and withhold exculpatory evidence with impunity.¹⁰⁹⁵ Several of the lawyers I studied were convinced they had been singled out because they charged too little, were sole practitioners, refused to back down, or were neither female nor Jewish. Aside from Furtzaig (whose misbehavior was also aberrational—trying to do too much for his firm, at great personal cost), all the others effectively practiced alone: Muto managed by “travel agencies”; Kreitzer running his own personal injury practice independent of his criminal defense partner; Byler “of counsel” to a small firm (but billing separately and paying overhead); and Cardozo, Brashich, and Wisehart as sole practitioners. Given their ethnoreligious and class backgrounds and the status of the law schools they attended, Kreitzer, Muto, and Furtzaig could never

¹⁰⁹⁰ Levin (2006).

¹⁰⁹¹ Shinnick et al. (2003).

¹⁰⁹² Felstiner et al. (1981).

¹⁰⁹³ Fisse & Braithwaite (1985); Groves & Newman (1986); Green (1990).

¹⁰⁹⁴ Carlin (1962: 178, 180, 183).

¹⁰⁹⁵ In 381 murder cases where the defendant received a new trial for prosecutorial misconduct, none was disbarred; in 120 death row exonerations, none was disciplined. Adam Liptak, “Prosecutor Becomes Prosecuted,” *New York Times* § 4 p. 4 (6.24.07); Gershman (1999). The disbarment of Durham District Attorney Mike Nifong for his rape prosecution of the three Duke University lacrosse players was exceptional. Duff Wilson, “Prosecutor in Duke Case Disbarred by Ethics Panel,” *New York Times* § 1 p. 16 (6.17.07).

have joined large firms. Cardozo and Brashich graduated from NYU when it was much lower ranked than it is today; their generations also would have encountered high ethnoreligious barriers. Wisheart and Byler were white Anglo-Saxon Protestants, had attended prestigious law schools (Michigan and Harvard), and had been large firm associates, but neither had made partner.

Observers have repeatedly confirmed that solo and small firm practitioners are overrepresented among disciplined lawyers.¹⁰⁹⁶ Sometimes this is deliberate: both the ABCNY and the Chicago Bar Association targeted plaintiffs' personal injury lawyers and ambulance chasing.¹⁰⁹⁷ But closer scrutiny has shown that the disproportion is attributable to *complaints*, not to their treatment by bar associations.¹⁰⁹⁸ Solo and small firm lawyers "often find themselves so overworked that they miss deadlines or fail to communicate with clients" and "do not have enough support staff to manage correspondence or back them up when they are involved in a trial, become ill, or take a vacation."¹⁰⁹⁹ Large firms suffer neither problem, and their clients can mobilize market pressures to ensure quality. Yet even if the complaints of solo and small firm practitioners are unjustified, their sense of persecution is one of the classic neutralization devices, which facilitates deviance and undermines the deterrent effect of discipline.¹¹⁰⁰ In the course of this research, some have criticized me for reproducing the ethnoreligious and class biases built into the grievance process. I would echo the response of criminologists criticized for focusing on street crime committed disproportionately by racial minorities: the harms of both street criminals and solo and small firm practitioners are real—and the victims are even more disadvantaged and vulnerable than the perpetrators.

¹⁰⁹⁶ Carlin (1966: 57, 178, 180, 183, and tables 42, 44, 45, 48, 74, 76, 117, 133); Auerbach (1976: 48–49); Rhode (1985a: 548; 1985b: 641 n.168); Curran (1986: 30); Shuchman (1968); New South Wales Law Reform Commission (1980: 16); Arnold & Kay (1995: 227–38); Levin (1998: 62 n. 275); State Bar of New Mexico (2000: 46); Hal R. Lieberman, "How to Avoid Common Ethics Problems: Small Firms and Solos Are Often Subject to Disciplinary Complaints and Malpractice Claims," N.Y.L.J. S4 (10.28.02); William McIntyre, "Whose Interests Does Texas' Disciplinary Process Protect?" Tex. Law. 27 (8.5.02); Mark Hansen, "Picking on the Little Guy: Perception Lingers that Discipline Falls Hardest on Solos, Small Firms," ABAJ 30 (March 2003).

¹⁰⁹⁷ Cappell & Halliday (1983: 329); Powell (1988: 20, 23–24); see also Baxter (1974).

¹⁰⁹⁸ State Bar of California (2001).

¹⁰⁹⁹ Id. 1–2.

¹¹⁰⁰ A "sense of injustice" is one of the classic neutralization techniques. Matza (1964: chapter 4).

Sanctions also may be ineffective for reasons other than perceived bias. Lawyer discipline satisfies many of what Harold Garfinkel called the "conditions of successful degradation ceremonies."¹¹⁰¹ Because discipline is based on lawyers' ultimate "grounds" or "reasons" for their behavior, it affects their "total identities." It expresses public moral indignation, reinforces professional group solidarity, and inverts ceremonies of investiture and elevation (swearing in new members of the bar). The denunciation is impersonal. And both behavior and perpetrator are made to look "strange," "out of the ordinary," by contrast with rule-abiding lawyers. The legal profession presents discipline as proof that it takes its responsibilities seriously. By purging the worst malefactors, it proclaims the integrity of all other lawyers. But what is the actual effect of discipline on its subjects?

The explicit goal of the penalty phase is to elicit expressions of remorse. In practice, however, it seems to intensify self-righteousness. True, it has to work with difficult material. Lawyers are self-selected and trained to be fighters and are rewarded for their ferocity and intransigence. Like all professionals, lawyers achieve their privileged status and material rewards by working hard and following rules. Uniquely among professionals, they spend their lives telling others what they have done wrong. Not surprisingly, lawyers are legalistic.¹¹⁰² All of us find it hard to admit and learn from mistakes.¹¹⁰³ But for all these reasons lawyers find it especially difficult to admit they have screwed up, to acknowledge that others may be right and they are wrong.¹¹⁰⁴ Byler is a vivid illustration: he rejected a private admonition; he insisted that escrowing the disputed funds would admit wrongdoing; and he failed to gain readmission at the end of his suspension because he could not feign contrition. He could make promises about the future but not admissions about the past. He and Wisheart both stressed years of active participation in church as evidence of good character. This inability to confess error led some (like Furtzaig) into cover-ups that aggravated their misconduct. Yet the problem is not just lawyer character. The structure of the disciplinary process is profoundly uncondusive to repentance. The penalty phase follows the guilt phase, sometimes immediately. During the former, the accused defend themselves vigorously, raising every possible procedural objection, drowning

¹¹⁰¹ Garfinkel (1956).

¹¹⁰² Tapp & Levine (1974); Willging & Dunn (1981); Landwehr (1982).

¹¹⁰³ Dweck (2006).

¹¹⁰⁴ Bohn (1971) (law students are higher than normal in self-confidence, dominance, exhibitionism); Solkoff & Markowitz (1967).

the tribunal in paper, endlessly seeking review. Lawyers often appear pro se because they cannot afford representation and are (overly) confident in their legal abilities; some may even find that role cathartic. But even represented accused actively participate in litigation strategy, sometimes upstaging their lawyers. After such displays of defiance, contrition could hardly be credible.

Rather than accept responsibility, the accused advanced a variety of what Scott and Lyman call “accounts.”¹¹⁰⁵ As I discussed above, they claimed to have been scapegoated for behavior that many others committed with impunity. Muto offered numerous excuses, including the deaths of his mother and cousin and his inability to fly. (A District of Columbia lawyer who neglected the incompetent for whom she had been appointed guardian said “My priority was my family, and it will be. And I don’t care.”¹¹⁰⁶) Muto pled to incompetence and “disorganization” but denied moral failings. Several accused said they had been motivated not by selfishness but by concern or responsibility for others (usually their families). The accused denied causing harm; these were victimless crimes, *malum prohibitum*, not *malum in se*. Any injuries were deserved: Morgan *was* a tax evader; he owed Byler most of the \$53,000 in quantum meruit. The accused emphasized what they had *not* done, such as stealing from client trust accounts. They invoked their *satisfied* clients (some of whom turned out to be less satisfied). They appealed to higher loyalties: Byler to the rule of law, Wisheart to justice for his client. They attacked both their accusers (clients and prosecutors) and their judges (those before whom they had appeared and those adjudicating discipline). Remember the light bulb joke? How many psychiatrists does it take to change a light bulb? Just one, but the light bulb really has to want to change. Lawyers aren’t light bulbs.

Lawyer discipline shares some of these problems with the prosecution of white-collar crime. In ordinary crime, someone is clearly guilty; the question is “Who Done It?” In white-collar crime there is rarely doubt about the perpetrators’ identity; the question is whether the conduct was criminal. Ordinary criminals often acknowledge their guilt (at least to themselves), unless there are strategic reasons to deny it. White-collar criminals often remain adamantly convinced of their innocence. Ordinary criminals—at least the professionals—experience no loss of reputation from conviction and punishment; jail time can even enhance their reputation

¹¹⁰⁵ Scott & Lyman (1968).

¹¹⁰⁶ Leonnig et al. (2003)

with some audiences. White-collar criminals suffer enormous reputational harm just from being accused.¹¹⁰⁷ Like drivers stopped for speeding or audited taxpayers, such lawyers tend to be more careful, at least for a while. Therefore, many white-collar accused (including some lawyers) contend they have suffered enough from being prosecuted and found guilty and should be spared further sanctions—the process is the punishment.¹¹⁰⁸ Muto could not see why his apologies were insufficient. A lawyer whose client had complained about a \$500 fee objected, “You don’t understand how stressful that is. . . . You can’t even do any work, it’s so stressful.”¹¹⁰⁹

In light of these problems, how could discipline be made more effective? One mechanism is clear: publicity is the greatest deterrent.¹¹¹⁰ There is *no* justification for private reprimands, the most common punishment in some jurisdictions. Some of the lawyers I studied had received many such reprimands and blithely continued to disregard ethical rules. Prospective clients should have easy access to disciplinary records (i.e., online). Publicity also affects intra-professional reputation. Many lawyers acknowledge (sometimes shamefacedly) that the first thing they read in professional journals is the disciplinary cases.¹¹¹¹ The media construct a contemporary urban analogy to the informal sanctions that used to operate in smaller urban bars and still do in rural communities. The more difficult question is whether to publicize accusations as well as convictions.¹¹¹² On one hand, that would give notice of all client complaints, not just the few that culminate in sanctions, and do so years before a final judgment. On the other, it would publicize false positives, harming innocent lawyers in ways that cannot easily be undone by ultimate vindication.

Charles Bosk’s classic study of social control among surgeons offers valuable insights for lawyer discipline.¹¹¹³ He distinguishes between two

¹¹⁰⁷ But see Schwartz & Skolnick (1962) (unskilled workers merely charged with assault found it much more difficult to get employment; doctors sued for negligence suffered no loss of referrals). See Zacharias (2008).

¹¹⁰⁸ Feeley (1979).

¹¹⁰⁹ There is some evidence that any exposure to the disciplinary system renders lawyers more wary. Levin (2004–2005: 371).

¹¹¹⁰ Haller (2003).

¹¹¹¹ Levin (2004–2005: 373).

¹¹¹² BrokerCheck does this for investors. Lynnley Browning, “Site That Tracks Brokers Questioned on Erased Cases,” *New York Times* C10 (12.4.07) (information on more than 670,000 securities professionals, including client accusations of wrongdoing).

¹¹¹³ Bosk (1979). For a precursor, see Stelling & Bucher (1973). See also Jerome Groopman, “Mental Malpractice,” *New York Times* A25 (7.7.07).

kinds of errors: technical and normative.¹¹¹⁴ Attending physicians “can forgive even the most serious lapses in technique” by residents (also called houseofficers) if they are “speedily noticed, reported, and treated” and not repeated. Nevertheless, all residents “report that their errors are etched indelibly in their memory.”¹¹¹⁵ (Both features echo Bosk’s title, *Forgive and Remember*.) Forgiveness “obligates the subordinate who is forgiven” to become “more vigilant in the immediate future.”¹¹¹⁶ Control of technical performance “is built into the fabric of everyday life as minidiscussions of surgical problems, as anecdotes or horror stories, as hypothetical questions or future considerations, or as mild rebukes.”¹¹¹⁷ Normative errors are role violations. The attending’s single most important rule is that the resident should present “no surprises.” Failure to keep the attending informed of the patient’s condition implies that the resident “was lazy, negligent, or dishonest.” Residents are responsible for getting along with nurses and managing patients and their families. Residents’ normative errors “destroy their credibility as responsible workers.” An attending commented,

Covering up is never really excusable. . . . A certain amount [of mistakes] are inevitable. But it is the obligation of everyone involved in patient care to minimize mistakes. The way to do that is by full and total disclosure.¹¹¹⁸

Residents cannot blame others. As in the Army “there were only three answers you could give: ‘yes sir’; ‘no sir’; and ‘no excuse, sir.’” The attending is the sole authority on correct clinical practice.¹¹¹⁹ Attendings collectively determine residents’ futures. The technically competent and normatively proper will be offered permanent positions; the technically incompetent but normatively proper will be advised to move into another specialty in the same hospital; the normatively improper will have to leave medicine.¹¹²⁰ Because a “moral error breaches a professional’s contract with his client” it is “treated more seriously than [a] technical one.” Although there is no

¹¹¹⁴ Residents also commit quasi-normative errors by deviating from their attending’s clinical style. Bosk (1979: 186–87).

¹¹¹⁵ Id. 37–40.

¹¹¹⁶ Id. 178.

¹¹¹⁷ Id. 173.

¹¹¹⁸ Id. 51–60.

¹¹¹⁹ Id. 76.

¹¹²⁰ Id. 153–56.

clear limit to the tolerable number of technical errors, "the minimum number of moral breaches needed to dismiss a professional from practice is clear-cut: one will do."¹¹²¹

If control of residents is intensely hierarchical, control of attendings is extremely egalitarian. Grand rounds "provide attendings an arena to display their virtuosity." Successfully treated patients are brought in and shown off, with or without clinical or scientific justification.¹¹²² Failure is analyzed in the Mortality and Morbidity Conference (MMC), which no physician misses. Because attendings are subordinate to no one, their errors are always defined as technical, not normative. For the same reason, attendings take full responsibility, because the subordinate residents lack authority to make judgment errors. As "part of a chivalrous code of behavior," attendings "put on the hair shirt." This ritual has multiple purposes. It is a cautionary tale for all those present. It "instill[s] professional 'super-egos' in junior staff." And it "mitigate[s] the rigid hierarchical authority system of a surgical service." "The major punishment of the practice is the embarrassment of a public confessional and the pain the outcome itself actually causes the surgeon's conscience."¹¹²³

The two forms of social control share a central element, despite their differences:

The houseofficer confesses to his attending. The attending confesses to the entire collegium, which is his superordinate. Both humble themselves and in turn are forgiven and embraced. . . . Confession is ipso facto proof that an individual adheres to group standards . . . [and] is punishing himself for his faults.¹¹²⁴

Both processes seek to correct technical mistakes and warn against normative errors, whose commission leads to banishment. Forgiveness of technical errors (and its counterpart, moral condemnation of those who cover up) strongly encourages transparency. Residents are subjected to a much milder degradation ritual than the one evident in lawyer discipline, and attendings are actually rewarded for self-abasement in the MMC, rather than humiliated. Both residents and attendings are powerfully

¹¹²¹ Id. 171-72.

¹¹²² Id. 123-25.

¹¹²³ Id. 128, 138, 142-45.

¹¹²⁴ Id. 179.

motivated to change what they can—technique—without being penalized for the constancy of what they cannot change—character. The intense, personal scrutiny of residents and the winnowing of a few have suggestive parallels in large law firms. But the solo and small firm practitioners who dominate the disciplinary docket (and the cases considered here) undergo no comparable institutional socialization and selection.¹¹²⁵

IV. Alternatives to Punishment

My case studies confirm what criminology has known for centuries. Deviance has powerful motivations, both material and psychological. Character is difficult to change. People have an extraordinary determination, and capacity, to rationalize misconduct. Education is ineffectual. Punishment can be counterproductive. If tweaking norms, intensifying regulation, and strengthening sanctions are unlikely to make much difference, what could we do to reduce the real harms lawyers inflict on clients, the legal system, and society? Once again, I think lawyers can learn from doctors. There are many reasons why we tolerate more errors (both malpractice and misconduct) by lawyers than doctors: lives rarely are at stake (though liberty is, and lots of money); the consequences often take years, rather than hours, to manifest; and there is less consensus about the goal (both complainants and lawyers feel morally worthy; justice is far more ambiguous than health). But medicine teaches that we do not have to resign ourselves to what all agree is an unacceptable status quo.¹¹²⁶

In his recent book, Atul Gawande offers several ways doctors have discovered to ensure they do “*Better*.”¹¹²⁷ As a surgeon, he realized that “our usual approach of punishing people for failures wasn’t going to eliminate the problem” of objects left inside the body, so he “soon found [himself] working with some colleagues to come up with a device that could automate the tracking of sponges and instruments.”¹¹²⁸ We already have similar solutions to some common forms of lawyer misconduct. English solicitors, for instance, must make mandatory contributions to a Compensation Fund, which has an incentive to police abuse of client trust

¹¹²⁵ On mentoring of lawyers generally, including its effect on moral reasoning, see Hamilton & Brabbit (2007); Kay et al. (2009); Kay & Wallace (2007a; 2007b).

¹¹²⁶ Danny Hakim, “State Watch for 2 Percent of Doctors,” *New York Times* C15 (5.7.08) (New York supervises more than 2% of doctors); Rolph et al. (2007).

¹¹²⁷ Gawande (2007). See also Wachter & Shojania (2004: chapters 18–22).

¹¹²⁸ *Id.* 255. A recent study made similar observations about needlestick injuries among trainee surgeons. Makary et al. (2007).

accounts (especially by solo practitioners, who have no liable partners with an incentive to look over their shoulders). And solicitors must regularly submit financial accounts to the Law Society.¹¹²⁹ Many American states require banks to inform disciplinary bodies of overdrafts on client trust accounts. Recognizing that temporary financial difficulties tempt American lawyers to dip into client trust accounts (a close analogy to the “non-shareable financial problems” that made Cressey’s subject embezzle), Leslie Levin proposes that bar associations make short-term low-interest loans to financially distressed members (giving those bodies an incentive to help borrowers extricate themselves from debt).¹¹³⁰ I agree with her that we ought to consider requiring all lawyers to have partners, for whom they would be financially responsible. And it is unconscionable that we require car owners to insure but not lawyers. The remainder of this conclusion will look for similar ways to anticipate and forestall the problems identified by the case studies: vulnerable clients, conflicts of interest, inappropriate fees, overzealous lawyering, and inadequate quality. Unlike conventional generic *ex post* remedies—increasing apprehension rates or penalty severity—*ex ante* solutions are individualized to the problems they address.

The clients of most of the accused lawyers were highly vulnerable: elderly, immigrant, financially needy, jobless, injured, facing financial penalties (or worse) and deportation, confronting powerful adversaries. Unlike the repeat-player corporate clients served by large firms, they were one-shot customers, not even capable of warning others against the lawyers who failed them. (Injured workers, by contrast, can confidently use the lawyers unions recommend for compensation claims because those lawyers derive significant ongoing business from the unions.) As a result, the accused lawyers risked little reputational capital by betraying client trust. In all these respects, the clients were typical of individuals who retain lawyers. Most do so reactively rather than proactively, to litigate rather than structure transactions. But because lawyers are expensive, few people have legal expenses insurance, and legal aid is drastically underfunded. Non-wealthy individuals can hire lawyers only in limited circumstances: after death (and a lifetime of wealth accumulation); following injury, including employment loss (because tort damages capitalize lost earnings and commodify both bodies and feelings); in real property transactions

¹¹²⁹ Abel (1988: 257–58).

¹¹³⁰ Levin (2004–2005: 387)

(because mortgages spread buyers' costs over decades); in bankruptcy (which can eliminate years of accumulated debts); and when confronting serious threats (eviction, firing, fines, liability, prison, deportation). Most people retain lawyers just a few times in the course of their lives, so they have little experience of lawyers in general, much less an ongoing relationship with a particular lawyer.¹¹³¹ Those who receive sudden, often unexpected, windfalls may express gratitude toward their lawyers by uncritically paying the lawyer's fee (Babette Hecht and her three children, Ljubica Callahan, perhaps Kreitzer's personal injury clients). Byler expected Morgan to do so. Those in extremis (like Muto's immigration clients) have no alternative but to trust the lawyer.

Gawande offers an imperfect but suggestive analogy. Many doctors must perform intimate examinations of their patients. (The definition of intimacy naturally varies greatly across cultures.) Gawande recognizes that "no one seems to have discovered the ideal approach." Shame and prudery can obstruct accurate diagnosis; but disregarding patients' feelings can violate their trust. He describes Britain's "stringent" standards:

A chaperone of the appropriate gender must be offered to all patients who undergo an "intimate examination" . . . irrespective of the gender of the patient or of the doctor. A chaperone must be present when a male physician performs an intimate examination of a female patient.

Deploring the absence of any guidelines in the United States, he argues that "the most important reason to consider tightening standards of medical protocol is simply to improve trust and understanding between patients and doctors."¹¹³² I believe the same is true for law practice. Clients should be told what they can expect from lawyers, perhaps in the form of a client bill of rights, drafted by the profession and presented to the prospective client at the first encounter.¹¹³³ Clients should be able to obtain a confidential second opinion from an independent lawyer about what their prospective lawyer is proposing to do and about his/her fee arrangements. Similar advice should remain available throughout the lawyer-client relationship. Such protections will not be cheap. But a legal profession that

¹¹³¹ Curran (1977: 190) (mean of 2.15 lawyer consultations/lifetime).

¹¹³² Gawande (2007: 74, 77-78, 80).

¹¹³³ See Rhode (2000: 210).

wants to restore trust would do much better to invest in them than in public relations spin doctoring.

Conflicts of interest attract more attention than any other ethical problem. Casebooks devote more space to them.¹¹³⁴ Large law firms expend substantial resources monitoring and avoiding conflicts, which limit both the cases and clients they can accept and firm expansion. Business clients demanding unconditional loyalty raise conflicts issues with their lawyers. Lawyers assert conflicts strategically in order to disqualify adversaries. Fortunately, scholars have begun to conduct empirical research on conflicts through case studies¹¹³⁵ and interviews with lawyers.¹¹³⁶ But because the lawyers I studied (and those disciplined more generally) tend to represent one-shot clients with discrete problems, they rarely encounter the typical conflict *between* clients. Most of Levin's small firm lawyers conducted no formal conflicts check, relying on an "in your head" method. None consulted "of counsel" or suitemates. Most were conscious of encountering the problem less than once a year. Some represented both sides in business deals and divorces. When conflicts were nonwaivable, lawyers referred the matter to others, who made reciprocal referrals to them.¹¹³⁷ The one conflict that did arise frequently pitted lawyer against client over fees, my next topic.

All fee arrangements create conflicts of interest between lawyers and clients. Contingent fees motivate lawyers to minimize effort; even without that perverse incentive such fees can produce an unearned windfall.¹¹³⁸ In Babette Hecht's case, they led Cardozo and Brashich to favor the settlement that produced a contingent fee far greater than they would have earned in quantum meruit. Fixed fees have the same effect. Hourly fees motivate lawyers to maximize effort, running up the meter with diminishing returns to clients (or none).¹¹³⁹ Additional problems arise when fee agreements are ambiguous or non-existent. Babette Hecht signed a confused, contradictory retainer because she was so grateful to and dependent on Benjamin Cardozo. She was destitute, living with friends, doing badly paid, humiliating work—and she had been rejected by four other lawyers.

¹¹³⁴ I did not systematically examine every casebook because I think the proposition is obviously true. See, e.g., Rhode & Luban (2004) (131 pages); Noonan & Painter (2001) (158 pages); Lerman & Schrag (2005) (194 pages); Hazard et al. (2005) (127 pages).

¹¹³⁵ Kelley (2001: chapter 4); Regan (2004).

¹¹³⁶ Shapiro (2002).

¹¹³⁷ Levin (2004–2005: 349–54).

¹¹³⁸ E.g., Beam (2006) (tobacco settlements).

¹¹³⁹ Lerman (1999); Fortney (2000); Kelley (2001: chapter 5).

Cardozo offered to work on contingency for a retainer of just \$7,500, most of which Babette's friends advanced. Ljubica Callahan, an immigrant with limited English and earning capacity, faced a will contest with her dead husband's hostile relatives. She was so grateful to Deyan Brashich, a fellow Serb, that she accepted a (contingent) \$75,000 in satisfaction of the \$264,000 repayment the court ordered and never even sought to recover that from Brashich. Facing a \$200,000 IRS deficiency at a moment of financial embarrassment, James Morgan turned to his good friend, Philip Byler. Morgan expressed his gratitude by assigning the returned security deposit to Byler and, later, casually saying *something* about the anticipated refund. All three instances exemplify the danger of mixing business with friendship. When courts rejected the contingent fees, the lawyers had to substantiate the effort they had exerted. Byler's claims about both hours and rates seemed arbitrary and result driven (the \$10,000 "non-bill bill" he thought Morgan would accept, a second bill with greatly increased hours that produced exactly the amount of the IRS refund). Neither Cardozo nor Brashich could prove or justify the hours they claimed.

These problems (which are common, despite the unusual facts in the cases cited here) suggest several responses. Lawyers might be required to offer written fee quotations in advance, as they must in Britain.¹¹⁴⁰ Just as lawyers proposing business deals to clients must advise them to obtain independent advice, so clients might be offered an independent review of their retainers. Bar associations might create panels of lawyers trained to do this and willing to serve at little or no cost. (Retired lawyers are a possible pool.) Lawyers who fail to comply with these requirements might be limited to quantum meruit claims, governed by rigorous criteria for proof of hours and judicial determination of rates. In most of the common law world, where losers pay both their own lawyers and their adversary's, there are elaborate procedures for independent calculation of fees.

The problems discussed above arose because lawyers favored the interests of others (including themselves) over those of their clients. Social scientists have described a variety of situations in which lawyers compromise the ethical obligation of vigorous advocacy by seeking to appear "reasonable" to judges and opposing counsel,¹¹⁴¹ cooling out personal

¹¹⁴⁰ Abel (2003: 363).

¹¹⁴¹ Katz (1982); Landon (1990).

injury victims,¹¹⁴² criminal defendants,¹¹⁴³ and divorcing spouses¹¹⁴⁴ in order to encourage their clients to accept less than optimum settlements. But the opposite can happen as well. Just as combatants jettison the laws of war out of fanaticism, or because their opponents are not complying, so lawyers can advocate for clients too vigorously. Some shamelessly corrupt the legal system.¹¹⁴⁵ For clients interested in preserving the status quo (e.g., tenants resisting eviction), delay may be the best tactic.¹¹⁴⁶ Discovery, intended to shorten and improve trials by giving both sides all the information to which they are entitled, has become a battleground where lawyers withhold essential unprivileged information, drown adversaries in a sea of irrelevant paper, and bully them into surrender by driving up the cost of litigation.¹¹⁴⁷ Prosecutors conceal exculpatory evidence¹¹⁴⁸—most recently Mike Nifong in prosecuting the Duke lacrosse team.¹¹⁴⁹ Sometimes the initiative comes from the client, who makes the lawyer complicit in illegal conduct: perjury,¹¹⁵⁰ forged documents,¹¹⁵¹ tax evasion,¹¹⁵² concealment of income or assets, or phony injuries.¹¹⁵³

Arthur Wisehart was an extreme example of a lawyer who flouted procedural rules in a ruthless effort to vindicate his client, Joan Lipin. True, it was she who took the first illegal step by reading, hiding, and keeping defense counsel's file on her. But Wisehart immediately took command, instructing her to make copies and even to lie about how she had obtained the papers. And he quickly devised rationalizations for reading the papers himself and using them (and the threat that Lipin would publicize the contents) to try to extract a \$1 million settlement. His motivations seem to have included intense identification with his client (a younger woman, whom he had hired as a paralegal after ARCGNY had made her unemployable) and fury at opposing counsel (both for their conduct—alleged complicity in Lipin's retaliatory firing, defamation, and abusive discovery—and their patronizing attitude toward him, which may have

¹¹⁴² Rosenthal (1974).

¹¹⁴³ Blumberg (1967); McIntyre (1987); Mello (2006) (persuading the Unabomber to plead guilty).

¹¹⁴⁴ Sarat & Felstiner (1995); Mather et al. (2001).

¹¹⁴⁵ Rovere (1947).

¹¹⁴⁶ Yale Law Journal (1973); Lazerson (1982).

¹¹⁴⁷ Brazil (1980a; 1980b); Nelson (1998).

¹¹⁴⁸ Gillers (2006).

¹¹⁴⁹ David Zucchini, "Nifong Loses Law License in Duke case," Los Angeles Times A16 (6.17.07).

¹¹⁵⁰ Abel (1988: 143).

¹¹⁵¹ Kelley (2001: chapter 1).

¹¹⁵² Rostain (2006a).

¹¹⁵³ Levin (2004–2005: 337–38).

occurred elsewhere). But there is also evidence that his behavior—never accepting defeat or finality, moving to recuse every judge who ruled or threaten to rule against him—extended to other cases and clients.

Despite the substantial differences, doctors who practice “heroic medicine” offer an interesting analogy. Gawande observes that “the seemingly easiest and most sensible rule for a doctor to follow is: Always Fight. Always look for what more you could do.” As a surgeon, he was personally sympathetic to that algorithm, especially because of the temptation to surrender too soon. “In the face of uncertainty, wisdom is to err on the side of pushing, to not give up.” But he also recalled being upbraided by an angry ICU nurse: “What is it with you doctors? Don’t you ever know when to stop?” He acknowledged that “you have to be ready to recognize when pushing is only ego, only weakness... when the pushing can turn to harm.” “Good doctors should understand ‘This is not about them. It’s about the patient.’”

Because it is an interpersonal contest, the adversary system breeds even stronger loyalties, which can extend over years. Lawyers sometimes risk hurting clients by fighting too hard.¹¹⁵⁴ But unrestrained partisanship poses a graver danger to the integrity of the legal system. As WGM correctly observed, the rule of law depends on lawyers being able to leave confidential documents on hearing room tables without having to fear their adversary will appropriate and read them. Moskowitz’s dismissal of the lawsuit (eliminating Wisheart’s contingent fee) was harsh but appropriate. I can think of two imperfect prophylactics for overzealousness. Partnership might inhibit excessive partisanship. Partners might be exposed to liability for disciplinary sanctions; in any case, the firm would suffer from the notoriety. It is noteworthy that the first two friends Wisheart approached for advice about the purloined papers rebuffed him. But partners’ and colleagues’ loyalty and ideological commitment might also intensify adversary zeal, as shown in Seham’s embarrassing representation of Wisheart and the testimony that Purves gave and Wall offered. The “cab rank rule,” which obligates British barristers to represent any client who can pay their fees and seeks services they are competent to perform, purports to moderate excessive partisanship. Before the creation of the Crown Prosecution Service it was not uncommon for a barrister to

¹¹⁵⁴ In one of the vignettes in Lawrence Dubin’s 1985 video *What Went Wrong*, a caring lawyer decided not to seek damages for a sexually abused mentally ill client he felt could not withstand the stress of litigation.

appear for the Crown in one case in the morning and for the accused in another that afternoon. But barristers have argued that the rule requires solo practice, one reason why solicitors have refused to adopt it.

Surveys of clients, quantitative analyses of disciplinary complaints and outcomes, and my own case studies all confirm that the legal profession's most pervasive, and intractable, problem is the inadequate quality of legal services. Solo practitioners—still more than a third of all lawyers and almost half of private practitioners in 2000¹¹⁵⁵—confront unique problems. More than 40 years ago, a solo matrimonial practitioner observed, “You can’t be in the office and circulating at the same time. And you have to circulate to get known. But then office work takes a lot of time, a great deal of clerical work.”¹¹⁵⁶ Because the only facet of the lawyers’ monopoly that is visible, and therefore is policed, is court hearings, many solo practitioners must spend a great deal of time in court. Muto bragged that he “practically live[d] at 26 Federal Plaza.” He was not unique: a study of that Immigration Court found another eight lawyers appearing in 23 to 76 cases a month.¹¹⁵⁷ Solo practitioners who cannot attend a hearing (because they are in another court or have personal obligations—or, as in Muto’s case, cannot fly) hire “per diem” lawyers, who are likely to be unfamiliar with the case, unprepared for the hearing, and even totally inexperienced (the New Orleans lawyer Muto retained). Because they spend so much time in court, solo practitioners have difficulty completing out-of-court work. Some, like Kreitzer, delegate legal tasks, such as drafting complaints, to non-lawyers.¹¹⁵⁸ Some lawyers just neglect these tasks. A few high-volume lawyers use large support staffs.¹¹⁵⁹ But many solo practitioners have only a part-time secretary, and some not even that.¹¹⁶⁰ A 1999 survey found that 41 percent of solo practitioners did all their own word processing.¹¹⁶¹

¹¹⁵⁵ Carson (2004: 7, table 7).

¹¹⁵⁶ O’Gorman (1963); Seron (1996: 115, 118).

¹¹⁵⁷ Mottino (2000).

¹¹⁵⁸ *In re Sledge*, 859 So. 2d 671 (La. 2003) (solo practitioner disbarred for giving his signature stamp to law clerks and non-lawyers who drafted and filed pleadings, discovery responses, and correspondence); *Spencer v. Steinman*, 179 F.R.D. 484 (E.D. Pa. 1998) (lawyer sanctioned for failing to supervise paralegal who issued subpoena to nonparty without notice to parties); *Mays v. Neal*, 938 S.W.2d 830 (Ark. 1997) (lawyer disciplined for improper delegation to non-lawyers); Richmond (2003).

¹¹⁵⁹ Levin (2004–2005: 343); Seron (1996: 99–100).

¹¹⁶⁰ Levin (2004–2005: 343).

¹¹⁶¹ ABA (2000: 159).

Muto may have been an outlier, but he was not unique.¹¹⁶² Levin's informants conceded,

We're all over the place, the files are constantly pulled out and left around because I don't have time in the day to tend to housekeeping, and it's a problem because if a file is missing or misplaced, it's gone for all purposes. . . .

I can't tell you how much time I lose to files that you can't find. . . .

You can't always prosecute your cases as diligently as you should . . . a lot of things really do lie fallow . . . you have to say that something's done before it's done.¹¹⁶³

A Manhattan solo practitioner who relied on court appointments to represent indigent criminal defendants told a reporter, tossing an imaginary folder across the room, "I use the same filing the judges do." "They just throw it in the basket and someone else files it." But he did not have anyone else. "Sometimes I come back here and I throw it down and then when the deadline comes for the motions, I miss them." He was comfortable being a .250 hitter. But the three out of four clients whose cases he lost were not.¹¹⁶⁴ A California criminal defense attorney was jailed by a judge for repeatedly missing hearings.¹¹⁶⁵

Solo and small firm lawyers have difficulty achieving profitability and can only be awed by, and envious of, the extraordinary incomes of their large firm colleagues. Most of their clients are poor, the amounts in controversy low, and opponents often intransigent. One lawyer said that for "most clients, it's a toss-up [between] whether it's fast and cheap or cheap and fast."¹¹⁶⁶ Lawyers, like all service providers, have only one commodity to sell: their time. In order to maximize the return on time, they want a queue of consumers waiting for their services.¹¹⁶⁷ Like doctors or

¹¹⁶² Adam Liptak, "The Verge of Expulsion, the Fringe of Justice," *New York Times* (4.15.08) (Frank R. Liu referred to 2nd Circuit disciplinary panel for "seriously deficient" work; he agreed: "Some attorneys, including myself, do not spend enough time. . . . I was probably not qualified to do the job.).

¹¹⁶³ Levin (2004–2005: 344–45).

¹¹⁶⁴ David Rohde, "Caseloads Push System to Breaking Point," *New York Times* A1 (4.9.01).

¹¹⁶⁵ Jack Leonard, "Tardy lawyer thrown in jail," *Los Angeles Times* B1 (6.6.08).

¹¹⁶⁶ Seron (1996: 108).

¹¹⁶⁷ Casper (1972: 102); Hensler et al. (1985: 90–91); Mather (1979: 24) (public defender); Dingwall & Durkin (1995: 375–76); Felstiner (1997: 121, 140–41).

building contractors, they overbook, in part because they suffer no penalty for doing so. In the 1960s, a divorce lawyer complained,

A lawyer to live must have volume. I have volume, but it is killing me. . . . One week you're as busy as you can be, and then you sit around for weeks or months until another busy spell sets in. . . . To tell you the truth, I'm in no position to refuse any kind of client.¹¹⁶⁸

Thirty years later, an Oregon State Bar survey found that 27 percent of lawyers had more work than they could handle and another 42 percent were at the limit of their workloads.¹¹⁶⁹ Under that pressure, lawyers will accept clients they are not competent to represent (as Muto took on divorce clients in Syracuse when threatened with mortgage foreclosure and then abandoned them because he did not know how to do divorces). Lawyers compensate for low profit margins by increasing volume.¹¹⁷⁰ The court-appointed criminal defense lawyer quoted above (who lost his files and three-quarters of his cases) earned \$125,041 in 2000 by handling 1,600 clients.¹¹⁷¹ A court-appointed guardian for incompetents explained, "I was overwhelmed by a tremendous amount of work. I only had sporadic and temporary clerical help. I had enough work for several lawyers."¹¹⁷² The "franchise law firms" pioneered by Jacoby & Meyers and Hyatt Legal Services emulate managed health care and compete in price by truncating client interviews. One lawyer employee said "I'm not interested in their life stories. When you have people scheduled only 15 minutes apart, I don't have time for it and it's not necessary."¹¹⁷³ Lawyers tend to be workaholics. Solo practitioners, like other small businesses, often drive themselves brutally hard.¹¹⁷⁴ Some feel that because they punish themselves, clients have no right to complain. But of course there is no connection.

¹¹⁶⁸ O'Gorman (1963: 47, 63-64).

¹¹⁶⁹ Ramos (1994: 1715 n.358) (almost all worked alone or in small firms).

¹¹⁷⁰ Until 2003 New York paid \$40 an hour in court and \$25 an hour outside—with the result that lawyers did no work out of court. Susan Saulny, "Lawyers' Fees to Defend Poor Will Increase," *New York Times* B1 (11.13.03).

¹¹⁷¹ David Rohde, "Caseloads Push System to Breaking Point," *New York Times* A1 (4.9.01).

¹¹⁷² Leonnig et al. (2003).

¹¹⁷³ Van Hoy (1997: 57).

¹¹⁷⁴ Levin (2004-2005: 342) (more than 70 hours a week).

Again I found insights in medicine's quality controls.¹¹⁷⁵ Many iatrogenic injuries are not the outcomes of complex judgments about which reasonable doctors could disagree. Each year American hospitals infect 2 million patients, 90,000 of whom die as a result. Health care providers have known since 1847 that a principal cause of infection is their failure to wash their hands adequately: only a third to a half do so today. The main obstacle is time, especially as cost-cutting forces speed-ups. Alcohol gel, which has been used in Europe for two decades, is faster than soap and water. By substituting it, one American hospital increased compliance from 40 to 70 percent. But the infection rate did not drop because even 70 percent was not good enough. The hospital then hired an industrial engineer, who systematically eliminated wasted time. As compliance rose, infection rates from the most common bacteria fell almost 90 percent. But the innovations did not spread to other units and were abandoned when the engineer left. A 2006 study by Johns Hopkins University researchers found that a five-step checklist reduced the rate of bloodstream infections from intravenous lines by two-thirds in three months.¹¹⁷⁶ Unfortunately, the federal Office for Human Research Protections ruled that the intervention constituted human experimentation and therefore required prior consent of each of the thousands of patients.¹¹⁷⁷ (Coincidentally, another study found low levels of compliance with standard procedures for urinary catheters, which correlated with high levels of urinary tract infection.¹¹⁷⁸)

A 1933 study found that although two-thirds of maternal deaths in childbirth and an even higher proportion of neonatal deaths were preventable, rates had not improved for two decades.¹¹⁷⁹

Many physicians simply didn't know what they were doing: they missed clear signs of hemorrhagic shock and other treatable conditions, violated basic antiseptic standards, tore and infected women with misapplied forceps.

¹¹⁷⁵ Gawande (2007: 14–24); Anemona Hartocollis, "In Hospitals, Simple Reminders Reduce Deadly Infections," *New York Times* A22 (5.19.08)

¹¹⁷⁶ Pronovost et al. (2006); Atul Gawande, "The Checklist," *The New Yorker* 86 (12.10.07); Jane E. Brody, "A Basic Hospital To-Do List Saves Lives," *New York Times* D7 (1.22.08).

¹¹⁷⁷ Atul Gawande, "A Lifesaving Checklist," *New York Times* § 4 p. 8 (12.30.07). The *New York Times* editorialized against this: "Pointy-Headed Regulation," *New York Times* § 4 p. 15 (1.27.08).

¹¹⁷⁸ Saint et al. (2008).

¹¹⁷⁹ Gawande (2007: 179–92).

Midwives had better outcomes. By the 1950s—after hospitals instituted training, regulated who could perform deliveries and what steps to follow, limited the use of forceps, and investigated all maternal deaths—they declined from 0.7 percent to 0.01 percent. But more than 3 percent of neonates were still dying, a rate that had not changed for a century. In 1953 Dr. Virginia Apgar published her scheme for scoring the condition of neonates, turning “an intangible and impressionistic clinical concept . . . into numbers that people could collect and compare.” Hospitals created neonatal ICUs for the most vulnerable. Doctors competing for better scores found that spinal and epidural anesthesia produced them. In difficult births, a few highly skilled obstetricians could produce as good a result for the infant with forceps as with C-sections, which were much more traumatic for mothers. But because most doctors were not adept with forceps, they were replaced by C-sections. As a result, neonatal deaths have declined from more than 3 percent to 0.02 percent, and maternal deaths have fallen to 0.001 percent.

Data on the quality of the 117 specialist-certified treatment centers for cystic fibrosis found that patients had a 30-year life expectancy at the average center but enjoyed 46 years at the best.¹¹⁸⁰ The director of the latter “insists on a degree of uniformity that clinicians usually find intolerable.” The same Bell curve is found in many other procedures. The likelihood of a recurrence following a hernia operation varies from 10 percent at the bottom to 0.2 percent at the top. Risk adjusted death rates in neonatal ICUs vary from 6 to 16 percent. The success of in vitro fertilization ranges from 15 to over 65 percent.

Gawande believes that publicizing such differences can motivate improvement among those at the bottom. The comparative information a private service sold through the Internet was virtually useless. In 1986, in response to *The New York Times*, the federal government produced an index ranking all hospitals by death rates for elderly and disabled Medicare patients.¹¹⁸¹ Because this “Death List” did not control for entry condition and exhibited high annual volatility, it was withdrawn under pressure from the hospitals in 1992. In June 2007, the Department of Health and Human Services released a report on some 5,000 hospitals, identifying 42 where heart patients were most likely to die and 55 where they were least

¹¹⁸⁰ Id. 205–28.

¹¹⁸¹ Gardiner Harris, “Report Rates Hospitals on Their Heart Treatment,” *New York Times* A11 (6.22.07); “(Sort of) Rating Hospitals,” *New York Times* A24 (6.26.07). The list is available at www.hospitalcompare.hhs.gov.

likely (controlling for patient health and medical history).¹¹⁸² The American Hospital Association had cooperated with the study “because we believe that patients should have the information they need to make choices.” (In fact, patients got only the information above; information about the other 99.8 percent of hospitals in the middle went only to those hospitals.) One low-ranked hospital called it “a statistical anomaly related to hospice-type patients” and concluded, after a review, that it had provided appropriate care to each patient who had died. But another low-ranked hospital said “we take the data very seriously.” Veterans’ hospitals and some teaching hospitals record and compare surgeons’ complications and death rates; and four of the most populous states publicize such data on every cardiac surgeon. Consumers’ Checkbook recently persuaded a federal judge to force the Department of Health and Human Services to release data on the 700,000 doctors who treat 40 million Medicare patients.¹¹⁸³ Medicare is also paying doctors a 1.5 percent bonus for reporting quality measures.¹¹⁸⁴ Under pressure from Mayor Bloomberg, the New York City Health and Hospitals Corporation (the largest public health system in the country) will release data on infection and death rates at its 11 hospitals.¹¹⁸⁵ Gawande concludes that

the scientific effort to improve performance in medicine—an effort that at present gets only a miniscule portion of scientific budgets—can arguably save more lives in the next decade than bench science . . . research on the genome, stem cell therapy, cancer vaccines.¹¹⁸⁶

Geisinger Health System in Pennsylvania charges a flat fee for elective heart bypass surgery, including 90 days of follow-up treatment.¹¹⁸⁷ This creates a strong incentive to avoid errors (which result in additional hospitalization, typically costing \$12,000–\$15,000). Studies have found

¹¹⁸² See the full-page advertisement “Compare the Quality of Your Local Hospitals,” *New York Times* A11 (5.21.08) (www.hospitalcompare.hhs.gov).

¹¹⁸³ Ricardo Alonso-Zaldivar, “Ruling May Unlock Key Data on Doctors,” *Los Angeles Times* (8.30.07). See www.hospitalcompare.hhs.gov.

¹¹⁸⁴ Manoj Jain, “Putting Pay on the Line to Improve Health Care,” *New York Times* F5 (9.4.07).

¹¹⁸⁵ Sarah Kershaw, “New York City Puts Hospital Error Data Online,” *New York Times* B1 (9.7.07).

¹¹⁸⁶ Gawande (2007: 232).

¹¹⁸⁷ Reed Abelson, “In Bid for Better Care, Surgery with a Warranty,” *New York Times* A1 (5.17.07).

that large proportions of patients are denied the most basic treatments: the right kind of antibiotics for pneumonia at the right time, aspirin after heart attacks, antibiotics before hip surgery. Noting that heart surgery mortality varied from zero to nearly 10 percent within Pennsylvania, Geisinger standardized its heart bypass procedure, which its seven surgeons each had done differently. It identified 40 essential steps, increasing compliance with all of them from 59 to 100 percent. It boasts that its mortality rate for coronary artery bypass grafts is 0.7 percent, compared with a national benchmark of 2.1 percent.¹¹⁸⁸ Regenstrief Institute in Indianapolis has created a patient medical record database covering five hospital chains, 20 public primary care clinics, 30 public school clinics, and 3,000 medical specialists, which has achieved major gains in health care quality.¹¹⁸⁹

Lawyers could draw many useful lessons from doctors. Almost no doctor practices alone today; it is not clear that any lawyer should do so. Litigators need others to make appearances and mind the office. (Although English barristers must be sole practitioners, they work in chambers whose clerks keep their calendars and find substitutes when there are time conflicts.) Multi-lawyer firms would have a reputational interest in preventing misconduct and a financial incentive in ensuring minimum quality (malpractice liability and insurance premium levels). Missed deadlines are the iatrogenic infections of law. Rapid advances in information technology make electronic tickler systems foolproof (except for data entry). There is no more excuse for litigators to operate without them than for car drivers not to buckle up. Legal clinics (also known as franchise law firms) have demonstrated that standardizing practice can reduce both errors and cost.¹¹⁹⁰ The quality of a nation's justice is determined less by how it handles the rare high profile case than by how it routinely processes garden variety claims. Compulsory partnership would disproportionately burden minority lawyers, who are overrepresented among sole practitioners, but it also would disproportionately benefit their clients, who are also more likely to be minorities.

Lawyers should be allowed to compete freely. In the 30 years since the U.S. Supreme Court recognized lawyers' First Amendment rights in

¹¹⁸⁸ www.geisinger.org.

¹¹⁸⁹ Shekelle (2006), cited in Simon Head, "They're Micromanaging Your Every Move," 54 (13) *New York Review of Books* 43 (8.16.07).

¹¹⁹⁰ Van Hoy (1997).

commercial speech, state bars have persisted in restraining advertising.¹¹⁹¹ Clients are as needy and deserving of information about the cost and quality of legal services as patients are about medical care. The variance in quality between Joseph Muto and Jan Reiner or Ann Hsiung was at least as great as that between the worst and best doctors. Clients need an Apgar score for successful lawyering. The largest private physicians' practice in California, serving more than 500,000 patients, has posted the price of 58 common procedures on its website;¹¹⁹² lawyers could do the same. Malpractice claims and disciplinary complaints and their outcomes (including settlements) should be available online.¹¹⁹³

Medicine began certifying specialists decades ago. Law has been slow to follow suit, often grandfathering in practitioners on the basis of experience without assessing expertise. In Britain, patients first must consult general medical practitioners, who alone can refer them to specialist consultants. Until recently, British clients first had to consult solicitors, who alone could refer them to barrister advocates. Specialization would force lawyers to develop measures of quality. (There is a danger, of course, that it could become yet another restrictive practice, allowing specialists to extract higher monopoly rents.)

Given the difficulty laypeople encounter in evaluating quality, referral sources could play an invaluable role.¹¹⁹⁴ Merely aggregating client reactions—the equivalent of Zagat's for restaurants, online ratings for hotels, and Angie's List for many other services—risks letting superficial judgments of style eclipse substantive measures of lawyer performance.¹¹⁹⁵ Controversy has raged over publicizing consumer complaints and evaluations of children's toys, child-care providers, police, and judges.¹¹⁹⁶ But for-profit

¹¹⁹¹ Compare *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), with *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 1792 (1993); see Maria Aspan, "Getting Law Firms to Like Commercials," *New York Times* C5 (6.19.07) (in February 2007, New York prohibited lawyers from using actors in television advertisements without identification, client endorsements, or images or slogans). See Rhode (2000: 211).

¹¹⁹² Lisa Girion, "Doctors' List Puts a Price on Care," *Los Angeles Times* A1 (5.28.07).

¹¹⁹³ See Rhode (2000: 211).

¹¹⁹⁴ Zacharias (2007: 631–40). But the referral sources would have to be regulated. Kirk Johnson, "Vast Legal-Aid Fraud Laid to Two Brothers," *New York Times* A14 (2.16.08) (Legal Aid National Services and Legal Aid Divorce Services took money and did nothing).

¹¹⁹⁵ Shari Roan, "The rating room," *Los Angeles Times* F1 (5.19.08) (www.RateMDs.com; www.Dr.Score.com; www.Healthgrades.com; www.vitals.com; www.nursesrecommendoctors.com; www.angieslist.com. Zagat has even collaborated with Wellpoint Inc.).

¹¹⁹⁶ Noam N. Levey, "Fight looms over consumer database," *Los Angeles Times* (3.6.08); Donna St. George, "Parents Weigh Day-Care Options Online," *Washington Post* A1 (4.14.08); Rebecca Cathcart, "Irked by a Ticket? Now Drivers Can Rate the Officer Who Issued It,"

referral sources (perhaps using legally trained evaluators) could assess and monitor the lawyers to whom they make referrals, transforming one-shot clients into repeat players, who would have the market power to demand quality (as unions allow members to do).¹¹⁹⁷ One online service uses “years in practice, disciplinary history, professional achievements and industry recognition.”¹¹⁹⁸ Referral sources would have to be transparent about financial relationships with the lawyers to whom they refer and liable in negligence for the information they sell. They would rightly be concerned about liability, given lawyers’ litigiousness.¹¹⁹⁹ Third-party payers (Medicare, Medicaid, private insurance, and the employers who pay most of the insurance premiums) have long monitored the price and quality of medical services.¹²⁰⁰ But there is no realistic prospect of replicating this for legal services. Legal aid is drastically underfunded, serves a tiny segment of the population, and is severely limited in the functions it may perform; no constituency promotes its expansion. Legal expenses insurance is virtually universal in Germany and has become much more widespread in Britain since the government replaced legal aid for money claims with conditional fees. But few Americans have legal expenses insurance, which covers only a narrow range of services.

The boundaries of the legal monopoly (which includes advice) are broader in the United States than anywhere else and should be drastically contracted.¹²⁰¹ Much of what solo and small firm lawyers do badly laypersons could do better and more cheaply. Indeed, much of it *is* done by laypersons but billed by lawyers, who pocket the surplus value. In Britain,

New York Times A11 (4.22.08); “More Information on Judges,” New York Times A18 (3.12.08).

¹¹⁹⁷ The enormous influence of the U.S. News and World Report ranking of colleges and universities has prompted them to produce their own websites with comparative information. Alan Finder, “Colleges Join Forces on a Web Presence to Let Prospective Students Research and Compare,” New York Times B8 (7.4.07).

¹¹⁹⁸ <http://www.avvo.com>.

¹¹⁹⁹ Adam Liptak, “On Second Thought, Let’s Just Rate All the Lawyers,” New York Times (7.2.07) (Avvo.com sued by criminal defense lawyer whose rating was low because of admonition over fee dispute); “National Briefing: Northwest: Washington: Lawyers Can Take a Number,” New York Times A24 (12.20.07) (U.S. District Court in Seattle dismissed lawsuit by John Henry Browne and Alan J. Wenokur).

¹²⁰⁰ Ellen Nakashima, “Doctors Rated but Can’t Get a Second Opinion,” Washington Post A1 (7.25.07); Ricardo Alonso-Zaldivar, “Medicare data should stay private, government says in appeal,” Los Angeles Times A21 (4.19.08).

¹²⁰¹ For an example of abusive enforcement of unauthorized practice rules, see Vladeck (2006). The U.S. Supreme Court recently recognized the rights of parents to represent themselves in seeking relief under the Individuals with Disabilities Education Act. *Winkelman v. Parma City School District*, 2007 WL 1461151 (U.S.). See Rhode (2000: 209).

immigration consultants do much of the work for which travel agencies had to hire Muto, and claims agents do much of the personal injury settlement negotiation that Kreitzer delegated to his subordinates.¹²⁰² But the American Immigration Lawyers Association wants the federal government to criminalize lay advice.¹²⁰³ And other bar associations continue to police their indefensible rules against unauthorized practice of law. If laypeople were allowed to perform functions currently restricted to lawyers, states would need to regulate quality and ensure that service providers were financially responsible for errors.

For more than a decade, American lawyers have bewailed the crisis in their profession, wringing their hands about its bad image. But their response has been limited to wasting money on public relations, mandating education of no demonstrated value, tinkering with ethical rules, and cracking down in a tiny number of high visibility cases. These measures will do nothing to solve the problems exposed by my six disciplinary case examples. The structural changes described above are first steps in restoring the public trust in lawyers. Can the profession muster the political will to reform?

¹²⁰² Abel (2003: 230–33, 314–15).

¹²⁰³ “Consumer Protection and the Unauthorized Practice of Law,” AILA Dispatch 7 (7/8 2003).