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Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar

William T. Gallagher

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Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar

William T. Gallagher*

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I. THE POLITICS OF PROFESSIONALISM

A. *The Cultural Logic of a Political Crisis*¹

This Article is a case study of the California State Bar lawyer discipline system in crisis. The Bar's lawyer discipline system is the official state mechanism for regulating the professional conduct of California's more than 100,000 lawyers. The State Bar in California self-regulates² as an adjunct of the judicial branch of government.³ The State Bar operates in this capacity as a quasi-governmental body while at the same time functioning as a professional organization, of which one role is to represent the collective interests of California lawyers.⁴ This is truly an extraordinary status. Unlike most other occupational groups, the legal profession has long enjoyed the privilege of regulating itself largely free from state or other external interference.

1. I borrow this term from and share a methodological affinity with Robert Hayden. See Robert M. Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Insurance Famine of 1986*, 11 *STUD. IN L., POL., & SOC.* 95 (1991).

2. The term "self-regulation" generally refers both to control over admissions and over standards in addition to the promulgation and enforcement of ethical rules that guide professional practice (as, for example, in the process of disbarment). This study focuses on the latter aspect of self-regulation.

3. State courts in conjunction with bar associations have been a central locus of lawyer regulation since the late nineteenth century. See generally ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES: WITH PARTICULAR REFERENCE TO THE DEVELOPMENT OF BAR ASSOCIATIONS IN THE UNITED STATES* (1953); CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* (1911). See also Thomas M. Alpert, *The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis*, 32 *BUFF. L. REV.* 525 (1983) (examining the relationship between courts, bar associations, and other mechanisms of lawyer regulation in American history). Although state supreme courts nominally exercise the ultimate power and control in regulatory matters, the courts typically play a relatively passive role in the discipline process and rather perfunctorily approve of bar association initiatives in these matters. See, e.g., SHARON TISHER ET AL., *BRINGING THE BAR TO JUSTICE: A COMPARATIVE STUDY OF SIX BAR ASSOCIATIONS 90-94* (1977) (A Public Citizen Report). Thus, "self-regulation" is the system of professional discipline of lawyers by state bar associations under the nominal review of the states' highest courts. See *id.* at 86-111.

4. See generally *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990) (discussing the dual role of bar associations). In *Keller*, the Court recognized that bar associations in those states retaining self-regulatory powers operate as quasi-governmental agencies that not only share some characteristics of purely private business or trade associations, but also operate as representatives of the state in discipline and other regulatory matters. *Id.* at 11.

B. *The Claim for Self-Regulation*

Lawyer self-regulation has long been defended as a necessary concomitant to an independent and effective profession that can serve public interests and not solely professional interests.⁵ The thrust of such an argument is that lawyers, and other specialized professions, possess complex and esoteric knowledge and skills; therefore, they should be allowed to self-regulate because they alone have the specialized knowledge to understand the unique nature of their profession's problems and hence, to apply effective cures. Outside interference in this process, commentators argue, would undermine the profession's public orientation and subject it to regulation that is harmful to both the profession and the public.

There are three essential claims that underlie this position. First, only lawyers can understand the legal complexities involved in regulation; because nonlawyers have no basis for understanding the issues involved or the context in which the lawyer's behavior needs to be understood. Second, lawyers, by virtue of their training and professional socialization, possess both the technical skills and the proper ethical orientation to self-regulate. Finally, the profession has upheld its end of the bargain

5. See, e.g., POUND, *supra* note 3, at 4-11; Talcott Parsons, *A Sociologist Looks at the Legal Profession*, in *ESSAYS IN SOCIOLOGICAL THEORY* (1964); see also Robert B. McKay, *The Future of Professional Independence for Lawyers*, in *THE LAWYER'S PROFESSIONAL INDEPENDENCE: PRESENT THREATS/FUTURE CHALLENGES* (Tort & Ins. Practice Sect., A.B.A. ed. 1984); Archibold Cox, *The Conditions of Independence for the Legal Profession*, in *THE LAWYER'S PROFESSIONAL INDEPENDENCE: PRESENT THREATS/FUTURE CHALLENGES* (Tort & Ins. Practice Sect., A.B.A. ed. 1984). This theme is also a staple of bar association rhetoric. See, e.g., Charles S. Vogel, *The Bar in the Balance*, 9 *L.A. LAW.* 5, 6 (1986).

We owe it to ourselves to retain a system of self-regulation. Even though a primary objective for the disciplinary system is the protection of the public, its other purpose is to retain the independence and integrity of lawyers. After all, lawyers serve as advocates of others and sometimes must urge unpopular and controversial causes. If their regulation is under the control of a popularly appointed agency, will their independence be compromised? I submit that the independence of lawyers is crucial to a democratic society. They cannot retain that independence if they do not remain a self-regulated profession.

Id. at 6. For an excellent discussion sorting through many of the various claims regarding professional independence, see generally Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. REV.* 1 (1988).

to carry out its self-regulatory duties, which should justify continued lawyer control over the disciplinary process.⁶

Each of these claims, however, has been increasingly viewed as problematic. While it is true that some discipline cases deal with complex and esoteric issues, this is certainly not the norm;⁷ consequently, it is not self-evident that only lawyers are capable of understanding the issues involved in lawyer regulation. The claim that self-regulation furthers the public interest is similarly suspect precisely because of the inherent conflict of interest involved in regulating members of one's own profession.⁸ Moreover, while lawyer self-regulation is a primary means of regulation, it is by no means the sole (or necessarily the most important) mechanism for social control of lawyers' professional behavior.⁹

1. The California Example

Despite these concerns, the California State Bar's claim to self-regulation remained secure for almost sixty years following its inception in 1927. However, during the mid-1980s and early 1990s, this traditional prerogative of the Bar has come under fierce attack. The State Legislature, responding in part to public outrage,¹⁰ criticized the Bar for having a discipline system that was perceived to be slow, unresponsive, and overly-protective of the interests of lawyers rather than the public interest. This attack culminated in a threat by the Legislature to divest the Bar of its self-regulatory powers.¹¹

6. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 20, 21 (West 1986).

7. See, e.g., Eric H. Steele & Raymond T. Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 919 (showing that most lawyer discipline complaints typically deal with issues of basic competence).

8. See, e.g., Kay A. Ostberg, *The Conflict of Interest in Lawyer Self-Regulation*, 1 PROF. LAW. 6 (1989).

9. There are many forms of social control, both formal and informal, that shape professional behavior. See generally JEROME E. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* (1966) (analyzing informal social controls in legal practice). See also David Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 801 (1992) (providing an excellent discussion and overview of formal controls affecting lawyers).

10. A six-part investigative reporting series in the *San Francisco Examiner* tellingly entitled *The Brotherhood: Justice for Lawyers*, created a tremendous public response. K. Connie Kang et al., *The Brotherhood: Justice for Lawyers*, S.F. EXAMINER, Mar. 24-29, 1985. The public response to this series included a large number of newspaper editorials and letters to the editor calling for external investigation and reform of lawyer discipline in California. See *infra* part II.A.2. for a discussion of the legislative criticism and action.

11. See *Joint Interim Hearing on the Attorney Discipline Function of the State Bar of California; Senate Task Force on the State Bar Discipline System*, Sept. 30,

To be sure, the legal profession in California and elsewhere had previously been the target of public outrage over ineffective discipline. For example, in the late 1960s and early 1970s, a special committee of the American Bar Association surveyed and evaluated lawyer discipline systems nationwide in response to public criticism of the Bar.¹² This committee reported that the status of disciplinary enforcement in the legal profession was nothing less than "scandalous."¹³ Moreover, prominent public figures such as former Chief Justice Warren Burger, have also focused attention on the perceived defects of lawyer discipline.¹⁴

Nevertheless, the 1980s' attacks on lawyer discipline in California took on an ominous tone missing from much of the earlier nationwide criticism. From the beginning, the critique in California focused on the presumed inability of the organized Bar to promote the public interest over narrower professional interests.¹⁵ In this critique, opponents challenged the legal profession to justify why it should be treated differently from other occupational groups. An important part of the debate in California thus centered on the legitimacy of lawyer self-regulation and not merely its efficacy. The Bar responded to this debate by attempting to redefine its proper role in the lawyer discipline system and by reasserting the special status of law as a "profession."

Despite this formidable challenge, and notwithstanding the substantial changes in the lawyer discipline system that were produced in its wake, the State Bar retained its regulatory powers. In fact, as the rather narrow parameters of the Bar's enforcement authority were expanded, these powers were enhanced. The resources expended on the discipline system were increased substantially, and the lawyer discipline bureaucracy was better staffed and organized. Ironically, in the short space of several years, the Bar's disciplinary system was transformed from the

1985 [hereinafter *Joint Interim Hearing*]. See also Philip Carrizosa, *Task Force Urges Stripping State Bar of Discipline Cases*, L.A. DAILY J., Sept. 19, 1985, at 1.

12. See American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement*, Final Draft, June 1970 (A.B.A. 1970) [hereinafter *Clark Report*] (report by panel chaired by retired Supreme Court Justice Tom Clark).

13. *Id.*

14. See, e.g., George M. Gold, *Burger Urges Reform of Lawyer Discipline*, 9 B. LEADER 29 (1984); Thomas H. Henderson, Jr., *Burger Critiques Discipline*, 8 DIST. LAW. 8 (1984).

15. See, e.g., *Joint Interim Hearing*, *supra* note 11. The task force recommended that the State Legislature establish a lawyer regulatory agency independent of the State Bar. *Id.* at 115-16.

subject of criticism to an object of emulation for other professional regulatory bodies.¹⁶

This study explores the meaning of the crisis in California's lawyer discipline system,¹⁷ examines the changes in lawyer discipline produced in response to this crisis, and analyzes the aftermath of these changes.¹⁸ The central argument in this analysis is that the "crisis" of professional self-regulation in California that occurred between 1985-92, while always a very real political crisis, is best understood as a crisis of "cultural authority"¹⁹ for the legal profession. From this perspective, what was at stake in the debate over lawyer discipline was not only the role of the Bar in lawyer self-regulation, but its very legitimacy as a "profession." Such an interpretation forces a reassessment of traditional theories developed in the sociology of professions and the sociology of law.

2. Why Self-Regulation?

Until recently, professional associations like the California State Bar were "one of sociology's least researched phenomena."²⁰ Yet such organizations are the collective voices of often powerful professions, and they potentially wield enormous influence in society. Thus, while it may be misleading to assume that bar associations are necessarily representative of the legal profession as a whole,²¹ they clearly play a prominent role in shaping and articulating professional values and ideology. For these reasons alone the choice to study a major bar association is justified. But why focus so narrowly on self-regulation? Bar associations

16. See, e.g., Robert C. Fellmeth, *Physician Discipline in California: A Code Blue Emergency*, report issued in April, 1989 by the Center for Public Interest Law, University of San Diego.

17. See *infra* part II.A.2.

18. See *infra* part II.B.

19. For a useful explication of the term "cultural authority", see PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE: THE RISE OF A SOVEREIGN PROFESSION AND THE MAKING OF A VAST INDUSTRY* 9-17 (1984).

20. TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* xiii (1987). At least with regard to the legal profession, this situation of neglect is changing. See generally MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* (1988); Corinne L. Gilb, *Self-Regulating Professions and the Public Welfare: A Case Study of the California State Bar* (1956) (unpublished Ph.D. thesis, Radcliffe College) (providing a very useful early study of the California State Bar).

21. For a vehement argument that bar associations are run by elites within the bar, see generally JEROLD AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976). More careful empirical studies suggest, however, this is simply not true or at least, should be considerably qualified. See generally HALLIDAY, *supra* note 20; POWELL, *supra* note 20.

do many things. In addition to attorney discipline, an association may administer bar exams, client trust funds, or continuing legal education, it may lobby state legislatures or other governmental agencies, it may file *amicus curiae* briefs in pending cases, and it may take positions on pressing social and political issues of the day or participate in law reform activities.²²

Nevertheless, although little scholarly consensus exists as to its significance, self-regulation has traditionally been considered theoretically central to the professional enterprise. Structural-functionalist theory, for example, views self-regulation as a necessary concomitant to professionalism.²³ As one scholar notes, "If structural functionalism had to distinguish professions by means of a single characteristic, self-regulation would be a prime candidate."²⁴ In this perspective, self-regulation is posited as a mechanism to ensure adequate professional discipline and to maintain necessary professional independence from the state. In contrast, theories critical of the professions perceive self-regulation as a principal means of enhancing collective professional status, of legitimating a monopoly market for professional services, and of forestalling intrusive state regulation. Self-regulation from this vantage point is an "essential element" of lawyers' "claim to professional status" itself.²⁵ An emerging cultural perspective on professions focuses on the symbolic role of legal ethics and claims for self-regulatory powers. This model of professions stresses that professional authority is socially constructed (and, indeed, needs to be re-constructed over time) and it points out the central role of self-regulation in this process.²⁶ Lastly, this perspective raises the possibility for understanding professional ideology, as articulated in professions' claims for superior ethicality, as a form of hegemonic control that both shapes professions and is shaped by them.

22. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 16 (1990) (recognizing numerous functions of the California State Bar Association, including that bar association dues may be used to formulate professional ethics and to discipline its members). See generally HALLIDAY, *supra* note 20; POWELL, *supra* note 20.

23. RICHARD ABEL, *AMERICAN LAWYERS* 37 (1989).

24. *Id.*

25. Richard Abel, *Toward a Political Economy of Lawyers*, 1981 WIS. L. REV. 1117, 1177 (1981).

26. See generally ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988).

a. *The functionalist model: professional communities and the public interest*

Functionalist theories of professions have their intellectual roots in Durkheimian sociology, which emphasizes the social control function of professional ethics.²⁷ The central theme in Durkheimian sociology is the problem of social solidarity.²⁸ This concern for social order dominates Durkheim's major works—which explore the nature, causes, and consequences of social alienation or anomie—and forms the basis for his understanding of the role of professions in modern society.²⁹

In Durkheim's view, modernization brought with it forces of social differentiation, industrialization, urbanization, and secularization. These forces attenuated the social institutions—such as the family and religion—that serve as a source of moral authority in society. For Durkheim, contemporary society was characterized by unrestrained economic egoism, which no society can long endure:

It is this anomic state that is the cause, as we shall show, of the incessantly recurrent conflicts, and thus the multifarious disorders of which the economic world exhibits so sad a spectacle. For, as nothing restrains the active forces and assigns them limits they are bound to respect, they tend to develop haphazardly, and come into collision with one another . . . Human passions stop only before a moral power they respect. If all authority of this kind is wanting, the law of the strongest prevails, and latent or active, the state of war is necessarily chronic.³⁰

For anomie to be eradicated, Durkheim argued, "there must then exist, or be formed, a group which can constitute the system of rules actually needed," and thus provide the necessary moral authority for successful social existence.³¹ Drawing on the historical example of the medieval guild, Durkheim looked to occupational groups to perform this function, serving as a "*corps intermediaires*," to instill moral values and discipline and to maintain social order:

What we especially see in the occupational group is a moral power capable of containing individual egos, of maintaining a spirited sentiment of common soli-

27. See Emile Durkheim, *Preface to the Second Edition* of EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 1, 1-31 (1933) [hereinafter PREFACE]; EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* 1-41 (Cornelia Brookfield trans., 1957).

28. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 49 (George Simpson trans., 1933).

29. *Id.* Durkheim's theory does not focus specifically, or exclusively, on "professions" as distinguished from other occupational groups. Nevertheless, it is clear the modern Anglo-American professions such as law and medicine are prototypical examples of occupational groups that fit Durkheim's model. Moreover, the sociology of professions is certainly the field most influenced by this aspect of Durkheim's work.

30. PREFACE, *supra* note 27, at 2-3.

31. *Id.* at 5.

parity in the consciousness of all workers, of preventing the law of the strongest from being brutally applied to industrial and commercial relations.³²

Durkheim found the state ill-suited to this task.³³ Rather, it is the corporation or occupational group that Durkheim considered most able to assume this integrative function because it alone is intimately knowledgeable about the occupational activity requiring regulation.³⁴ In this view of the state, Durkheim mirrors De Tocqueville's famous comments on the American legal profession as playing an intermediary role between the potential excesses of an interventionist state and those of a democratic lay public.³⁵ Thus, occupational self-regulation is a central dynamic in Durkheim's vision of modern democratic society.

Parsonsian functionalist theory³⁶ shares Durkheim's macrosociological concern with the social control function of professions, but also develops a model of social control of professions that has been both influential and much criticized.

In his work on the sociology of professions, Parsons explored the emergence and significance of professions as a unique historical form of social organization, describing them as one of the most crucial structural developments of modern society.³⁷ Like Durkheim, Parsons viewed utilitarian theory, with its emphasis on rational, economic elements, negatively. In his theoretical work in general and in his focus on professions in particular, Parsons emphasized that normative, non-rational elements are a significant factor in human action.³⁸ Parsons' theoretical work on professions argued against the idea that professional behavior can be adequately explained solely on instrumental grounds.³⁹ In contrast to other occupational groups, which are motivated primarily by self-interest, Parsons characterized professions as "collectivity-oriented" and as having norms that are not based on the market.⁴⁰

Parsons viewed the legal profession's role in the social structure as similarly beneficial. Like Durkheim, Parsons argued for understanding the

32. *Id.* at 10.

33. *Id.* at 5.

34. *Id.*

35. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272-80 (1945).

36. See TALCOTT PARSONS, *ESSAYS IN SOCIOLOGICAL THEORY* 9 (1954).

37. Talcott Parsons, *The Professions and Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY* 34, 34-49 (1954).

38. See generally PARSONS, *supra* note 36.

39. See generally *id.*

40. See, e.g., Parsons, *supra* note 5, at 375 n.2.

role of the legal profession as exerting moral control between the individual and the state.⁴¹ Parsons stressed the “dual character” of the legal profession: it operated between state authority and norms of the individual, “whose conduct or intentions may or may not be in accord with the law.”⁴² The role of lawyers in this situation was “integrative.” As Parsons wrote:

(T)he lawyer stands as a kind of buffer between the illegitimate desires of his clients and the social interests . . . the sociologist must regard the activities of the legal profession as one of the very important mechanisms by which a relative balance of stability is maintained in a dynamic and rather precariously balanced society.⁴³

Again, as with Durkheim, self-regulation in Parsons' scheme is a necessary attribute of professionalism. For the legal profession to maintain its intermediary and integrative role between the state and society, it must retain its independence from both. State or public intrusion into lawyer regulation serves to undermine this socially beneficial autonomy.

There is a second dimension of Parsons' treatment of professions. In addition to his macrosociological concern with the social-integrative function of professions, Parsons developed a more micro-sociological theory of professions that focuses on the problem of social control of professions themselves.⁴⁴ Parsons recognized that professions serve socially useful roles as well as sensitive and potentially threatening roles. Their position as experts requires that the general public trust them to use their expertise wisely, but also brings with it an obligation not to abuse the “asymmetry of expertise” that characterizes their relationships with clients.⁴⁵ In this view, there is a social compact implicit in professional status. Additionally, the institutional arrangement best situated to ensure that the terms of the compact are met is a system of collegial control through professional codes of ethics—which are presumed to hold professions to a higher moral standard than other occupations—and disciplinary oversight by professional colleagues, which is the essence of self-regulation.

Goode furthered this structural-functionalist analysis of professions and made explicit the theorized social pact between professionals and the community they serve.⁴⁶ Goode argued that the professions are a distinct community because they share common backgrounds, common

41. *Id.* at 370-85.

42. *Id.* at 381.

43. *Id.* at 384-85.

44. *Id.* at 373-74.

45. *Id.* at 370-85.

46. See generally William J. Goode, *Community Within a Community: The Professions*, 22 AM. SOC. REV. 194 (1957).

specialized language, common values, and a common sense of identity.⁴⁷ The professions share a higher standard of behavior and training than the lay community and, because of this, enjoy special social advantages, discretion, and autonomy denied the larger society.⁴⁸ These advantages, however, come at a price. The professions must adhere to the high standards that they assert guide their behavior; the failure to do so will invite outside control:

The larger society has obtained an *indirect* social control [of professions] by yielding *direct* social control to the professional community [T]hey frequently argue that the most effective technique for avoiding lay control over the professional community is to maintain strong control over its members Failure to discipline would mean both a loss of prestige in the society, and a loss of community autonomy.⁴⁹

Goode's analysis of professions as self-regulating communities thus largely recapitulates Durkheim's ideal of a *corps intermediaires*. Yet in neither Goode's nor Parsons' version of functionalist theory need there be a naive belief that professions invariably live up to their own professed high moral standards. Thus, neither Goode nor Parsons argues that as an empirical matter professional self-regulation is effective, which would clearly be a problematic assumption.⁵⁰ What these theories highlight is both the significant problem of controlling professions and the consequences for the failure of self-regulation. What functionalist theory does tell us is that self-regulation is significant as a mechanism for maintaining socially beneficial professional autonomy and for ensuring quality control. This theory takes seriously—at least in its most abstract forms—professional ideals of community service that underlay self-regulation and, at the very least, properly remain aspirational goals.⁵¹

b. Monopoly theories: professions and market control

A second, more critical and empirical tradition, takes the role and

47. *Id.*

48. *Id.* at 195-96.

49. *Id.* at 198.

50. As Heinz and Laumann tell us, the notion of professional "community" itself is misleading because the bar is highly stratified, indeed, segmented into two fairly exclusive spheres. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319-85 (1982). Additionally, as their work suggests and Carlin's work shows, professional self-regulation is not generally effective. See generally JEROME E. CARLIN, LAWYERS ON THEIR OWN (1962).

51. Importantly, such ideals can also form the basis for an internal critique of professional behavior itself. See generally AUERBACH, *supra* note 21.

significance of professions in the market for their services more seriously than does functionalist theory. Drawing on Weber's insight into the monopolistic tendencies of medieval guilds, Johnson's theoretical analysis of professions shifted the focus of professions studies away from a unilineal model of professionalization, towards a richer, more historically informed and contextual framework.⁵² Johnson's major contribution lay in explicating a model of professions as occupations that successfully organize their resources, knowledge, and skills to define and defend the market for their services.⁵³

Focusing on the medical profession, Berlant argued that professional associations have as their central goal the attainment of monopoly and that the function of ethics and self-regulation is largely to facilitate this goal.⁵⁴ Larson's approach builds on this analysis and moves beyond it by adding that the "professional project" entails not only the attainment of a monopoly market but also the maintenance of upward social mobility.⁵⁵ In this analysis, self-regulation serves three main functions. First, as the functionalists recognized, it forestalls state intervention into the regulatory process.⁵⁶ Second, it serves to legitimate professional market control and to enhance professions' claims to altruism or special ethicality.⁵⁷ Finally, the system of self-regulation legitimates monopoly capitalism.⁵⁸ Abel's work applies Larson's arguments specifically to the legal profession. Abel stresses that self-regulation both allows the profession to "stave off state regulation" and to "support the status hierarchy in the profession" by defining as unethical that conduct in which mostly non-elite lawyers engage. He argues further that because the profession's record on self-regulation is so abysmal by any measure, it is likely that the organized bar "may be losing a hallmark of professional status—the right to engage in self-regulation."⁵⁹

Market theory thus emphasizes the role of self-regulation in securing professional autonomy and social status. It views the attenuation of this prerogative as an indicator of professional decline. Other contemporary (and non-market oriented) theorists agree. Halliday's neo-functionalist account concedes the utility of self-regulation to the early period of professionalization but argues that to an "established" profession self-

52. See generally TERENCE J. JOHNSON, *PROFESSIONS AND POWER* (1972).

53. *Id.*

54. See JEFFREY L. BERLANT, *PROFESSION AND MONOPOLY: A STUDY OF MEDICINE IN THE UNITED STATES AND GREAT BRITAIN* (1975).

55. See generally MAGALLI S. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977).

56. See, e.g., ABEL, *supra* note 23.

57. *Id.*

58. *Id.*

59. *Id.* at 157.

regulation is no longer important.⁶⁰ Yet what remains to be explained adequately in both these accounts is the symbolic or ideological significance of self-regulation. This is a function that does not diminish over time even once the professional markets have become well-established. The system of self-regulation is one of the chief mechanisms by which the organized bar can articulate its collective voice and its ideology of professionalism, its vision of the role of lawyers in society.

*c. Professions and cultural control*⁶¹

There is a third tradition in the sociology of professions that, while not incompatible with either functionalism or market theory⁶² moves past these theories' one-dimensional vision of professions and develops a more sophisticated vision of the cultural dimensions of professional power. An emerging cultural perspective promises to provide a more complex and nuanced understanding of professions and their significance. Such an approach is not entirely new, although it is underdeveloped in much professions' scholarship.

Although he is generally considered solely an early market theorist, Hughes is among the earliest writers to show awareness of and sensitivity towards the cultural rather than merely structural components of professionalism.⁶³ Because of this, Hughes' work is a corrective to overly benign functionalist accounts of professions that largely take for granted the emergence of professions in modern society. As outlined above, functionalist perspectives frequently omit questions concerning precisely how certain occupational groups achieve professional status.⁶⁴ The logic of functionalism presumes that complex societies have fundamental needs for expertise that are then met by professional groups. Hughes' work, and certainly the work of his students,⁶⁵ is much more oriented toward

60. See HALLIDAY, *supra* note 20, at 345-56; see also Michael J. Powell, *Professional Divestiture: The Cession of Responsibility for Lawyer Discipline*, 1986 AM. B. FOUND. RES. J. 31 (discussing why the Illinois Bar Association voluntarily transferred control over lawyer discipline).

61. I borrow the term "cultural control" from Laura Nader. See generally LAURA NADER, *HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE* (1990); *The ADR Explosion: The Implication of Rhetoric in Legal Reform*, 8 WINDSOR Y.B. OF ACCESS TO JUST. 269 (1988).

62. In fact, this third tradition repeats some of the key insights of the two previously mentioned.

63. See generally EVERETT C. HUGHES, *MEN AND THEIR WORK* (1958).

64. See *supra* note 53 and accompanying text.

65. See, e.g., ELLIOTT FREIDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTION-*

understanding the processes by which particular occupational groups in specific social and historical contexts secure claims to professional status. From this perspective, there is no *a priori* abstract social need for particular professions. Rather, the label "profession" denotes success in defining and protecting unique occupational turf and, importantly, in having this achievement accepted as legitimate by society.⁶⁶ Hughes' terms "license" and "mandate" capture this dynamic.⁶⁷

For Hughes, professions are those groups that have achieved both license and mandate.⁶⁸ License is a form of social control; it is an official sanction the state may grant of unique occupational boundaries.⁶⁹ Rules defining the practice of law or medicine and limiting such practice to officially recognized group members are obvious examples of this form of control. Many, if not most distinct occupations acquire some form of license, gain some means of identifying unique work, and develop some method of securing it from outsiders. In its strongest form, license is a form of state sanctioned monopoly.⁷⁰

Mandate, on the other hand, is a form of cultural control, markedly more ephemeral in nature.⁷¹ It denotes the capacity to have an occupational monopoly and the attendant claims for heightened moral and intellectual status that justify viewing the monopoly as legitimate, natural, and necessary. Thus, in its strongest version, mandate is a form of hegemonic control.⁷²

ALIZATION OF FORMAL KNOWLEDGE (1986).

66. See HUGHES, *supra* note 63.

67. *Id.*

68. *Id.* As he writes: "Many new and some old occupations have sought for themselves the envied status of *professions*; some of them succeed in gaining that esteem, that broad license to control their work and that social mandate over affairs pertaining to it that the term *professions* connotes." *Id.* at 7.

69. *Id.*

70. *Id.*

71. *Id.*

72. Hughes' language aptly illustrates the point:

All occupations—most of all those considered professions . . . —include as part of their very being a license to deviate in some measure from common modes of behavior. Professions also, perhaps more than other kinds of occupations, claim a legal, moral, and intellectual mandate. Not merely do the practitioners, by virtue of gaining admission to the charmed circle of colleagues, individually exercise the license to do things others do not do, but collectively they presume to tell society what is good and right for the individual and for society at large in some aspect of life. Indeed, they set the very terms in which people may think about this aspect of life When the presumption of a group to a broad mandate of this kind is explicitly or implicitly granted as legitimate, a profession has come into being.

Id. at 79. For an excellent discussion of the term "hegemonic control" as used in the present analysis, see T.J. Jackson Lears, *The Concept of Cultural Hegemony: Problems*

In Hughes' scheme, true professions are those groups whose claims to both license and mandate are most secure. However, this security need not be permanent. Indeed, professions, other occupations, and the public at large may develop "jurisdictional disputes"⁷³ regarding the proper parameters of professional license and mandate.⁷⁴

Starr's approach to professions' theory has a great affinity with Hughes.⁷⁵ In explaining the rise and decline of a "sovereign" medical profession, Starr distinguishes between social and cultural authority. "Social authority . . . involves the control of action through the giving of commands, while cultural authority entails the construction of reality through definitions of fact and value."⁷⁶ Starr views professions as occupations that have achieved "cultural authority," or the capacity to have "particular definitions of reality and judgments of meaning and value . . . prevail as valid and true."⁷⁷ Thus, professionalism is a form of "occupational control rather than a quality that inheres in some kinds of work."⁷⁸ The attainment of professional status results in large part from a successful struggle for cultural authority.⁷⁹ In this view, a crisis of the cultural dimension of professional power is thus a challenge to the very core of status as a "profession."

In another essay, Abbott develops an approach to professions' theory that is similar to both Hughes' and Starr's models in many ways.⁸⁰ His theory of professions is broadly ecological and focuses on the centrality to professions of what he terms "jurisdiction," or the capacity to claim

and Possibilities, 90 AM. HIST. REV. 567 (1985).

73. See HUGHES, *supra* note 63.

74. As Hughes remarks:

The typical reform movement is a restless attempt of laymen to redefine values, or at least to change the nature and tempo of action about some matter over which an occupational group, or several occupations, holds a mandate. The movement may simply push for faster or more drastic action where the profession is moving slowly or not at all; it may be direct attack upon the dominant philosophy of the profession, as in some attempts to change the manner of distributing medical care. The power of an occupation to protect its license and to maintain its mandate, the circumstances in which they are attacked, lost or changed; all these are matters for investigation.

Id. at 85.

75. See generally STARR, *supra* note 19.

76. *Id.* at 13.

77. *Id.*

78. *Id.* at 16.

79. *Id.* at 17.

80. See generally ABBOTT, *supra* note 26.

exclusive control over particular work.⁸¹ In making such a claim, a profession “asks society to recognize its cognitive structure through exclusive rights,” which may include the right to a monopoly market for services, the right to control training, recruiting and licensing of practitioners, and the right to self-regulate.⁸² Echoing Hughes’ notions of license and mandate, Abbott argues that jurisdiction “embodies both social and cultural control.”⁸³

A profession may make jurisdictional claims in various arenas, including the public, legal, and workplace arenas. Moreover, Abbott argues that in the United States, the arena of public opinion is most significant. It is in the public arena that professions “establish power that enables them to achieve legal protection,”⁸⁴ which is often difficult to establish. Indeed, “[b]y the time a profession actually achieves legal establishment, it has usually long since won its public position.”⁸⁵ The establishment of legal jurisdiction, however, while difficult and slow to attain, is generally enduring. In contrast, public jurisdictional claims are much more precarious, even while they may be more quickly attainable.⁸⁶

Importantly, the process of securing professional jurisdiction is an ongoing task in Abbott’s theory. Professions must reassert, rejustify, and reestablish their claims to professional jurisdiction as challenges to professional jurisdiction arise.⁸⁷ As does the cultural view on professions, this view stresses the role of self-regulation in the ongoing process of maintaining professional cultural authority.

The aim of this study, then, is to develop this cultural perspective on professions, focusing on the California State Bar disciplinary system in crisis. In California, the Bar’s self-regulatory powers were threatened, forcing the Bar to reassert its justifications for the privilege of self-regulation. The California example is thus a study of a crisis of cultural au-

81. *Id.*

82. *Id.* at 59.

83. *Id.* at 86.

84. *Id.* at 60.

85. *Id.* at 64.

86. As Abbott explains:

A jurisdictional claim made before the public is generally a claim for the legitimate control of a particular kind of work. This control means first and foremost a right to perform the work as professionals see fit. Along with the right to perform the work as it wishes, a profession normally also claims rights to exclude other workers as deemed necessary, to dominate public definitions of the tasks concerned, and indeed to impose professional definitions of the tasks on competing professions. Public jurisdiction, in short, is a claim of both social and cultural authority.

Id. at 60.

87. *Id.*

thority for the legal profession. At stake is not only control over lawyer discipline but also control over the capacity to articulate professional ideology.

A central theme of this study is the key theoretical link between self-regulation, professional ideology, and professional cultural (or hegemonic) control. Before turning to the contemporary crisis, however, it is first necessary to understand the historical dimensions of this linkage, developed as lawyers in America were transformed in a traditional to a modern legal profession.

C. Self-Regulation in Historical Perspective

Self-regulation, along with a general system of legal ethics is one of the cornerstones of the modern legal profession's ideology and world view. The pre-modern legal profession often enjoyed considerable autonomy from the state and from external regulation. The ancient English Inns of Court, for instance, were private guild-like bodies that possessed extensive power to regulate admissions, etiquette, and conduct of barristers. But it is only with the rise of a modern legal profession beginning in the nineteenth century that self-regulation became such an integral part of professional ideology and power. This section examines the development of this linkage.

1. The Roots of Collegial Control

a. Continuities and discontinuities

One characteristic of professions is the need to construct their cultural authority. Self-regulation, as part of a broader system of professional ethics and ideology, plays a crucial role in this process. The claim for self-regulation is symbolically important because it is one resource a profession can marshal to articulate its view of the world and the proper role it plays in society. The successful attainment of self-regulatory powers, which is frequently grounded in a claim for superior ethicality and specialized knowledge, both conveys and legitimizes professional prerogatives and status.⁸⁸ Of course, a profession can also establish professional authority on other grounds and by other means.⁸⁹ A central theme of

88. See Andrew Abbott, *Professional Ethics*, 88 AM. J. SOC. 855 (1983).

89. See, e.g., STARR, *supra* note 19; Stephen Botein, "What We Shall Meet Afterwards in Heaven": *Judgship as a Symbol for Modern American Lawyers*, in PRO-

this chapter, however, is that this symbolic function of self-regulation was particularly salient for the modern legal profession as it struggled to create a new ideology of professionalism—and also to establish new social institutions to articulate that ideology—in response to the decline of the traditional social and legal order that had previously sustained the profession and guaranteed its social status.

This argument highlights the discontinuities between the modern legal profession and its antecedents. Thus, it is useful to first delineate precisely why such a distinction is significant. For example, many early histories have failed to make such a rigid distinction. Indeed, they often stress or even celebrate the ancient historical roots of law as one of the “learned” or “gentlemanly” professions, and typically presume continuities between the ancient and contemporary legal professions.⁹⁰ Such a view, however, misses much. It suffers from a naive teleological bias that emphasizes both the naturalness of the progression from a “gentlemanly” to a modern elite profession, and the development of contemporary institutions (such as bar associations) appropriate to such development. As such, it ignores key questions pertaining to when, why, and how the modern legal profession developed its own unique bases of cultural authority.

Other legal historians have generally been more sensitive to the complexities and contingencies of professionalization.⁹¹ Yet it is theorists such as Johnson and Larson who highlight the uniqueness of modern professions.⁹² As Larson states: “The continuity of older professions with their ‘pre-industrial’ past is . . . more apparent than real.”⁹³ For Larson, the modern professions are relatively recent social products whose emergence coincides with industrialization. Modern professions, Larson explains, are quite different from their historical predecessors. The source of professional power in pre-industrial society derives not from training or credentialing but from social position and association with elite patrons.⁹⁴ Yet, as social conditions changed with the onset of industrial

FESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA (Gerald L. Geison, ed., 1983); GERARD W. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760-1840* (1979); THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY* (1977); MARY O. FURNER, *ADVOCACY AND OBJECTIVITY: A CRISIS IN THE PROFESSIONALIZATION OF AMERICAN SOCIAL SCIENCE 1865-1905* (1975).

90. See, e.g., POUND, *supra* note 3; WARREN, *supra* note 3.

91. See generally JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985).

92. See generally TERENCE J. JOHNSON, *PROFESSIONAL POWER* (1972); LARSON, *supra* note 55.

93. See LARSON, *supra* note 55, at xvi.

94. *Id.* at 4-5.

society, so too did the bases for professional power: "From dependence upon the power and prestige of elite patrons or upon the judgment of a tightly knit community, the modern professions came to depend upon specific formal training and anonymous certificates."⁹⁶ Moreover, while the modern legal profession undoubtedly incorporated some pre-industrial status criteria and ideological orientations, it also faced the need to develop new sources of professional authority.⁹⁶

This is a view that Duman successfully elaborates in his study of the nineteenth century English legal profession.⁹⁷ Duman demonstrates the significance of what Johnson and Larson⁹⁸ find so crucial: that the modern legal profession arose in a social, economic, and cultural setting vastly different from the one that sustained the traditional legal profession and its ideology of a "learned" and "gentlemanly" profession.⁹⁹ As Duman shows, the pre-modern legal profession derived its authority from its close relationship with the landed aristocracy it served.¹⁰⁰ Additionally, the aristocracy defined the ideals of the professional culture.¹⁰¹ Chief among these ideals was the concern for social status rather than the intellectual or economic value of professional work.¹⁰²

The onset of industrialization, however, attenuated the close bonds between the legal profession and the aristocracy.¹⁰³ Increasingly, the legal profession came to serve not the landed aristocracy, but the business

95. *Id.* at 4.

96. *Id.*

97. See Daniel Duman, *The Creation and Diffusion of a Professional Ideology in Nineteenth Century England*, 27 SOC. REV. 113 (1979).

98. See *supra* notes 52-59 and accompanying text.

99. See generally Duman, *supra* note 97.

100. *Id.* at 114-15.

101. *Id.* at 115.

102. *Id.* Discussing the professional ideals current in the 18th century, Duman writes:

Professional men at that time emphasized the status and not the functions connected with their occupations. Their social superiority was not dependent upon the intellectual intensity, or on the social or economic worth of their work. On the contrary, the professions were valued as occupations which provided their practitioners with an appropriate environment and sufficient resources—leisure and sometimes finances—to live a life which was indicative of their superior station. The professions served as a means to an end—to the gentlemanly life, to the *right* social milieu and to acceptance as a member of the nation's social elite.

Id.

103. *Id.*

and industrial class.¹⁰⁴ The result was a shift from the dominant patron-professional relationship, characterized by the dependency of professionals on aristocratic custom and largesse, to a new professional-client relationship, characterized by the dependency of the client on the expertise, skill, and promise of the professional to provide quality service.¹⁰⁵ Because of this shift, the social and occupational ideals of the legal profession became more independent of the client.¹⁰⁶ However, this produced an identity crisis for lawyers.¹⁰⁷ The legal profession could no longer claim superior social status based on its connection with the aristocracy.¹⁰⁸ As Duman argues, the profession's increasingly close relationship to business and industry threatened to undermine its professional status: "Professional men were left to defend the social position which they had inherited from their pre-industrial predecessors, but without the support of a high status clientele."¹⁰⁹

Partly in response to this crisis, the legal profession began to develop a unique, self-conscious, and group-oriented ideology in the early nineteenth century that stressed:

[T]he importance of specialized training, the need to test practitioners' competence, and the exacting demands of professional work, [professionals] began to view their occupations as desirable and useful ends in themselves. Based upon a common understanding of their social functions and ethical obligations, this ideology was fundamental to the development of the professions as a distinct social entity. Even more importantly, however, it provided professional men with a moral justification for their claim to high social status—namely the service ideal.¹¹⁰

The emerging professional ideology was eclectic. It incorporated elements of both aristocratic and entrepreneurial ideals. It stressed, among other things, a view of professional duty to client and society. Importantly, the pre-industrial gentlemanly heritage of professions was never fully eradicated, but instead was subsumed into the new professional ideology.¹¹¹ In place of the aristocratic notion of a gentleman came one more

104. *Id.*

105. *Id.*

106. *Id.* at 115-16.

107. *Id.* at 117.

108. *Id.* at 116.

109. *Id.* at 117.

110. *Id.*

111. In an interesting recent historical study, Haber argues that the American professions retain a distinctive sense of gentlemanly honor and authority that derives from the model of an 18th century English gentleman. See generally SAMUEL HABER, *THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS, 1750-1900* (1991). Haber's argument is important, primarily because it avoids the instrumentalism implicit in both Larson's and Johnson's accounts of professional ideology. See *supra* notes 52-59 and accompanying text (discussing the theories of Larson and Johnson). On the other hand, Haber's analysis falters because he too readily dismisses any understanding of professional ideology as a form of hegemonic control. See *id.*

suiting to the changed social conditions of the nineteenth century.¹¹² In this new professional world view, professional superiority was founded on *moral* superiority, and grounded in a commitment to public service.¹¹³

Duman's concern is with the emergence and diffusion of this new professional ideology and not with the institutional arrangement by which it is articulated. However, in a recent study also focusing on the English bar during the early-modern period, Pue makes this link explicit.¹¹⁴ He shows how the Bar's system of disciplinary enforcement of professional etiquette and ethical ideals (or self-regulation) helped to project an image of professional dedication to public service, to shape modern professional ideology, and to bolster professional authority during a period when this authority was severely challenged.¹¹⁵

The process of self-regulation has thus been an integral resource with which the modern legal profession has shaped its professional ideology and authority. What needs to be examined, then, is precisely how this resource developed in the American context.

b. The pre-modern era

The early colonial period in America was not a hospitable setting for the development of a legal profession.¹¹⁶ Few of the early colonists were lawyers.¹¹⁷ This was partly due to the fact that the largely agrarian colonial economy had little need for full-time legal practitioners. Equally important was the pervasive anti-lawyer sentiment that stemmed from, among other sources, religious antipathy for lawyers and litigation, Utopian yearnings for government without law and lawyers, animosity towards the English legal system and its servants, and the desire of self-sufficient planters and merchants to control their own affairs.¹¹⁸

What legal work that arose was handled by litigants themselves.¹¹⁹ Where this was not feasible or advisable, there was a variety of part-time

112. Duman, *supra* note 97, at 119.

113. *Id.* at 119-20.

114. See W. Wesley Pue, *Moral Panic at the English Bar: Paternal vs. Commercial Ideologies of Practice in the 1860s*, 15 L. & SOC. INQUIRY 49 (1990).

115. *Id.* at 81.

116. See FRIEDMAN, *supra* note 91, at 81-84.

117. *Id.* at 81.

118. *Id.* at 82.

119. *Id.* at 83.

legal and occasional practitioners who handled cases for others while also pursuing other occupations. One scholar has shown, for instance, how attorneys in the county and provincial courts in early colonial Maryland can be divided into four major categories of part-time practitioners:¹²⁰ (1) planter-attorneys, who might have had some acquaintance with the law during the course of their education and who worked on occasion in their own counties; (2) clerk-attorneys, some of whom had lost their governmental positions due to the "vicissitudes of politics and patronage"¹²¹ and some of whom were newly arrived to the colony and, unable to secure positions suitable to their training, turned to the practice of law for support; (3) merchant planter-attorneys, who were typically immigrants with previous commercial connections with the colony and who upon arrival worked in law to protect their business interests; and (4) entrepreneur-attorneys, who were both "occupationally and geographically mobile"¹²² and who practiced law as only one of several occupational pursuits. One such entrepreneur, for example, held jobs as a shipwright, carpenter, innholder, planter, and lawyer before leaving Maryland.¹²³

Several early colonies actually prohibited professional lawyers, preferring instead that individuals act as their own advocates in legal matters.¹²⁴ For example, the Body of Liberties, which was Massachusetts colony's first written law code, disallowed the payment of fees to legal practitioners.¹²⁵ Other colonies, such as Virginia, went so far as to make the professional practice of law itself illegal.¹²⁶

Despite these formidable obstacles, the need for a full-time legal profession developed along with the growth of commerce and the rise of land speculation.¹²⁷ Colonial officials began to view lawyers as a "neces-

120. See Alan F. Day, *Lawyers in Colonial Maryland, 1660-1715*, 17 AM. J. LEGAL HIST. 145, 147-49 (1973).

121. *Id.* at 148.

122. *Id.* at 149.

123. *Id.* (referring to Michael Judd).

124. See FRIEDMAN, *supra* note 91, at 81. Or, more likely, they preferred that people avoid courts altogether. A prominent theme in colonial legal culture, and indeed throughout American history, is an emphasis on harmony and conciliation, and an intolerance for litigation and litigants. See generally JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? RESOLVING DISPUTES WITHOUT LAWYERS 3-30 (1983).

125. See 1 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 75 (1965) (section 26 provides "[e]very man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploy any man against whom the Court doth not except, to help him, Provided, he give him noe fee or reward for his paines").

126. See Alan M. Smith, *Virginia Lawyers, 1680-1776: The Birth of an American Profession* 280 (1967) (unpublished Ph.D. thesis, Johns Hopkins University).

127. See FRIEDMAN, *supra* note 91, at 84.

sary evil rather than an outright abomination."¹²⁸ Consequently, there was a shift from prohibitory legislation to regulation of the legal profession. Regulations, of course, varied both over time and between jurisdictions. They were often quite extensive and generally entailed some combination of control of the legal profession by the executive, the legislature, and the courts. Thus, it was the state rather than the profession that typically regulated lawyers.¹²⁹

Regulations dealt with both standards for admission and control of post-admission conduct.¹³⁰ In a 1732 Virginia act, for example, the Governor's Council was empowered to suspend or disbar an attorney for violating the required attorney's oath.¹³¹ Similarly, the Act granted courts considerable control over attorneys who practiced before them, including the power to order an attorney to pay all costs resulting from wilful neglect of a case before the court.¹³² Also, early lawyer regulation

128. See Smith, *supra* note 126, at 280.

129. See, e.g., *id.* at 269.

130. Sometimes the focus of regulation was the competence of the lawyer and not merely his ethics. In a 1720 Massachusetts court regulation, a lawyer whose client had been nonsuited due to an error in the lawyer's writ was required to redraft a new writ without charging an additional fee. See GAWALT, *supra* note 89, at 10.

131. See Smith, *supra* note 126, at 312.

132. *Id.* at 313. Occasionally, such powers were exercised in quite colorful contexts. One scholar of this period writes of a "rather spectacular example of the misbehavior of an attorney" and the response of a Virginia county court in 1730:

Prosser was the attorney for the plaintiff in the case of *Wiles v. Hughes*. When the case was called, Prosser began without the permission of the court to question Hughes before he was sworn as a witness. The court admonished him for this breach of proper procedure. Prosser answered that if he was not allowed to speak for his client he would consider the court to have perpetrated an injustice and that he would ask any questions he pleased. The court then demanded that Prosser enter into bond giving security for his good behavior. Prosser refused and was taken by the sheriff to the jail to be kept until he paid fifty pounds security conditioned on his good behavior for a year and a day. The court attempted to proceed with the case of *Wiles v. Hughes* but discovered that Prosser had possession of the declaration in the case. First the sheriff and then the clerk were sent to demand the declaration from Prosser, but he refused to give it to them. Prosser was then summoned before the court but said he would not produce the declaration so long as he was held a prisoner. The court then held him guilty of a breach of behavior, fined him five pounds and ordered the sheriff to keep him in jail until he paid. The court was still unable to proceed without the declaration, however, and again sent the sheriff to bring Prosser and his papers before the court so that they might be searched for the declaration. The sheriff returned alone, reporting that Prosser was defending himself in the jail

often set maximum fees that could be assessed for professional services.¹³³ The rates were typically low, and this type of external control over the legal profession was accordingly a constant source of irritation for lawyers.¹³⁴

Increasingly, however, there were a number of self-conscious collective attempts by lawyers to assert professional power and authority.¹³⁵ These attempts met with varying success. In 1774, for example, Virginia lawyers' efforts at protesting against low statutory legal fees were a major factor in closing the colony's courts.¹³⁶ Such protests had to do with more than money. They were also an expression of the increased cohesion and power of lawyers. Haber, in fact, argues that lawyers' activity in pushing for controls over admission to the profession and influencing fee legislation indicates the rise of the legal profession's cultural authority during this period.¹³⁷ Haber views the profession's ready ability to equate professional betterment (in the form of entry restrictions and higher fees) with the public good (which was the justification for such improvements) as proof that lawyers were "acting in an atmosphere of moral legitimacy that supported their increasing assertiveness and allowed them to apply their full strength in order to get what they wanted."¹³⁸

Lawyers attempted to construct their authority along two dimensions. The first was ideological. Drawing on the model of an idealized English gentlemanly class, the legal profession attempted to create a public image of lawyers as a class of gentlemen. The second dimension was institutional. Chief among the institutional bases for establishing professional power was the bar association.

Initially, the legal profession turned to the formation of bar associations as a means to assert their collective interests and to bolster professional authority and gentlemanly status.¹³⁹ Bar associations existed as

with a sword. The court then ordered the sheriff to summon a guard and keep Prosser in jail without food and drink until he delivered up his weapons and papers. Two months later, Prosser was finally released after giving bond for good behavior and was refused an appeal.

Id. at 322-23.

133. *Id.* at 327.

134. *Id.* at 327-43.

135. *Id.*

136. *Id.* at 339.

137. See HABER, *supra* note 111, at 74-75.

138. *Id.*

139. One likely model for colonial bar associations was the Society of Gentleman Practisers in the Courts of Law and Equity, founded by London attorneys in 1739. The goals of this English society were to promote the gentlemanly status of the profession (or perhaps more accurately, to extend such status to the attorney branch of the profession, since the elite barristers were already secure in their status as gen-

early as colonial times.¹⁴⁰ Although many organizations functioned primarily as social or dining clubs for lawyers, some also played an active role in promulgating rules pertaining to entry and educational requirements, fee schedules, and post-admission lawyer conduct.¹⁴¹ Educational requirements frequently stressed the need for lawyers to have had a "liberal" (*i.e.*, classical) education, which, following the English tradition, itself conferred much status as a gentleman.¹⁴²

The success of these organizations prior to the Revolution varied. Gawalt has shown, for example, that the pre-Revolution bar associations in Massachusetts were successful in generating regulations for governing the legal profession, but were only moderately successful in enforcing them.¹⁴³ Despite bar association efforts to promote stiff entrance requirements to the profession, many untrained and unsanctioned practitioners continued to work in the courts, particularly in rural counties.¹⁴⁴ Moreover, the associations were hampered by their very nature as voluntary organizations, which precluded disciplining or otherwise enforcing regulations on anyone but member attorneys. Even when dealing with members, the associations were not fully effective in having their regulatory authority recognized by the courts.¹⁴⁵ Judges, who were infrequently attorneys, were simply not receptive to the notion that the only guarantee of lawyer competence lay in professional control over the lawyers who appeared before them in court.¹⁴⁶

The pre-Revolution bar associations were able, however, to voice the collective interests and views of the growing American legal profession. Importantly, they were able to draw on and rearticulate an ideology of the gentlemanly status of law as a profession. These organizations offered an institutional means to give some cohesion and solidarity to a varied and geographically dispersed profession.¹⁴⁷ Moreover, they were instrumental in identifying professional goals and values. On the eve of

tlement professionals), to stiffen entrance requirements and exclude "irregular practitioners" (*i.e.*, those not trained or certified by the Society), and to secure powers of self-regulation over practitioner conduct. See GAWALT, *supra* note 89, at 11-12.

140. For general histories of bar associations in America, see generally POUND, *supra* note 3; WARREN, *supra* note 3.

141. *Id.*

142. See GAWALT, *supra* note 89, at 18-19.

143. *Id.* at 22-30.

144. *Id.* at 22.

145. *Id.*

146. *Id.* at 24-26.

147. *Id.*

the Revolution, however, many of these goals remained inchoate since there was insufficient public and judicial support for the profession's claims for authority to regulate itself.

The post-Revolution legal profession faced renewed efforts at external regulation, and even elimination, by the state.¹⁴⁸ Public hostility towards the profession stemmed in part from the lawyers' role in the booming debt collection practice that followed the Revolution.¹⁴⁹ Public suspicion of the self-serving and monopolistic nature of bar association regulations and "reforms" similarly fueled antipathy towards lawyers.¹⁵⁰ Nevertheless, lawyers continued to use the bar associations as a means to assert their collective will and authority. By 1810, Gawalt tells us, Massachusetts lawyers had achieved considerable autonomy and power through bar association efforts; that year, the supreme judicial court adopted as its own various rules and standards promulgated by local bar associations pertaining to admission and educational requirements.¹⁵¹ Additionally, the supreme court mandated that henceforth local bar associations were to have the formal legal power to control admission to the profession by requiring candidates to secure the recommendation of the local association where he had studied, as a prerequisite to admission to practice before any court.¹⁵² "With these rules," Gawalt writes, "the bar associations achieved their peak of institutional autonomy, and the profession had its most complex formal standards before the twentieth century."¹⁵³

But bar associations were not the only institutional source of professional power. In fact, by the mid-nineteenth century bar associations were eclipsed in many respects by the development of the modern law school. As part of their efforts to elevate professional status and authority, bar associations had quite consciously drawn on an ideological model of gentlemanly status and authority. Through bar associations, the legal profession modeled legal education in a manner befitting such gentlemanly status. This often consisted of a requirement for a liberal education followed by training in a system of apprenticeship monitored by the associations themselves. Yet some segments of the profession realized that there was considerable power to be derived from viewing law as a scientific system rather than a disjointed set of rules, and they attempted to construct the institutional base appropriate for reshaping legal education along these lines: the university affiliated law school.¹⁵⁴

148. *Id.* at 81-118.

149. *See* POUND, *supra* note 3, at 179-80.

150. *Id.*

151. GAWALT, *supra* note 89, at 116-17.

152. *Id.*

153. *Id.* at 117.

154. *See, e.g., id.* at 129-158. For a detailed discussion of the development of the law school in American history, see generally ROBERT B. STEVENS, *LAW SCHOOL: LEGAL*

Thus, the role of early bar associations in constructing professional authority is mixed. Clearly the Bar benefited from having an organization such as the bar association to articulate a collective voice and view of the profession in the public arena and to foster a sense of group cohesion and identity. It is also certainly true that a professional ideology of superior ethics and public service, which were modern adaptations of the gentlemanly model of professions, enhance professional stature. Moreover, there were notable successes by bar associations, particularly in the areas of control over entry requirements and some post-admissions regulations.¹⁵⁶ However, the legal profession did not achieve extensive self-regulatory powers of the type it won in the later nineteenth and early twentieth centuries. At that time, bar associations no longer had a primary role in shaping legal education but did reassume a prominent role as generators of professional ideology that once again revolved around the gentlemanly and public-spirited image of the legal profession. The re-emergence of this ideology helped shape the modern legal profession, its institutional arrangements, and its professional authority and power.

c. Modern bar associations and the reassertion of professional mandate

As Halliday reminds us in his study of the Chicago Bar Association: "The politics of expertise are contingent on an authority that can be constructed only through assiduous and persistent effort."¹⁵⁶ Beginning in the 1870s, the American legal profession once again turned to bar associations as the central mechanism to assert its professional mandate and construct that authority.

This development followed over three decades in which lawyers as a group did not pursue professional goals collectively since bar associations generally fell into desuetude between the 1830s and 1870s.¹⁵⁷ Pound and others characterize this period as "The Era of Decadence."¹⁵⁸ But, as Bloomfield has argued, such a characterization "overemphasizes the role of formal organization as the appropriate yardstick by which to measure the strength of professionalism within the bar."¹⁵⁹ During this

EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983).

155. See generally GAWALT, *supra* note 89.

156. See HALLIDAY, *supra* note 20, at 59.

157. POUND, *supra* note 3, at 223.

158. *Id.*

159. See Maxwell Bloomfield, *Lawyers and Public Criticism: Challenge and Re-*

period of Jacksonian democracy, the American legal profession prospered in many respects, even though bar associations did not.¹⁶⁰

What, then, were the reasons behind the re-emergence and rapid development of modern bar associations in the late nineteenth and early twentieth centuries?¹⁶¹ There were clearly a number of factors. Linking these factors together, however, were elite lawyers' perceptions of the tenuousness of their status and authority in the face of substantial social and professional changes, and elite lawyers' concerns over the need to construct and justify a coherent professional self-image.

One explanation for the rise of the modern bar associations during this period is that it was simply part of a broader trend towards the formation of an organizational society.¹⁶² But other factors influenced this development as well. This period witnessed an enormous growth in the number of lawyers, an increase in the heterogeneity of the profession, the concentration of many lawyers in large urban areas, and a shift in the dominant type of practice from courtroom to office work. This combination made informal control of the profession less effective and created a need for more, formal regulation, a notion which the profession itself advanced.¹⁶³ While this explanation is partially true, it risks downplaying some of the baser motivations undoubtedly associated with the rise of bar associations.¹⁶⁴

sponse in Nineteenth-Century America, 15 AM. J. LEGAL HIST. 269, 269 (1971).

160. FRIEDMAN, *supra* note 91, at 278; see also DAVID H. CALHOUN, *PROFESSIONAL LIVES IN AMERICA: STRUCTURE AND ASPIRATION, 1750-1850*, at 59 (1965). Further, the fact that admission to the profession was relatively open did not mean that there were no controls over lawyers. Informal controls were undoubtedly important, particularly in the early circuit-riding system where lawyers and judges traveled and lived together to visit the local county courts. *Id.* at 60-61. Additionally, "the market for legal services remained a harsh and efficient control" that would weed out many of the inept and untrustworthy. See FRIEDMAN, *supra* note 91, at 278.

161. By 1899 only four states had not yet made efforts to establish state or local bar associations. See generally Terence C. Halliday, et al., *Minimalist Organizations: Vital Events in State Bar Associations, 1970-1990*, 52 AM. SOC. REV. 456 (1987).

162. See, e.g., CORINNE L. GILB, *HIDDEN HIERARCHIES: THE PROFESSIONS AND GOVERNMENT* 17 (1966) ("To articulate and sustain the new and needed levels of professionalism, and to hold their own in a society whose various other members were increasingly organized, the professions, too, formed organizations."). See generally ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877-1920* (1967). For a contrary view, see generally WAYNE K. HOBSON, *THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY, 1890-1930* (1986).

163. See Theodore J. Schneyer, *The Incoherence of the Unified Bar Concept: Generalizing from the Wisconsin Case*, 1983 AM. B. FOUND. RES. J. 1, 16 (1983).

164. Auerbach, for example, argues quite forcefully that bar associations' development of, and emphasis on, professional self-regulation during their early years was an attempt by elites within the profession, motivated by anti-ethnic bias, to control the burgeoning immigrant bar. See AUERBACH, *supra* note 21, at 95-129; see also HOBSON, *supra* note 162, at 301-04. Hobson shows how the elite bar's anti-ethnic campaign

In addition, the very real concerns about corruption within the judiciary and legal profession, threatening to delegitimize the entire legal system and, hence, undermine the role and authority of lawyers also spurred the development of bar associations.¹⁶⁵ In 1870, a small group of elite corporate lawyers established the Association of the Bar of the City of New York (ABCNY) in response to widespread judicial and political corruption in New York City.¹⁶⁶ This corruption stemmed both from Tammany Hall control over city politics and the judiciary to the much publicized scandals involving leading lawyers, judges, and legislators, which "made a mockery of the law" and threatened to undermine the legitimacy of the legal system and of lawyers.¹⁶⁷ Similarly, in 1874, an elite core of lawyers formed the Chicago Bar Association (CBA), whose stated goal was to "maintain the honor and dignity of the profession" and who turned their organization's reformist attention to the city's corrupt legal system and judiciary.¹⁶⁸ This same concern animated the formation of the first successful national bar association, the American Bar Association (ABA), in 1878.¹⁶⁹ The formation of the ABA was an elite effort that included as its chief aim, the restoration of the "honor, integrity, and fame of the profession in its two manifestations of the Bench and Bar."¹⁷⁰

was symbolically important. It identified a convenient low-status scapegoat for the profession and it allowed elite lawyers to assert their superior status and ethicality. This campaign also allowed the elite bar to define the "dirty work" of the profession as that work typically done by low status solo and small firm practitioners who worked for individual rather than corporate clients. *Id.*; see also Andrew Abbott, *Status and Status Strain in the Profession*, 86 AM. J. SOC. 819 (1981).

165. See HOBSON, *supra* note 162, at 217-19.

166. See POWELL, *supra* note 20, at 6-28.

167. *Id.*; see also John A. Matzko, *The Best Men of the Bar: The Founding of the American Bar Association*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 79 (Gerard W. Gawalt ed., 1984).

In 1868, the leaders of the New York City bar had begun a shifting fratricidal struggle on behalf of Cornelius Vanderbilt, Daniel Drew, Jay Gould, and Jim Fisk, who were attempting to gain control of the Erie Railroad. When judges as well as legislators and lawyers proved for sale to the highest bidder, the legal system nearly collapsed into anarchy. Soon after an armed conflict between two hired gangs on the Erie tracks outside Binghamton was halted by the state militia, a call for an organization of the New York City bar began to circulate.

Id.

168. See HALLIDAY, *supra* note 20, at 64-67.

169. See Matzko, *supra* note 167, at 80.

170. *Id.* (citations omitted) (discussing the formation of the ABA).

During much of this period, the organized bar focused on the encroachment of

Given the organizers' acute awareness of the need to enhance the law's image as a profession, it is perhaps no surprise that among the first functions initiated by bar associations were those primarily devoted to professional image and reform. For example, the first committees established by the ABCNY were those dealing with grievances against lawyers and reforming the judiciary.¹⁷¹ These committees investigated complaints against lawyers and judges and initiated disciplinary or impeachment actions in meritorious cases.¹⁷² Similarly, of the five committees first founded by the CBA, three were concerned with professional image and standing, including the Grievance Committee, that disciplined unprofessional lawyers.¹⁷³ By establishing such committees, the elite bar associations attempted to assert their superior ethicality as professionals and hence, their authority to define the parameters of professional conduct for lawyers and judges.¹⁷⁴ In short, the modern bar associations were asserting their mandate to self-regulate.¹⁷⁵

The foundations of this mandate developed rather quickly. In the late 1870s, the ABCNY Grievance Committee established an important precedent by agreeing to investigate and bring charges against an attorney for bribing a witness.¹⁷⁶ Previously, only the courts had initiated misconduct proceedings against lawyers.¹⁷⁷ There was little activity from the ABCNY Grievance Committee immediately after this, but in 1884 the committee voted to extend its disciplinary power over lawyers to *non-members* within its jurisdiction as well as members.¹⁷⁸ With this move the bar also increased the scope of its purview over lawyer misconduct. Whereas previously the courts had confined their policing of the profession to actual courtroom behavior, the bar's assertion of disciplinary

its professional turf and the concomitant threat of the demise of a lawyer-centric view of the law due to the rise of administrative law and increased rationalization of the law by legislation. For an account of this shift, see HURST, *supra* note 91, at 187-88. See also HOBSON, *supra* note 162, at 62-65 (noting that a prominent complaint of lawyers at the time was "overlegislation").

171. See POWELL, *supra* note 20, at 18.

172. *Id.* As Powell writes:

In establishing these committees the ABCNY was taking the moral high ground and asserting that, although representing a minority of the members of the New York Bar, it could and would define acceptable standards of professional and judicial conduct and act to discipline those lawyers or judges who brought the bar and bench into disrepute.

Id. at 18-19.

173. See HALLIDAY, *supra* note 20, at 68.

174. *Id.* at 68-69.

175. *Id.* at 68-75.

176. See POWELL, *supra* note 20, at 19.

177. *Id.*

178. *Id.*

authority over all lawyers—a move that was given *de facto* recognition by the courts¹⁷⁹—meant that an organization existed that could act on complaints regarding lawyers' behavior outside of court as well.¹⁸⁰ By 1892, the ABCNY Grievance Committee even acquired the authority to initiate investigations of its own accord, a power that, while infrequently used, indicated the growing strength of the bar's disciplinary mandate.¹⁸¹

The ABCNY was a "pioneer" in forming a successful model of self-regulation during the earliest years of its development.¹⁸² Although the ABCNY Grievance Committee was not necessarily successful in terms of the number of lawyers it disciplined, its importance lay in the "symbolic significance of its control over lawyer discipline."¹⁸³

Voluntary bar associations such as the ABCNY and CBA constructed a model and ideology of self-regulation that was both symbolically important and highly influential. This became a model that the legal profession tried to institutionalize nationwide in the move to establish mandatory bar associations.

2. The Institutionalization of Collegial Control

By the early years of the twentieth century, private bar associations had established a model of professional collegial control that stressed a public service ideal, a view that lawyers were properly key players in significant social reform efforts, and an image of professional moral superiority. This model influenced and strengthened the bar's status as arbiter of professional standards and as creator of professional ideology.

179. *Id.* In New York, only the supreme court had the power to disbar or suspend errant attorneys, but it generally deferred to the Grievance Committee's recommendations. *Id.* at 19-20.

180. *Id.* Misuse of client funds or improper solicitation were common subjects of complaints acted upon by the ABCNY. *Id.*

181. *Id.* at 20.

182. *Id.*

183. *Id.* at 27. As Powell writes:

The development of disciplinary machinery and the institutionalization of a voluntary association's right to investigate complaints and bring charges against all lawyers was fundamentally important to the professionalization process. The pioneer work of the ABCNY Grievance Committee contributed significantly to the development of professional self-regulation, in particular encouraging the impression that the bar was, and should be, responsible for its own discipline.

Id.

The Progressive era movement toward mandatory bar membership in all states was an effort to establish this newly found authority nationwide.

a. *The unified bar movement and the consolidation of professional power*

The unified bar movement¹⁸⁴ was part of broader Progressive era reform efforts, but was the brainchild of one influential reformer: Herbert Harley, a former small-town lawyer and newspaper editor.¹⁸⁵ As an editor, Harley advocated various progressive reform efforts, including the development of small claims courts, improving judicial selection, and reforming court procedures.¹⁸⁶ During a 1912 visit to Ontario, where he examined judicial reforms in Toronto, Harley became acquainted with the Law Society of Upper Canada. This was a guild-like professional association for lawyers that was as autonomous and powerful as the English Inns of Court.¹⁸⁷ The Law Society was an organization to which all practicing lawyers in its jurisdiction had to belong and pay dues. The Society not only controlled admission to the bar, but also entry to the Osgoode Hall Law School, and post-admission discipline of lawyers.¹⁸⁸ This example of professional control inspired Harley to envision what the legal profession might be able to achieve in the United States, should the often weak and underpopulated voluntary bar associations be transformed into compulsory organizations with expanded powers befitting lawyers' professional status.

Upon his return to the United States, Harley advocated for the establishment of nationwide collegial control of the legal profession along the model of the Law Society.¹⁸⁹ Harley was not alone in his vision, and he gathered support for his proposal to create mandatory-membership associations from Roscoe Pound and other luminaries.¹⁹⁰ With the help of a generous local benefactor, Harley established the American Judicature Society in 1913 to study and fight for bar unification and other legal reforms.¹⁹¹

The central goal of the bar unification movement was to create an autonomous, self-regulating, prosperous, and influential legal profession.

184. A "unified" bar, also variously referred to as an "integrated" or "mandatory" bar, is one in which dues-paying membership is a prerequisite to the privilege of licensure in a particular state. See Schneyer, *supra* note 163, at 1 n.1.

185. See DAYTON D. MCKEAN, *THE INTEGRATED BAR* 30-51 (1963).

186. *Id.* at 32.

187. *Id.* at 33.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

To further that goal Harley considered it necessary to create mandatory bar associations with the power to establish their own admissions criteria, promulgate ethical rules to guide the profession, issue subpoenas to aid in lawyer discipline investigations, and sanction errant lawyers.¹⁹² These were broad and unprecedented powers for any occupational group, and were to lead the bar into "a golden age 'in the future far outshining that other supposedly golden age of the pre-civil war years.'"¹⁹³

From the beginning of the bar unification movement, Harley was sensitive to the claim that the movement's aims were purely monopolistic. Harley responded to a letter written by a judge that criticized the "closed shop" mentality of bar unification by publishing both the letter and his editorial response in the *American Judicature Society Journal*. "The judge," Harley wrote, "should take more exercise in the open air, and eat frugally of laxative foods."¹⁹⁴

Harley understood that bar unification was a restrictive device that limited competition; but this was precisely the point. Harley held that only with an adequate income could a lawyer have the proper ethical orientation and grounding. Bar unification, then, would help upgrade the profession both by limiting access to the profession to a better class of lawyers and by removing financial constraints that might lead to unscrupulous practice, thus allowing lawyers the necessary leisure to realize their proper public role and responsibilities. In commenting on the effect of the bar-controlled admissions he witnessed in Canada, Harley remarked:

[W]hen admission is won finally there is compensation. The candidate finds himself in a profession which is looked up to. He is free from the demoralizing competition which dulls the conscience of the young practitioner in the States. He is not impelled by starvation to cruise along the ragged coast of impropriety.¹⁹⁵

Improving professional ethics and regulation was the principle argument behind bar unification in every state.¹⁹⁶ The claim was that increased membership dues generated by a mandatory bar would provide

192. See Herbert Harley, *Redeeming of the Profession*, 2 J. AM. JUDICATURE SOC'Y 105, 118-21 (1918).

193. HALLIDAY, *supra* note 20, at 80 (quoting Herbert Harley, *An American Bar in the Making*, 10 J. AM. JUDICATURE SOC'Y 103 (1926)).

194. MCKEAN, *supra* note 185, at 25.

195. *Id.* at 33-34.

196. See William A. Glaser, *Three Papers on the Integrated Bar, Part I: Organization, and Part II: The Debate* (1960) (unpublished papers prepared for the New York State Bar Association and the Columbia University School of Law, Columbia University, Bureau of Applied Social Research).

funding for a comprehensive disciplinary apparatus for policing the bar in each state. Further, mandatory membership would facilitate beneficial collegial relations, instill a sense of collective duties and ethics, and thus prevent discipline problems from arising in the first place.¹⁹⁷ Finally, proponents argued that bar control over the admissions process would improve the character and honor of lawyers. Only independent bar associations could be properly selective since they would not be subject to the same political constraints felt by courts and legislatures to keep admissions standards lax and entry to the profession relatively easy.¹⁹⁸

Other arguments advanced in support of bar unification included the claim that only a unified bar could speak with a united and authoritative voice on important public policy issues. Legislatures are unlikely to give credence to positions taken by voluntary bar associations, which are exclusive and thus never representative of the bar as a whole. Supporters envisioned that a unified bar, as a democratic and self-governing body, would have the resources to make its positions on policy issues known to the legislature and could claim to speak with authority for the entire bar and not simply a small professional elite.¹⁹⁹

Naturally, there were counter arguments to each of these assertions. For example, successful and influential elite private bar associations such as the ABCNY had been established on precisely the opposite understanding of their professional and moral authority.²⁰⁰ William Guthrie, then the president of the ABCNY, vehemently opposed the bar unification movement.²⁰¹

The arguments supporting bar unification portray an ideology of lawyers as properly ethical, self-regulating, and prominently involved in public policy issues of the day. The development of the unified bars successfully constructed this vision. The first states to unify were smaller states

197. *Id.* at 2-3. Harley thus envisioned professional associations functioning very much like Durkheim's *corps intermédiaires*. For an interesting discussion of this notion of the professional "community" and its historical roots, see Thomas L. Haskell, *Professionalism versus Capitalism: R.H. Tawney, Emile Durkheim, and C.S. Peirce on the Disinterestedness of Professional Communities*, in *THE AUTHORITY OF EXPERTS: STUDIES IN HISTORY AND THEORY* (Thomas H. Haskell ed., 1984).

198. See Glaser, *supra* note 196, Part II at 9.

199. *Id.* at 9-14.

200. See Powell, *supra* note 20.

201. As Powell explains:

Asserting that the source of the authority of voluntary bar associations such as the ABCNY lay in the fact that they were "representative not so much of the whole bar as representative of the elite of the bar, of the best part of the bar," Guthrie warned that "democratizing the Bar" would have disastrous consequences for ethical standards.

POWELL, *supra* note 20, at 28.

with fairly homogeneous bars. Larger states, which had more heterogeneous bars and already functioning voluntary bar associations, successfully resisted bar unification.²⁰² Specifically, North Dakota was the first state to create a unified bar in 1921, followed by Alabama in 1923, and New Mexico in 1925.²⁰³ In 1927, California became the first large industrial state to unify its bar.²⁰⁴

i. The birth of the California State Bar

The creation of the State Bar of California by legislation in 1927 was not only an early and influential victory for the proponents of bar unification, it was also the culmination of decades of work by the organized legal profession in the state. Voluntary bar associations had been established in major California cities since the resurgence of the modern bar association. The San Francisco Bar Association was established in 1872 and its counterpart in Los Angeles was founded in 1888.²⁰⁵ A nominally statewide bar association was formed in San Francisco as early as 1889, but it was short-lived, as were two other such associations established in the city prior to the 1906 earthquake.²⁰⁶

There were formidable barriers to statewide organization of the profession in California. The great size of the state made the logistics of collegiality problematic, particularly since transportation between various regions was inadequate.²⁰⁷ Rural distrust for urban lawyers was another factor inhibiting statewide organization as was North-South intrastate animosity, indicated best perhaps by an 1888 attempt by Southern California residents to divide the State in two.²⁰⁸

There was also a natural impediment to professional cohesion deriving from the large numbers of newly-arrived attorneys from out of state. The period between the latter part of the nineteenth and the early twentieth century was one of extraordinary population growth in California, especially in the southern part of the state. The population of Los Angeles, for instance, increased nearly six-fold from 102,479 to over 577,000 be-

202. See generally MCKEAN, *supra* note 185.

203. *Id.*

204. *Id.* at 41-46. Idaho had passed legislation unifying its bar in 1923, but the Idaho Supreme Court held this statute to be unconstitutional the following year. *Id.*

205. See Gilb, *supra* note 20, at 32. This account of the birth of the State Bar in California derives largely from Gilb's study. *Id.* at 28-78, 101-29.

206. *Id.* at 35.

207. *Id.*

208. *Id.*

tween 1900-1920.²⁰⁹ Moreover, many of these immigrants were attorneys who competed fiercely with each other as well as with lay competitors and bank and trust company practitioners for business.²¹⁰ So many were lawyers, in fact, that the Los Angeles Chamber of Commerce produced a brochure in 1912 that, Gilb writes, bluntly warned would-be migrant lawyers that “[T]his is probably the least promising city of the size in the United States for lawyers and other professional men. If you seek employment of this kind, do not come here.”²¹¹

Despite these obstacles, the California Bar Association (CBA) became the first statewide bar organization when it was founded in 1909.²¹² Yet the Association struggled to wield any real collective power. Prior to 1917, few of its measures proposed to the state legislature were enacted into law.²¹³ Further, when the Association did succeed in this task²¹⁴ it found that even in victory “we are laughed at in the interior We have men who refuse to join our Association They not only do not join, but they ridicule us.”²¹⁵

Local bar associations also had limited influence on public policy issues and on professional regulation. In 1917, the San Francisco Bar Association attempted to have two police court judges disciplined who had been charged with accepting bribes to dismiss criminal cases pending before their courts.²¹⁶ While successful in having the judges recalled, the Association could not persuade the supreme court to disbar them.²¹⁷ In this same year, and partly in response to its lack of success in pursuing the police court judges, the San Francisco Bar Association attempted to upgrade its professional status. This attempt echoed similar attempts by the CBA to acquire the power to issue subpoenas to aid in disciplinary investigations and to exercise greater regulatory control over the profession.²¹⁸

These two associations jointly formed a committee to study a Quebec model of bar organization, which, like the model that influenced Herbert Harley, included strict lawyer control over admissions and discipline.²¹⁹ In 1919, the committee drafted a bill proposal that would have given the

209. *Id.* at 35-36.

210. *Id.* at 35-37.

211. *Id.* at 36 (quoting the Los Angeles Chamber of Commerce).

212. *Id.* at 35.

213. *Id.* at 36.

214. One success was its 1917 campaign to create an additional division of the District Courts in order to alleviate court congestion and delay. *Id.*

215. *Id.* (quoting the California State Bar Proceedings of 1917).

216. *Id.* at 37.

217. *Id.*

218. *Id.* at 37-39.

219. *Id.* at 40.

CBA authority to recognize official bar associations for each county and to delegate to these county bar associations the power to investigate disciplinary matters.²²⁰ This proposed legislation was not the strong model of autonomous bar association control over admissions and discipline enjoyed by the English Inns of Court and the Quebec or Toronto organized bars.²²¹ But even this weaker version of bar supervision over lawyer regulation did not become law. The initial bill was reported out of committee just prior to the close of the year's legislative session.²²² A subsequent attempt to introduce the bill the following year was similarly unsuccessful.²²³

The San Francisco Bar Association tried on its own in 1920 to draft a bill to increase the bar's self-regulatory powers.²²⁴ This bill was modelled on the American Judicature Society's model Bar Unification Act, published in 1918.²²⁵ The central features of the model act were that it created a Board of Governors to administer the bar association, gave the bar control over the appropriation of funds from mandatory lawyer registration dues, established in the bar the power to determine standards for admission to the profession, and gave the bar the power to promulgate its own ethics code, to discipline, and even disbar attorneys for violating that code.²²⁶

The San Francisco Bar Association's version of this bill failed to get out of committee in 1921.²²⁷ But this same year a propitious event occurred. The CBA had directed great effort to pass a bill defining and prohibiting the unauthorized practice of law.²²⁸ The main targets of this proposed legislation were lay practitioners, disbarred attorneys, and bank and trust companies who competed with lawyers.²²⁹ This bill passed the legislature and was signed by the governor, but the public subsequently placed the bill on referendum and voted it down in the following November election.²³⁰ This defeat mobilized bar leaders. As Gilb remarks, "[t]he bar association members who fought hardest for the [defeated bill]

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 39-40.

224. *Id.* at 42.

225. *Id.* at 41-42; *see also* Harley, *supra* note 192, at 111.

226. *See* Gilb, *supra* note 20, at 42.

227. *Id.* at 44.

228. *Id.* at 43-44.

229. *Id.*

230. *Id.* at 44.

were, by and large, the leaders in the subsequent campaign to create a State Bar in California.²³¹

These leaders learned well from their failure with the unauthorized practice bill and paid great attention to mobilizing the support of lawyers, other occupations and professions, and the general public for bar unification. The central theme of the bar's campaign in 1925 was to reform the profession—"kick the rascals out"—by means of creating a unified and self-regulating bar.²³² The campaign also attempted to obtain the support of local bar associations, district attorneys, real estate boards, chambers of commerce, and even the bar's traditional enemies.²³³ Members of the banking community were also persuaded not to oppose the State Bar bill, in return for which the bar promised similar lack of opposition to the banks' attempts to raise executors' fees.²³⁴

This broad-based support facilitated passage of the State Bar bill. The Senate approved the bill unanimously and the Assembly passed it by a vote of sixty-five to eleven.²³⁵ Despite this, the Governor, Friend W. Richardson, vetoed the bill.²³⁶ Richardson's main objection was that the proposed self-regulating bar would not be subject to state control.²³⁷ Richardson wanted, for instance, to add a provision to this legislation that would grant the Governor power to appoint the bar's Board of Governors, a move that would transform a self-regulating bar into one regulated "through an administrative commission."²³⁸

In response, the bar once again mobilized support.²³⁹ The Bar bill was reintroduced into the 1927 legislative session, where it passed the Senate on a vote twenty-five to fourteen and the Assembly by a margin of fifty-one to fifteen.²⁴⁰ This time the newly-elected Governor C.C. Young—who had been elected in large part due to the support and influence of a leading unified bar advocate—signed the bill into law.²⁴¹ The legislation created the State Bar as a public corporation subject to supervision by the Supreme Court of California.²⁴²

This statute, as ultimately passed, was largely drawn from the Ameri-

231. *Id.*

232. *Id.* at 53.

233. *Id.* at 54. These enemies included its competitors targeted by the previous unauthorized practice of law bill, the title insurance and trust companies. *Id.*

234. *Id.* at 54-55.

235. *Id.* at 55.

236. *Id.* at 55-56.

237. *Id.* at 57.

238. *Id.* at 57.

239. *Id.* at 58.

240. *Id.* at 68-71.

241. *Id.* at 74.

242. *Id.* at 71-74.

can Judicature Society's model bar unification bill.²⁴³ However, it also contained an important change derived from the American Bar Association's model Bar Unification Act, subsequently approved by the ABA in 1920.²⁴⁴ The change was not only a strategic move but was also symbolically important. Whereas the earlier version of the legislation proposed to create a statewide bar organization by incorporating then-existing bar associations, the new version was based on the premise that the "bar was already a body-politic." Lawyers were officers of the court. Creating the State Bar on this premise meant that the supreme court retained ultimate control over the profession and had delegated its power to regulate lawyers to the bar itself. While this delegated power deviated from the autonomous form of self-regulation that Herbert Harley and other reformers initially envisioned, it was nonetheless considerable.²⁴⁵

Under the statute creating the State Bar, lawyers had substantial control over professional discipline. The Board of Governors, elected by lawyers themselves, appointed the Administrative Committees charged with investigating cases of professional misconduct. Additionally, although the supreme court retained the power to conduct its own disciplinary proceedings, had full powers of judicial review, and was not bound by the decisions of the Board of Governors regarding action in particular cases (the Board merely "recommends" disciplinary action), the court has generally been highly deferential to the bar's opinions and authority in disciplinary matters.²⁴⁶

There can be little doubt that this special relationship with the Court enhanced the bar's professional authority. The role of lawyers as officers of the court entitled them to privileges greater than other occupational groups, making their acquisition of self-regulatory power as an agent of the state less of a precedent for other groups than it might otherwise have been.

Initially, the preferred method for creating a unified bar was by means of legislation. But this meant that the Legislature could alter or amend the proposed bill, and the governor could veto it, as in the California experience. The more expedient process of obtaining unification through

243. *Id.* at 44-45.

244. *Id.* at 46.

245. *Id.* at 45-47.

246. *Id.* at 103. *But see* Lowell Turrentine, *May the Bar Set its Own House in Order?*, 34 MICH. L. REV. 200, 202 (1935) (arguing that the California Supreme Court had "emasculated" Bar authority by its active exercise of oversight into Bar discipline, frequently *lessening* recommended disciplinary sanctions).

court order—typically following the passage of a brief enabling statute—became the norm after 1934.²⁴⁷ This change in tactics was an important shift. Previously, bar associations had tended to view courts as adversaries for control of the profession. Such an adversarial relationship no doubt stemmed in part from courts' historical animosity towards the profession's attempts to upgrade requirements for practice and for judge-ships.²⁴⁸ But before a modern judiciary the bar found a more amenable audience for many of its claims. Thus, while Harley's vision of a fully autonomous and self-regulating profession never materialized, the bar unification movement nevertheless elevated the status and power of the organized bar. Unified bars never acquired complete disciplinary control over lawyers (as in Harley's Ontario-inspired proposal), but rather received delegated powers from the courts to control and discipline the profession.²⁴⁹ This partnership with the courts elevated the bar and made its claims for professional status and self-regulation more secure.

ii. The rise of the "inherent-powers" doctrine

With the establishment of the unified bar movement, the legal profession substantially institutionalized its mandate to self-regulate. Bar associations maneuvered a shift from *de facto* to *de jure* recognition of their self-regulatory claims. This mandate was further strengthened by a concurrent development fostered by the judiciary: the rise of the "inherent-powers" doctrine. This doctrine was (and is) a historically confused but sociologically interesting creation of state courts and was first asserted nearly contemporaneously with the resurgence of the modern bar associations in the late nineteenth century.²⁵⁰

The doctrine itself is a "judge made and lawyer supported" legal doc-

247. See MCKEAN, *supra* note 185, at 49.

248. See, e.g., DORIS M. PROVINE, JUDGING CREDENTIALS: NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM 1-60 (1986) (discussing the history of the judiciary, including the movement from nonlawyer judges to lawyer judges).

249. See Glaser, Part I, *supra* note 196, at 16.

250. See generally Alpert, *supra* note 3 (analyzing the historical development of the inherent powers doctrine). Wolfram cites an 18th century decision, *In re Mosness*, 39 Wis. 509 (1876), as the earliest case asserting the judiciary's exclusive authority to regulate the legal profession. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 27 n.45 (1986). Wolfram notes that in the *Mosness* decision, the court expressed concern over the legislature's attempts to "corrupt" the bar by easing entry standards to the profession. In this case, Wolfram tells us, the *Mosness* court "strongly intimated that it would refuse to follow a statute that required the court to admit a person whom it considered unqualified." *Id.* The court was certainly responding to the times, since there were great concerns among the bench and bar about the hoi polloi of immigrant and ethnic lawyers entering the profession. Wolfram also speculates, however, that an earlier decision (appearing in the same reporter) involving a woman's application before the court for admission to the bar, influenced the *Mosness* court. See *id.*

trine which essentially holds that the courts alone have the ultimate authority to regulate the practice of law.²⁵¹ A weak form of the doctrine derives from the judicial claim of power to regulate lawyers even in the absence of specific statutory authority to do so. This version of inherent powers is based on the logic of necessity and arises from the very existence of the judiciary and the need to protect its proper functioning.²⁵²

A stronger and more expansive version of the inherent-powers doctrine holds, not merely that courts must have the power to regulate lawyers, but also that this power is *exclusive* to the judiciary.²⁵³ This interpretation rests on the logic of the related separation-of-powers doctrine, which is a core tenet of the American system of government.²⁵⁴ Separation-of-powers has as its central premise the idea that governmental power is properly divided among the three branches of government: the

251. WOLFRAM, *supra* note 250, at 22-33; see also Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L.J. 1, 3 (1989).

252. Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783, 784-86 (1976) [hereinafter *Inherent Power*].

Courts have premised their power to regulate on the concept of "inherent" judicial power. Inherent judicial powers are those not expressly granted by constitution but said to arise from the very existence of the judiciary as an independent branch of government. The constitutional creation of a "court" implies that it must have the incidental powers necessary to its dignity, functioning, and survival . . . The theory with regard to regulation of attorneys is that, because they are officers of the court whose activities are crucial to the court's operation, their qualifications and conduct must be subject to the control of the court. . . . If the power to regulate attorneys is necessary to the functioning of the courts, it is an "inherent" judicial power.

Id.

253. See, e.g., *In re Day*, 54 N.E. 646 (Ill. 1899). In this case the Illinois Supreme Court struck down a law that exempted already-enrolled students of the state's two-year law schools from newly-promulgated supreme court regulations requiring three years of law school study and a bar examination for admission to the profession. *Id.* at 653. The court had recently raised these admissions requirements (previously, graduates from the state's law schools enjoyed a "diploma privilege" that exempted them from taking the bar exam) and it denied an exemption from the new rules to students who had already been enrolled in law school prior to the promulgation of these rules. *Id.* at 646-47, 653. In response to the court's actions, the legislature enacted a statute exempting these students from the newly heightened requirements. See Alpert, *supra* note 250, at 537-38. The court struck down the law, reasoning that it improperly constituted an encroachment on judicial power to regulate the profession. See *In re Day*, 54 N.E. at 653 (cited by Alpert, *supra* note 250, at 537-38).

254. *Inherent Power*, *supra* note 252, at 785.

executive, the legislative, and the judicial.²⁵⁵ Further, it states that the functions of these three branches are distinct, subject only to limited oversight and control by the other branches.²⁵⁶ The stronger, more expansive version of the inherent-powers doctrine threatens to deny the executive and legislative branches of government any role in regulating lawyers, no matter how perfunctory or minimal that role might be.²⁵⁷ As Wolfram writes, “[t]his means that an attempt by a legislature or an administrative agency of a state to pass a law or to write a regulation that affects lawyers or lawyering risks a judgment by the state’s courts that the law is unconstitutional.”²⁵⁸

Since the late nineteenth and early twentieth centuries, courts have sometimes claimed inherent regulatory power over lawyers as an ancient prerogative of the judiciary, but this power is a thoroughly modern development.²⁵⁹ While courts have certainly played a substantial role in lawyer regulation in the Anglo-American tradition,²⁶⁰ this has historically been a shared rather than an exclusive function.²⁶¹ In colonial America, lawyers were regulated by courts, legislatures, and the executive branch.²⁶² Similarly, even relatively modern case law indicates that American courts recognize that they have concurrent and not the sole power to police the legal profession.²⁶³

Despite the somewhat weak historical claim for the strong version of inherent-powers, the American judiciary, between the 1870s and mid-twentieth century, fashioned such a claim into an expansive doctrine. Under this doctrine, state supreme courts have declared the courts’ power to admit and disbar attorneys, promulgate ethics codes, designate what constitutes unauthorized practice of law, and form a unified bar.²⁶⁴

255. *Id.* at 786.

256. *See id.*

257. *See, e.g.,* *Sharood v. Hatfield*, 210 N.W.2d 275 (Minn. 1973). In *Sharood*, the Minnesota Supreme Court struck down as unconstitutional a statute providing that money collected from lawyers’ annual bar registration dues be deposited in the state treasury. *Id.* at 282. In declaring the law unconstitutional, the court based its decision on the theory that the legislature lacked any power to regulate the legal profession. *Id.*; *see also* Note, *supra* note 252, at 783 (discussing the case).

258. Wolfram, *supra* note 251, at 7.

259. *See generally* Alpert, *supra* note 250.

260. *See, e.g.,* WOLFRAM, *supra* note 250, at 25-26.

261. *Id.*

262. *See* Alpert, *supra* note 250, at 532.

263. *Id.* Alpert shows, for example, that as late as 1876, it was unexceptional for a state court to resolve the question of who has the ultimate authority to regulate the profession in favor of the legislature. *Id.* at 533-34. By the turn of the century, however, such a judicial view “had become a minority position” among state courts. *Id.* at 540.

264. *See* WOLFRAM, *supra* note 250, at 24-25.

Courts have also declared numerous laws invalid as an encroachment on their judicial power over lawyers.²⁶⁵

The inherent-powers doctrine has not only empowered the judiciary but provided a privilege to the legal profession. Under this doctrine, lawyers receive quasi-public status as officers of the court and as adjuncts of the judiciary in carrying out the lawyer discipline function. The model of regulation that results from the inherent-powers doctrine, while not a pure guild model of autonomous professional self-regulation, is nevertheless formidable. It privileges lawyers over other occupations (which are routinely regulated by the legislature), makes bar associations partners with the judiciary for purposes of policing the profession, and threatens to preclude external intervention into control of the legal profession. Whereas other occupations have sought and achieved various degrees of self-regulation and restrictions on unauthorized practice, only lawyers acquired the additional advantage of having—during a critical period of their professionalization—a legal doctrine whose effect was to preclude nonlawyers from second-guessing such controls.²⁶⁶

b. Bar unification and professional authority

The bar unification movement fell short of its goal of unifying all state bars, even though it achieved considerable success. By the time of Harley's death in 1951, twenty-four of the then forty-eight states had unified bars.²⁶⁷ By the mid-1970s, a total of thirty-three state bars had been unified.²⁶⁸ Yet the fact that bar unification did not fully succeed on its own ambitious terms is, perhaps, not surprising. More noteworthy is the rapid extent to which the broader symbolic goals of the movement were realized. Through bar unification, the legal profession was ideologically re-cast as a group distinct from other occupations and thus worthy of professional prerogatives and its privileged relationship with the state.

This is an important point, and it is one that Schneyer does not fully appreciate in his study of the unified bar movement.²⁶⁹ As is apparent

265. *See id.* (analyzing applicable case law).

266. WOLFRAM, *supra* note 250, at 14-18. The doctrine is still very much in force, although it has come under steady attack since the 1960s. *See* Alpert, *supra* note 250, at 548-56.

267. MCKEAN, *supra* note 185, at 51.

268. JEFFREY A. PARNES, CITATIONS AND BIBLIOGRAPHY ON THE UNIFIED BAR IN THE UNITED STATES 3-4 (1973).

269. *See generally* Schneyer, *supra* note 163.

from the title of his study, Schneyer's central argument is that the concept of a unified bar is fundamentally "incoherent" because it remains unclear what is the chief status of a unified bar: a public agency, a compulsory membership organization, or merely a private voluntary organization.²⁷⁰

One goal of bar unification, and of professionalization generally, is to construct just such a "special identity" or cultural authority to demarcate the profession from other occupational groups. Schneyer remarks in his study that he is mystified why his critique of unified bars is not more widespread.²⁷¹ The problem is that Schneyer's analysis aims to answer the question of whether unified bars function as well as their originators claimed. This level of analysis ignores the ideological significance of the movement. Bar unification was part of a larger professional and public debate over a privileged vision of law and lawyers in society, and at that level the legal profession fared well. Bar unification strengthened professional control over lawyer discipline, and in doing so aided the bar's assertion of its professional authority.²⁷²

Self-regulatory powers are not an inherent or natural attribute of the legal profession, but rather have been collectively claimed and construct-

270. As Schneyer writes:

The protracted nature of the debate [about the proper status of a unified bar] is all the more remarkable when one stops to think that in modern times no other American profession has seriously considered the same organizational form. It is almost as if the debate itself were an expression of the lawyer's special identity.

Id. at 2.

271. *Id.* at 108.

272. It is certainly not a goal of this research to delineate the historical development of the legal profession's cultural authority. Such a task requires a book of its own, such as Paul Starr's work on the medical profession in *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE*. See generally STARR, *supra* note 19. There is no comparable social and cultural history of the legal profession.

Nevertheless, it is somewhat unremarkable to claim that the modern American legal profession achieved broad cultural authority by the early to middle 20th century. One focus of the present study is the role that self-regulation played in this process. See generally HALLIDAY, *supra* note 20 (discussing whether the legal profession has achieved such authority). Halliday's study successfully examines whether and to what extent American lawyers have authority with regard to issues of both legal policy and broad public policy. See also PROVINE, *supra* note 248 (studying lay lower-court judges in New York State). Provine's study tests whether or not lay judges perform their tasks as competently or as ethically as their counterparts who are lawyers. She finds few relevant differences, but her analysis suggests that the assumption, that judges who are lawyers are more ethical and technically proficient, has extraordinary sway in American culture. The very taken-for-grantedness of this view is certainly one strong indicator of professional hegemony or cultural authority. It is more than a coincidence that this authority is, in part, grounded in an ideology which proclaims the superior ethicality of lawyers. See *id.*

ed. The bar unification movement played a significant role in this process. Early on, leaders of the bar unification movement attempted to establish a model for lawyer self-regulation that emulated the strongly autonomous professional control enjoyed by the English Inns of Court and some of their Canadian counterparts.²⁷³ But in the United States, such a guild model of control never existed as anything more than a professional ideal. Advocates for bar unification quickly turned to a second model of self-regulation that emphasized lawyers' public service role and orientation, and that was premised on the status of lawyers as "officers of the court."²⁷⁴ It is this status, along with the cultural and moral authority that it implies, that the bar unification movement helped to secure for the legal profession. Construction of this authority was in large part the result of the organized bar's efforts, but was also supported by a concomitant assertion of legal authority by the judiciary that established a doctrinal basis for lawyers' claims to professional status.²⁷⁵ This was a powerful combination. The institutionalization of a self-regulatory organization and ideology had a significant role in deterring the threat of external intervention into professional regulation in California for almost forty years.

II. CHALLENGE AND RESPONSE

A. *Challenges to the Professional Prerogative*

Once established in the late nineteenth and early twentieth centuries, self-regulation by the legal profession proved to be remarkably durable. It was not seriously called into question for decades. By the late 1960s and early 1970s, however, professional authority began to erode.²⁷⁶ This was, of course, a period of tremendous social unrest and transformation in the United States. Major social institutions were under attack as unresponsive to popular needs, and the legal profession was not spared from these attacks. By the 1970s, there was great nationwide dissatisfaction with the perceived inadequacies of lawyer regulation.²⁷⁷ It was viewed as ineffective in protecting the public and oriented towards protecting professional power.²⁷⁸ In California, the profession also had problems

273. See *supra* notes 184-95 and accompanying text.

274. See Alpert, *supra* note 250, at 532-34.

275. See Gilb, *supra* note 20.

276. See *infra* notes 283-97 and accompanying text.

277. See *infra* notes 283-97 and accompanying text.

278. See *infra* notes 289-95 and accompanying text.

with its image and its record on self-regulation. But in many respects, California's system for lawyer regulation was better than most and, as a result, was not unduly threatened.²⁷⁹

By the 1980s, this status changed. Both internal and external sources of dissatisfaction focused attention on the deficiencies of lawyer self-regulation. Unlike the 1970s, the California Bar was not able to fend off attacks on lawyer discipline with facile promises to "clean house."²⁸⁰ The challenge to the Bar went deeper than a critique of the efficacy of self-regulation. Rather, critics challenged the Bar's very authority to self-regulate.²⁸¹ Further, opponents fundamentally questioned the Bar's role as the voice of the collective profession.²⁸² In short, the Bar's cultural authority was threatened. The Bar was thus forced to justify not only the traditional prerogative of lawyers to self-regulate, but also its role in speaking for the legal profession as a whole. At stake was not merely the role of the State Bar in disciplining lawyers, but the very status of the profession as a privileged occupational group. This chapter explores the nature and extent of this challenge to the Bar in California.

1. The Crisis of the 1970s: Lawyer Discipline in Disarray

In her study of the California State Bar, Corinne Gilb was able to portray a remarkably benign image of lawyer self-regulation.²⁸³ As of the mid-1950s, the system was, she argued, an effective system of regulation motivated by professional concern for the public welfare.²⁸⁴ As she writes:

[S]teadily over the years, the percentage of [the State Bar's] time devoted to discipline has become less and less, complaints against attorneys have become fewer and fewer Dissatisfaction with the level of attorneys' ethics comes now not so much from the public as from the bar itself.²⁸⁵

Within the two decades after Gilb wrote these remarks, however, there was a much different tone nationwide.²⁸⁶ Auerbach shows, for instance, how a number of social factors undermined the authority of the legal profession in the late 1960s and 1970s.²⁸⁷ The civil rights struggle, he

279. See *infra* notes 304-12 and accompanying text.

280. See *infra* notes 325-28 and accompanying text.

281. See *infra* notes 337-39 and accompanying text.

282. *Id.*

283. See Gilb, *supra* note 20.

284. *Id.* at 255-72.

285. *Id.* at 101.

286. Gilb, too, reflected this more critical stance towards professions in her later work. See generally CORINNE LATHROP GILB, HIDDEN HIERARCHIES: THE PROFESSIONS AND GOVERNMENT 1966).

287. See AUERBACH, *supra* note 21, at 263-308.

argues, focused attention on the role of law and lawyers in upholding an increasingly intolerable racist legal order in the South. Disenchantment with the American policy in Vietnam also contributed to general disrespect for numerous social institutions, including the legal profession. There were increasing pressures on the bar to conform its actual behavior to its professed high ideals of public service and equal justice. Watergate especially, Auerbach tells us, provided a glaring example of the failure of professional values, since most of those involved in the Nixon administration scandal, including the president himself, were lawyers.²⁸⁸

Powell discusses other social factors that account for the diminution of professional authority during this period.²⁸⁹ The rapid growth of the Bar in both numbers and heterogeneity increased the pressure to lessen barriers of access to the profession and of public access to law. Younger and more diverse segments of the profession, Powell tells us, brought with them concerns for access to justice and the provision of legal services to groups traditionally denied legal representation.²⁹⁰

This consumerist attitude is also evident in numerous legal challenges to the bar's traditional authority during this period.²⁹¹ A series of United States Supreme Court decisions highlighted the fact that the bar's system of ethics and regulation often supported its own interests rather than the public's.²⁹² Thus, in *Goldfarb v. Virginia State Bar*,²⁹³ the Court held the restrictive ethical practice of promulgating and enforcing minimum fee schedules was illegal price-fixing in violation of the Sherman Act.²⁹⁴ Similarly, in 1977, the Court struck down ethics rules restricting the advertising of legal services as an unconstitutional infringement on the First Amendment right of free expression.²⁹⁵

Each of these factors increased the scrutiny and criticism of the legal profession as a whole and of its system of ethics and regulation in partic-

288. *Id.*

289. See generally POWELL, *supra* note 20.

290. *Id.* at 97-113.

291. For other examples of the emerging consumer-oriented focus on lawyer discipline, see Martin Garbus & Joel Seligman, *Sanctions and Disbarment: They Sit in Judgment*, in VERDICTS ON LAWYERS (Ralph Nader & Mark Green eds., 1976); TISHER, *supra* note 3, at 86-118. See generally PHILIP M. STERN, *LAWYERS ON TRIAL* (1980); JETHRO K. LIEBERMAN, *CRISIS AT THE BAR: LAWYERS' UNETHICAL ETHICS AND WHAT TO DO ABOUT IT* (1978).

292. See *infra* notes 293-95 and accompanying text.

293. 421 U.S. 773 (1975).

294. *Id.* at 791.

295. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 382 (1977).

ular. One response of the bar was to publicly re-examine its collective commitment to self-regulation. In the late 1960s, for example, the American Bar Association promulgated a new ethics code, the first revision of its ethical rules since initially adopting such rules in 1908.²⁹⁶ The ABA also established a panel of prominent attorneys under the chairmanship of retired Supreme Court Justice Tom Clark, with the mandate to “assemble and study information relevant to all aspects of professional discipline, including the effectiveness of present enforcement procedures” nationwide.²⁹⁷

This committee surveyed lawyer disciplinary agencies nationwide.²⁹⁸ It also held hearings in various United States cities where it listened to comments and criticisms of judges and lawyers involved in lawyer discipline.²⁹⁹ Importantly, the committee did not question the status of lawyer self-regulation itself, but interpreted its mandate as “limited to consideration of methods for improving the present system of self-discipline.”³⁰⁰ Despite this narrow focus, the Clark Report was scathing:

296. The ABA adopted the *Canons of Professional Ethics* in 1908 and the *Code of Professional Responsibility* in 1969. See generally CANONS OF PROFESSIONAL ETHICS (1969); MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979).

297. See *Clark Report*, *supra* note 12, at xiii.

298. *Id.*

299. *Id.*

300. *Id.* at xvii; This is in sharp contrast to the position taken by the ABA 20 years later. In 1989, the ABA created the Commission on Evaluation of Disciplinary Enforcement to, among other things, re-evaluate the functioning of lawyer discipline systems after the reforms generated by the Clark Report. See ABA Comm. on Evaluation of Disciplinary Enforcement, *Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement* 23 (1992) [hereinafter *Lawyer Regulation*]. The report stated:

Despite the many reforms made in the disciplinary process in the last twenty years, there is significant distrust of the fairness and impartiality of self-regulation. The Commission finds an important distinction between judicial regulation and self-regulation in the area of lawyer discipline. Neither inherent powers doctrine nor the need for professional independence provides a rationale for disciplinary functions to be conducted by elected officers of bar associations.

The Disciplinary system should be controlled and managed exclusively by the state's highest court and not by state or local bar associations. This is necessary for two primary reasons. First, the disciplinary process should be directed solely by the disciplinary policy of the Court and its appointees and not influenced by the internal politics of bar associations. Second, the disciplinary system should be free from even the appearance of conflicts of interest or impropriety. When elected bar officials control all or parts of the disciplinary process, these appearances are created, regardless of the actual fairness and impartiality of the system.

Id.

After three years of studying lawyer discipline throughout the country, this Committee must report the existence of a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers towards disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors.

The Committee has found that in some instances disbarred attorneys are able to continue to practice in another locale; that lawyers convicted of federal income tax violations are not disciplined; that lawyers convicted of serious crimes are not disciplined until after appeals from their convictions have been concluded, often a matter of three or four years, so that even lawyers convicted of serious crimes, such as bribery of a governmental agency employee, are able to continue to practice before the very agency whose representative they have corrupted; that even after disbarment lawyers are reinstated as a matter of course; that lawyers fail to report violations of the Code of Professional Responsibility committed by their brethren, much less conduct that violates the criminal law; that lawyers will not appear or cooperate in proceedings against other lawyers but instead will exert their influence to stymie the proceedings; that in communities with a limited attorney population disciplinary agencies will not proceed against prominent lawyers or law firms and that, even when they do, no disciplinary action is taken, because the members of the disciplinary agency simply will not make findings against those with whom they are professionally and socially well acquainted; and that, finally, state disciplinary agencies are undermanned and underfinanced, many having no staff whatever for the investigation or prosecution of complaints.³⁰¹

In light of this "scandalous" situation, the Committee warned that, unless reform of lawyer discipline was effected from within the profession, external regulation would likely result.³⁰² The remainder of the report focused on developing thirty-six specific reform proposals to fend off such a fate.

The much publicized Clark Committee report did have some impact, as numerous states moved to implement some or all of its recommended reforms.³⁰³ California, however, was fairly well situated to withstand

301. See *Clark Report*, *supra* note 12, at 1-2. This Article quotes extensively from the first two paragraphs of the *Clark Report* because many of these themes arise repeatedly in analyses of lawyer self-regulation. Prior to this report, several empirical studies of lawyers had shown many of these same deficiencies, such as routine non-compliance with ethical rules by attorneys and the failure of lawyers to turn in colleagues who violate ethical rules to the authorities. See, e.g., CARLIN, *supra* note 9; JOEL F. HANDLER, *THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY* (1967). The *Clark Report*, however, was a much more public condemnation of the legal profession's system of ethics than these academic studies.

302. See *Clark Report*, *supra* note 12, at 8.

303. For a discussion of each reform proposal and its subsequent implementation in various jurisdictions, see *Lawyer Regulation*, *supra* note 300, at 89-129. For a pos-

many of the criticisms generated by the report. In fact, the Clark Committee modeled its "ideal" disciplinary agency on the California system.³⁰⁴ The main features of this model included: (1) a full-time investigative staff, (2) an initial hearing stage to determine whether formal charges should be filed, (3) a formal hearing to determine findings of fact and law, (4) internal administrative review, and (5) ultimate review by the state supreme court.³⁰⁵

This does not mean, however, that calls for reform during this period did not affect California's lawyer discipline system. There were public warnings for the Bar to "clean house."³⁰⁶ The Bar responded, both by rhetoric and by deed. It reiterated publicly that the Bar's proper role was to self-regulate and that it had every intention to fulfill this role.³⁰⁷ It doubled bar dues during this time to finance disciplinary reforms.³⁰⁸ Additionally, the Bar established a fund to help reimburse clients whose attorneys had misappropriated funds from client trust accounts.³⁰⁹ The Bar promulgated a revised ethics code in 1975, which generally met with public approval.³¹⁰ The Bar also made efforts to increase the number of

itive assessment of post-Clark Report reforms, see Timothy K. McPike & Mark I. Harrison, *The True Story on Lawyer Discipline*, 70 A.B.A. J. 92, 93-99 (1984). An insightful critique of the Clark Report is contained in Douglas R. Haddock, *The Legal Profession's Attempt to Discipline its Members: A Critique of the Clark Report*, 1970 UTAH L. REV. 611. Haddock argues that the Clark Report reform recommendations "will probably not be a cure but a placebo." *Id.* at 623.

304. See generally Clark Report, *supra* note 12.

305. See *id.* at xiv. In fact, following the Clark Report, a standard refrain from California Bar leaders to any attack on their system of lawyer regulation was that California's system was a model for the nation.

306. See, e.g., *Bar Association Should Curb Excesses of its Members*, SACRAMENTO BEE, Feb. 7, 1972, at A16; *Reagan Tells Lawyers to Clean House, Public Fed Up*, SAN DIEGO UNION, Dec. 21, 1970, at C1; *State Bar Should Support Reform*, SACRAMENTO BEE, Sept. 20, 1970, at E2.

307. See, e.g., *California Bar Reaffirms Role as Disciplinarian*, Los Angeles Times, Sept. 28, 1971, at B7; *State Bar President on Discipline*, L.A. TIMES, July 25, 1970, at 4; see also Forrest A. Plant, *President's Message: The Disciplinary Problem, A Call for Individual Dedication*, 46 CAL. ST. B.J. 130, 132 (1971).

308. See *State Senate OKs Bill to Double Bar Dues, Protect Clients*, SACRAMENTO BEE, June 16, 1971, at A4.

309. See *Annual Report of the Board of Governors*, 47 CAL. ST. B.J. 501, 508 (1972) [hereinafter *1972 Annual Report*]. Such a fund had been formally considered as early as 1960. See, e.g., Burnhan Enersen, *Report of Board of Governors*, 35 CAL. ST. B.J. 558, 565 (1960). But the fund was not first established until 1972.

310. See *Annual Report of the Board of Governors*, 50 CAL. ST. B.J. 422, 422-23 (1975) [hereinafter *1975 Annual Report*]; *The Practice of Citizenship*, L.A. TIMES, March 14, 1975, sec.2, p.4, col.1.

lawyer disciplinary cases processed.³¹¹ Lastly, in 1976 the Bar began to appoint public members to act as referees in the discipline system.³¹²

There were thus continual changes in the discipline system throughout the 1970s. But the Bar never received a serious challenge to its mandate to self-regulate during this period. By the 1980s, however, this had begun to change.

2. 1980s Déjà Vu: The "Crisis" in California

Although the California State Bar remained relatively unscathed by the nationwide public dissatisfaction with lawyer discipline throughout the 1970s, the 1980s would prove to be quite a different story. In the early 1980s, the Bar faced a formidable legal threat to its status and role as a mandatory association. This legal challenge centered on the Bar's capacity to utilize mandatory membership fees to support "political" purposes. However, the attack also focused on the viability of the unified Bar itself. Additionally, a 1985 exposé of the Bar's disciplinary system dramatically highlighted the ineffectiveness of self-regulation and, more damagingly, the possible unwillingness of the Bar to police its own members. In combination, these two attacks on the Bar helped to generate a crisis in lawyer self-regulation in California, and one that threatened both the authority of the State Bar as the voice of California lawyers as well as the legitimacy of professional self-regulation.

a. *The roots of crisis*

The rapid growth of the legal profession during the 1960s and 1970s was not met with a corresponding increase in Bar resources devoted to lawyer discipline. Typically, between one-quarter and one-third of the Bar's total annual dues collected were expended on self-regulation, and this figure remained fairly stable until the mid-1980s.³¹³ But as the legal

311. See, e.g., Gene Blake, *Disciplining of Lawyers by Bar Rises 50%*, L.A. TIMES, Aug. 11, 1972, at A31; Gene Blake, *Errant Lawyers: More Critical View Emerging*, L.A. TIMES, Aug. 31, 1974, at A1.

312. See *Annual Report of the Board of Governors*, 51 CAL. ST. B.J. 549, 556 (1976) [hereinafter *1976 Annual Report*].

313. In 1974, for example, the Bar allocated \$1,092,780 to discipline, which constituted 26% of its total annual general budget. See *1975 Annual Report*, *supra* note 308, at 422-23. By 1985, the Bar spent \$7.8 million on discipline, representing 44% of its annual budget. These figures rose dramatically thereafter. In 1987, the Bar's expenditures on discipline were \$25.2 million, constituting 64% of the budget; and in 1992

profession grew in the state, it became increasingly evident that, as in most states, lawyer discipline in California lacked adequate funding and thus was unable to keep up with the demands made of it by an increasingly large lawyer population—one that almost tripled in the state between the mid-1970s and early 1980s (and continued to climb thereafter).³¹⁴

Among the first public signs of the problems in California's lawyer discipline system in the 1980s appeared in a four-part investigative report published in the *Los Angeles Daily Journal*.³¹⁵ This report was the result of a six-month investigation and found that: "A . . . review of dozens of . . . examples of (lawyer) misconduct, ranging from outright theft of client funds to simple neglect, leaves the unavoidable conclusion that California lawyers seldom are held accountable for their misdeeds."³¹⁶ The findings of this investigative report were that lawyers in California rarely report the misconduct of their colleagues;³¹⁷ that over eighty percent of complaints received by the Bar remain uninvestigated,³¹⁸ that few investigations lead to disciplinary action against an attorney,³¹⁹ that

the Bar spent \$37.2 million, which was 74.3% of its total budget. California Bar Association, *State Bar of California Statistics* (unpublished report, on file with author and the CBA) [hereinafter *Statistics*].

314. The following table illustrates the trend:

STATE BAR OF CALIFORNIA

Annual Membership Figures

Active/(Total)

1970: 31,523	(33,788)	1985: 87,491	(98,956)
1975: 45,674	(49,601)	1990: 108,531	(125,863)
1980: 68,538	(75,247)	1992: 113,716	(134,983)

Statistics, supra note 313; *Annual Report of the Board of Governors*, 45 CAL. ST. B.J. 601, 602 (1970) [hereinafter *1970 Annual Report*]; *1975 Annual Report, supra* note 310, at 446.

The number of lawyers in the entire United States also grew considerably during this period. See generally BARBARA A. CURRAN ET AL., *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S* (1985).

For a very interesting profile of the legal profession in California in the early 1990s, see SRI International, *Demographic Survey of the State Bar of California*, Final Report (August 1991) (prepared for the State Bar of California).

315. See Jon Standefer, *Is the Legal Profession Guilty of Failing to Police Itself?*, L.A. DAILY J., May 15, 1981, at 5 [hereinafter *Standefer I*]; Jon Standefer, *State Bar Meting Out Fewer—and Lighter—Penalties*, L.A. DAILY J., May 18, 1981, at 6 [hereinafter *Standefer II*]; Jon Standefer, *Attorney Incompetence Presents Difficult Problem*, L.A. DAILY J., May 19, 1981, at 7 [hereinafter *Standefer III*]; Jon Standefer, *State Bar Resisting Discipline Changes*, L.A. DAILY J., May 20, 1981, at 8 [hereinafter *Standefer IV*].

316. *Standefer I, supra* note 315, at 5.

317. *Id.*

318. *Id.*

319. *Id.*

most such discipline consists of a light punishment such as a reprimand letter;³²⁰ and that the disciplinary system simply does not address issues of basic attorney incompetence.³²¹ In sum, this report concluded that the State Bar disciplinary system was an elaborate bureaucracy that simply did not work.³²²

The Bar's response to this series was initially defensive, perhaps predictably so. State Bar President Robert Raven wrote in an opinion piece, also for the *Los Angeles Daily Journal*, that the Bar's discipline system was recognized nationally as "outstanding" and as a model for self-regulation that other states sought to emulate.³²³ Raven deemed it a good system, even if it could, of course, always be made better.³²⁴

Others, however, were not quite so sanguine. Philip Schafer, a Crescent City attorney elected as a Bar Governor, ran his campaign promising to devote his time to improving lawyer discipline. His candidacy arose from his indignation over the length of time it took the Bar to discipline a local attorney whose client accused him of misappropriating over \$30,000 of his client's money—an accusation the lawyer never bothered to deny. After his election, Schafer became head of the Bar's Committee on Adjudication and Discipline.

Schafer's tenure proved eventful. Within a year after his election, Schafer uncovered a potential scandal in the Bar's disciplinary system.³²⁵ In June 1983, while implementing its first-ever computerized inventory of unresolved complaints against California lawyers, the Bar found that it had over 5,000 of them buried in its files. Most of these complaints were about a year old. Yet a number were considerably older, and at least one dated back to 1976. Clearly something was wrong with the disciplinary system, and Schafer appointed a special panel to find out precisely what this was. The panel had a broad mandate to determine the source of the ineffectiveness in the discipline system at every stage in the process.

The panel, headed by U.S. District Judge Robert Coyle (who was a former member of the Bar's governing board) found that the disciplinary backlog and delay were the result of "systemic" defects, which, it argued,

320. *Id.*

321. *Id.*

322. *Standesfer IV*, *supra* note 315, at 8.

323. See Robert Raven, *California a Model for Lawyer Discipline*, L.A. DAILY J., June 11, 1981, at 4.

324. *Id.*

325. *Id.*

could no longer be tolerated.³²⁶ The report stated that even in cases where the attorneys and Bar prosecutors stipulated as to the relevant facts and appropriate discipline, it took "virtually two years for discipline to be effectuated."³²⁷ The time required for full processing of a contested case that passed through the entire system averaged over forty months.³²⁸

Among the reforms proposed by the Coyle Committee were measures to increase the resources spent on lawyer discipline (particularly at the investigative stage where the case backlog was then most urgent), and to permit the Office of Trial Counsel (the prosecutorial arm of the disciplinary system) to issue formal disciplinary charges (rather than continuing to require prosecutors to present evidence to a State Bar Court referee who alone was empowered to issue formal charges).³²⁹

Ultimately, however, the report was not a scathing condemnation of the Bar. Rather, it was a critical but respectful critique, and one that did nothing to challenge the Bar's self-regulatory mandate. Indeed, the Coyle Committee report expressly stated that various proposals in California and at the national level, which threatened to impinge upon this traditional prerogative of the bar, were "well-meaning but ill-founded."³³⁰ In short, the Coyle Committee firmly upheld the principle of self-regulation by the Bar.

A second report, based on a commissioned study completed by external analysts, reiterated many of these same findings.³³¹ This report focused exclusively on the investigative function of the discipline system. The report based its findings on a study headed by Mark Kroeker, a vet-

326. See State Bar of California, *Committee Report of the Subcommittee on Expediting the Disciplinary Process to the State Bar of California Committee on Adjudication and Discipline*, March 27, 1984 [hereinafter *Coyle Report*].

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.* Among the proposals singled out by the report included one by United States Senator Robert Packwood of Oregon (S.B. 1714) that would remove authority for lawyer discipline from the states entirely and vest it in the Federal Trade Commission. *Id.* A somewhat more limited encroachment of the Bar's self-regulatory power cited with similar disapproval by the Coyle Committee report was a proposed bill by California Assembly member Lawrence Stirling (A.B. 3233) that granted powers to municipal and superior courts to suspend attorneys immediately who, in the opinions of the judges, were guilty of crimes involving moral turpitude. *Id.* Lastly, the Committee also disapproved of the proposed development in the Ninth Circuit to establish a system for disciplining directly lawyers appearing before the Ninth Circuit courts. *Id.*

331. See State Bar of California, *Report to the Committee on Admissions and Discipline: Investigative Process of the State Bar Disciplinary System, Presented by the Subcommittee on Expediting the Disciplinary Process*, July 19, 1985 [hereinafter *Kroeker Report*].

eran Los Angeles Police Department commander. The central finding of the report was that the complaint backlog in the investigative stage was "substantial and unacceptable," and it resulted from lack of sufficient investigative resources as well as "serious organizational, structural and procedural deficiencies."³³² In order to address these deficiencies, the Kroeker Report recommended that the Bar immediately provide additional resources for investigations and, more dramatically, that it organize the investigative function as a separate and autonomous division of the discipline system.³³³

Many of the reforms recommended by the Coyle and Kroeker Committees were, in fact, implemented by the Bar.³³⁴ Yet the Bar faced other challenges as well, which only tangentially dealt with the lawyer discipline system, but which ultimately affected the development of the "crisis" in attorney self-regulation profoundly.

In the early 1980s, politically conservative Bar members, angered by the Bar's public stances on controversial political issues, sued the Bar to prohibit the use of mandatory membership fees to support law reform and political activities. The suit argued that by doing so, the Bar violated the dissident members' First Amendment rights.³³⁵

332. *Id.*

333. *Id.* At that time, investigations were performed under the direct supervision of the Office of Trial Counsel. The Report suggested that an independent Office of Investigations (which would more closely resemble the functional role of a police department working with a separate district attorney's office in the criminal justice system), headed by a Chief Investigator with a professional background in investigations, rather than an attorney, would professionalize the much-maligned bar investigative staff and provide for greater accountability at this stage of the disciplinary process. *See id.*

334. *See* Cameron Andersen, *The New, Improved System*, 5 CAL. LAW., Dec. 1985 at 12; James Evans, *Opening Up Discipline*, 5 CAL. LAW., Oct. 1985, at 22; Kim I. Eisler, *Lawyer Discipline Revamp Approved by Bar Committee*, L.A. DAILY J., Aug. 19, 1985, at 1. Among other things, the Bar established a new Office of Investigations separate from the prosecutorial arm of the discipline system (the Office of Trials), provided greater funding and staff to the investigative arm of the system, and created a "career ladder" for Bar investigators in an attempt to encourage experienced investigators to remain with the Bar. *See id.*; *Bulletin Board: Board Moves on Discipline*, 5 CAL. LAW., Dec. 1985 at 67.

335. *See* *Keller v. State Bar*, 47 Cal. 3d 1152 (1989), *rev'd*, 496 U.S. 1 (1990). The *Keller* case was initially filed in superior court in October of 1982. *See* James Evans, *Behind the Keller Case*, 10 CAL. LAW., May 1990, at 35, 38. Eddie Keller and the other dissident Bar member plaintiffs objected to the Bar's use of their fees to support causes that they found objectionable, including such diverse activities as:

(1) Lobbying for or against state legislation prohibiting state and local agency

Beyond the narrow legal issues involved in the case, the *Keller* assault was part of a broader attack on the Bar's status as a mandatory membership organization.³³⁶ Thus, fundamentally the Bar had to justify its continued existence as a unified bar with affirmative support from all members of the profession. This claim historically had been one powerful and pragmatic basis for organizing unified bars, especially in the early part of the century. By the early 1980s, however, the claim had lost much of its appeal, at least for those Bar members who considered the Bar's political positions to be too liberal.

During this same period, while the Bar's asserted role as the legal profession's voice on broad policy issues became problematic, its authority to self-regulate also became precarious.³³⁷ In a 1981 investigative series on Bar discipline appearing in a legal newspaper, one San Diego lawyer quipped that before a lawyer would lose his license in California, "you've damn near got to prove he's an ax murderer."³³⁸ Although this remark was no doubt intended as a bit of hyperbole, a subsequent and

employers from requiring employees to take polygraph tests; prohibiting possession of armor piercing handgun ammunition; creating an unlimited right of action to sue anybody causing air pollution; creating criminal sanctions for violation of laws pertaining to the display for sale of drug paraphernalia to minors; limiting the right to individualized education programs for students in need of special education; creating an unlimited exclusion from gift tax for gifts to pay for education tuition and medical care; providing that laws providing for the punishment of life imprisonment without parole shall apply to minors tried as adults and convicted of murder with special circumstances; deleting the requirement that local government secure approval of the voters prior to constructing low-rent housing projects; requesting Congress to refrain from enacting a guest worker program or from permitting the importation of workers from other countries.

(2) Filing *amicus curiae* briefs in cases involving the constitutionality of a victim's bill of rights; the power of a workers' compensation board to discipline attorneys; a requirement that attorney-public officials disclose names of clients; the disqualification of a law firm.

(3) The adoption of resolutions by the Conference of Delegates endorsing a gun control initiative; disapproving the statements of a U.S. senatorial candidate regarding court review of a victims' bill of rights; endorsing a nuclear freeze initiative; opposing federal legislation limiting federal court jurisdiction over abortions, public school prayer, and bussing.

Keller v. State Bar of Cal., 496 U.S. 1, 6 n.2 (1990).

336. For a discussion of the political context of *Keller*, see Evans, *supra* note 335, at 35, 38. Compare Edward Lascher, *Dismantle the Unified Bar*, 3 CAL. LAW., May 1983, at 12 (opining that the Bar is in need of reform) with Anthony Murray, *The Unified Bar Serves the Public Interest*, 3 CAL. LAW., May 1983, at 13 (arguing against changing the Bar).

337. Indeed, these two issues were intertwined. See *infra* notes 363-439 and accompanying text (discussing SB 405 and SB 1543).

338. See *Standefer II*, *supra* note 315, at 6.

highly influential investigative newspaper series proved that the San Diego lawyer's claims might not be too far off the mark.³³⁹

b. The "Brotherhood" revealed

In many respects, the "Brotherhood" series of articles in the *San Francisco Examiner* merely reiterated claims and criticisms about the Bar that were already known, at least among lawyers.³⁴⁰ The critique furthered by these articles—that Bar discipline was slow, secretive, and lenient in its procedures³⁴¹—was not new, and in fact, the Bar itself had already recognized some of these problems and begun to address them.³⁴² But there are several reasons, far beyond bringing these claims to light, why the "Brotherhood" series was effective. First, it personalized and dramatized the defects of an ineffective lawyer regulation system by focusing poignantly on the victims of attorney misconduct and on horror stories of ethical violations. Second, these stories appeared in a general circulation newspaper rather than a legal periodical, which greatly increased their visibility and impact. Few who read this series could fail to be outraged at a system that allowed such abuses to occur with seeming impunity. Finally, the series focused not merely on the efficacy of the Bar's disciplinary system but on the issue of whether lawyer self-regulation itself was legitimate. Whether lawyers were capable of self-regulating—or should be allowed to—was, after this series, thrust prominently into public debate.³⁴³

339. See Kang, *supra* note 10, at 1-3, 14.

340. See generally *id.*

341. *Id.*

342. See generally Burke M. Critchfield, *The Bar is Improving a Good System's Shortcomings*, L.A. DAILY J., Apr. 10, 1985, at 4.

343. The opening lines of the "Brotherhood" articles were powerful:

There are convicted criminals practicing law in California. They include lawyers who have lied, cheated and stolen. A bagman in a bribery scheme is allowed to practice law.

So is an attorney who burglarized a client's market.

So is a drug smuggler, an embezzler and a stock swindler.

So is a lawyer who impersonated a cop.

So is a child molester.

So is an attorney who did dirty tricks for the White House, and another who tried to raise campaign cash for President Nixon by selling an ambassadorship.

After punishments ranging from a wrist slap to a few years on the sidelines, all were judged to be fit to be attorneys.

California's system for disciplining lawyers is "deeply troubled," the article stated, even though it was once "the model for the entire nation."³⁴⁴ "That system is supposed to protect the public by weeding out unscrupulous lawyers. Instead, it protects lawyers."³⁴⁵

These dramatic statements and others were supported by telling statistics.³⁴⁶ In 1984, almost 9000 complaints against attorneys made their way to the State Bar.³⁴⁷ Yet in that same year, only eleven attorneys were disbarred.³⁴⁸ More troubling than this, the Bar seemed more aggressive against lawyers who failed to pay their Bar dues than against those who violated ethical standards.³⁴⁹ Five times as many lawyers were suspended for failing to pay dues than those suspended for ethical misconduct.³⁵⁰ The articles further revealed that sixty percent of complaints received by the Bar were closed without any formal investigation, and ninety-four percent of cases were dropped prior to a formal hearing. Bar discipline, the authors concluded, was slow (cases frequently took years to resolve, while an attorney remained practicing), unduly secretive, protective of attorneys, lenient, and ineffective in protecting the public.³⁵¹ The chief reason for these problems, according to the "Brotherhood" series, was the "built-in" conflict of interest in having lawyers, alone among professions and occupations, self-regulate.³⁵² The numerous and compelling stories culled from Bar discipline case files and extensive interviews bolstered the authors' conclusions.³⁵³

Kang, *supra* note 10, at 1-2.

344. *Id.* at 2.

345. *Id.*

346. *Id.* at 2-9.

347. *Id.* at 2.

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.* at 2-3.

352. *Id.* at 3, 14.

353. *See generally id.*

For example, one particular attorney stole from many of his clients. *Id.* at 6. He stole almost \$60,000 from a family he successfully represented in a wrongful death action by forging their settlement checks and keeping the funds for himself. *Id.* The family finally brought a complaint against the attorney before the Bar, but in the course of two years while the complaint was pending, the attorney embezzled over \$300,000 from a dozen more clients. *Id.* Ironically, during that time the lawyer served as a discipline judge for the State Bar. *Id.* Additionally, because the Bar's disciplinary investigation remained a secret, the attorney was able to win election during the same period as a vice-president of the California Trial Lawyers Association. *Id.* It was only after the attorney was actually convicted of grand theft in the criminal justice system that the Bar suspended him. *Id.* Even two years later at the time of the article, the supreme court had not yet acted to disbar him. *Id.*

Another victim of attorney misconduct had to sue his lawyer to receive anything

The Bar's response to these charges of ineffectiveness in disciplining the state's unethical lawyers was familiar. One top Bar administrator, J. David Ellwanger, repeated the oft-used rebuttal that the California system was the best in the country.³⁶⁴ A former Bar president repeated this refrain, claiming that California's lawyer discipline system was the "envy of other states."³⁶⁵ Similarly, the then-current State Bar president, Burke M. Critchfield, responded to the allegations of the "Brotherhood" series by claiming that California's disciplinary system, while imperfect, was the "most effective . . . system of regulation of any bar or other professional group in the country."³⁶⁶

Critchfield excoriated the "Brotherhood" authors for focusing on atypical horror stories representing "an extremely small percentage of California lawyers."³⁶⁷ Moreover, Critchfield asserted that the Bar was already aware of problems with lawyer discipline and had taken substantial steps to address them. These steps included sponsoring legislation³⁶⁸ that would: (1) give the Bar power to speed disciplinary proceedings against attorneys deemed to pose an "imminent threat of harm" to their clients or the public, (2) allow for reciprocal discipline where lawyers had already been disciplined in another jurisdiction, (3) strengthen the Bar's investigative powers by requiring respondent attorneys to cooperate with Bar investigations (backed by new contempt powers to enforce subpoenas before the State Bar Court), and (4) clarify and expand the Bar's authority to assume the practice of a lawyer who had abandoned a client.³⁶⁹

These reforms were, indeed, already in progress, but given the publici-

from a tort claim settlement the lawyer had negotiated on his behalf. *Id.* at 14. The client had been rendered a quadriplegic in an accident, and the lawyer was able to settle the case for over \$350,000. *Id.* The lawyer also kept all but \$29,000. *Id.* This same lawyer embezzled over \$600,000 from other clients and was ultimately convicted of these thefts and disbarred. *Id.* Yet during the course of the Bar's confidential investigation into numerous complaints against the miscreant lawyer, he continued to practice and steal from his clients. *Id.* During this time, he was even named to the State Appellate Court, though the nomination was later withdrawn. *Id.*

354. *Id.*

355. See Kenneth Jost, *The Public's Stake in Lawyer Discipline*, L.A. DAILY J., Apr. 8, 1985, at 2.

356. *Id.*; see Burke M. Critchfield, *The Bar is Improving a Good System's Shortcomings*, L.A. DAILY J., Apr. 10, 1985, at 4 (asserting that the "Brotherhood" report was exaggerated).

357. *Id.*

358. A.B. 1275, California Legislature, 1985-86 Regular Sess.

359. See Karen Ringuette, *Cleaning up the Act*, 5 CAL. LAW., July 1985, at 12.

ty generated by the "Brotherhood" series, they were too little, too late.³⁶⁰ As various newspaper articles and editorials indicate, there was little sympathy for lawyer self-regulation after the revelations of the "Brotherhood" series.³⁶¹

The "Brotherhood" series had been a catalyst in another sense as well. It not only created considerable public response, it generated political responses. Within one month of the series' publication, Democratic State Senator Robert Presley created a special Task Force on the State Bar Discipline System to examine lawyer regulation and to recommend possible reforms, including, presumably, establishing a disciplinary agency independent of the Bar as the "Brotherhood" article had suggested. Many of the Task Force members were individuals who had been cited or interviewed for the "Brotherhood" articles, including academics, public interest lawyers, former Bar prosecutors, and members of the public.

A second political response revolved around what had been a fairly mundane Bar dues bill, which had been introduced into the legislature in February of 1985.³⁶² This bill was transformed in the wake of the "Brotherhood" articles into a vehicle to increase legislative oversight of Bar discipline and almost destroyed the unified Bar.

c. "Bar wars"

Under the state constitution, the California Legislature must authorize the Bar to set and collect its annual membership fees.³⁶³ In February of 1985, State Senator Dan Boatwright introduced Senate Bill (SB 405) as legislation designed to extend the Bar's dues collecting authority and allow for slight dues increases.³⁶⁴ This bill was far from routine, however. Following the *Examiner's* exposé on Bar discipline, several members of the legislature were unwilling to authorize the Bar's dues collecting power without addressing the glaring deficiencies in lawyer regulation in the state. At a Senate Judiciary Committee hearing on Senate Bill 405, Senator Robert Presley, who had recently appointed a special task force to examine the problems in lawyer regulation, insisted that the proposed

360. See Kang, *supra* note 10, at 14.

361. See, e.g., Dan Walters, *Self-Regulation Doesn't Work*, L.A. DAILY J., Apr. 10, 1985, at 4; Jost, *supra* note 355, at 2; Jon Standefer, *How Serious is the Bar About Lawyer Discipline?*, L.A. DAILY J., May 13, 1985, at 4 (analyzing the changes in the Bar's disciplinary system).

362. S.B. 405, California Legislature, 1985-86 Regular Sess. Under the State Constitution, the Bar requires legislative authorization to collect its mandatory membership dues.

363. CAL. CONST. art. VI § 9; CAL. BUS. & PROF. CODE § 6140 (West 1990 & Supp. 994).

364. See S.B. 405, *supra* note 362.

dues bill contain some "controls" to ensure that the Bar clean up its scandalous disciplinary case backlog.³⁶⁵ Several other members advocated similar changes, and the legislature subsequently amended Senate Bill 405 to: (1) raise Bar fees to be used exclusively for disciplinary reforms where needed, and (2) provide for unprecedented legislative control over the disciplinary process.³⁶⁶ As amended, the legislation required the Bar to report to the legislature on changes and improvements it was to implement in the disciplinary system. Additionally, the Bill required the Bar to reduce its disciplinary case backlog within the following two years³⁶⁷ and to establish goals regarding the amount of time within which disciplinary cases were to be resolved.³⁶⁸

Yet these changes were not sufficient to ensure the bill's passage, for the "Brotherhood" series not only generated reformist sentiments in the legislature to require the Bar to clean up its act, but also provided an opportunity for conservative legislators to attempt to use the fee bill as a vehicle to accomplish legislatively what *Keller v. State Bar of California*³⁶⁹ threatened to do judicially: restrict the Bar's role and authority in the political arena.³⁷⁰ On the final day of the 1985 legislative session—effectively the last day for the Bar to obtain authority to collect membership dues for 1986—these two issues came to a head.

The last day of the 1985 legislative session fell, ominously enough for the Bar, on Friday the 13th of September. Although the dues bill remained unpassed, many hoped and expected that it would become law because it provided for substantial legislative oversight into the Bar's disciplinary matters and required the Bar to seriously address its scandalous complaint backlog.³⁷¹

Assembly Judiciary Committee Chair Elihu Harris first raised the dues bill for a floor vote at 5:30 P.M., but Assembly Speaker Willie Brown prevented the bill from proceeding to a vote at that time.³⁷² Shortly after 9:00 P.M., Harris had a second opportunity to bring the dues bill for

365. See Charley Roberts, *Senate Unit Approves Bar Dues Bill; Orders Disciplinary Backlog Cleared*, L.A. DAILY J., May 22, 1985, at 2.

366. See *id.*; S.B. 405, CONF. REP. NO. 1, Sept. 10, 1985, at 2, 5.

367. The amount of reduction required was later set at 80%.

368. Roberts, *supra* note 365, at 2; see SB 405, as amended in the Senate May 30, 1985.

369. 496 U.S. 1 (1990).

370. See *supra* note 335 and accompanying text.

371. See Charley Roberts & Philip Carrizosa, *Bar Dues Bill Fails in Final Hours of Legislative Session*, L.A. DAILY J., Sept. 17, 1985, at 1.

372. *Id.*

a vote in the Assembly. This time, however, the conservative legislators made their move. Assembly Minority leader Pat Nolan, who was a leader of the Assembly Republican caucus and also one of the *Keller* plaintiffs, attempted to block a vote on the bill.³⁷³ Angered over the Bar's supposed support for "liberal causes," Nolan's goal was to use the bill to force the Bar to sharply limit its political activities and to focus exclusively on admissions and disciplinary functions.³⁷⁴

Nolan cited a recently passed and, at that time, untested legislative procedural rule requiring conference committee reports to be placed in members' files for at least one legislative day prior to proceeding to a vote.³⁷⁵ Although the conference committee had met several days earlier, its report on the bill had been delayed and only arrived in members' files on the Thursday afternoon preceding the proposed Friday vote.³⁷⁶ The Senate had already voted on the dues bill Friday afternoon after the Senate Secretary interpreted the new rule to allow for such action. But in the Assembly, the Chief Clerk had a different interpretation; he concluded that the rule required a full twenty-four hour day to elapse between the time a bill arrived and the vote on it could occur.³⁷⁷

Assembly Speaker Brown presided over the floor when this controversy arose and learned of the conflicting interpretations of the rule.³⁷⁸ Brown had already obtained an opinion from the legislative counsel that supported allowing the vote to proceed. Much to everyone's astonishment, however, the Speaker elected not to decide which interpretation to accept, quipping that as an impecunious member of the Bar himself, he had a conflict of interest over the dues bill and would wait for further authority on the interpretation of the legislative rule, thus postponing any decision until the legislature re-convened in January.³⁷⁹ No dues bill would be had this term, Brown declared.³⁸⁰ Stunned, both Harris and Senate Judiciary Committee chair William Lockyer continued to press the Speaker during breaks in the session to allow the vote, arguing that, as the late Friday session had edged over into the early hours of Saturday, a new day had begun, thus properly allowing the dues bill to be the subject of a vote.³⁸¹ At 5:30 A.M. on Saturday, Brown relented and allowed Harris to bring the bill to the floor. But, again, Nolan objected, arguing that legislative rules required that the lawmakers adjourn by midnight of the

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. *See* Roberts & Carrizosa, *supra* note 371, at 19.

379. *Id.*

380. *Id.*

381. *Id.*

last day of the session. Any extension of time required a two-thirds vote of both houses, something the united Assembly Republican caucus could prevent.³⁸² Defeated, Harris gave up, and the dues bill remained unpassed.³⁸³

The Bar was in a panic over this situation.³⁸⁴ Traditionally, it mailed membership dues bills immediately after approval of legislative authority.³⁸⁵ Many lawyers paid their dues before the end of the year for tax purposes, and the Bar relied on this money for its operating expenses.³⁸⁶ With no dues bill, the Bar faced a financial crisis.³⁸⁷ Since the bill had not passed in 1985, the Bar faced having to try for "emergency" legislation in January, which would authorize it to collect membership dues immediately.³⁸⁸ The other alternative would force the Bar to wait until January of 1987 for its dues collecting authority to go into effect, thus requiring retroactive collection of 1986 dues.³⁸⁹ However, such an extraordinary measure also required a two-thirds vote, which was unlikely unless the Bar agreed to limit its role to admissions and discipline as the Assembly Republicans wanted.³⁹⁰

Another option for the Bar was to petition the supreme court to override the legislature's ban on collecting its dues.³⁹¹ The Bar chose to try this move in October, but was opposed by the Governor and various legislative leaders.³⁹² Ultimately, the supreme court refused to accede to the Bar's request. As a result, the Bar was forced to request that its members submit their dues voluntarily.³⁹³

In January of 1986, a compromise on the dues bill became possible. Senate Bill 405 was to be passed as a regular measure, requiring only a

382. *Id.*

383. *Id.*

384. See Dan Morain, *State Bar Asks High Court for Dues Power*, L.A. TIMES, Oct. 30, 1985, at I3.

385. Roberts & Carrizosa, *supra* note 371, at 19.

386. *Id.*

387. See Morain, *supra* note 384, at I3.

388. Monica Bay & Eric Jaye, *Willie Brown: Emergency Dues Bill Won't Pass*, THE RECORDER, Dec. 13, 1985, at 1.

389. *Id.*

390. *Id.*

391. See *State Bar Asks Supreme Court to Override Republican Assembly Ban on its Collection of Member Dues*, L.A. TIMES, Oct. 30, 1985, at A3.

392. See *Governor, Brown, and Legislative Leaders ask Supreme Court to Refuse to Let Bar Collect Dues*, L.A. TIMES, Nov. 20, 1985, at A2.

393. See *California Supreme Court Rejects State Bar Plea that State Rescue it from Crisis, Postpones Decision until February 1986*, L.A. TIMES, Nov. 27, 1985, at A20.

majority vote, and not as emergency legislation. This would mean that the Bar technically had authority to collect its 1986 dues retroactively in 1987. But the bill retained the novel legislative oversight into Bar disciplinary reforms that had broad support in both parties and houses. Senate Bill 405 was thus not the vehicle for the Assembly Republican caucus to force the Bar to limit its role to "non-political" matters. However, the political strategy had shifted. In late 1985, Senator Presley's Task Force on Bar Discipline endorsed a proposal to remove the Bar from self-regulating entirely, and in January 1986 the senator introduced legislation to effect this change.³⁹⁴ Senator Nolan and others now rallied behind this proposal.

In an important sense, Presley's legislation was to prove more threatening to the Bar than Nolan's attempt to limit its role. Both challenges shared the political goal of reducing the Bar's power. However, Presley's new legislation had broader political support and could not be characterized narrowly as a spiteful attempt by conservatives to destroy the Bar. It also directly challenged the ideology of professionalism itself.

d. Ideologies of professionalism

In response to the "bar wars" dues bill crisis, the Bar generated a massive "media and member blitz" designed to convince both the public and the profession the bar was being victimized by "either conservative demagogues or, a spiteful legislature intent on destroying or dismembering the state bar, or both."³⁹⁵ But the real challenge to the Bar cut deeper than this, and cut across both partisan and political lines. Moreover, the attacks on the Bar's traditional prerogative of self-regulation were directed not only at the political level, but at the ideological level as well. The Presley Task Force in particular, in its report and recommendations and the legislation resulting from them, developed this ideological critique. Although it ultimately failed, this attack on professional ideology shaped the debate over Bar self-regulation, as it affected the direction of future disciplinary reforms.

i. The task force on State Bar discipline

One month after the publication of the *Examiner's* "Brotherhood" series, State Senator Robert Presley formed a blue ribbon Task Force on the State Bar Discipline System to consider and adopt proposals to reform lawyer regulation in California.³⁹⁶ The sixteen-member Task Force

394. See S.B. 1542, California Legislature, 1985-86 Regular Sess.

395. See Richard A. Antonico, *Bar Governor Richard Antonico: The Bar Should Not, and Cannot, Police Its Own*, THE RECORDER, Jan. 6, 1986, at 1.

396. See Philip Carrizosa, *Task Force Urges Stripping State Bar of Discipline Cases*,

was a diverse mix of people,³⁹⁷ composed of law professors,³⁹⁸ attorneys (two of whom had previously been Bar discipline prosecutors and two of whom were public interest lawyers),³⁹⁹ public officials, and public nonlawyer members. Richard Antonico, a public member of the State Bar Board of Governors was on the Task Force, as was another Bar Governor, Philip Schafer, who had appointed the Coyle Committee.⁴⁰⁰

The Task Force examined not only the Bar's disciplinary system but also other state regulatory bodies responsible for disciplining various occupations and professions.⁴⁰¹ In September of 1985, the Task Force produced a joint resolution and several reform recommendations that were supported by the majority of Task Force members.⁴⁰² Chief among these proposals was the recommendation that the State Bar be divested of its control over lawyer regulation, to be replaced by an independent state agency under the authority of the supreme court.⁴⁰³

This was a dramatic proposal, repeated in a public hearing within the following two weeks.⁴⁰⁴ This hearing was a joint session of the Senate and Assembly Judiciary committees. The purpose of the hearing was to examine the Task Force's proposals in order to determine whether legis-

L.A. DAILY J., Sept. 19, 1985, at 1.

397. See *Recommendation of Senator Presley's Task Force on Bar Discipline*, Sept. 18, 1985 (copy of document in author's files) [hereinafter *Presley Recommendation*].

398. Professors Deborah Rhode of Stanford Law School and Stephen Bundy of Boalt Hall School of Law were the academics on the Task Force. *Id.* Both were well acquainted with the history and sociology of lawyers and had quite a critical and progressive perspective on reform of the legal profession.

399. Interview with Phil Martin, (a former Bar prosecutor, then in private practice) (1987). Phil Martin was particularly contemptuous of Bar discipline management, having come to his role as a Bar prosecutor with previous experience as a practicing defense lawyer, a rarity for the Bar. Bar discipline management in particular often had little or no actual trial experience before coming to the Bar. In fact, some top Bar Managers were not licensed attorneys in California. Martin had little doubt that these "inexperienced bureaucrats" were a major reason for the ineffectiveness of the Bar's disciplinary system.

400. *Id.*

401. *Id.*

402. *Recommendation of Task Force on Bar Discipline: Before the Joint Meeting of the Senate and Assembly Judiciary Committees*, California Legislature, 1985-86 Regular Sess. (Sept. 30, 1985) (testimony of Stephen M. Bundy) (in author's files). Even those members in the minority, while not formally supporting the specific proposals, considered them to be worthy of further study. *Id.* at 2.

403. *Id.* See generally *Presley Recommendation*, *supra* note 397; see also Carrizosa, *supra* note 396, at 1.

404. See *Joint Interim Hearing*, *supra* note 11.

lation enacting some or all of them would be introduced in the next legislative session.⁴⁰⁵

The two academics on the Task Force, Deborah Rhode of Stanford Law School and Steve Bundy of U.C. Berkeley's Boalt Hall School of Law, presented the chief findings and recommendations of the Task Force majority.⁴⁰⁶ There were two essential points. First, incremental reforms in lawyer discipline are unlikely to be satisfactory given the Bar's long history of ineffective lawyer regulation and its equally long experience with piece-meal reforms accompanied by assurances to improve the system.⁴⁰⁷ The second and related point was that the Bar, as both a trade association and a disciplinary agency, had an inherent conflict of interest and for that reason alone cannot be expected to regulate its own members effectively.⁴⁰⁸ The message was clear: lawyers alone, unlike any other occupation in the state, were allowed to regulate their own despite their abysmal record of doing so and absent any expectation that they would perform any better in the future.⁴⁰⁹ For these reasons, both Bundy and Rhode concluded that the only solution to the lawyer discipline crisis in California was to divest the Bar of its self-regulatory authority, and to establish an independent regulatory agency under the supervision of the supreme court to regulate lawyers in the state.⁴¹⁰

Phil Martin, another Task Force member and former Bar Prosecutor, continued the critique.⁴¹¹ Whereas Rhode and Bundy stressed the illegitimacy of lawyer self-regulation, Martin proffered another level of criticism to this theme: the Bar is a mismanaged bureaucracy that is ineffective in regulating lawyers.⁴¹² The organization of Bar discipline substantiates this accusation.⁴¹³ The disciplinary system is handled by the Board of Governors who are not interested in or familiar with the field of legal ethics and discipline. Similarly, neither the next level of management, the senior discipline executive, nor the director of the Trial Counsel's office has much experience with the actual practice of law or with prosecuting discipline cases.⁴¹⁴ Moreover, the line prosecutors are routinely lawyers with virtually no experience practicing law prior to working for the Bar.⁴¹⁵ "This is an excellent structure for a trade association," Martin

405. *Id.* at 1-3.

406. *Id.*

407. *Id.* at 37-38.

408. *Id.* at 38-40.

409. *Id.* at 40-43.

410. *Id.* at 52-54.

411. *Id.* at 59-66.

412. *Id.* at 60.

413. *Id.* at 62-63.

414. *Id.*

415. *Id.* at 62.

concluded, but no prosecutor's office would ever staff its organization with so many levels of lawyers inexperienced in actual disciplinary prosecution.⁴¹⁶ Little wonder then, Martin remarked, that in his three years as a defense attorney defending lawyers accused of wrongdoing, he never lost a case. Martin attributed this not so much to his own legal acumen as to the incompetence of Bar lawyers and management.⁴¹⁷

The public, nonlawyer testimony at these hearings pushed the critique of Bar self-regulation to its extreme. From this perspective, the system needed real improving, not mere window dressing that would leave lawyer regulation "in the hands of judges and attorneys."⁴¹⁸ Several members of the public forcefully asserted that only nonlawyers were competent to serve as prosecutors and judges in any system of lawyer regulation since the "old Boys" of the bar are inherently biased towards their fellow members.⁴¹⁹ "The only . . . answer that makes sense," one witness remarked, "is to remove attorneys and judges from the jury and the bench when we're talking about attorney discipline."⁴²⁰

In advocating for such measures as removing attorneys from the system of lawyer regulation and replacing them with, for instance, "citizen justice panels," the lay testimony reflected the deep dissatisfaction and alienation that consumers of legal services felt with law, lawyers, and an unresponsive lawyer discipline system.⁴²¹ It also carried the critique of the Task Force to its logical conclusion: because lawyers have an inherent conflict of interest in regulating themselves, discipline should be removed from their responsibility and, indeed, from the purview of the judiciary entirely.

It was clear that the legislators present were not entirely persuaded by the Task Force critique. Repeatedly, they asked for some indication of precisely what type of independent agency the Task Force had in mind as a model.⁴²² One legislator asked Rhode to identify a single state regulatory agency that was sufficiently effective so that it might be emulated.⁴²³ Rhode and the other Task Force members had no answer.⁴²⁴

416. *Id.* at 63.

417. *Id.*

418. *Id.* at 66-75, 84-99.

419. *Id.* at 71-73, 84-87.

420. *Id.* at 73.

421. *Id.* at 66-75, 84-99.

422. *See id.* at 42-45.

423. *Id.* at 42.

424. *Id.* at 42-43.

Nevertheless, the Bar's promises to do more to reform lawyer discipline were also not fully reassuring to those present. They had heard it all before. Because of this, the Task Force's recommendations could not be lightly dismissed. As one newspaper editorial explained following the hearing:

The Profession's longstanding failure to adequately discipline its own members gives weight to the task force's central argument: that no private trade association can be relied on to hold the interests of the public above those of its members. Therefore, the task force argues, it is time for the state to step in The task force proposal deserves serious consideration.⁴²⁵

Following this initial public hearing, Senator Presley began to flesh out some specifics of what an independent lawyer discipline agency might look like.⁴²⁶ By January of 1986, Presley was prepared to introduce legislation implementing some of the proposals his Task Force had developed. The most important of which was the creation of a new lawyer regulation agency separate from the Bar. He introduced two separate bills proposing Bar disciplinary reforms, one that would establish an independent administrative arm of the supreme court to regulate lawyers, another that would impose a variety of new duties on lawyers ranging from disclosing rates to issuing written contracts for legal services and permitting audits of attorney-handled client trust funds.⁴²⁷

425. *Regulating Professionals*, L.A. DAILY J., Oct. 7, 1985, at 1 (reprint of a SACRAMENTO BEE editorial).

426. Senator Presley wrote, for instance, to the Legislative Analyst requesting an examination and evaluation of various extant models of occupational regulation in the state. See Letter from Senator Robert Presley to William Hamm, Legislative Analyst (Oct. 10, 1985) (on file with author). The Legislative Analyst responded and recommended that the system for regulating doctors in the state was the best model available. See Letter from William Hamm, Legislative Analyst, to Senator Robert Presley (Dec. 16, 1985) (on file with author).

427. The most controversial bill, SB 1543 (Presley), would establish the "California Attorney Discipline and Competency Commission" to serve as the administrative arm of the Supreme Court for purposes of regulating lawyers, thus divesting the Bar of this function. See SB 1543, California Legislature, 1985-86 Regular Session; see also James Evans, *Year of Discipline: Will the 1986 Reform Bills be the Closing or Opening Shots in the Battle over Attorney Discipline?* 6 CAL. LAW., Dec. 1986, at 37. The proposed commission was to be composed of 15 members appointed by various governmental officials: the Governor would appoint four members, the Legislature would appoint six, the State Bar would have four appointees, and the Chief Justice one. *Id.* Importantly, the Commission was to have a *majority* of public, nonlawyer members. It would be composed of nine nonlawyers and six lawyers. Rather than relying on volunteer attorney referees to serve as disciplinary "judges," Presley's bill proposed to use administrative law judges to fill this task. *Id.*

Senate Bill 1569, the companion bill to SB 1543, California Legislature, 1985-86 Regular Sess. (Presley), introduced a variety of additional changes in lawyer regulation, regardless of whether the new state agency gained approval. See SB 1569. See generally Evans, *supra* note 335. This bill, among other things, imposed duties on

Understandably, the bar vigorously resisted both bills.⁴²⁸ The State Bar Board of Governors voted 18-1 in its February meeting to oppose transferring control over lawyer discipline to an outside state agency. To the Bar, outside regulation of the profession was simply unthinkable.⁴²⁹ Any such proposal, Bar President Heilbron argued, was "radical" as self-regulation was an ancient prerogative dating back for centuries.⁴³⁰ Moreover, stated Heilbron, lawyers *are* different from other occupations since they are both officers of the court—in effect, a branch of the judiciary, which the other two branches of government should not be allowed to "emasculate"⁴³¹—and are frequently defenders of interests adverse to the state and hence need the independence from the state that self-regulation ensures.⁴³² In short, as the president of the Los Angeles County Bar association stated, self-regulation is "crucial to a democratic society."⁴³³

Although the Legislature was receptive to the Presley legislation, it was by no means guaranteed to enact these proposals into law. Some legislators simply were not convinced that an independent regulatory agency would perform more effectively than the Bar.⁴³⁴ Presley tried to assure

lawyers to disclose to clients their hourly rates and standard fees for legal services; to provide written fee agreements for most contracts for legal services over \$1000; to self-report information to the Bar such as the filing of three or more malpractice claims against them in a single year and to report, in some instances, when they had been the subject of judicial sanctions. Additionally, the bill increased the Bar's powers to audit client trust funds managed by attorneys and specified that the goal in disciplinary proceedings was to process a complaint within six months of receiving it. Lastly, the bill required the Bar to report annually to the Legislature regarding its progress towards meeting these goals. See SB 1569.

428. See, e.g., David M. Heilbron, *Solving the Discipline Problem*, 6 CAL. LAW., June 1986, at 53 (comments of the State Bar President). For an overview of the Bar's position and that of its critics, see Robert Egelko, *State Bar Discipline Under Fire*, 6 CAL. LAW., June 1986, at 54-55.

429. See Victoria Slind-Flor, *Bar Opposes Outside Discipline Agency*, L.A. DAILY J., Feb. 24, 1986, at 1. The sole Board member opting to support the Presley bills was Richard Antonico, a public member of the Board who also served on the Task Force. For a discussion of Antonico's views on this matter, see Antonico, *supra* note 395, at 1; Richard Antonico, *Why Lawyers Should Support Senator Presley's Bill*, THE RECORDER, March 20, 1986, at 3.

430. See Heilbron, *supra* note 428 at 90; see also Letter from David Heilbron to William Lockyer (Mar. 18, 1986) (on file with author).

431. See Slind-Flor, *supra* note 429, at 2.

432. See Heilbron, *supra* note 428, at 90.

433. See Vogel, *supra* note 5, at 5.

434. See Charley Roberts, *Heated Debate Opens on Reform of State Bar's Discipline*

Lockyer (and others) that his bill was not designed to "create another mediocre state regulatory agency." Rather, he argued, the new independent discipline system would be better than the Bar's because it would serve the interests of the public first instead of those of the profession.⁴³⁵

The Los Angeles County Bar Association and the politically powerful California Trial Lawyers Association joined the Bar in its opposition to Senate Bill 1543. Both groups argued that it was premature to consider placing control for lawyer discipline in an independent agency, particularly since various reforms were already underway and should thus be given time to take effect.⁴³⁶ Because of this opposition, Presley delayed action on his bill.⁴³⁷ By March it became clear that Presley did not have the votes to move his bill past the Senate Judiciary Committee without amendments.⁴³⁸ At the end of March, Presley suggested a compromise. Presley dropped his insistence that the Bar divest itself of its lawyer discipline function and instead proposed that Senate Bill 1543 create an independent director appointed by the Governor to run the Bar's discipline system. The Bar, however, objected to this intrusion into its prerogative as well.⁴³⁹

Finally, in late April, Presley offered a final amendment that allowed him to move the bill out of committee.⁴⁴⁰ Rather than creating an independent director of Bar discipline, Senate Bill 1543 now proposed to create an outside monitor of Bar discipline to be a "public watchdog" of the lawyer discipline system.⁴⁴¹ The monitor would oversee and report on Bar regulation but would have no authority to direct its operations. Although the Bar opposed even this level of oversight into its operations, it was unable to defeat this measure and instead tried to put passage of the bill in the best possible light: "All in all, I think it's a good bill," Bar Pres-

Role, L.A. DAILY J., Feb. 26, 1986, at 2. As William Lockyer, chair of the Senate Judiciary Committee succinctly put the issue at this committee's initial hearing on the matter: "The current system stinks. It will continue to stink. And the changes will stink." *Id.*

435. See Letter from Senator Robert Presley to Senator William Lockyer, Chair, Senate Judiciary Committee (Mar. 6, 1986) (on file with author).

436. See Resolution of the Board of Trustees of the Los Angeles County Bar Association, adopted Apr. 9, 1986 (on file with author).

437. See Philip Carrizosa, *Vote on Lawyer Discipline Bill is Postponed*, L.A. DAILY J., Mar. 11, 1986, at 2.

438. See Philip Carrizosa, *Lawyer Discipline Compromise Muled; Outsider Could guide Process in Bar*, L.A. DAILY J., Mar. 21, 1986, at 2.

439. *Id.*

440. Philip Carrizosa, *Senate Panel Approves Accord on State Bar's Discipline Role*, L.A. DAILY J., Apr. 30, 1986, at 2.

441. See Letter from Senator Robert Presley to Senator John Doolittle, Senate Judiciary Committee (Apr. 28, 1986) (on file with author).

ident Heilbron stated. "[S]elf-regulation has been retained and discipline is still under the judiciary, administered by the bar."⁴⁴²

As passed, Senate Bill 1543 and its companion bill, Senate Bill 1569, were substantial pieces of legislation that created unprecedented legislative oversight into lawyer regulation. Originally controversial for its attempt to divest the Bar of its self-regulatory powers, Senate Bill 1543 ultimately allowed the Bar to retain responsibility for lawyer regulation. An unsuccessful version of the bill would have placed an outside director in charge of Bar discipline operations, but even this was finally defeated in favor of having a more passive monitor examine and report on lawyer regulation—but without having any direct power to change Bar operations or procedures. While the Bar resisted even this interference into its traditional prerogative, the final version of the bill could be viewed as a victory of sorts for the Bar. Yet, the creation of the Bar Discipline Monitor position would prove to be a most eventful development. Any feeling of victory by the Bar would be short-lived.

ii. The Bar discipline monitor

Phil Martin, a former Bar prosecutor, member of the Presley Task Force, and the principal author of Senate Bill 1543, once remarked that he assumed the position of Bar Discipline Monitor would be filled by "some retired judge from Fresno." By this remark, Martin conveyed his geographical elitism as well as his fear that the Monitor position would turn out to be an ineffective means of reforming lawyer regulation. The individual chosen to serve as Bar Monitor, however, was neither from Fresno nor hesitant in advocating effective lawyer discipline.

Attorney General John Van de Kamp was ultimately responsible for selecting the Monitor.⁴⁴³ His office solicited inquiries from those willing to serve in this capacity and sought to have a number of candidates apply for the position.⁴⁴⁴ Van de Kamp's preference was to select a retired judge, deeming it important to choose a Monitor who was neither identified closely with the Bar nor with its harshest critics.⁴⁴⁵ By early January of 1987, Van de Kamp had his choice: Robert Fellmeth, a professor of

442. See Carrizosa, *supra* note 440, at 2.

443. See Philip Carrizosa, *Search Starts for Bar Discipline Monitor*, L.A. DAILY J., Nov. 18, 1986, at 2.

444. *Id.*

445. See Attorney General of California John K. Van de Kamp, Remarks to the State Bar Convention 1 (revised as delivered Oct. 20, 1986) (on file with author).

law at the University of San Diego and director of the school's Center for Public Interest Law.⁴⁴⁶ Fellmeth's scholarly background was in the field of administrative and regulatory law, and he had previously worked in a district attorney's office specializing in the prosecution of white-collar crime. Fellmeth (like Van de Kamp) also had a strong background in consumer law, having been one of the first of "Nader's Raiders," working with attorney-consumer advocate Ralph Nader in the 1960s.⁴⁴⁷ While he was certainly above the "Bar wars" fray, Fellmeth's credentials promised that his oversight of lawyer regulation would be anything but tolerant of the status quo.

Indeed, in his initial report in June of 1987, Fellmeth leveled a scathing critique at Bar self-regulation.⁴⁴⁸ He described a lawyer discipline system that was understaffed, underfunded, ill-trained, and poorly organized. It was, in short, a system almost designed to fail.⁴⁴⁹

Subsequent reports continued in this vein. In his first progress report, Fellmeth stated that, despite "*bona fide*" efforts by the Bar to respond to his initial criticisms, the "current failure" in Bar discipline could only be characterized as "extreme."⁴⁵⁰ Investigators had triple the caseload they could handle effectively, the prosecutorial arm of the disciplinary system was entirely "incapable of handling a complex serious case against a practicing attorney," and the State Bar Court adjudication system remained inconsistent and minimally competent.⁴⁵¹ According to Fellmeth's Second Report, these problems were "critical," and would remain so until passage and complete implementation of the series of reform measures he advocated and that were contained in proposed legislation, Senate Bill 1498 (Presley).⁴⁵²

446. See Patricia Rogero, *San Diego Law Professor Picked as Bar Discipline Monitor*, L.A. DAILY J., Jan. 22, 1987, at 21.

447. *Id.*

448. See generally Robert C. Fellmeth, *Initial Report to the Assembly and Senate Judiciary Committees and Chief Justice of the Supreme Court: A Report on the Performance of the Disciplinary System of the California State Bar*, June 1, 1987 (on file with Robert C. Fellmeth at the Center for Public Interest Law, University of San Diego) [hereinafter *Fellmeth Initial Report*].

449. As Fellmeth concluded:

I would be shirking my duties as assigned by law to contend that the system now in place, or as it is evolving, approaches a minimum level of acceptability. Under standards requiring expeditious, independent, fair and thorough disciplinary proceedings, it is my duty to report that we are a long way from meeting those standards.

Id. at 176.

450. Robert C. Fellmeth, *First Progress Report of the State Bar Discipline Monitor*, Nov., 1987, at 1 [hereinafter *Fellmeth I*].

451. *Id.*

452. Robert C. Fellmeth, *Second Progress Report of the State Bar Discipline Moni-*

By his third progress report, Fellmeth began to re-shape the discussion over Bar discipline.⁴⁵³ He continued to advocate for implementation of the almost forty reforms contained in Senate Bill 1498, yet also argued for the first time the lawyer discipline system's need to emphasize more than reducing backlogs and enhancing the investigative, prosecutorial, and adjudicative functions. The system also needed, he argued, to take a broader focus and deal with a consumer emphasis.⁴⁵⁴

Such a model system, Fellmeth explained, should implement preventive measures to deal proactively with attorney misconduct; it should address the widespread problem of attorney dishonesty; it should place greater emphasis on issues such as fee disclosures and billing abuses; and it should develop such needed measures as mandatory malpractice insurance and required continuing education.⁴⁵⁵

In his final reports, Fellmeth continued to press for this broad range of reforms as well as for implementation of those he made originally. By his fourth report, he was able to announce "for the first time" that "significant progress had been made" in the lawyer regulation system, even though considerable deficiencies remained.⁴⁵⁶ This remained the theme of Fellmeth's remaining reports. By his sixth progress report, Fellmeth contended that, while not "ideal," California's lawyer regulation system was indeed making progress.⁴⁵⁷

In his last report, Fellmeth commended the "substantial progress" made over the past four and one-half years, including the implementation

tor, Apr. 1, 1988 [hereinafter *Fellmeth II*]; SB 1498, Ch. 1159, 1987-88 Regular Sess., 1988 Cal. Stat. at 3699.

453. Robert C. Fellmeth, *Third Progress Report of the State Bar Discipline Monitor*, Sept. 1, 1988 [hereinafter *Fellmeth III*].

454. Fellmeth noted that:

(A) model system should clearly include a focus on gross or continuing incompetence within its disciplinary function. The *sine qua non* of a professional licensing system is the prevention of irreparable harm to consumers and to the judicial system; that is the rationale for the prior restraint of licensure barrier into the profession.

Id. at 4.

455. *Id.* at 4-7.

456. Robert C. Fellmeth, *Fourth Progress Report of the State Bar Discipline Monitor*, Mar. 1, 1989, at 2-3 [hereinafter *Fellmeth IV*].

457. Robert C. Fellmeth, *Sixth Progress Report of the State Bar Discipline Monitor*, Mar. 1, 1990, at 7 [hereinafter *Fellmeth VI*]. In the Sixth Report, Fellmeth noted, "It is within the realm of possibility that the California system could become the model system its defenders have always proclaimed it to be—proclamations solemnly issued in the face of 5,000-case backlogs and little public discipline." *Id.* at 7.

of many of his two hundred recommended changes in the discipline system, but he also continued to stress the need for greater client-focused measures.⁴⁵⁸

Presley's Senate Bill 1498 was the vehicle Fellmeth used to implement his vision of an effective system of lawyer regulation—or, at least, as effective a system as could be had while still under Bar control. This legislation aimed to accomplish three objectives: to enhance the detection capacity of the discipline system, to increase the legal authority of the system, and, perhaps most importantly, to restructure the State Bar Court.⁴⁵⁹ Enhanced detection powers would be achieved by such measures as authorizing the Bar to retain members' fingerprints to facilitate criminal arrest notification, requiring the courts and malpractice insurers to report judgments against attorneys to the Bar in certain circumstances, and authorizing the courts to report the issuance of contempt orders against an attorney that could lead to disciplinary action by the Bar. The legal authority of the Bar would expand under this bill to increase the discipline system's ability to remove attorneys from practice when they constitute a substantial threat of harm to clients or to the public. The reformation of the Bar Court effected by Senate Bill 1498 included replacing volunteer practicing attorney Referees appointed by the Bar with professional administrative law judges appointed by the supreme court.

Senate Bill 1498 became law in May of 1988, and with it continued the transformation of the California State Bar Discipline System.⁴⁶⁰

iii. Summary: competing ideologies

The crisis in attorney discipline that arose in California during the 1980s was both political and ideological. At the political level, the Bar faced a challenge from largely conservative members and legislators, designed to limit the Bar's ability to act in the political arena. At the ideological level, however, the crisis was even more pronounced. The attack was against the Bar itself, challenging its legitimacy as the voice of the legal profession in the state, and against the legal profession, challenging it to justify its privileged position in society in order to retain self-regulatory powers.

The Presley Task Force and, later, Presley's legislation, Senate Bill 1543, developed one version of the attack on the Bar. The Task Force critique was essentially grounded in an ideology of de-professionalism,

458. See Robert C. Fellmeth, *Fellmeth Final Report of the State Bar Discipline Monitor*, Sept. 20, 1991, at 1 [hereinafter *Fellmeth Final Report*].

459. See generally S.B. 1498, Ch. 1159, 1987-88 Regular Sess., 1988 Stat. of Cal. 2 at 3699.

460. See *id.*

having as its main goal the de-mythologization of professional power and authority. The central tenets of this view were that lawyers are no different from other occupational groups that are routinely regulated by the state and that the inherent conflict of interest involved in attorney self-regulation renders it fundamentally illegitimate. Professional ideology, from this view, is a mask for professional self-interest.

A related, but more extreme, anti-professional ideology was also part of the debate in the lawyer regulation crisis, but its support was always marginal. To be sure, members of the public and organized consumer groups such as HALT⁴⁶¹ made their voices heard. The core themes in this ideology were that, not only was lawyer regulation by the State Bar illegitimate, but that any lawyer involvement in the attorney discipline system, even the involvement of the judiciary, was simply another example of the "Brotherhood" at work. This perspective developed an ideology of the legal profession as not simply another occupational group, but as an actual conspiracy against the public good.

The Bar responded in various ways to these different levels of critique. Its main response was to reassert a traditional ideology of professionalism, which stressed the historical tradition and social value of professional self-regulation: Lawyers are a bulwark of democracy, the profession is an arm of the judiciary, and only a free and independent (*i.e.*, self-regulating) profession can hope to achieve the ethical ideals to which lawyers properly aspire. Moreover, from this view, lawyers are those best situated to do the job of attorney discipline, since they alone have the expertise and motivation to see that the job gets done properly.

In the end, however, none of these perspectives was fully persuasive. The Bar's traditional ideology of professionalism seemed to ignore the very clients the profession professed to serve. Moreover, the Bar's ideological response to the attacks on its role in lawyer regulation seemed largely irrelevant. In neither the Presley Task Force nor subsequent Senate Bill 1543 proposals was regulation of lawyers by lawyers seriously in doubt. Under both, lawyers would continue to carry out lawyer regulation under the aegis of the supreme court. Similarly, the anti-professional ideology was also deficient. It relied on a view of the legal profession that caricatured the professional motivation of lawyers and judges. The "Brotherhood" motif, while popular (and certainly containing a seed of

461. See, e.g., *Hearing in Favor of SB 1543 Before the California Senate Judiciary Committee* (Feb. 25, 1986) (testimony of HALT—An Organization of Americans for Legal Reform) (on file with author).

truth), simply mischaracterized a more complex reality. The bar is highly differentiated, segmented, and diverse. Many lawyers, including those on the Task Force and in the Legislature—and, presumably some in the Bar—wanted not to protect fellow lawyers but to police them effectively. The anti-professional ideology, insofar as it treated the Bar as a monolith, lacked credibility.

By contrast, the de-professionalism ideology formulated by the Task Force was intellectually persuasive. Its main goal was to de-mythologize the legal profession and to undermine the long unquestioned basis for lawyer self-regulation. But this was ultimately not enough. Few in the Legislature appeared to disagree with the view that lawyers should be considered as just another occupational group and hence be forced to justify or relinquish their self-regulatory powers. Yet the de-professionalism critique did little to explain how an independent disciplinary agency would operate and why it would be more effective than Bar regulation, legitimate or not. This de-mythologizing ideology ran into the formidable barrier of a pragmatic Legislature that would be forced to fashion any alternative to Bar regulation.

With the creation of the Bar Discipline Monitor, the debate over the ideology of professionalism shifted. No longer was the central focus whether lawyers should self-regulate, but how lawyer regulation under the administration of the Bar should operate. The ideology of professionalism advanced by the Monitor drew on traditional ideology by exhorting the Bar to develop a system of lawyer regulation that lived up to professional ideals. It also drew on reformist ideologies by emphasizing the primacy of the client's perspective in the regulatory process. Self-regulation had thus been maintained by the Bar, but with a mixed victory. Self-regulation remained not because of the persuasiveness of the Bar's ideological claims but due to the more pragmatic concerns of a legislature unwilling to create another ineffective or "captured" regulatory agency. As a result, the Bar had become subject to continued pressures for reform and continued efforts to re-shape professional ideology from a consumer's view. The next sections explore the results of these processes.

B. The Professionalization of Bar Discipline

The previous section examined the ideological dimensions of the debate over lawyer self-regulation in California. As discussed, the profession's ideological vision was not fully accepted, but neither was it successfully defeated. Nevertheless, the challenge to the Bar's authority was important because it marked a turning point in the Bar's role in the regulation of lawyers. Although the Bar retained self-regulatory powers, henceforth these powers would be subject to considerable scrutiny. But

to what effect? The debate over lawyer self-regulation occurred not only at the ideological level but also at the empirical and normative levels. This chapter analyzes the contours of this debate and examines the competing claims of critics and the Bar concerning the effectiveness and desirability of lawyer self-regulation.

The most strident critics of lawyer self-regulation contend that the Bar is simply incapable of effectively regulating its own members.⁴⁶² There are two dimensions to this critique. The first is an empirical and psychocultural claim which holds that lawyers, whose training and socialization have inculcated in them a shared sense of professional community, will either naturally tend to, or in more conspiratorial versions, purposely seek to protect the interests of fellow members of this community rather than those of the client or public at large.

A second aspect of this critique is normative. This version either expressly or implicitly holds that it is simply improper to allow lawyers (or any occupation) to police themselves because it constitutes an inherent conflict of interest. This is a variation on the notion that it is wrong to be a judge in one's own case. It is not that one cannot ever act properly in such a role but that the mere appearance of impropriety in such a situation itself renders the role illegitimate.

The Bar, in turn, has had two main responses to these critiques. Again, the first response constitutes an empirical claim: No one can do a better job regulating lawyers than lawyers.⁴⁶³ Nonlawyers, it is contended, will simply not comprehend the complexities of the practice of law or the need for lawyerly discretion sufficiently to be effective and fair regulators of the profession. The second, and more normative claim is that it is a good thing that lawyers self-regulate. Such a system of self-regulation not only builds intraprofessional pride and public-mindedness, but more importantly is socially beneficial because lawyers' independence from external regulation is a prerequisite for a vigorous democratic society.⁴⁶⁴

Yet, how are we to evaluate these competing claims? This section does so by assessing how effectively they explain and predict how the lawyer discipline system actually operates. Such a task is made considerably more difficult because the California system itself underwent continuous

462. See, e.g., ABEL, *supra* note 23, at 142-57; KAY A. OSTBERG, HALT, ATTORNEY DISCIPLINE NATIONAL SURVEY AND REPORT 1 (1990) (on file with author); see generally Ostberg, *supra* note 8.

463. Of course, this does not explain why the State Bar must be the agency to regulate lawyers rather than an independent state agency staffed by lawyers.

464. See Heilbron, *supra* note 428, at 90; Vogel, *supra* note 5, at 5.

change during the period of this study. This also presents, however, the opportunity to understand the impact and consequences of these changes on the disciplinary process. Thus, this section evaluates both qualitative and quantitative data on the Bar disciplinary process. Rather than focusing on the system at only one point in time, this study examines and compares the evolving system over time, concentrating on the period between 1985-1992.⁴⁶⁵ Such an inquiry involves two steps. The first is an analytic description and comparison of the Bar's disciplinary apparatus and the processes of self-regulation. The second step involves a quantitative analysis of the output of the disciplinary system. Taken together, these two levels of analysis provide the means to assess the validity of the competing claims over lawyer self-regulation in California.

1. The Organization of Self-Regulation

Although the California Supreme Court has ultimate authority over the regulation of lawyers in the state, the court traditionally delegates much of the responsibility for lawyer discipline to the State Bar. Additionally, the State Bar Act,⁴⁶⁶ which created a unified bar in the state in 1927, legislatively bestowed substantial self-regulatory authority on the Bar, including the power to perform disciplinary investigations, to hold hearings on discipline matters, to subpoena witnesses and evidence, to sanction by means of public or private reprimands, and to recommend discipline such as suspension or disbarment by the supreme court.⁴⁶⁷ Through its governing body, the Board of Governors, the State Bar has also directly shaped the contours of self-regulation by promulgating the ethical rules it will enforce.⁴⁶⁸

465. This period roughly corresponds to the time-frame of the Bar's most recent "crisis" of self-regulation. See *supra* part II.A.2. In 1985 the "social drama" began with a highly influential public exposé of the failures of the Bar's lawyer discipline system and the subsequent threat by the state legislature to force the Bar to relinquish its self-regulatory powers. The year 1992 marks the end of the Discipline Monitor's tenure. See *supra* notes 443-60 and accompanying text. By this time the Bar's discipline system was once again being publicly hailed (at least by the Bar) as a model for the nation. As the previous sections have shown, however, the roots of this particular challenge to the Bar run deeper than the specific attacks in 1985. Indeed, they are part of broader and recurrent crises of authority that all professions undergo, and in an important sense, it is only after much more time elapses that we will be able to examine the full effect of the "reforms" enacted during 1985-92. This section represents a preliminary effort in this regard, and one that is, ultimately, skeptical.

466. CAL. BUS. & PROF. CODE §§ 6000-6228 (West 1990 & Supp. 1994)

467. ALBERT P. BLAUSTEIN & CHARLES O. PORTER, *THE AMERICAN LAWYER: A SUMMARY OF THE SURVEY OF THE LEGAL PROFESSION* 254-55 (Greenwood Press ed., 1972); see also ORIE L. PHILLIPS & PHILBRICK MCCOY, *CONDUCT OF JUDGES AND LAWYERS* (1952). For a concise—although largely uncritical—history and overview of early lawyer discipline in California, see Gilb, *supra* note 20, at 101-112.

468. While the Board of Governors passes these rules, they are formally adopted by

a. *Exercise of disciplinary powers*

Historically, the Board of Governors exercised its disciplinary powers with the aid of local grievance committees comprised of volunteer attorneys who are appointed by the Board. Under the discipline system that remained in operation throughout much of the Bar's existence, volunteer assistant secretaries were assigned the role of screening complaints that were brought against Bar members. These complaints typically came directly through the mail or were referred to the Bar by local voluntary bar associations, district attorneys, or other state agencies. At least in the early years of the system's operation, such screening appears to have been largely perfunctory, as an extraordinarily high percentage of complaints proceeded to the subsequent preliminary investigation stage, which was conducted by the local grievance committees.⁴⁶⁹ These committees, located throughout the state, generally investigated complaints, held hearings, made findings of fact, and provided recommendations as to whether a case should be dismissed, a reproof issued, or a disbarment or suspension occur. The Board of Governors received this record created by the local committees and itself acted collectively as judge in all disciplinary matters.⁴⁷⁰ Before the Board, a respondent attorney (and the attorney's counsel, if so desired) could present either oral or written arguments and introduce any additional evidence pertinent to the case.⁴⁷¹ A resulting disciplinary decision was formally a "recommendation" by the Board of Governors that was sent to the supreme court for its approval.⁴⁷²

the California Supreme Court. See CAL. BUS. & PROF. CODE §§ 6076-6077 (West 1990 & Supp. 1994). California adopted the original Rules of Professional Conduct of the State Bar of California in 1928 and revised them in 1975. In 1988, California adopted the California Rules of Professional Conduct, superseding the Revised Rules of 1975. Lawyers in California are also subject to legislatively prescribed rules. See CAL. BUS. & PROF. CODE §§ 6000-6228 (West 1990 & Supp. 1994).

469. See BLAUSTEIN & PORTER, *supra* note 467, at 254. These authors show that between 1927 and 1939, the Bar received 8335 complaints against lawyers, conducted preliminary investigations in 7965 of those cases, and brought formal charges in 1425 of them. From this, 278 cases were recommended to the Supreme Court for discipline.

470. See Gilb, *supra* note 20, at 104-05.

471. *Id.* at 105.

472. See *id.*; *The Board of Governors' Page, Disciplinary Work*, 3 ST. B.J. 209 (1929); *Proceedings of the State Bar of California* (Seventh Annual Meeting), at 3-4 (1934); Lowell Turrentine, *May the Bar Set its Own House in Order?* 34 MICH. L. REV. 200, 201-02 (1935) (stating the Board had the power to investigate facts and make recommendations to the Supreme Court).

This disciplinary structure remained in effect well into the 1960s. By 1966, however, the Board of Governors felt it was unable to deal with all discipline cases directly as well as carry out its other mandated functions. Consequently, the Board delegated its disciplinary responsibilities to two statewide discipline boards, and in 1968, consolidated this authority into a single fifteen-member discipline board.⁴⁷³ Nonlawyer members were added to the discipline board in 1976, which was part of a nationwide movement to increase public scrutiny into lawyer discipline in light of the "scandalous" conditions in self-regulation revealed by the Clark Report.⁴⁷⁴ The State Bar Court was created in 1979, to which the Board of Governors delegated much of its authority in handling disciplinary matters. The new Bar Court was established with three main departments charged with conducting disciplinary investigations, holding hearings, and reviewing discipline decisions prior to submitting them to the supreme court for approval. The Bar Court was staffed mostly by voluntary attorney "referees," although the hearing and review departments both contained nonlawyer members as well. Thus, with few substantive changes, the lawyer discipline system that existed in the 1970s bore great resemblance to the original model of self-regulation envisioned at the creation of the unified State Bar in 1927. Spurred by both internal and external criticisms of the system, however, in the early 1980s, lawyer regulation in California was about to undergo significant change.

b. Functional overview

Before examining California's contemporary Bar discipline system in detail, it is useful to outline its broad functional contours, even though the specific organizational arrangement of the system has changed over time. There are five main functions performed by the Bar discipline system: complaint intake, investigation, prosecution, adjudication and review. Each function in turn is handled by a separate set of actors within the system.

Complaint intake is the initial step in the disciplinary system. At this step, complaints against attorneys are received, screened for relevance and jurisdiction, and categorized in terms of the nature and seriousness of the complaint. It is also at this stage that the Bar staff may informally mediate "minor" complaints (*i.e.*, those dealing with attorney behavior unlikely to lead to disciplinary sanctions). Additionally, complaints falling outside the Bar's jurisdiction, such as fee disputes, can be referred to outside agencies or to alternative divisions within the Bar such as the

473. See *President's Message: Disciplinary Procedure Updated and Streamlined*, 43 J. ST. B. CAL. 9-12 (1968).

474. See *supra* note 301 and accompanying text.

Bar's mandatory fee arbitration program. Finally, case handlers at the intake stage can also initiate preliminary investigations and fact gathering to facilitate a more formal investigation of complaints that occurs at the next step in the process.

At the investigation stage, those complaints that have been screened by the intake process and are deemed both jurisdictionally relevant and likely to assert a disciplinable offense are investigated. This typically involves interviewing the complaining client (or "complaining witness" or CW), the respondent attorney, and any other available witnesses. It may also involve collecting and examining pertinent documentary evidence. Where there is sufficient evidence to warrant further proceedings, an investigator and attorney will prepare a summary of the case (termed a "statement of the case" or SOC) that sets forth the basis for bringing formal charges against a miscreant attorney.

The third stage in the lawyer discipline process involves determining whether or not to prosecute a case by means of filing formal charges (a "notice to show cause" or NTSC) in State Bar Court or to dismiss or settle a case by means of informal disciplinary sanctions. Where Bar prosecutors determine that formal charges should be filed, they contact the respondent attorney and allow him or her to respond to the allegations or to attempt to enter into a settlement with the Bar without proceeding to a formal disciplinary hearing.

At the adjudicative stage, those cases neither settled nor dropped in the preceding stages are scheduled for a formal hearing before the State Bar Court. Here cases are fully adjudicated in a non-jury proceeding before a Bar referee or judge. The referee or judge then recommends either to dismiss the case, to issue minor disciplinary sanctions, or to suspend or disbar the attorney. This recommendation in turn is subject to preliminary review at the State Bar Court level and ultimate review before the California Supreme Court.

Such a brief overview of the discipline process can, of course, only introduce and highlight the main stages in the Bar's system for regulating lawyers. Moreover, while the general functions of the system have remained constant, structural and organizational changes over time have influenced each step in this process. It is thus necessary to explicate in greater detail how the system outlined above actually operates as well as to describe the recent evolution of Bar discipline process in California and its consequences.

2. The Transformation of Lawyer Discipline

Between 1985 and 1992, California's lawyer discipline system underwent substantial structural and organizational changes. These developments occurred due to both internal and external dissatisfaction with a system of self-regulation that seemed incapable of dealing with the explosion in California's lawyer population and the corresponding growth in disciplinary complaints that resulted after 1970. During his tenure as State Bar Discipline Monitor (1987-1992), Robert Fellmeth⁴⁷⁵ proposed numerous changes in the operation of lawyer regulation. Many of these proposed reforms were put into effect, and met with surprisingly little resistance from the Bar. In the space of five short years, the Discipline Monitor shifted from excoriating the Bar's self-regulatory apparatus to viewing it in many respects as a model to be emulated by other states and other professions.⁴⁷⁶

This section analyzes the process of lawyer regulation in California during this remarkable period of change and reform. Quantitative indicators of the output of the discipline system give us one way to evaluate lawyer regulation in California and the effect, if any, of the reforms during this period. Yet, it is also necessary to examine in detail precisely what the changes in the system entailed. What, for instance, did the system look like at the beginning and end of this period? How were complaints against lawyers processed and how did this change over time? Who were, and are, the key actors at each step in the disciplinary process and how have their roles been affected by the reforms enacted in lawyer discipline? This section addresses these questions by analyzing and comparing each stage of the lawyer discipline system as it evolved during this period of reform.⁴⁷⁷

a. Intake

The California State Bar has two main offices, located in San Francisco and Los Angeles. While some disciplinary procedures occur in both locales, the intake function for the system is performed in the Bar's

475. Robert Fellmeth was selected by legislative mandate to oversee the lawyer discipline process and to recommend reforms in the system of self-regulation. See *supra* notes 443-46 and accompanying text.

476. See *Fellmeth Final Report*, *supra* note 458, at 2-6. It is important to stress that Fellmeth's praise for the Bar discipline system reforms was qualified, a point the Bar generally ignores when it selectively uses quotations from the Monitor's final report, such as in its own annual reports on the discipline system. See *Progress Report*, ST. B. CAL. (1989-91) (quoting Robert C. Fellmeth, *Seventh Report of the State Bar Discipline Monitor*, Sept. 1, 1990 [hereinafter *Fellmeth VII*]).

477. This description and analysis is derived from published and unpublished reports, archival sources, interviews, and limited observational data.

downtown Los Angeles office. In the mid-1980s, the intake unit originated as a separate division in the disciplinary system and part of the procedural reforms implemented by the Bar in response to an internally-generated study and critique of its lawyer discipline system.⁴⁷⁸ The central rationale for developing the intake unit was that it would quickly identify those relevant, potentially meritorious, and more serious complaints entering the system for speedy processing.⁴⁷⁹ Those complaints identified as non-meritorious would be disposed of quickly and, therefore, make the entire system more efficient as well as alleviate pressures caused by heavy caseloads and tremendous complaint backlogs. The underlying assumption supporting this development was that the vast majority of complaints received by the Bar simply did not pertain to problems within the Bar's jurisdiction nor rise to a level of sufficient seriousness to justify disciplinary attention.⁴⁸⁰ By weeding out facially non-meritorious complaints at an early stage, the intake unit would thus help to focus Bar discipline resources on relevant matters tending to involve the most serious forms of misconduct.⁴⁸¹

The intake unit is generally the first step in processing complaints through the contemporary lawyer discipline system. Although the Bar has authority to initiate its own investigations, absent a formal complaint made by a third party, such actions are relatively rare.⁴⁸² Some cases may also enter the system by bypassing the intake unit entirely. These include special disciplinary proceedings, such as attorney requests for reinstatement subsequent to disbarment, which enter the system directly at the investigative stage. While not rare, such cases are far outnumbered by cases originating as client complaints about an attorney.⁴⁸³ In 1986, the Bar created a toll-free telephone complaint line to facilitate public access to the disciplinary system. This is the means by which most complaints enter the system. In 1987, a staff of six junior investigators performed complaint intake under the guidance of a nonlawyer supervisor.⁴⁸⁴ The primary tasks of these operators were to screen incoming calls, categorize them for further handling in the system, or dis-

478. See *Kroeker Report*, *supra* note 331 and accompanying text.

479. See *Complaints' Grievance Panel Fifth Annual Report*, STATE BAR CAL. 10 (1992) [hereinafter *Grievance Panel Report*].

480. See *id.*; *Fellmeth Initial Report*, *supra* note 448, at 8-15.

481. See *id.* at 8-11; see generally *Grievance Panel Report*, *supra* note 479.

482. See *Ostberg*, *supra* note 462, at 5 (citing Nat'l Org. of Bar Counsel).

483. *Fellmeth Initial Report*, *supra* note 448, at 29.

484. *Id.* at 8, 29-30, 50-51 (criticizing the use of inexperienced investigators in the intake process).

miss or divert the complaints as appropriate.⁴⁸⁵ At the outset, many calls received were simply not considered within the Bar's jurisdiction and were thus terminated with an explanation that the complaint fell outside the Bar's disciplinary purview.⁴⁸⁶ Fee disputes, for instance, could be diverted to the State Bar's fee arbitration program.⁴⁸⁷ Other complaints could be referred to local bar associations, which sometimes attempted on their own to mediate or arbitrate disputes involving local attorneys.⁴⁸⁸

Calls that in the estimation of the operator involved facts unlikely to lead to further investigation were termed "inquiries" and were similarly subject to dismissal.⁴⁸⁹ These calls might include allegations of relatively minor misbehavior such as the failure to return a client's phone calls or to return case files to a client.⁴⁹⁰ The designation of an incoming call as an "inquiry" effectively removed the complaint from further consideration by the disciplinary system, although the investigators handling complaint intakes did have the authority to attempt to mediate such minor complaints by phoning or writing a letter to a respondent attorney.⁴⁹¹

It is only where an intake investigator initially determined that an allegation, if true, described behavior that was manifestly unethical, unlawful, or likely to lead to disciplinary action that a call would be designated as a "complaint."⁴⁹² In such instances, the complaining client ("complaining witness," or CW) would be sent a complaint form to initiate a formal complaint.⁴⁹³ CWs were also routinely sent a letter requesting that they provide additional documentation to substantiate their claims. Typically, only a small percentage—around twenty percent—of complaint forms were returned.⁴⁹⁴ This is, perhaps, not surprising since the system placed a substantial onus on complaining witnesses at an early stage to articulate properly a type of lawyer misconduct which would be deemed

485. *Id.* at 7-9.

486. *Id.* at 9.

487. *Id.*

488. Local bar associations themselves also frequently screened potential complaints from entering the Bar's disciplinary system. *Id.* at 34. Consumers of legal services, unless they are sophisticated or repeat clients, are unlikely to realize that local voluntary bar associations have absolutely no formal authority to deal with complaints about lawyers. *Id.* at 35. Nevertheless, in 1987 many associations accepted such complaints and attempted to resolve them informally. *Id.* at 35. Complainants, however, were frequently not informed of the local associations' lack of jurisdiction nor were their cases routinely referred to the Bar if the cases were not resolved. *Id.* at 34-36.

489. *Id.* at 8-9.

490. *Id.* at 8.

491. *Id.* at 8-9, 46-50.

492. *Id.* at 8.

493. *Id.* at 9.

494. *Id.* at 9-10, 46-50.

jurisdictionally relevant and to produce sufficient evidence or documentation to support their allegations of misconduct.⁴⁹⁵

Those complaint forms that were completed and returned received *de novo* review by an intake investigator who again sought to determine upon quick consideration whether the complaint was properly in the Bar discipline system.⁴⁹⁶ Upon reviewing the written formal complaint, and perhaps contacting the respondent attorney by telephone for a response, the investigator would again attempt to determine whether any further action was warranted.⁴⁹⁷ If so, the investigator's final step was to prioritize the complaint in terms of the seriousness of its allegations.⁴⁹⁸ Complaints that survived this process of preliminary screening were then forwarded to the Office of Investigations (OI), of which the intake unit was a separate part, for more thorough case analysis and investigation.⁴⁹⁹

Although the intake unit was designed as a reform measure to help deal with case backlog problems within the discipline system, early on it was vulnerable to harsh criticism, particularly by the Bar Discipline Monitor.⁵⁰⁰ One difficulty was that the intake unit performed its screening function perhaps too well, since few calls received on the phone ever actually became active complaints that were passed on for more complete investigation. Callers faced the initial obstacles of stating their claims in a manner that the intake unit would recognize as both within the Bar's jurisdiction and likely to lead to disciplinary sanctions even before they were given a complaint form to complete. Additionally, the relatively small percentage of complaint forms that were actually completed and returned faced a second screening process that included a preliminary evaluation of the evidence produced by the complainant. Thus, the very early stages of the discipline system were almost entirely complainant-driven. As a result, only the most articulate or persistent complainants were likely to initiate a formal complaint.⁵⁰¹

Perhaps most problematic however, was that this formidable screening function remained largely hidden from view. Investigator discretion to

495. *Id.* at 41.

496. *Id.* at 47.

497. *Id.* at 10.

498. *Id.* at 11.

499. *Id.*

500. *See id.* at 46-54.

501. *Id.* at 8-11, 46-50 (discussing the procedures and shortcomings of the intake unit).

refuse to send a complaint form or to designate both calls and completed forms as "inquiries" was substantial and was not subject to meaningful or systematic review. Moreover, the investigators performing this crucial function were junior investigative staff members who typically lacked any sophisticated knowledge about legal practice and procedures, or even the nature of the Bar's disciplinary jurisdiction.⁵⁰² Consequently, investigators at this stage tended to focus their attention on instances of obvious criminality or misconduct, such as misappropriation of client funds. More subtle misconduct was less frequently or reliably identified for further investigation and processing.⁵⁰³

Case screening determinations at the intake level also were performed largely devoid of context.⁵⁰⁴ The system intended to allow intake investigators to determine whether a respondent attorney had been subject to any prior discipline or complaints, yet this information was not available to investigators in any reliable fashion. Although some information pertaining to an attorney's "priors" was available on computer, records of mere "inquiries" were kept only on index cards in files that were purged periodically.⁵⁰⁵ Thus, investigators often had no way of knowing whether a seemingly "minor" incident reflected a broader, more persistent pattern of routine misconduct or incompetence that should receive more substantial scrutiny.⁵⁰⁶

By 1991, however, many of the most serious organizational and procedural deficiencies in the Bar intake unit had begun to receive attention, largely in response to the published criticisms of the Bar Discipline Monitor.⁵⁰⁷ While still serving its screening function, intake had become arguably more reliable. Part of this increased reliability stemmed from personnel changes. Previously, junior level investigators performed the intake function with little training in complaint handling procedures or disciplinary law. Moreover, these investigators wanted to "investigate," and considered phone duty an undesirable assignment.⁵⁰⁸ Thus, a larger

502. *See id.* at 52-54.

503. *Id.* at 52.

504. *See generally id.* at 46-54 (explaining the procedures and difficulties discovered by the Bar Discipline Monitor regarding the intake unit).

505. *Id.* at 10.

506. *See generally id.* at 54-56 (describing the intake unit).

507. *See generally Fellmeth I, supra* note 450; *Fellmeth II, supra* note 452; *Fellmeth III, supra* note 453; *Fellmeth IV, supra* note 456; Robert C. Fellmeth, *Fifth Progress Report of the State Bar Discipline Monitor*, Sept. 1, 1989 [hereinafter *Fellmeth V*]; *Fellmeth VI, supra* note 457; *Fellmeth VII, supra* note 476; Robert C. Fellmeth, *Eighth Progress Report of the State Bar Discipline Monitor*, Mar. 1, 1991 [hereinafter *Fellmeth VIII*]; *Fellmeth Final Report, supra* note 458.

508. *See Fellmeth Final Report, supra* note 458, at 50-53.

staff of newly appointed "complaint analysts" who were specially trained for their role replaced the intake staff.⁵⁰⁹

At the organizational level, investigator discretion to designate cases as "inquiries" (and hence close them to further investigation) was constricted. Following a recommendation by the Discipline Monitor, the Bar added a new level of staff review at the intake unit.⁵¹⁰ This consisted of centralizing the training and supervision of complaint analysts under the authority of an experienced Bar attorney who was to henceforth review all decisions before closing a case and who also read each incoming completed complaint form.⁵¹¹

A second source of review and oversight was established by statute and put into effect subsequent to 1987.⁵¹² This legislation created a "Complainants' Grievance Panel," composed of seven members, three of whom were nonlawyers.⁵¹³ This new panel was established with the power to review dismissed cases and to order further investigations or even to recommend that formal disciplinary charges be filed.⁵¹⁴

The intake unit also benefitted from reforms that increased the amount of information available to complaint analysts. Perhaps the most helpful development was that the unit became fully computerized.⁵¹⁵ From the time an initial call was made, intake staff now had access to a variety of data to aid their determination of whether to proceed further with a case. Complaint analysts staffing the phones were able to view a detailed record of a respondent attorney's prior and current involvement with the discipline system. This record included such information as the nature of any prior discipline imposed as well as the number and nature of any previous "inquiries" received about a respondent attorney, or the status of any current complaints against the same attorney.⁵¹⁶ At least theoretic-

509. *Id.* at 24-25.

510. *See id.* at 61.

511. *Id.* at 61, 70.

512. CAL. BUS. & PROF. CODE § 6086.11 (West 1990 & Supp. 1993).

513. *Id.* § 6086.11(b).

514. *Id.* § 6086.11(a). For data on the operation of this panel for its first five years, see generally *Grievance Panel Report*, *supra* note 479.

515. *Fellmeth Final Report*, *supra* note 458, at 72-73.

516. *Id.* Other information made increasingly available to Bar staff included data regarding an attorney's criminal convictions and arrests, malpractice insurance claims filed against the attorney, records of serious judicial sanctions imposed, and instances where an attorney had written a check for "insufficient funds" against a client's trust fund account (often an indicator not only of poor office management but of dishonesty that can lead to more serious unethical misconduct). *Id.* Many of these reforms

cally, this enabled Bar intake staff to identify respondent attorneys who had a pattern of misconduct or who had multiple current complaints pending against them.⁵¹⁷

Table 1 presents the quantitative data on the Bar's complaint intake function. This data well-illustrates the primary screening function of the intake unit. The number of total communications received, which is the sum of all incoming calls plus the small amount of walk-in or initially mailed complaints, rose dramatically between 1987 and 1992, from 26,216 to 89,467, an increase of over 340%. This is due both to the efforts of the Bar to publicize its disciplinary work and reforms, and the publicity about the disciplinary system generated by the Discipline Monitor's evaluative reports. This figure also highlights a fundamental tension in the discipline system, particularly at the intake stage. The more successful the Bar is about publicizing its lawyer discipline system, the more complaints are received by a system already struggling to reduce case backlog and delays.

were mandated by SB 1498, *supra* note 452, and only implemented after 1987.

517. This was not an insubstantial development. The Bar Discipline Monitor, for instance, reported that a large percentage of complaints received involved a small number of repeat offenders and that between 65-80% of cases forwarded for further investigation involved attorneys with multiple complaints pending against them. *See Fellmeth Final Report, supra* note 458, at 72-81.

Table 1
State Bar of California Lawyer Discipline System
Office of Investigations, Intake/Legal Advice
COMPLAINT INTAKES⁵¹⁸

	1987	1988	1989	1990	1991	1992
TOTAL COMMUNICATIONS RECEIVED	26,216 [100%]	32,856 [100%]	39,572 [100%]	68,197 [100%]	76,858 [100%]	89,467 [100%]
OUTCOME (Categorization Assigned)						
Information Requests	15,135 [58%]	15,394 [47%]	19,805 [50%]	48,054 [70%]	56,104 [73%]	67,726 [76%]
Inquiries	11,081 [42%]	17,462 [53%]	19,767 [50%]	20,143 [30%]	20,754 [27%]	21,741 [24%]
Inquiries Advanced to Complaint Status	7452 [67%]	4376 [25%]	5267 [27%]	5980 [30%]	6447 [31%]	8181 [38%]
TOTAL # of LAWYERS INVOLVED (complaints may involve more than one lawyer)	8096	4724	5686	6512	6925	8734
TOTAL # of Lawyers in State Bar ⁵¹⁹	93,877	98,201	101,226	108,531	109,886	113,716
% of CA Lawyers involved in complaints	8.6%	4.8%	5.6%	6.0%	6.3%	7.7%

Note: Percentages are rounded and thus may not total 100%.

518. State Bar of California, *Lawyer Discipline in California: A Progress Report for 1988 and 1989*, at 18-19 (on file with author); State Bar of California, *Annual Report, 1992*, at 4 (on file with author), *Annual Report, 1991*, at 22 (on file with author).

519. State Bar of California, *Membership Statistics* (on file with author). This figure represents annual active membership as of December in each year.

Most incoming calls are designated as requests for information, which are diverted from the discipline system entirely, rather than as inquiries, which may lead to an open complaint case. Information requests represented 58% of the calls received in 1987 and 50% in 1989. However, in 1990, as the Bar experienced a surge of over 260% in the number of calls received (compared with 1987), the amount termed information requests rose to over 70% of incoming calls and remained at this high level for both 1991 and 1992. Correspondingly, the number of inquiries fell. The ratio of inquiries to information requests was fairly even between 1987-1989, but by 1992 more than three times as many calls were categorized as mere information requests rather than inquiries. The difficulty with interpreting these statistics is that, while many calls are certainly mainly informational (such as requests for bar brochures or advice on how to select an attorney), many calls deemed information requests undoubtedly involve matters that are referred because they are considered to be outside the Bar's disciplinary jurisdiction.⁵²⁰ Thus, these figures may also represent a shift by the Bar towards a more aggressive screening posture, which would mean that an increasing number of calls that might otherwise properly be handled by the discipline system are being diverted at this early stage.

Similarly, the figures on the number of inquiries that advance to become open complaint cases also reflect the heavy screening that occurs at this level. In 1987, over 67% of inquiries resulted in eventual complaint status. The following year, despite a 25% increase in the number of incoming calls and a concomitant 58% increase in the number of inquiries, the number of official complaints declined by over 41%. This shift occurred as the Bar replaced its junior investigators with specially trained complaint analysts at the intake level. The resulting decline in both the number and percentage of complaints may thus reflect more "efficient" complaint screening or, again, may indicate a policy shift towards increasing barriers to processing potentially meritorious complaints in the discipline system.

b. Investigation

Cases that survive the initial screening performed at intake make their way to the Office of Investigations, which operates out of both the Bar's San Francisco and Los Angeles offices.⁵²¹ Like the intake stage, the investigation step focuses on identifying those cases most likely to lead to a successful disciplinary sanction and channelling them for prosecu-

520. An example of such a matter is one involving an apparent fee dispute issue, even where other potentially disciplinable issues may also be involved.

521. *Fellmeth Initial Report*, *supra* note 448, at 11.

tion.⁵²² The vast majority of complaints received at this stage are diverted from the disciplinary system either by closure or the imposition of informal sanctions.⁵²³

In 1987, the investigation stage of the Bar discipline system was, in many respects, the most problematic stage of the entire system.⁵²⁴ Despite earlier reform efforts, there was a tremendous backlog of complaint cases awaiting investigation. Moreover, because there was considerable political pressure to increase the output of processed cases (and hence to lessen the case backlog), investigators often felt pressured to close a case quickly or to pass on for further prosecution those cases that required minimal investigation, frequently leaving more complex cases and those involving difficult or multiple allegations uninvestigated.⁵²⁵

The first step of the investigation stage repeated part of the intake screening function. Investigators receiving cases from the intake unit reviewed complaints, reclassifying some cases as inquiries, dismissing those unlikely to lead to disciplinary sanctions, or mediating cases that seemed amenable to such informal resolution. During this second preliminary screening, if it was determined that further investigation was appropriate, the complaint was assigned to an investigation team. Both the director of these investigative teams and the investigator ultimately assigned to the case had the authority to close a complaint for "insufficient facts" entirely without any additional review.⁵²⁶

Typically, the investigation of Bar complaints entailed little or no field investigation. Because of heavy caseload pressures—investigators in 1987 were burdened with caseloads at least twice their optimal level—most investigatory work was handled over the phone.⁵²⁷ Bar policies discouraged off-site investigation, requiring investigators to obtain special permission to conduct such fieldwork.⁵²⁸ Instead, the typical investigation involved contacting both the complainant and the respondent attorney to

522. See generally *id.* at 8-15.

523. See *id.* at 11-15.

524. *Id.* at 63-64.

525. *Id.* at 63-66. There were frequent charges by Bar staff and staff attorneys that administrative pressures rather than sound prosecutorial policy often dictated how cases were processed in order to make the system's statistics look good to outside critics. See, e.g., Monica Bay, *Bar Attorneys Charge 'Number Massaging': Claim Bar is Manipulating Discipline Case Statistics*, THE RECORDER, Mar. 21, 1986, at 1.

526. See *Fellmeth Initial Report*, *supra* note 448, at 12.

527. *Id.* at 64.

528. *Id.* at 64-65.

clarify each party's version of the relevant facts and their responses to the opposing party's position. Investigators could also request that both parties submit pertinent documentary evidence in the mail.⁵²⁹

In those instances where investigators determined that there was sufficient compelling evidence to warrant filing formal charges against an attorney, they compiled a report of their work and a recommendation (called the "statement of the case" or SOC) that was submitted to the director and then to the legal unit of the Office of Investigations (OI) for attorney review. This was the first time in the Bar's lawyer discipline system that an attorney reviewed a client complaint. Once again, at this stage the attorney reviewing the complaint was able to close a case for insufficient facts or issue a letter of admonition to a respondent attorney.⁵³⁰ Alternatively, the OI attorney might agree to file formal charges and forward the case to the prosecution stage where these charges were drafted.⁵³¹

Like their counterparts at the intake unit, OI investigators enjoyed considerable, and largely nonreviewable discretion to dismiss complaints, often after only quite cursory investigation. Heavy caseloads and pressures to resolve or dismiss complaints quickly created disincentives to in-depth investigative work.⁵³² Exacerbating this situation were formidable barriers to extensive or thorough investigation of complaints. For example, investigators and even attorneys working in the OI were not permitted to subpoena documents relevant to an investigation without filing a supporting affidavit, which in turn, faced strict scrutiny before it was accepted.⁵³³ Nor were investigators allowed, in the course of their investigations, to mention the name of a respondent attorney to a witness or even to write the attorney's name in correspondence with a complaining client of that attorney.⁵³⁴

529. *Id.* See generally *id.* at 63-69 (discussing the operations of and difficulties encountered by the investigators).

530. An "admonition" is technically not a form of discipline. Rather, it is a warning against repeating the alleged misbehavior in the future. Admonitions are kept on file for two years and can be reactivated if subsequent complaints are received against the same attorney. See generally *id.* at 58-85 (assessing the investigations unit's procedures and shortcomings).

531. *Id.* at 58-85.

532. For example, investigators had a practice of "abating" investigations where they discovered that a civil or criminal case was pending against the respondent attorney raising similar issues. Such abatements were not re-opened unless a client refiled a complaint. See *id.* at 77-78.

533. The Bar Discipline Monitor termed the level of scrutiny it applied "search warrant affidavit criteria." See *id.* at 71.

534. *Id.* at 70-71. As the bar Discipline Monitor remarked: "Where a complaining witness has problems with two or three attorneys, the investigator's attempt to write a response letter acknowledging the complaints without mentioning the name of any of

Attempts by an investigator to interview a respondent attorney's client who had not filed a formal complaint with the Bar required extraordinary effort. First, the investigator had to make a formal request for permission to conduct such an interview by means of completing a special request form.⁵³⁵ This request had to be approved not only by the investigator's supervisor, but also by the Bar's Board of Governors. Similarly, Bar policy precluded investigators from speaking with Bar attorneys, including those assigned to the OI, without receiving permission from two senior supervisors.⁵³⁶ This strict policy was due, in part, to the desire to keep investigations as independent of outside interference as possible, but it also seriously undermined the ability of the OI to coordinate its investigations with the rest of the disciplinary system.⁵³⁷

Other divisions within the Bar also maintained policies that were unduly solicitous to attorney privacy, even at the expense of Bar investigators' effectiveness. For instance, if an investigator had probable cause that an attorney had misappropriated funds from a client's trust account, the investigator could not obtain basic information about the account (such as the name of the bank holding the account or the account number) from the Bar's Legal Services Trust Fund office, which kept records of such information.⁵³⁸ Similarly, investigators seeking to check a respondent's record for prior criminal arrests and convictions were not allowed access to attorney fingerprint files maintained by the Bar.⁵³⁹ Perhaps most ludicrous (and perhaps, revealing), after the passage of discipline reform legislation requiring attorneys to self-report instances of criminal convictions or multiple malpractice filings against them to the Bar, the Bar's Membership Records Office, which had responsibility for receiving this information, would not release it to Bar investigators on grounds that it was "confidential."⁵⁴⁰

These anecdotes reveal more than bureaucratic inefficiency or inertia, they indicate how much the Bar's system for investigating disciplinary complaints was imbued with extreme solicitousness for attorney confidentiality and welfare, even at the expense of a miscreant attorney's client or the public welfare. This is precisely the criticism that the

them makes for some interesting problems of draftsmanship." *Id.* at 71.

535. *Id.* at 72.

536. *Id.* at 77.

537. *See id.* at 72-77.

538. *Id.* at 73.

539. *Id.* at 73-74.

540. *Id.* at 74.

staunchest foes of the Bar had long levelled against lawyer self-regulation. In 1987, much about the investigation stage of the lawyer discipline system substantiated this critique.

By 1991, however, many of the most egregious examples of system dysfunction at the investigative stage simply had not survived the Discipline Monitor's exposure of them to the public. The OI itself had been reorganized so that it, along with the Office of Trials (OT), was under the management of a newly created Chief Trial Counsel.⁵⁴¹ This arrangement was intended to facilitate basic interaction between the investigative stage and the subsequent prosecution and hearing stages. As part of earlier reform efforts, the OI had been established as an independent unit in the disciplinary system. Under this arrangement, the OI was responsible for a case only until they recommended to pursue the case further and prepared an SOC. Because of the reorganization, an investigator was able to remain involved in a case from the investigative stage to a hearing. At least in theory, this allowed the investigator and the prosecuting attorney to work together to conduct discovery or any subsequently needed investigation.⁵⁴²

Other changes also generally strengthened the investigation stage. Not insignificantly, investigator pay and staffing increased. Perhaps most importantly, the rather bizarre Bar rules and policies impeding aggressive investigation of complaints were abolished. The former policy prohibiting investigators from speaking with Bar attorneys, even those in their own office at OI, was dropped. Nor were investigators any longer required to obtain written authorization prior to interviewing non-complaining clients of an attorney or precluded from mentioning the name of a respondent in written communications. By this time, the OI had also begun to implement additional options to divert cases from the discipline system at the investigative stage. These "Agreements in Lieu of Disciplinary Prosecution" (ALDs)⁵⁴³ allowed the Bar to place restrictions on an attorney's right to practice, such as requiring participation in an alcohol or drug treatment program, mandatory remedial training, or attendance at the Bar's "ethics school" program.⁵⁴⁴

Are these changes reflected in the quantitative data? Table 2 summarizes the disposition of complaints at the investigation stage between 1987 and 1992. As these data indicate, the central function of the inves-

541. See CA. BUS. & PROF. CODE § 6079.5 (West 1990 & Supp. 1994). The Board of Governors, appoints the Chief Trial Counsel subject to Senate confirmation.

542. See *Fellmeth Final Report*, *supra* note 458, at 27-32, 81-83; *Fellmeth V*, *supra* note 507, at 33-43 (explaining and evaluating the office of investigations).

543. See CAL. BUS. & PROF. CODE § 6092.5(i) (West 1990 & Supp. 1994). California first implemented this diversion program in 1989.

544. See *Fellmeth Final Report*, *supra* note 458, at 81-91.

tigation stage, just as at the intake stage is to screen complaints. The vast majority of cases entering the investigation stage are not passed on for further proceedings. Instead, most cases are dismissed after a determination that there is insufficient evidence to proceed or that the case lacks merit.⁵⁴⁵ The highest dismissal rate for this period was in 1987, ninety-three percent, which undoubtedly reflects the heavy caseload problems at that time and the concomitant pressure faced by OI staff to reduce the backlog. But the figures for the subsequent years remain high as well—in fact, they are almost identical for most years—between sixty and sixty-four percent.

The percentage of SOCs prepared, corresponding to the number of cases submitted for filing of formal disciplinary charges, remains small during the entire period. The rate was extremely small in 1987, where only five percent of dispositions resulted in SOC recommendations, and varied thereafter between sixteen and twenty-six percent.

545. The category "dismissals" in Table 2 also includes cases where letters of warning are sent as an informal sanction.

Table 2
State Bar of California Lawyer Discipline System
Office of Investigations
COMPLAINT DISPOSITIONS: INVESTIGATION STAGE⁵⁴⁶

	1987	1988	1989	1990	1991	1992
TOTAL						
(# of Attorneys Involved)	9484 [100%]	5340 [100%]	6832 [100%]	6793 [100%]	7423 [100%]	8087 [100%]
OUTCOME:						
Dismissal	8831 [93%]	3356 [63%]	4350 [64%]	4318 [64%]	4451 [60%]	5165 [64%]
Statement of Case (SOC) Prepared	465 [5%]	1273 [24%]	1747 [26%]	1484 [22%]	1420 [19%]	1319 [16%]
Termination	133 [1.4%]	432 [8%]	549 [8%]	563 [8%]	463 [6%]	206 [2.5%]
Admonition	-	-	18 [.3%]	41 [.6%]	68 [.9%]	65 [.8%]
Agreement in Lieu of Discipline (ALD)	-	-	1 [.01%]	3 [.04%]	6 [.08%]	22 [.3%]
Forwarded	55 [0.6%]	279 [5%]	167 [2.4%]	384 [6%]	1015 [14%]	1310 [16%]

Note: Percentages are rounded and thus may not total 100%.

546. State Bar of California, *Lawyer Discipline in California: A Progress Report for 1988 and 1989*, at 20-21 (on file with author); *Annual Report, 1992*, at 7 (on file with author).

Terminated cases are those that are closed for further disciplinary action because they involve attorneys who have died, been disbarred in another matter, or who have resigned with charges pending against them. Again, these cases are relatively few in number, fluctuating between 1.4% in 1987, and 2.5% in 1992, with a rise to between 6% to 8% for each of the years in between.

Diversions from the system, in the form of admonitions or agreements in lieu of discipline (ALDs), represent only a minute portion of cases. This figure, however, is growing. From a low in 1989 of eighteen admonitions (0.3% of dispositions at this stage), the figure grew to sixty-eight admonitions in 1991 (0.9%), and sixty-five in 1992 (0.8%). Similarly, ALDs increased from only one during the first year this diversion alternative was implemented by the Bar, to twenty-two in 1992 (0.3%). Such an increase in both types of diversions, while very small, may indicate a growing emphasis by the discipline system towards informal sanctioning.

The last column in Table 2 represents cases forwarded to the prosecution stage for further consideration or consolidation with other cases against the same attorney. These figures show that the number of such cases has been increasing. It is clear that in 1987 there was little capacity in the system for processing such cases, or perhaps, little effort made to do so, since fewer than 1% were so handled. Yet by 1991, 14% of cases at the investigation stage were forwarded for consolidation. In 1992, an almost equal number of cases were forwarded as were sent to the prosecution stage for filing of formal charges. This is an important statistic because it indicates that the investigative process has become potentially more effective in coordinating cases against repeat offenders, who often are responsible for an astonishingly high number of disciplinary actions.⁵⁴⁷

c. Prosecution

As with the investigation function, prosecution of Bar disciplinary cases occurs both in the Los Angeles and San Francisco offices. In 1987, the Office of Trial Counsel (OTC) handled the prosecution function.

547. For example, between 50-80% of cases forwarded from Intake to Investigation involve respondents with other complaints pending against them. Further, a very small percentage (perhaps 1-2%) of miscreant lawyers account for what the Discipline Monitor has termed an "extraordinary proportion" of consumer complaints (having up to 23 complaints open against them at a single time). See *Fellmeth Final Report*, *supra* note 458, at 68, 81.

There were two main steps in this process. The first entailed receiving the SOC from the investigation stage and evaluating whether the complaint warranted filing formal disciplinary charges. OTC attorneys evaluated cases almost exclusively on the basis of the papers prepared in the preceding stages. They did little or no supplemental investigation and had virtually no contact with investigative staff in the OI. In fact, until 1989 OI and OTC operated from entirely different office buildings in Los Angeles, making interaction between investigators and prosecuting attorneys difficult even when not discouraged by Bar policy.⁵⁴⁸

At this stage in the discipline process, prosecuting attorneys had authority to close a case for lack of sufficient facts to support a formal prosecution, to issue an admonition,⁵⁴⁹ to enter into a stipulated agreement with a respondent attorney for private reproof or other discipline such as probation, or to bring formal charges by filing a notice to show cause (NTSC) in State Bar Court.⁵⁵⁰ Upon the filing of an NTSC, the case was handed over to a separate prosecutor who was responsible for conducting pre-trial negotiations and discovery and for presenting the Bar's position at the hearing stage.⁵⁵¹

The decision to file an NTSC required the approval of the Assistant Chief Trial Counsel.⁵⁵² Once counsel prepared and approved a draft NTSC, they sent a letter giving notice of the intent to file the NTSC to the respondent attorney. A respondent attorney received the opportunity to reply within ten days and to meet with the prosecuting attorney in an "intent to file" conference. This conference gave the respondent attorney the opportunity to meet and respond to the impending charges and attempt to have the charges dropped. Once the NTSC was filed, the complaint was a matter of public record.⁵⁵³

At the post-conference stage, the OTC attorney could again decide whether to drop a case, to enter into a stipulated agreement or to issue a reproof or admonition.⁵⁵⁴ The attorney could also decide in favor of additional investigation, but as a practical matter this was generally not done. Not only were there formidable pressures to process cases quickly,⁵⁵⁵ but also a lack of investigative assistance or resources available to

548. See *Fellmeth Initial Report*, *supra* note 448, at 16-20.

549. See *id.* at 18-19.

550. *Id.*

551. *Id.* at 14-20.

552. *Id.* at 14.

553. *Id.*

554. *Id.* at 92.

555. Notwithstanding the pressure created by the tremendous case backlog at this level in 1987, Senate Bill 1569 established a six month deadline at this stage for OTC to determine case dispositions. See *generally supra* note 427 (discussing the standards

an OTC attorney who decided to investigate any inconsistencies, gaps, or other problems revealed in the "intent to file" conference.⁵⁵⁶

Once an NTSC was filed, the case moved to new trial counsel for further prosecution and possible adjudication.⁵⁵⁷ A settlement conference was scheduled for ninety days thereafter to allow time for discovery, hearing preparation, and settlement negotiations. At this stage the prosecutor and respondent attorney could once again agree to impose almost the full range of discipline without a formal hearing. On an organizational flow chart such a settlement procedure appears to be an uneventful step. Due to Bar policies of the time, however, the practice was nothing short of Kafka-esque. The prosecuting attorneys at the settlement conference had virtually no authority to settle cases on their own, even within established guidelines.⁵⁵⁸ Instead, should the prosecuting attorney, respondent, and respondent's attorney come to a meeting of the minds regarding the proper disposition of a case (both as to the facts and discipline to be stipulated), the prosecutor had to submit this proposed agreement to an Assistant Chief Trial Counsel for review and instruction for substantive changes. These changes were then incorporated into a redrafted agreement, which in turn was subject to two additional layers of review and approval. Only after these multiple instances of review and editing was the redrafted agreement presented to the respondent attorney for approval and signing. The respondent could, of course, accept the redrafted agreement. Not surprisingly, however, the respondent often objected to particular substantive alterations. But any further changes in the agreement were again subject to de novo review through the entire process.⁵⁵⁹

In the few cases when the parties could negotiate a stipulated agreement, they submitted the agreement to a hearing referee for formal approval. If the referee approved the agreement, it was then subject to additional review before the review panel of the State Bar Court. If the referee disapproved of any part of the agreement, the entire document had to be re-submitted to the multilayered review and approval process, even if the respondent attorney agreed with the referee's changes.⁵⁶⁰

established by Senate Bill 1569).

556. *Fellmeth Initial Report*, *supra* note 448, at 93.

557. *See id.* at 23.

558. *Id.* at 97.

559. *Id.* at 95-102.

560. *Id.*

In addition to this lack of discretionary authority in negotiating settlements, Bar prosecuting attorneys faced other barriers to effective prosecution. For example, pre-trial discovery was difficult to conduct. Bar attorneys were required to make written requests for permission to conduct depositions or to initiate any other action necessitating the expenditure of funds.⁵⁶¹ Even small expenditures, such as photocopies made outside of Bar offices, required separate approval.⁵⁶² Because of this, Bar prosecutors typically conducted very little pre-trial discovery, even for complex disciplinary cases. Prosecutors suffered from a dearth of other support services, even of the most basic kind. Because of historically below-market pay scales, few secretaries were hired with any legal secretarial training and staff turnover was constant.⁵⁶³ In 1987, for instance, only one legal secretary at the prosecution stage had served with the Bar for longer than a single year.⁵⁶⁴ The secretaries themselves were allowed access to modern word-processing equipment, on average, for less than two hours a day.⁵⁶⁵

Bar prosecutors fared little better. Their salaries were also below market and accordingly, prosecutorial staff turnover was also high. The Bar found itself unable to attract staff attorneys or to keep them employed for longer than a year.⁵⁶⁶ This was, perhaps, not surprising, since Bar prosecutors quickly learned that the dominant impression, even from within the Bar hierarchy, was that trial counsel consisted of attorneys who could not be successful in private practice.⁵⁶⁷

Thus, in 1987, the prosecution stage of the disciplinary system was embarrassingly chaotic, dispirited, poorly staffed, and viewed even from within as inept. Following the public disclosures of these inadequacies by the Bar Monitor reports, conditions at the prosecution stage improved.

By 1992, the Bar had begun addressing staffing problems at the prosecutorial stage, though they acknowledged that turnover was a continuing problem. Pay scales had been increased for both attorneys and secretaries. Additionally, computer resources were improved and additional resources were now available to allow attorneys to conduct pre-trial discovery.⁵⁶⁸

Substantive changes at this stage were evident as well. A new Office of Chief Trial Counsel was created to supervise and coordinate both the

561. *Id.* at 102-03.

562. *Id.*

563. *Id.* at 105-06.

564. *Id.* at 105.

565. *Id.* at 106.

566. *See id.* at 109-116.

567. *Id.* at 115.

568. *See Fellmeth Final Report, supra* note 458, at 33-34.

investigative and prosecution stages. The first two Chief Trial Counsels appointed were career prosecutors from outside the Bar. The first Chief Trial Counsel changed Bar policies to allow prosecutors greater discretion in conducting settlements with respondent attorneys.⁵⁶⁹ Moreover, the use of informal sanctions to deal with disciplinary cases increased fairly substantially. By 1989, for example, Bar prosecutors had two new informal discipline alternatives available to them. The first, a "letter of warning" (LOW), was an informal reprimand used to warn attorneys that their behavior, while not currently subject to further disciplinary proceedings, is misconduct nonetheless and subject to re-examination should the Bar receive additional information or complaints against the attorney within two years. A LOW is thus similar to an "admonition" letter. However, the LOW provides prosecuting attorneys greater flexibility since Bar prosecutors can issue them unilaterally, whereas the admonition letter generally requires the prior agreement of the respondent attorney or must follow a formal hearing.⁵⁷⁰

The second alternative was "Agreements in lieu of discipline" (ALDs). ALDs were intended as a diversion alternative for use in limited circumstances: where the matter had not caused serious harm, where restitution had been made, and where a program of treatment could be fashioned that had a prior record of success.⁵⁷¹ The Bar initially used the ALD option in cases where attorney alcohol and drug problems had contributed to misconduct and the attorney might be amenable to aggressive preventive treatment, such as monitoring program progress and unannounced drug testing. By 1992, the Bar had also begun to use ALDs in other circumstances, such as misconduct cases involving basic attorney incompetence. In such cases, the ALD agreement could specify conditions of future law practice, such as a promise not to practice in a particular substantive area of the law (*e.g.*, family law or immigration), or to require the respondent attorney to attend specified education classes (*e.g.*, ethics courses or classes in office management skills). The Bar even established its own practically oriented "ethics school" with a curriculum designed to acquaint lawyers with their ethical obligations and with the resources available to help them improve their practice and management skills.⁵⁷²

569. *Id.* at 92.

570. *Id.* at 97-111; see generally *Fellmeth I*, *supra* note 450, at 8-11, 56.

571. See generally *Fellmeth Final Report*, *supra* note 458.

572. See *id.* at 91-111.

As indicated in Table 3, these reforms at the initial prosecution stage are reflected in the changing mix of case dispositions produced. Between 1987 and 1992, the total output of case dispositions at this stage more than quadrupled. Despite this, the percentage of dismissed cases stayed relatively constant—although it jumped rather inexplicably in 1991—and the percentage of cases where formal charges were filed declined rather substantially. NTSC filings, which accounted for 40% of the dispositions in 1987 (and were the single most prominent case disposition that year), declined to only 18% by 1992. Most disciplinary diversions remained fairly constant over time. Admonitions, however, declined from a high of 17% of dispositions in 1988 to 5% of cases in 1989, and 4% in 1992. This drop can be accounted for by the introduction of diversion alternatives in 1988 and 1989 and their subsequent steadily increasing use. Agreements in lieu of discipline (ALDs), for instance, were first used in mid-1988. While in 1989 they were used to process 1% of cases in 1989, their use increased to 4% in 1992. More dramatic was the use of letters of warning (LOWs) during this period. First implemented in 1989, they constituted the most popular case disposition that year (at 30% of dispositions). Moreover, they have continued to constitute the single most prevalent disposition at this stage over time.

Table 3
State Bar of California Lawyer Discipline System
Office of Trial Counsel/Trials
COMPLAINT DISPOSITIONS: PROSECUTION STAGE⁵⁷³

	1987	1988	1989	1990	1991	1992
TOTAL DISPOSITIONS	598 [100%]	712 [100%]	1150 [100%]	1721 [100%]	2796 [100%]	2511 [100%]
OUTCOME:						
Dismissal	105 [18%]	139 [20%]	204 [18%]	255 [15%]	676 [24%]	298 [12%]
Termination	86 [14%]	71 [10%]	90 [8%]	271 [16%]	435 [16%]	822 [33%]
Admonition	69 [12%]	118 [17%]	54 [5%]	60 [3%]	119 [4%]	89 [4%]
Resignation with Charges Pending	50 [8%]	68 [10%]	81 [7%]	92 [5%]	96 [3%]	108 [4%]
Agreement in Lieu of Discipline (ALD)	- -	2 [.3%]	11 [1%]	50 [3%]	125 [4%]	94 [4%]
Stipulated Discipline	47 [8%]	48 [7%]	41 [4%]	67 [4%]	122 [4%]	110 [4%]
Notice to Show Cause (NTSC) Filed	241 [40%]	266 [37%]	316 [27%]	376 [22%]	603 [22%]	444 [18%]
Letter of Warning (LOW) Sent	- -	- -	353 [30%]	550 [32%]	620 [22%]	546 [22%]

Note: Percentages are rounded and thus may not total 100%.

573. State Bar of California, *Lawyer Discipline in California: A Progress Report for 1988 and 1989*, at 28-31; *Annual Report, 1992*, at 7 (on file with author); State Bar of California, Member Statistics (on file with author).

Therefore, at the pre-trial prosecution stage, most cases result in either the filing of formal charges or the implementation of some form of informal sanction. Dismissals at this stage are significant, approximately 10% of dispositions, but have become less frequent over time, due in large part to the intense case screening that occurs at both the intake and investigative levels. Informal sanctions, particularly LOWs, are increasingly prominent at this stage of prosecution. In theory, this allows the Bar to mildly sanction miscreant attorneys while at the same time keeping the case for reactivation if warranted, thereby preserving full-blown adjudication for those cases likely to result in disciplinary sanctions greater than an admonition.

d. Adjudication and review

Perhaps the most momentous changes in the contemporary lawyer discipline system in California have occurred at the State Bar Court level. The Bar Court is responsible for adjudicating and initially reviewing disciplinary cases. The State Bar Court's authority extends over original disciplinary proceedings as well as various special proceedings.⁵⁷⁴ The structure and functioning of the State Bar Court in 1987 lent credence to critics' claims that the Bar disciplinary system was a "brotherhood" more concerned with protecting lawyers than protecting the public. The Court is composed of separate hearing and review departments, both of which in 1987 were staffed almost exclusively by lawyers in private practice who volunteered their services on a part-time basis to act as Bar Court "referees."⁵⁷⁵ The hearing department had over 500 such referees and the review department consisted of eighteen members, which included six nonlawyer referees.⁵⁷⁶

Hearings were typically held before a single referee, although there were also provisions for a three-member panel at this stage, at the Bar offices in San Francisco and Los Angeles. The referee in charge of each hearing admitted evidence and testimony, issued findings of fact, and determined whether to dismiss a case or sanction the attorney, including disbarment, as appropriate. These determinations were technically only recommendations since all hearing department decisions were subse-

574. These include such matters as conviction referral cases, reinstatement petitions, expedited disciplinary proceedings following an attorney's discipline in another state, incapacity proceedings, and several other specialized matters. See *Fellmeth Initial Report*, *supra* note 448, at 21.

575. See *id.* at 20.

576. See *id.* at 21-22.

quently examined by the review department whether or not either party had appealed the matter.⁵⁷⁷

A party also had the right to request review, in which case additional briefing and oral arguments could be scheduled. At the review department stage, referees sitting en banc were free to make independent determinations of fact, law, and appropriate discipline, although they were to grant great weight to hearing level findings of fact.⁵⁷⁸

Review department meetings were scheduled ten times per year for a two-day period. All eighteen members participated in the review of every case, but each case was also typically assigned to a single member for more extensive review of the often voluminous record.⁵⁷⁹ Review department referees could collectively decide to uphold the hearing department decision, alter it, or send the case back for rehearing.⁵⁸⁰ Final determinations made by the review department were merely recommendations to the state supreme court. Every case in which the review department recommended disbarment or suspension was automatically passed to the supreme court for review.⁵⁸¹ Additionally, parties had the right to petition the court for formal review, which was generally granted in cases where any substantial discipline had been recommended.⁵⁸²

There were formidable problems with this system of adjudication and review. The State Bar Discipline Monitor, for example, excoriated the use of volunteer practitioners as referees in disciplinary matters as they might be colleagues or competitors of respondent attorneys. Such a system, he argued, not only created an image of lawyers protecting their own but was bound to be inefficient and lack uniformity, and thus lack predictability. The volunteer referees were given only perfunctory training in Bar discipline procedural rules and the substantive law governing lawyer discipline, a specialized area of the law most practitioners are probably not familiar with.⁵⁸³ Additionally, hearing referees would typically handle only a few discipline cases per year and accordingly, few of these part-time referees had a sophisticated understanding of the relevant review department decisions or supreme court rulings that were to

577. *Id.* at 25.

578. *Id.* at 25, 123-31.

579. *Id.* at 25.

580. *Id.* at 26.

581. *Id.*

582. *See generally id.* at 20-28, 131-39 (describing the hearing process and evaluating its performance).

583. *Id.* at 125-26.

guide their determinations.⁵⁸⁴ This lack of familiarity with relevant precedent and procedure was exacerbated by the unwieldy size of the referee pool. As might be expected under such a system, there was a great deal of variation in referee quality and in the standards applied by referees. Because of this, it was difficult to predict how a particular case would fare under a particular hearing referee or review panel. Consequently, respondents often had little incentive to settle cases rather than take their chances at a full adjudication of the matter.⁵⁸⁵

In his initial report, the Bar Discipline Monitor strongly advocated that the Bar replace its reliance on volunteer lawyer referees with a smaller set of full-time administrative law judges for both the hearing and review functions.⁵⁸⁶ The Bar resisted this suggestion, preferring instead to implement its previous decision to replace many volunteer referees with compensated attorney referees and retired judges.⁵⁸⁷ The Bar's primary objection was the high cost of maintaining a full-time judicial staff for disciplinary matters. Additionally, the Bar argued that removing practicing attorneys from participating in the system would diminish the *esprit de corps* which it felt underlay the volunteer system. Further, it simply rejected outright the suggestion that the use of practicing attorneys as referees constituted an inherent conflict of interest.⁵⁸⁸

Despite its initial reluctance, the Bar ultimately supported the reformation of the State Bar Court system to include the use of a specialized, full-time judicial staff appointed by the California Supreme Court.⁵⁸⁹ The new State Bar Court hearing department now consisted of one presiding judge and six hearing judges, one of whom must be a nonlawyer.⁵⁹⁰ Sim-

584. *Id.* at 125.

585. *Id.* at 126-27, 174-75. *See generally id.* at 123-27 (describing and criticizing the referees).

586. *Id.* at 126-27.

587. *See Fellmeth I, supra* note 450, at 197-214 (Exhibit XII, atch. A: *State Bar Court's Initial Response to ALJ Proposal*).

588. *See id.* at 211 (Resolution Adopted by the State Bar Court Executive Committee, August 21, 1987). "(3) [T]here is no inherent conflict in the use of practicing attorney referees and any suggestion that they are or have been biased either for or against respondents due to some improper motives is unsupported by any empirical evidence." *Id.*

589. Senate Bill 1498 mandated these changes. *See generally supra* note 452 and accompanying text. The Bar helped screen and recommend candidates to the supreme court. The Bar selected the first judges from an applicant pool of 374. From this pool, the Bar's Board of Governors choose 33 candidates for interviews. The Bar subsequently nominated nine individuals from this group who were formally appointed to the Bar Court by the supreme court. These judges began their appointments in 1989. For a biographical sketch of the first judges selected, see State Bar of California, *Lawyer Discipline in California, A Progress Report for 1988 and 1989*, at 33-37 (1989).

590. *See Fellmeth VI, supra* note 457, at 65.

ilarly, the new review department was composed of three judges: one lay judge, the presiding judge of the hearing department, and a third review judge. Judges in the hearing department were paid the salary of a municipal court judge, and judges in the review department were paid at the level of a superior court judge.⁵⁹¹

The creation of the new Bar Court in 1989 also changed the procedures used in disciplinary cases. As in the old referee system, hearing judges were still responsible for receiving evidence and testimony and recommending disciplinary sanctions. But unlike the old system, these disciplinary recommendations were no longer subject to routine review. Instead, if no party requested review, all disciplinary recommendations less than suspensions would stand as final. When a hearing judge recommended that a respondent attorney be suspended or disbarred, the case would be transmitted directly to the supreme court, unless it was appealed.⁵⁹²

If requested, formal review by the review department was granted as a matter of right. The review department determination was based on the record established at the hearing level, but review judges had the authority to act independently in reviewing all findings of fact or law and could decide cases at variance with the hearing level determination. Review judges and hearing judges both write decisions, and the review department opinions are reported in a newly-established *California State Bar Court Reporter*.⁵⁹³ Having these decisions reported allows for greater continuity in decisionmaking by the Court.

In 1990, California Supreme Court rule changes—long advocated by the Bar Discipline Monitor—greatly enhanced both the practical and symbolic authority of the new Bar Court. These so-called “finality rules” changed the effect of final decisions issued by the Bar Court.⁵⁹⁴ There are two aspects to these changes. First, all State Bar Court discipline recommendations now stand as the final decision of the supreme court

591. See CAL. BUS. & PROF. CODE §§ 6079.1, 6086.65 (West 1990 & Supp. 1994); see also *Fellmeth VI*, *supra* note 457, at 65-73.

592. See also *Fellmeth Final Report*, *supra* note 458, at 40-41, 116-20 (explaining the set-up and approach of the State Bar Court). See generally State Bar Court Rules of Practice, Rules 1200-71;

593. The idea for the reporter was formulated in 1979 and repeatedly advocated by the Discipline Monitor. However, the first volume remained unfunded and unpublished until 1992.

594. LEGISLATIVE ANALYST'S OFFICE, A REVIEW OF THE STATE BAR COURT 6 (1991).

unless review is sought by either party.⁵⁹⁵ Second, review before the supreme court is discretionary rather than a matter of right.⁵⁹⁶ Moreover, the standard of review used by the Court is now an "abuse of discretion" standard: The supreme court will only grant review in cases indicating that the Bar has failed to afford a party due process or has clearly acted outside its jurisdiction.⁵⁹⁷ Thus, within a year of the State Bar Court's initial operation, the supreme court had delegated to the Court much of its authority for disciplining lawyers in California.⁵⁹⁸

Table 4 represents the aggregate case output at the State Bar Court between 1987-1992 and shows one perspective on the reforms made at this level of the disciplinary system. During this period, the mix of dispositions remained fairly constant. The percentage of disbarments recommended was an exception, however. The figure for 1987-89 was around 20% of total dispositions, but was slightly less than 10% thereafter, corresponding with the establishment of the new Bar Court. Thus, there is at least some evidence indicating that the new court is less likely than its predecessor to recommend the most serious sanction. Yet this conclusion is less dramatic when both disbarments and suspensions are examined together. The total percentage of such serious sanctions combined remained around 60% of dispositions between 1987-92, although it went as high as 72% in 1989. Similarly, the incidence of less serious sanctions (*i.e.*, reprimands and admonitions) remained about the same at around 20% of total dispositions for most of this period, before increasing to 27% in 1992. Lastly, the dismissal rate showed similar consistency. Between 16-20% of cases were typically dismissed, although these figures dipped to 13% and 9% for 1988 and 1989 respectively. Thus, this data

595. See *Fellmeth Final Report*, *supra* note 458, at 121.

596. *Id.*

597. See Cal. Ct. R. 954 (1994). Rule 954 States:

The supreme court will order review of a decision of the State Bar Court recommending disbarment or suspension from practice when it appears (1) necessary to settle important questions of law; (2) the State Bar Court has acted without or in excess of jurisdiction; (3) petitioner did not receive a fair hearing; (4) the decision is not supported by the weight of the evidence; or (5) the recommended discipline is not appropriate in light of the record as a whole.

Denial of a review of a decision of the State Bar Court shall constitute a final judicial determination on the merits and the recommendation of the State Bar Court shall be filed as an order of the supreme court.

Id.; see also LEGISLATIVE ANALYST'S OFFICE, *supra* note 594, at 8 ("[T]he high court announced that it will apply a discretionary review standard.").

598. This decision is also noteworthy because the supreme court originally considered delegating review of Bar discipline matters to the courts of appeal. See Select Committee on Internal Procedures of the Supreme Court, *Report to Honorable Malcolm M. Lucas, Chief Justice of California*, Feb. 16, 1988, at 24-25 (on file with author).

gives little indication of what changes the new court has produced or is likely to produce.

Table 4
State Bar of California Lawyer Discipline System
State Bar Court
Actions and Recommendations in Disciplinary Matters
(Hearing and Review Departments Combined)
ACTIONS AND RECOMMENDATIONS⁵⁹⁹

	1987	1988	1989	1990	1991	1992
TOTAL	296	292	424	495	581	600
DISPOSITIONS	[100%]	[100%]	[100%]	[100%]	[100%]	[100%]
OUTCOME:						
Disbarment	56 [19%]	69 [24%]	89 [20%]	44 [9%]	55 [9%]	47 [8%]
Suspension without Probation	18 [6%]	12 [4%]	17 [4%]	15 [3%]	20 [3%]	27 [5%]
Suspension with Probation	105 [35%]	121 [41%]	204 [48%]	252 [50%]	278 [48%]	261 [44%]
Public Reproval, Duties Added	18 [6%]	24 [8%]	32 [8%]	46 [9%]	25 [4%]	70 [12%]
Public Reproval	11 [4%]	7 [2%]	14 [3%]	7 [2%]	9 [2%]	1 [.2%]
Private Reproval, Duties Added	17 [6%]	16 [6%]	24 [6%]	47 [10%]	59 [10%]	94 [16%]
Private Reproval	6 [2%]	4 [1%]	4 [1%]	11 [2%]	21 [4%]	6 [1%]
Admonitions in Formal Proceedings	7 [2%]	3 [1%]	2 [1%]	1 [1%]	3 [1%]	1 [1%]
Dismissal	58 [20%]	36 [13%]	38 [9%]	72 [15%]	111 [19%]	93 [16%]

Note: Percentages are rounded and thus may not total 100%.

599. State Bar of California, *Lawyer Discipline in California: A Progress Report for 1988 and 1989*, at 35 (on file with author); *Annual Report, 1992*, at 9-12 (on file with author); State Bar of California Member Statistics (on file with author).

Perhaps a better indicator of State Bar Court effectiveness over time is the rate of settlements produced. A court that is operating efficiently and predictably can, in many cases, induce respondents to settle their cases by stipulation rather than bear the substantial expense of full adjudication. Strong evidence shows that the new court has had such an effect. Historically, the settlement rate for cases in State Bar Court has been between 15% and 18%. In 1987, 73% of cases were fully adjudicated at the hearing level, 25% were settled, and 2% were terminated. These figures changed rather dramatically in the first years of the new court. In 1990, 35% of cases went to a full hearing, 47% settled, and 18% were terminated. The 1991 figures include 27% of cases reaching a full hearing, and 45% settling by stipulation, with 28% terminated. These figures were similar in 1992. In that year, 26% of cases were adjudicated, 51% settled by stipulation, and 23% were terminated. Thus, in 1987 almost three times as many cases were fully adjudicated as were settled. But by 1992, this trend reversed, with almost twice as many cases settled as reached full adjudication. At least to the extent that these figures represent strategic decisions by respondent attorneys based on their view of the new court's predictability in decisionmaking, it appears that the new State Bar Court is more effective than its predecessor.⁶⁰⁰

A second indicator of predictability and efficiency—review requests from hearing department decisions—yields similar findings. For the five year period prior to the establishment of the new court, the percentage of cases appealed averaged over 27%. This figure dropped by over one-half for the total period from November of 1989 when the Bar Court began operation to the end of 1992. During this period, a total of 12.6% of hearing decisions were appealed to the Review Department.⁶⁰¹ This figure is even more significant because, since its adoption of new “finality rules” in 1990, the California Supreme Court has substantially deferred to the State Bar Court determinations in disciplinary matters.⁶⁰² For instance, in 1990 the supreme court granted thirty writs for review from the Bar Court. Yet in 1991, this figure was down to a single writ granted, which occurred prior to adoption of the “finality rules.” In 1992 the supreme court did not grant a single request for review, thus leaving the Bar Court's determinations to stand in all disciplinary matters.⁶⁰³

600. The source for these figures is the State Bar of California, (unpublished statistics on file with author).

601. See State Bar of California, *Annual Report of 1992*, at 9.

602. See *supra* note 594 and accompanying text (discussing the court's adoption of the “finality rules”).

603. See State Bar of California, *Annual Report of 1992*, at 11.

e. Oversight: complainants' grievance panel

An important part of the transformation of the lawyer discipline system in California was the institutionalization of the means for scrutinizing the Bar's disciplinary process. A perennial criticism of lawyer self-regulation has been not only that the system is slow and overly deferential to lawyers' interests but also that it operates largely free from the public gaze. Much of the impetus for creating the unique position of Bar Discipline Monitor stemmed from the desire to create a means of oversight into the process of lawyer self-regulation. But the Discipline Monitor position was intended from the start to be temporary.⁶⁰⁴ A second and more permanent—even if less comprehensive—institution of oversight was the Complainants' Grievance Panel, which began operation in May, 1987.⁶⁰⁵

The Panel is staffed by seven members, four attorneys who are appointed by the State Bar and three nonlawyer members. The Governor, Speaker of the Assembly, and Senate Committee on Rules each appoint one nonlawyer member.⁶⁰⁶ The Panel has review authority over the disciplinary system in two spheres. First, upon the request of a complaining witness, it is empowered to review closed Bar investigations, "closed inquiries, admonitions, warning letters, or agreements in lieu of discipline issued prior to the issuance of a Notice to Show Cause."⁶⁰⁷ Second, the Panel has the authority to audit a random sample of cases closed prior to the issuance of a Notice to Show Cause (NTSC).⁶⁰⁸ In both instances, the Panel can require that further investigation be performed in a particular case and can recommend to the Bar that an NTSC be issued or even that other disciplinary action be pursued.⁶⁰⁹

Although the Panel was intended as a reform effort, it was clear from early on that unintended consequences would result from institutionalizing this new layer of oversight and review. These problems partly derived from the unique organizational role the Panel was to play: essentially to second-guess decisions and close or divert complaints in order to

604. See CAL. BUS. & PROF. CODE §§ 6086.9, 6140.8 (West 1990 & Supp. 1994). The State Bar Discipline Monitor's appointment ended on January 1, 1992.

605. See *id.* § 6086.11 (West 1990 & Supp. 1994).

606. *Id.*

607. *Fellmeth Final Report*, *supra* note 458, at 111; see also *Fellmeth VIII*, *supra* note 507, at 67; CAL. BUS. & PROF. CODE § 6086.11 (West 1990 & Supp. 1994).

608. See *Fellmeth Final Report*, *supra* note 458, at 11.

609. *Id.* at 113-14.

ensure that the Bar disciplinary system lives up to its mandate to protect the public as well as to enhance the legal profession. This second-guessing tended to detract from what the Bar, and increasingly even the Bar Discipline Monitor, viewed as a proper role of the disciplinary system: to quickly cull those cases from the system that would not likely lead to serious sanctions in order to direct the Bar's disciplinary resources efficiently towards prosecuting complex, heinous, or repetitive misconduct.⁶¹⁰

One inherent difficulty, however, is that the Panel views its cases out of context. Panel members do not see the entire universe of cases entering the discipline system and hence are not privy to what considerations have led the Bar to proceed with one case rather than another. Consequently, Panel recommendations to reinvestigate cases are not popular with Bar investigative staff. At a fundamental level, the Panel represents a challenge and impediment to what the Bar views as the prosecutorial discretion necessary to prosecute cases effectively.⁶¹¹

Thus, although the Panel generally agrees with the Office of Investigations or Office of Trials decisions to close or divert cases over 70% of the time,⁶¹² in exercising its mandated authority it exacerbates pressures within the disciplinary system to deal with an increasing number of incoming complaints. The Complainants' Grievance Panel is certainly aware of such problems, particularly since it suffers from case backlog and delays serious enough to "alarm" the Discipline Monitor.⁶¹³ But the Panel has also highlighted what appear to be problems within the discipline system that are quite resistant to change. The guiding ethos at the initial intake and investigation stages is to categorize complaints and determine their "worth" quickly.⁶¹⁴ In this process, much subtlety is lost. As both the Discipline Monitor and the Panel have noted, for instance, there is a tendency at these levels to refer cases that might otherwise be properly in the disciplinary system for alternative dispute resolution wherever possible.⁶¹⁵ The danger in this is that complainants who have

610. *Id.*

611. *Id.* See generally *id.* at 111-16 (explaining the Panel's responsibilities and methods, and making recommendations for its improvement).

612. See *Grievance Panel Report*, *supra* note 479, at 31.

613. Ironically, the Discipline Monitor reported that his office received more consumer complaint letters about the Panel's operations than about any other aspect of the discipline system. *Fellmeth, Final Report*, *supra* note 458, at 144-45.

614. *Grievance Panel Report*, *supra* note 479, at 5-6.

615. See *Fellmeth Final Report*, *supra* note 458, at 20-21. Both the Monitor and the Panel have remarked that cases involving possible fee-issues—no matter how tangentially related and notwithstanding how many other issues might be involved in the complaint—are routinely referred to arbitration programs because fee disputes are not generally within the Bar's disciplinary jurisdiction.

not articulated their problems in terms of categories of obvious interest to the Bar discipline system risk having their complaints de-valued.

Table 5 illustrates the functioning of the Complainants' Grievance Panel. On average, over 70% of the cases reviewed by the Panel are considered to have been properly closed or diverted. And few cases, around 2% of those reviewed, are recommended back to the system for the issuance of formal charges or informal discipline. A similarly small percentage of cases, between 1% and 3%, are either continued or highlighted as "training issue" cases, which do not themselves warrant further handling but which illustrate potential weaknesses in training or policy within the disciplinary system and are therefore sent back to supervisors for their consideration. But fully a fifth or more of the cases reviewed by the Panel annually have been submitted for reinvestigation. This constitutes a considerable number of cases (*e.g.*, 506 in 1992). As this data shows, there is ample evidence that the Panel does not simply rubber-stamp Bar decisions but exercises independent discretion and review. But the very performance of the Panel's intended function nevertheless highlights limitations in the disciplinary process.

Table 5
 State Bar of California Lawyer Discipline System
 Complainants' Grievance Panel
PANEL DECISIONS⁶¹⁶

	1987	1988	1989	1990	1991	1992
TOTAL DECISIONS	321 [100%]	717 [100%]	506 [100%]	892 [100%]	1361 [100%]	2274 [100%]
OUTCOME:						
Denied	251 [78%]	410 [57%]	344 [68%]	625 [70%]	1041 [78%]	1663 [73%]
Further Investigation Ordered	49 [15%]	279 [39%]	139 [27%]	251 [28%]	281 [21%]	506 [22%]
NTSC, Warning Letter, or Admonition Recommended	7 [2%]	8 [1%]	11 [2%]	16 [2%]	9 [.6%]	34 [2%]
Continued	14 [5%]	20 [3%]	12 [3%]	0 [0%]	10 [.75%]	71 [3%]
Training Issue	- -	- -	- -	- -	20 [1%]	83 [4%]

Note: Percentages are rounded and thus may not total 100%.

616. *Grievance Panel Report*, *supra* note 479, at 31 (on file with author).

f. Summary

In many respects, the Bar's system for regulating lawyers was so dysfunctional in 1987 that it made credible the claims of the Bar's harshest critics. The initial acceptance and investigation of complaints about attorney misconduct inspired little confidence. The primary function at the intake and investigative stages was (and is today) to screen cases from the voluminous number of complaints received in order to identify cases most likely to lead to disciplinary sanctions. Yet in 1987, it was clear that those in charge of screening cases often performed their task in an un-systematic and haphazard fashion. Complaints alleging obvious criminal misconduct or the most egregious forms of misbehavior were most likely to survive the screening process. Numerous other potentially valid complaints were dismissed or otherwise diverted from the system because they failed to clearly state a claim that the Bar's intake and investigative staff considered within the Bar's jurisdiction, or a high priority matter. Perhaps most alarming, much of the discretion to make these determinations was delegated to Bar staff with little experience or education in the relevant areas of law with which many complaints commonly deal. Nor did Bar staff at this preliminary level of the discipline system have more than a rudimentary understanding of the procedural standards or relevant case law to guide their determinations. Moreover, entry-level staff often exercised this extraordinary discretion, largely without supervision.

The investigations and prosecutions suffered from other inadequacies as well. Investigators were hindered by policies more solicitous of respondent attorneys' privacy than concerned with aggressive investigation. Just as at the intake level, investigators at the investigative stage (many of whom have a background in law enforcement) were geared towards identifying complaints that alleged obvious or criminal behavior, such as fraud or theft of clients' funds, rather than more subtle forms of ethical misconduct or even gross incompetence, which are also properly within the Bar's disciplinary purview. The role of Bar investigators was to conduct sufficient preliminary investigation to identify cases warranting further processing in the disciplinary system. Yet once a complaint case was passed to prosecutors for further consideration, Bar policy largely prohibited investigators from working or even speaking with Bar attorneys who were subsequently assigned to the case they had investigated. This left prosecutors with the tasks of learning about the case solely from the written record and of attempting to settle or prepare the case for formal charges without being able to conduct much subsequent investigation or pre-trial discovery. Bar prosecutors were also hindered by policies that

gave them little or no independent authority to enter into stipulated discipline agreements with respondent attorneys.

Adjudication and review in State Bar Court were, in 1987, handled by part-time volunteer practicing attorneys who were often ill-trained in disciplinary procedures⁶¹⁷ and unfamiliar with the case law and review department authority relevant to their decisions. As a result, adjudication and initial review in State Bar Court suffered from obvious inconsistencies, making full hearings and appeals both within the system and to the supreme court a likely choice for many respondents.

By 1992, however, it was far less obvious that California's lawyer discipline system was as ineffective—and as protective of attorneys—as it had been in 1987. Part of the explanation, of course, rested in the fact that the system in 1987 was simply so bad that any change at all would likely be an improvement. But the system also underwent numerous and often substantial reforms at all levels of its operations.⁶¹⁸ Funding for revamping the discipline system, which is supported solely by Bar membership fees, more than quadrupled between 1987-1992, and expenditures on the discipline system constituted an increasingly large portion (almost 75% by 1992) of the total annual budget of the State Bar.⁶¹⁹ Additionally, Bar policies and organizational changes in the discipline system increased supervision over decisions to close or divert complaints, lessened the barriers to effective investigation and prosecution of cases, provided greater access to information about respondent attorneys and their complaint and discipline history, and increased the potential for coordination between Bar investigators and prosecutors. Most eventfully, the former volunteer-practitioner referees who staffed the State Bar Court were replaced by full-time administrative law judges appointed by the supreme court.

The supreme court itself, the ultimate authority in disciplinary matters, gave the new Bar Court a strong vote of confidence by giving it authority over matters previously reserved to the supreme court and by making Bar Court decisions in most disciplinary matters final.

Statistical data on the output of the disciplinary system reflect some of

617. See generally *Fellmeth Initial Report*, *supra* note 448, at 60-63. By the time of the Monitor's first progress report, and on his recommendation, the Office of Investigations discontinued the Volunteer Investigative Attorney Program. See *Fellmeth I*, *supra* note 450, at 47.

618. See generally *Fellmeth Final Report*, *supra* note 458.

619. In 1985, the Bar spent \$7.8 million on its discipline function, which constituted 44% of its total annual budget. By 1992, the Bar had spent \$37.2 million for discipline, which represented 74.3% of the budget. State Bar of California, Unpublished Financial Reports (on file with author). As late as 1975, the Bar spent only slightly more than \$1 million on discipline, or 26% of its total annual budget. See *1975 Annual Report*, *supra* note 310, at 423.

these changes and reforms. The total number of complaints received by the system increased almost three and one-half times between 1987-1992. Nevertheless, most cases continue to be screened or diverted from the system from the start. Relatively few complaints are investigated; fewer still result in formal charges, disbarments, or suspensions imposed by the State Bar Court. Yet, an increasingly large number and percentage of complaints are dealt with by informal disciplinary measures or result in stipulated agreements. Thus, it is clear that the lawyer discipline system in California has changed in more than superficial ways between 1987-1992. What remains to be determined, however, is how these changes affect the claims made by both the Bar and opponents of lawyer self-regulation.

III. IS SELF-REGULATION IMPORTANT?

A. *Evaluating the Claims*

Over a relatively short period of time, the California State Bar's lawyer discipline system underwent major reforms. In 1987, the system operated in a manner that supported critics' image of the Bar as a self-protecting "brotherhood" more concerned with professional image than with public protection. Both internal dissatisfaction with Bar regulation and external pressures (including major reform legislation) forced the Bar to initiate changes in the lawyer discipline system. Expenditures on Bar discipline, which is funded solely from members' dues, increased substantially. The Bar's annual budget for the years 1985-1992 increased from \$17.8 million to over \$50 million, and the amount spent on the discipline system constituted almost 75% of the total Bar budget by 1992, up from a total of around 44% in 1985.⁶²⁰ Additional notable reforms were implemented between 1987 and 1992, such as more adequate staffing and organizational procedures, computerization, the creation of a semi-autonomous State Bar Court staffed by full-time judges, and the institutionalization of limited external oversight in the establishment of the Complainants' Grievance Panel.

Because of these changes, the Bar's total disciplinary output increased. The increased rate of sanctions indicates greater overall activity by the

620. State Bar of California, Unpublished Financial Reports (on file with author). This shift is even more dramatic over a longer period of time. *See supra* note 619 (recounting the difference between expenditures in previous years and those after the reform process).

discipline system and increased effectiveness in processing complaints. But the full impact of these changes is difficult to assess. While the number of annual disbarments produced by the system did not rise significantly, the total number of the most serious disciplinary sanctions (disbarments, resignations and suspensions taken together) did increase. Moreover, a far greater number of informal sanctions were produced by the system. By 1992, the system was more efficient and moderately more autonomous from the Bar. In sum, the substantial reforms implemented had produced incremental but significant changes in the disciplinary process. What then, if anything, does this experience reveal about the efficacy of the new and reformed model of Bar regulation? And what do the reforms in California tell us about the competing claims about lawyer self-regulation in general?

How one evaluates the reforms in California depends on the perspective chosen, whether it be the internal perspective of the Bar or the external perspective developed by critics of professional self-regulation. As it turns out, analyzing the California experience highlights limitations in each view. Because both the defense and the critique of lawyer self-regulation rest primarily on normative rather than empirical grounds, they frame the debate over lawyer discipline too narrowly and thereby ignore the broader context in which the discipline system operates. This limits both the theoretical reach of each perspective on self-regulation as well as their utility for policy purposes.

1. Competing Perspectives on Self-Regulation

From the Bar's perspective, self-regulation serves the dual purposes of protecting the public from a small number of miscreant lawyers and of insulating the profession from harmful external regulation. According to this view, the incremental changes resulting from the California reforms represent a resounding victory and a confirmation of the wisdom of self-regulation. The increases in both formal and informal sanctions produced by the disciplinary system are seen as evidence that the Bar can effectively regulate itself and has the will to do so. The assumptions underlying this view are, first, that only lawyers have the expertise required to understand the complexities of law practice and hence to regulate other lawyers, and, second, that self-regulation promotes a socially useful independent profession.

Both assumptions, however, are problematic. The claim that only lawyers can properly regulate other lawyers simply misrepresents the actual complexity involved in the majority of lawyer misconduct cases handled by the Bar. Most lay people as well as lawyers are perfectly capable of understanding whether a lawyer has stolen client funds or abandoned a

client's case, two offenses that constitute the basis for many complaints.⁶²¹ Moreover, the claim of special competence is irrelevant to the issue of whether the organized bar should have self-regulatory power as opposed to, for instance, having lawyers staff an independent state regulatory agency to regulate the profession. The claim that self-regulation promotes a socially useful, independent profession is similarly irrelevant. An alternative model of lawyer regulation might replace Bar control with control by a state agency under state supreme court supervision. Such a system would not compromise the Bar's independence from the executive or legislative branches of government.

The Bar's claims, then, are grounded in the normative assumption that lawyer self-regulation is a good thing. Given this premise, the evidence that reforms have generated even incremental changes for the better quite naturally leads to the conclusion that the current system of self-regulation is satisfactory.

The critical perspective on self-regulation, while resting on quite different assumptions, similarly fails to advance our understanding of the California reforms significantly. The central thrust of this critique of lawyer self-regulation is that the organized bar either will not or cannot effectively regulate its own members.⁶²² This critique entails both empirical and normative assertions. The empirical claim is that self-regulation simply does not work⁶²³ and that this is due in large part to lawyers'

621. See, e.g., State Bar of California, *Lawyer Discipline in California: A Progress Report for 1988 and 1989*, at 23-24.

622. See generally ABEL, *supra* note 23; Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?* 59 TEX. L. REV. 639 (1981); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985); Deborah L. Rhode, *The Rhetoric of Legal Reform*, 45 MD. L. REV. 274 (1986); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689 (1981); Ostberg, *supra* note 8 (Kay Ostberg is a representative of HALT, a consumer-oriented legal reform organization).

623. See, e.g., ABEL, *supra* note 23, at 143: "The suspicion that professional associations promulgate ethical rules more to legitimate themselves in the eyes of the public than to engage in effective regulation is strengthened by the inadequacy of enforcement mechanisms." *Id.*

natural solicitude towards each other⁶²⁴ or, perhaps, the inherent inability of a trade association to protect the public from its own members.⁶²⁵

Abel's work constitutes the most fully developed critique of lawyer self-regulation. This critique derives from his larger theoretical perspective on the legal profession, which holds that lawyers are to be understood primarily in terms of their orientation towards controlling the market for their services and enhancing their collective social status.⁶²⁶ From this perspective, self-regulation is significant only as a means of securing and legitimating professional status. The legal profession's claim that it has the ability to self-regulate, Abel argues, is largely rhetorical. Formal disciplinary mechanisms are not effective.⁶²⁷ Most lawyers do not know the profession's ethical rules and, even if they do, do not internalize them.⁶²⁸ Moreover, the disciplinary apparatus fails because it produces few sanctions; in fact, most complaints are dismissed outright without investigation. Historically, most self-regulatory systems have produced few disbarments and few serious sanctions of any sort.⁶²⁹ Penalties for violating the profession's ethical rules are extremely light, Abel tells us, as many miscreants are processed through the system having received only reprimands.⁶³⁰ Finally, the system of self-regulation "supports the status hierarchy within the legal profession" because it focuses almost exclusively on less prestigious solo and small firm practitioners to the exclusion of elite corporate lawyers.⁶³¹ Even in California, Abel argues, where the Bar has provided significant resources for self-regulation under the supervision of an independent Bar Discipline Monitor, self-regulation is a failure because it leads to few formal sanctions.⁶³² Thus, Abel tells us that: "The California experience offers little

624. See, e.g., ABEL, *supra* note 23, at 147. "There is reason to believe that this (*i.e.*, low rates of disciplinary investigation and sanctions) expresses the solicitude practicing lawyers feel for each other." *Id.*; see also Ostberg, *supra* note 8, at 9 n.1 ("HALT believes that there is no distinction between self-regulation and court regulation. That is because judges are lawyers and share a commonality with lawyers that creates an "us/them" view of lawyers and nonlawyers.").

625. As Professor Rhode argued (in an exemplary expression of this view): "No matter how well-intentioned . . . I think no vocational group is well situated to pass judgment on matters that directly implicate its own economic interests, social status, and self-image." See *Joint Interim Hearing*, *supra* note 11 (statement of Deborah L. Rhode, member of the Task Force on the State Bar Discipline System).

626. See generally ABEL, *supra* note 23.

627. *Id.* at 144.

628. *Id.* at 143.

629. *Id.* at 145-48.

630. *Id.* at 147.

631. *Id.* at 144-45.

632. Abel's remark on California reflects changes in the disciplinary system implemented by late 1987. Based on the structure of his argument, however, there is little

reason to believe that even the most vigorous and independent outside monitor can transform a professional association into an effective disciplinary mechanism.⁶³³

Much of Abel's critique is compelling.⁶³⁴ It highlights many of the defects in self-regulation found in the literature. But how well does this critique help us understand the California experience? The results are mixed. This is ostensibly a critique grounded in empirical analysis, the key point being that self-regulation simply produces few serious sanctions, in California or anywhere else. But this begs the questions of what number or types of sanctions are optimal, or of how many sanctions an effective regulatory system would produce. Moreover, from this perspective, the key indicator of system effectiveness is "serious" sanctions, including disbarments, resignations, and suspensions. Such an approach dismisses outright the significance of "minor" sanctions imposed for less serious conduct or of disciplinary alternatives, both of which categories have increased in California between 1987-1992. As will be discussed below, it is not clear that merely relocating control over the lawyer discipline apparatus to an independent body will, of itself, produce a greater output of sanctions.⁶³⁵ Nor is it clear that this is the best criterion by

reason to expect that his critique would change in the face of the Bar's subsequent reforms. *Id.*

633. *Id.* at 150.

634. To be precise, Abel's list of defects in lawyer self-regulation derives from other critiques in the literature. Abel's contribution lies in locating these studies within the critical theory of professions his work explicates.

635. This limitation is also true with regard to other aspects of the critique of Bar self-regulation. Both Abel and Rhode, for example, correctly highlight the historical bias in lawyer regulation against the lower echelon of the bar, typically solo and small firm practitioners. Carlin and Auerbach are influential proponents of this criticism as well. See generally CARLIN, *supra* note 9; JEROME E. CARLIN, *LAWYERS ON THEIR OWN* (1962); AUERBACH, *supra* note 21; Philip Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244 (1968). For a useful empirical study of this phenomenon, see Bruce L. Arnold and John Hagan, *Careers of Misconduct: The Structure of Prosecuted Professional Deviance Among Lawyers*, 57 AM. SOC. REV. 771 (1992). There can be little doubt that drafters premised early bar regulation on bar elite values and nativist sentiments. See, e.g., Matzko, *supra* note 167. The debate in California over the newly-established Bar's attempts in the 1930s to focus disciplinary attention on issues such as "ambulance chasing" indicates that certain segments of the Bar experienced the disciplinary system as unduly biased. See, e.g., James F. Brennan, *The Bugaboo 'Ambulance Chasing'*, 6 STATE B.J. 37 (1931). Yet, this critique yields no clue regarding what institutional arrangement for lawyer regulation would or could broaden the focus of professional discipline so as to include misbehavior engaged in by elite or corporate lawyers. This is a difficult and important question

which to evaluate the efficacy of self-regulation. Lastly, this critique gives us little basis to evaluate the structural changes produced in the California lawyer disciplinary system, such as the creation of a semi-autonomous State Bar Court and Complainants' Grievance Panel. Thus, the critique of self-regulation based on quantitative output alone provides only a partial basis for evaluating the California experience with self-regulation.

Perhaps the primary reason that the empirical critique of lawyer self-regulation is ultimately incomplete is that, like the Bar's claims regarding self-regulation, its evaluative premise is mainly normative rather than quantitative. The key idea is that lawyer self-regulation is simply illegitimate. There is no valid reason for any occupational group to be granted special status to police its own members, particularly when to do so appears to be a fundamental conflict of interest. In part, this normative critique assumes that members of the same profession cannot place the public interest over that of their fellow members. Yet in this regard the critique is unpersuasive. It assumes, for instance, that all members of the profession share a sense of interconnectedness and community. But much evidence suggests that the notion of a professional community is illusory. In fact, the legal profession is highly stratified and segmented into two "hemispheres" of practice that have little in common other than the label "lawyer."⁶³⁶ Bar prosecutors may have more in common with other prosecutors than with the solo and small firm practitioners they typically prosecute.

The strength of the normative critique is its capacity to de-naturalize professional self-regulation. By questioning why lawyers and not other occupations should enjoy self-regulatory powers, this critique forces an examination of the historically and culturally contingent factors that supported the rise of professional authority and the claim for self-regulation. In light of this perspective, the Bar's claims regarding the legitimacy of self-regulation are attenuated. In the end, however, the critical perspective on self-regulation remains problematic. While it demystifies professional authority, it fails to provide an adequate conceptual or theoretical foundation for understanding alternative regulatory models likely to be more efficacious than Bar discipline.⁶³⁷ Like the Bar's normative

because there are both structural and cultural components underlying the labelling of certain professional behavior as deviant. See generally Ross E. Cheit, *Corporate Ambulance Chasers: The Charmed Life of Business Litigation*, 11 *STUD. L., POL., SOC.* 119 (1991).

636. See HEINZ & LAUMANN, *supra* note 50, at 319-85.

637. This is, of course, not the goal of this normative critique. Rather, its central aim is to demystify professional authority. But, from a pragmatic perspective, this is not enough. This explains why the Presley Task Force on Lawyer Discipline, which presented a penetrating normative critique of lawyer self-regulation, was not able to con-

assertions, the critical claims provide little guidance for assessing the California disciplinary reforms.

2. Models of Lawyer Regulation

Part of the disagreement over the efficacy of California's lawyer discipline reforms stems from opposing normative premises that influence how those incremental reforms are to be interpreted. Still other difficulties derive, however, from tensions inherent in the regulatory process itself and from the lack of conceptual clarity regarding the proper parameters of lawyer discipline.

The lawyer discipline system in California, as in most jurisdictions, is based largely on a prosecutorial model. This model was constructed by bar associations in the early years of their modern rise to prominence and authority as they promulgated ethical codes to articulate professional norms and established the disciplinary machinery to enforce them.⁶³⁸ The underlying premise of the regulatory model was that professional education, standards for admission, and socialization would increasingly ensure lawyer competence and integrity, except for the few inevitable "bad apples" of the bar. This prosecutorial model focuses disciplinary attention on deviance from the profession's ethical norms. It relies on sanctioning such deviant behavior as a means of cleansing the bar of miscreants and thus protecting both the public and its image of the profession. Moreover, the prosecution model necessarily focuses on instances of egregious misconduct so as to ration scarce prosecutorial resources. As a result, the initial stages of this model emphasize efforts to screen complaints from the system in order to isolate those few com-

vince the state legislature to divest the Bar of its self-regulatory powers. The legislature understood the critique, but wanted to know what alternative model of lawyer regulation would produce better results. See generally *Joint Interim Hearing*, *supra* note 11. Following Stanford Law Professor Deborah Rhode's critique of lawyer self-regulation, one legislator asked her to identify a single state agency that might be emulated as a model for the independent regulatory agency she (and the rest of the Presley Task Force) advocated. Professor Rhode was not able to do so. *Id.* at 37-45. A second legislator followed up on this line of questioning by asking why anyone should believe that an independent lawyer regulatory agency would do a better rather than a worse job than the Bar. *Id.* at 44 (Comments of Assembly Member Calderon). As one legislator added: "I would only suggest that . . . I think our perhaps unique task is to try to predict the practical result of some of these theories . . . That's why I ask for an example in the real world of something that approaches the theoretical ideal you urge" *Id.* at 44-45.

638. See, e.g., POWELL, *supra* note 20.

plaints most likely to lead to the imposition of sanctions. Such a model is also largely reactive rather than proactive in its reach. It relies almost exclusively on a complaining witness to recognize and properly identify lawyer misconduct and to initiate a formal case.⁶³⁹

Although the prosecutorial model is dominant in most lawyer regulation schemes, there is a second model, focusing on consumer dispute resolution, with which it is in tension.⁶⁴⁰ This tension derives from the fact that most client complaints received by the discipline system deal not with ethical deviance, but with issues of basic competence and service.⁶⁴¹ Most regulatory systems must relieve this tension by making some adjustments to orient themselves towards a consumer dispute resolution model.⁶⁴² This model focuses on responding to client concerns about attorney competence and service rather than enforcing ethical norms. Restitution and conciliation rather than punishment are the primary goals of this model. The dispute resolution model is also oriented towards addressing all complaints in some manner and not simply dealing with those deemed to be most serious.⁶⁴³

At a fundamental level, it is difficult to reconcile the competing goals of these two models of lawyer regulation. Certainly in the California reform experience the tension between these models was evident. For example, from the beginning of his tenure, the Bar Discipline Monitor advocated consumer oriented reforms such as increasing client access to the disciplinary system, expanding disciplinary concerns to include issues

639. See generally Steele & Nimmer, *supra* note 7, at 919; Wilkins, *supra* note 9, at 799.

640. See Steele & Nimmer, *supra* note 7; F. Raymond Marks & Darlene Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 ILL. L. F. 193.

641. See Steele & Nimmer, *supra* note 7, at 923:

[C]lient complaints tend neither to present allegations conforming to the profession's definitions of unethical conduct nor to request agency action consistent with its enforcement emphasis. Instead, the complaints tend to deal with contractual disputes concerning the quality of legal services rendered or an attorney's failure to meet his client's expectations as to cost or promptness of service Thus, an explicit tension is created within the agency between its formal policy objective (the discipline of unethical conduct) and its actual caseload (complaints primarily concerning contract disputes).

Id.

642. As Steele and Nimmer note, one way to relieve this tension is simply to ignore the bulk of these client complaints by labelling them as insignificant, outside of jurisdictional grounds, or frivolous or crank complaints. Most systems, however, take at least some measures to address these "minor" complaints, such as informal mediation.

643. See, e.g., OSTBERG, *supra* note 8, at 9 ("The ideal consumer oriented system would not be a 'discipline' system at all; it would be a consumer protection system with the responsibility to mediate disputes.")

of competence, and ensuring that the system did not screen out complaints simply because they dealt with "minor" issues.⁶⁴⁴ But the Monitor also recommended changes designed to enhance the prosecutorial capacity of the system, such as coordinating the investigative and prosecution functions, raising salaries to attract career prosecutors, and increasing the discretion that prosecutors could employ.⁶⁴⁵ But not all of these changes fit well together. Increasing access, for instance, produced greater pressure to process cases or divert them quickly.⁶⁴⁶ Establishing the Complainants' Grievance Panel institutionalized a consumer perspective in the system. But the efforts of the Panel to ensure that complaints were not summarily dismissed hindered the capacity of the system to focus attention on instances of serious misconduct.⁶⁴⁷ Thus, the very competing goals involved in the lawyer discipline system inherently limit its potential effectiveness.

A second limitation on the efficacy of lawyer discipline derives from the limited capacity of any particular system to address the varied contexts and circumstances in which lawyers work. The parameters of disciplinary control under Bar regulation are, in fact, quite narrow. Increasingly, there are other models of control that also regulate the profession. These include liability controls, such as malpractice law, and institutional controls, such as sanctions imposed by administrative agencies or the federal courts (*e.g.*, Rule 11) for lawyer misconduct that occurs in these settings. Additionally, there are also complex informal controls affecting lawyers in such settings as corporate law firms, where both colleagues and clients are able to evaluate and sanction lawyers' behavior.⁶⁴⁸

Wilkins has provided the best analytical framework in which to understand the strengths and limitations of each of these forms of professional control.⁶⁴⁹ His central argument is straightforward and quite compelling: no single mechanism for regulating lawyers can effectively reach

644. *Fellmeth Initial Report*, *supra* note 448.

645. *Id.*

646. For a similar example of such pressures in another context, see generally Susan S. Silbey, *Case Processing: Consumer Protection in an Attorney General's Office*, 15 *Law & Soc'y Rev.* 849 (1980).

647. Indeed, in several of his reports, the Discipline Monitor warned that the Panel's aggressive consumerist stance threatened to undermine necessary prosecutorial discretion to focus resources on cases deemed most likely to lead to imposed sanctions. *See, e.g., Fellmeth VII*, *supra* note 476.

648. *See Wilkins*, *supra* note 9, at 826.

649. *Id.* at 804-19.

all types of lawyer misconduct or all contexts of professional practice.⁶⁵⁰

In the first place, different actors in the process have different capabilities and even different incentives for seeking redress when attorney misconduct occurs. Some clients, particularly individual "one shot" users of lawyer services, have little capacity or experiential basis to evaluate lawyer conduct.⁶⁵¹ Corporate clients, on the other hand, are "repeat players" and have both the sophistication and resources to evaluate professional services and conduct. Additionally, the incentives both types of clients have to report various forms of misconduct itself vary. To explicate this point, Wilkins makes the useful distinction between two main categories of lawyer misconduct, what he terms "agency" and "externality" problems.⁶⁵² Agency problems involve instances where the lawyer's action primarily harms the client. Examples of this type of misconduct include overbilling, allowing the statute of limitations to lapse on a client's claim, or representing interests adverse to a client. Externality problems are those cases where both the lawyer and client improperly harm third parties or injure the legal system itself. Examples of this latter type of misconduct include helping a client to file a false or misleading proxy statement, allowing a client to commit perjury, or filing frivolous pleadings.⁶⁵³ The typical lawyer discipline system, Wilkins argues, "despite its formal breadth" must focus almost exclusively on agency-type problems.⁶⁵⁴ This is so because clients have little incentive to report externality problems because these involve instances of "strategic behavior" that are committed on the client's behalf.⁶⁵⁵

Moreover, even in focusing narrowly on agency problems, there will likely be inherent limitations to any disciplinary enforcement scheme. This point Wilkins labels the "paradox of agency problems."⁶⁵⁶ In order for agency problems to come to the attention of disciplinary enforcement officials, the client must understand both that he has been injured and that the injury resulted from lawyer misconduct.⁶⁵⁷

650. *Id.*

651. See Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW SOC. REV. 95 (1974) (discussing the notion of "one shot" vs. "repeat player" litigants).

652. Wilkins, *supra* note 9, at 819-20.

653. *Id.*

654. *Id.* at 823-34.

655. *Id.* at 823.

656. *Id.* at 824.

657. I would add further that the client must also be sufficiently sophisticated and articulate to know where and how to bring a formal complaint against a lawyer and must also make the determination that pressing a formal complaint is a better strategy than "lumping it." See generally William L. Felstiner et al., *The Emergence and Trans-*

Paradoxically, Wilkins tells us "those clients in the best position to make this determination are the least likely to bring their complaints to the attention of disciplinary authorities."⁶⁵⁸ Unlike most individual clients, sophisticated "repeat players," typically corporate clients, have the skill and resources to screen lawyers or their firms for competence and integrity. Additionally, they have the experience, and often in-house legal staff, to supervise and evaluate lawyer behavior and to ensure that their wishes are carried out. Finally, they also have the capability to sanction agency-type misbehavior such as overbilling immediately by such techniques as withdrawing business or threatening to do so.⁶⁵⁹ There is thus little incentive for corporate clients to bring agency problems to disciplinary authorities.⁶⁶⁰ Conversely, although "one shot" individual clients have incentives to bring such complaints, they are often without the sophistication or resources to do so.⁶⁶¹ Because disciplinary enforcement systems (like regulation by bar associations) rely so extensively on client complaints, they necessarily fail to address much misconduct within their nominal purview. And, because the disciplinary system acts mostly reactively to instances of misconduct, the system must bear the quite significant costs to investigate, prosecute, and adjudicate complaints. In sum, a discipline enforcement system for regulating lawyer behavior is structurally unsuited to deal with the majority of client complaints and the system is likely to incur high transaction costs when it attempts to do so.⁶⁶²

For these reasons, the California State Bar's claims for superior efficacy in regulating lawyers must be significantly qualified. The reforms in the California disciplinary system have produced significant changes in the output of the system. But as of 1992, the system still screened-out the vast majority of complaints that came to its attention. Moreover, the reforms have come at great expense and will likely require additional

formation of Disputes: Naming, Blaming, Claiming, 15 LAW & SOC'Y REV. 631 (1980-81); William L. Felstiner, *Avoidance as Dispute Processing: An Elaboration*, 9 LAW & SOC'Y REV. 695 (1975); NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM (Laura Nader ed. 1980).

658. Wilkins, *supra* note 9, at 824.

659. *Id.* at 826-27.

660. *Id.* at 827.

661. *Id.* at 828-29 (explaining that individual clients don't know what services they need, are inadequately informed to predict the quality of lawyer services, and are unable to effectively evaluate the services after performance).

662. *Id.* at 828-29.

expenditures to increase the system's ability to handle more or different types of cases, including increasing the consumer perspective of the system. On the other hand, critics' claims that an independent agency would produce better results than Bar self-regulation are similarly suspect. They ignore the difficulties and likely costs involved in achieving these results and they fail to come to terms with the structural limitations of any system of disciplinary control. Ultimately, the critique of Bar regulation is most effective as a normative argument but provides little evaluative capacity to aid in understanding the significance of the California reforms in lawyer discipline.

B. The Symbolic Politics of Self-Regulation

In professions theory, self-regulation has traditionally been viewed as a core attribute of professionalism, although scholars differ as to its precise significance. Functionalist theory, for example, has tended to stress self-regulation as an obligation of public service arising from professions' privileged standing in society⁶⁶³ or as a special form of social control necessary to protect clients from the dangers of uncontrolled expertise.⁶⁶⁴ In this view, an increasingly complex and differentiated society needs specialized occupational groups who control technical knowledge and expertise. It is difficult for non-experts to assess, or even to understand the practical application of this expertise due to an "asymmetry of knowledge" and power inherent in the professional-client relationship. Such a relationship thus requires trust, including the primary trust that the profession will constrain its self-interest in favor of the client's and, ultimately, society's best interest. Self-regulation is both the solution for that problem and symbol of that trust.⁶⁶⁵

Largely in response to functionalism's overly benign view of professions, later critical theorists highlighted the role that self-regulation plays in furthering a professions' dual goals of monopolizing the market for their services and enhancing their collective status.⁶⁶⁶ The function of a system of professional ethics and self-regulation from this perspective is ideological in a largely instrumental sense: it serves to legitimize the professional monopoly by highlighting professional claims to special competence, superior ethicality, and public service at the same time that

663. See, e.g., T.H. Marshall, *The Recent History of Professionalism in Relation to Social Structure and Social Policy*, in CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT (1965).

664. See generally Parsons, *supra* note 37; Parsons, *supra* note 5; Abbott, *supra* note 88.

665. *Id.*

666. See also ABEL, *supra* note 23; Abel, *supra* note 622, at 639; Rhode, *supra* note 622, at 689. See generally BERLANT, *supra* note 54; LARSON, *supra* note 55.

it denies the influence of the market on professional behavior.⁶⁶⁷

There is much insight produced by the critical tradition on professions. Certainly by now there is little disagreement over the view that one function of professional ethics and self-regulation is to stave off state or other external regulation and thus to facilitate a profession's development of distinct status and a secure market. Halliday, for instance, whose neo-functional perspective on the legal profession is in many respects at odds with critical professions theory, agrees with critical scholars that, at least in the early stages of professionalization, self-regulation is an important resource for achieving market control.⁶⁶⁸

Halliday distinguishes between "formative" and "established" professions and stresses that self-regulatory activities play an important role only in the formative stage of professionalization.⁶⁶⁹ Mature professions, Halliday argues, are able to devote their resources and expert knowledge to the service of the state, which he terms "civic professionalism."⁶⁷⁰

This argument for the decreasing significance of self-regulation is important, but makes the experience in California problematic. As Powell

667. As Larson writes:

Traditional claims of disinterestedness and public service, integrated into the ideological model of profession, contradict the market orientation of the professional project and the monopolization of competence to which it necessarily tends. Ideologically, these claims deny the invidious implications of monopoly and are used to stave off possible attacks.

LARSON, *supra* note 55, at 52.

668. Halliday notes:

I contend that the centrality of monopoly to the professional enterprise has a developmental dimension. Control of the market for American lawyers was a prominent task only in the *formative stage* of the profession's development. In the first decades following the renewal of collegial organizations for lawyers in the 1870s, substantial portions of time, effort, funds, and other organizational resources were committed to programs that either were intended to accomplish or resulted in domination of the market for legal services In other words, the profession was committed to the task of constructing an elaborate system of professional and market control. This was not the only component of professional activity, but it was prominent. It was also transitory A preoccupation with market dominance marked only one . . . stage in the emergence of the profession Once that stage was reached, and its "developmental tasks" accomplished, the importance of monopoly in collective professional action and to professional identity began to fade.

HALLIDAY, *supra* note 20, at 350-51.

669. *Id.* at 350-53.

670. *Id.*

has shown, other bar associations, when faced with “crises” of their own, have relinquished self-regulatory powers.⁶⁷¹ Powell thus concludes that self-regulation is not a significant source of power or authority for mature professions.⁶⁷² Because the examples Powell elaborates prove to be so different from the California experience, they merit special attention.

1. Voluntary Relinquishment of Self-Regulatory Power

Powell’s study of self-regulation in Illinois provides an example of a private bar association that voluntarily relinquished self-regulatory power.⁶⁷³ Unlike California, Illinois never became a unified Bar state. Two major voluntary bar associations, the Chicago Bar Association (CBA) and the Illinois State Bar Association (ISBA), carried out professional regulation in Illinois.⁶⁷⁴ In 1971, both organizations petitioned the state supreme court for permission to rid themselves of their responsibility for lawyer regulation. Scholars have typically explained this development largely as the result of external challenges to the profession.⁶⁷⁵ Yet Powell argues that factors internal to these associations and to the profession as a whole provide a more satisfactory explanation for this extraordinary relinquishment of what historically had been a hard-won professional prerogative.⁶⁷⁶

There were, of course, tremendous external pressures for reform of lawyer discipline in the 1970s coming from both within and outside the organized bar. In the CBA, for example, committees responsible for lawyer discipline knew of inadequacies in their system and lobbied for better funding to reform it.⁶⁷⁷ Externally, the early 1970s were a period of nationwide unrest and dissatisfaction with professional regulation. The ABA’s “Clark Report,” published in 1970, warned of an urgent need for reform of lawyer discipline.⁶⁷⁸ Just prior to the publication of this report, both the CBA and ISBA had begun to suffer from heavy criticism for having ineffective lawyer discipline systems.⁶⁷⁹ In fact, an alternative

671. Powell, *supra* note 60, at 31. Powell argues that this development is a “national trend,” based on the fact that by 1983 control over lawyer discipline was located in state supreme court or court-appointed committees in 33 out of 54 state jurisdictions (54 because New York has four separate jurisdictions). *Id.* at 49.

672. *Id.* at 54; see also POWELL, *supra* note 20, at 144-50.

673. See Powell, *supra* note 60, at 39-49.

674. *Id.* at 35.

675. *Id.* External actors including a hostile legislature imposed reform on reluctant professions according to these scholars. *Id.*

676. *Id.*

677. *Id.* at 38.

678. See *supra* note 12 and accompanying text.

679. See Powell, *supra* note 60, at 38.

progressive bar association in Illinois, the Chicago Council of Lawyers, published its own scathing report on lawyer regulation in Illinois and argued that control over professional discipline should be removed from the private bar associations.⁶⁸⁰ Within a month of this report, the CBA requested that it be allowed to relinquish control over lawyer regulation and hand this responsibility to the state.⁶⁸¹

Unlike the California example, in Illinois there was no significant threat of outside intervention into lawyer discipline by the legislature. Nonetheless, the CBA still suffered from a crisis of legitimacy.⁶⁸² As a volunteer association the CBA faced pressures to alter its membership to be more inclusive of various under-represented segments of the bar, such as women, minorities, and younger lawyers in general. The CBA became viewed as an exclusive "lawyers club." Consequently, criticism over its ineffective discipline system reinforced this view and was detrimental to both the association's and the profession's image.⁶⁸³

Additionally, reform of lawyer regulation would likely be very costly. Yet the CBA chose not to raise its dues (as the California Bar did) to finance disciplinary reforms. Powell argues, however, that funding was not a decisive factor in the CBA's choice to divest itself of lawyer regulation. The CBA could have chosen to raise dues, to petition the legislature to have nonmember lawyers contribute funds for lawyer discipline, or even to reallocate existing funding to finance regulatory reforms (since expenditures on discipline constituted only 15% of the CBA's total expenditures). Instead, the CBA chose to voluntarily relinquish control over lawyer discipline. This, Powell explains, was a relatively painless way for the CBA to deal with its legitimacy crisis, which was exacerbated by the negative publicity generated by the ineffective discipline system. Moreover, Powell argues, self-regulation was simply not as central to the identity or authority of the professional association (or of the profession) as it had been at an earlier stage of development.⁶⁸⁴

2. Involuntary Loss of Self-Regulatory Power

Powell's second explication of the decline of self-regulation thesis involves the Association of the Bar of the City of New York (ABCNY)

680. *Id.* at 39-40.

681. *Id.* at 40.

682. *Id.* at 41.

683. *Id.*

684. *Id.*

which was forced to surrender control over lawyer regulation in New York in 1980. Like the CBA, the ABCNY is a voluntary bar association. Additionally, the ABCNY is one of the oldest bar associations in the country and was the first to acquire extensive self-regulatory power in the 1870s. It was also established as an exclusive organization that was more representative of elite corporate lawyers than of the bar as a whole. Although this very elitism was a source of authority in the nineteenth century ("the best men of the bar"), Powell tells us, it helped to undermine the bar's authority in the late twentieth century.⁶⁸⁵

Increasingly, non-elite segments of the bar in New York challenged the ABCNY's exclusive control over lawyer discipline. In this challenge the critics had a powerful ally, the Appellate Division of the New York Supreme Court.⁶⁸⁶ Elite lawyers, who predominated in the ABCNY, had little in common with the Appellate Division judges involved in disciplinary reforms. The court was essentially a local court, and one before which few corporate lawyers practiced. By the late 1970s, the Appellate Division began to take an activist role in overseeing lawyer discipline in the state, partly because of nationwide scandals over the inadequacies of lawyer discipline, but also because it was motivated by concerns over the elite association's power over an increasingly heterogeneous bar. The Appellate Division, which bore much of the costs of the lawyer discipline system, stopped simply passively funding the system and began to take a more active role, such as appointing individuals to serve on the disciplinary committee. Some of these appointments were not ABCNY members and some of them were actively opposed by the ABCNY. The Appellate Division also began to assert that disciplinary committee staff were *its* employees rather than the bar association's. As the Appellate Division exerted its control, Powell tells us, the ABCNY was forced to play a less extensive role in lawyer regulation and ultimately surrendered its disciplinary authority entirely to the court.⁶⁸⁷

Powell argues that for both the CBA and ABCNY, self-regulation became a liability to the bar. Ultimately, self-regulation was no longer crucial as a source of professional power or authority for either association. What, then, explains the contrary California experience? One explanation may be that the California example is simply an anachronism or an outlier on an otherwise nationwide trend. However, such an account does not explain why the Bar fought so vigorously to retain its self-regulatory powers, spending over 80% of its total budget on the lawyer discipline system by 1992. A second possible explanation may be that in California it was the threat of legislative involvement that was the key. Such en-

685. *Id.* at 231-35.

686. The supreme court is the trial-level court in New York.

687. *See* Powell, *supra* note 60, at 231-35.

croachment on the Bar's traditional prerogative challenged the Bar's identity as an autonomous profession and lawyers' identity as officers of the court. Yet another partial explanation may be that the crisis in California was particularly profound since, from the start, the attack on the Bar focused not simply on the Bar's efficacy in self-regulating but its very legitimacy in doing so. This is different from the Chicago example, where the emphasis was on the CBA's inability to self-regulate effectively. But it is not too dissimilar to the experience in New York, where the ABCNY was attacked as an illegitimate and unrepresentative organization to regulate the bar. However, a more complete and satisfactory explanation for the California counter-example lies at the symbolic level.

C. The Symbolic Significance of Self-Regulation

The declining significance of self-regulation thesis shares with monopoly theory an over-emphasis on a single aspect of self-regulation: its relevance for monopoly control. But, as the California example illustrates, the better view is to recognize the enduring symbolic function of self-regulation.⁶⁸⁸ Professional status is never secure even though (at least for elite segments of the bar) a mature profession may have relatively strong control over the market for professional services and the capacity to create new legal needs and services to fill those needs.⁶⁸⁹ Rather, the cultural authority of a profession is precarious in a liberal democratic society and must continuously be rearticulated and renegotiated.⁶⁹⁰

In his later work, Powell identifies three distinct symbolic functions served by a system of professional self-regulation.⁶⁹¹ The first is to legitimize professional autonomy and thereby discourage external control

688. Powell himself discusses the symbolic importance of self-regulation in his study of the ABCNY. See POWELL, *supra* note 20, at 18-28, 245-49. Yet this does not lead him to refine his thesis that self-regulation is not important to a mature profession.

689. See generally ABBOTT, *supra* note 26.

690. *Id.* See generally STARR, *supra* note 19. In recent and quite interesting work, Solomon and Schneyer discuss how the ideology of professionalism has been mobilized by the Bar during periods of perceived crisis in order to bolster its claimed professional status. See Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism 1925-1960*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* (Robert L. Nelson et al. eds. 1992); Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* (Robert L. Nelson et al. eds. 1992).

691. See POWELL, *supra* note 20, at 172-75.

of the profession.⁶⁹²

A second symbolic function of self-regulation is to elevate inter-professional status. It is a means by which an occupational group can distinguish itself from other occupations by reference to the group's superior ethicality and, hence, professional status.⁶⁹³ Finally, self-regulation may also serve an intra-professional symbolic function. A system of self-regulation allows dominant segments of the legal profession symbolically to degrade work engaged in by lower status lawyers by labeling it as unethical and immoral, thereby elevating the prestige of the dominant segment of the profession.⁶⁹⁴

In the California example, the theme of intraprofessional status was not prominent because the crisis of authority addressed by the Bar stemmed from external attacks on the profession's prerogative of self-regulation rather than from internal challenges to professional stratification and hierarchy (which was a more prominent theme in the New York case). Thus, the response by the Bar to this challenge was to construct a traditional ideology of professionalism, which emphasized disinterestedness, public service, and special competence in order to justify its claimed status.

Self-regulation is not the only mechanism by which the bar can reassert its mandate, but it is an important one. Nelson and Trubek, for example, identify four settings or "arenas" where ideologies of professionalism are socially constructed.⁶⁹⁵ These include arenas of legal education, of collective action (e.g., in bar associations), of work, and of disciplinary enforcement.⁶⁹⁶ These scholars make the very useful observation that, with the legal profession becoming increasingly diverse and stratified, there is a concomitant growing need for the profession to appear unified.⁶⁹⁷ Claims for ethicality, which underlie the claim for self-

692. *Id.* at 172-73.

[T]he discipline system, despite its limited reach, serves to demonstrate to outsiders that the profession engages in self-regulation, even from time to time expelling one of its own, thereby discouraging interest in implementing external controls . . . the bar's self-regulatory edifice provides "symbolic reassurance" to its supposed beneficiaries even though its actual performance falls far short of providing the protections to the public that it claims.

Id.

693. *Id.* at 173.

694. *Id.* at 173-74; see also Abbott, *supra* note 164, at 819.

695. See Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* (Robert L. Nelson et al. eds. 1992).

696. *Id.* at 185.

697. *Id.* at 194.

regulation, are group claims. They allow the profession as a whole to collectively reassert its authority.⁶⁹⁸

In California, the importance of the symbolic function of self-regulation was heightened by the legal context in which the debate over the Bar's control over the discipline system took place; for not only was the Bar's traditional self-regulatory authority challenged in the 1980s, its legal capacity to do much of anything else in the public arena was seriously limited by changing legal doctrine.

1. *Keller v. State Bar of California*

Halliday has argued that established professions shift their attention and resources away from primarily monopolistic pursuits towards a broader range of functions less centered on professional self-preservation.⁶⁹⁹ For Halliday, this mature stage of "civic professionalism" has, at least for lawyers, allowed the profession to bring its knowledge and expertise to the service of the state.⁷⁰⁰ Though this argument too readily ignores the continuing need of professions for symbolic renewal and redefinition of mandate, it is important. It is also a welcome change from the one-dimensional view of professions elaborated by monopoly theorists. Moreover, it is of particular relevance to the California example. Beginning in 1982, the California State Bar faced a formidable legal challenge that threatened to substantially limit the Bar's capacity to engage in "civic professional" activities.⁷⁰¹

The legal challenge to the Bar stemmed from conservative members' dissatisfaction with the Bar's public stance on political issues. In his inaugural speech in 1982, for instance, incoming California State Bar President Anthony Murray advocated that all supreme court justices up for retention be retained, absent any showing of incompetence or im-

698. There is a sense in which professional disciplinary enforcement has a similar function for the profession as criminal justice does for a society: its symbolism is directed outward towards the public audience and its moral claims help to define and sustain group identity and authority. For a recent discussion of the symbolic function of a system of criminal justice, see generally David Garland, *Punishment and Culture: The Symbolic Dimension of Criminal Justice*, 11 *STUD. L. POL. SOC.* 191 (1991).

699. See generally HALLIDAY, *supra* note 20.

700. *Id.*

701. See *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). David Luban has an insightful analysis of the relevance of the *Keller* case for the legal profession as a whole. See David Luban, *The Disengagement of the Legal Profession: Keller v. State Bar of California*, 1990 *SUP. CT. REV.* 163 (1990).

propriety. The election itself was controversial because the four judges facing the retention vote were judicially opposed to capital punishment, which was a central issue to those opposing their retention. Murray's speech, which was printed and widely disseminated by the Bar, was viewed by conservative Bar members as an improper stance for the mandatory Bar to take on such a controversial issue. Eddie Keller, a state deputy attorney general, along with twenty other Bar members brought suit against the Bar seeking to prohibit it from using membership resources to advance "political or ideological" causes.⁷⁰²

The plaintiffs claimed that the Bar's use of mandatory membership dues to endorse such causes violated their First Amendment rights to freedom of speech since they as individuals disagreed with the Bar's political stances. Specifically, the plaintiffs objected to the expenditure of dues to support such functions as lobbying the state legislature, filing *amicus curiae* briefs in pending cases, holding annual meetings at which public policy issues were discussed and corresponding resolutions passed, and disseminating public and voter education materials on a wide variety of subjects.⁷⁰³

The California Supreme Court held that the Bar may not use its membership dues to support election campaigns.⁷⁰⁴ However, the court also held that, due to its status as a "governmental agency," the Bar was not precluded from expending dues for the other protested activities, since these were properly related to the Bar's mandated function to improve the administration of justice.⁷⁰⁵

The United States Supreme Court disagreed. In a unanimous decision, it prohibited the California State Bar from expending membership dues for activities that were not "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of legal services available'" to the public.⁷⁰⁶ The Court reasoned that, rather than being a governmental agency, the Bar was best analogized to a labor union. Relying on a line of cases restricting a union's ability to spend dissident members' dues on activities unrelated to its core function (*e.g.*, collective bargaining), the Court explained that the Bar may only expend funds to improve legal services.⁷⁰⁷

702. *See Keller*, 496 U.S. at 46.

703. *Id.*

704. *See Keller v. State Bar of California*, 767 P.2d 1020 (Cal. 1989), *rev'd*, 496 U.S. 1 (1990).

705. *Id.*

706. *Keller*, 496 U.S. at 14 (quoting *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961)).

707. The Court stated:

The State Bar may therefore constitutionally fund activities germane to those goals (*i.e.*, of regulating the profession or improving legal services) out of the

At one level, the *Keller* decision was a victory for the Bar. The case firmly upheld the Bar's status as a mandatory membership organization—which some felt was the real threat posed by the case⁷⁰⁸—and the Bar's public pronouncements highlighted that aspect of the case.⁷⁰⁹ But *Keller* also clearly circumscribed the Bar's capacity to exercise its authority in the public arena.⁷¹⁰ Self-regulation was henceforth one of the few permissible and highly visible public functions of the Bar. Because of this, the debate over lawyer self-regulation was played out in a context of particular urgency. The symbolic function of the profession's system of ethics and regulation was thereby made even more important since it remained one of the few ways for the Bar to assert its mandate.

2. Professions and Professional Ideology

Self-regulation has a core symbolic function of articulating and thus helping to sustain professional ideology and professional authority. There is, however, a second dimension to professional ideology that has received less scholarly attention, although this is changing.⁷¹¹ As Nelson and Trubek note, functionalist theory largely ignored professional ideology. Rather, it assumed "a close correspondence between formal declarations of professional values, as in codes of professional ethics, and the values actually held by individual practitioners."⁷¹²

Critical professions theory, on the other hand, while focusing on professional ideology, has tended to view it in a rather instrumental and one-dimensional fashion. For critical theorists, professional ideology is solely a tool for maintaining control over the market for professional services.⁷¹³ Yet professional ideology is more complex and nuanced than

mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside those areas of activities.

Id. at 14.

708. See generally Luban, *supra* note 701.

709. See *The Keller Decision: U.S. Supreme Court Upholds Concept of Unified Bar*, 10 CAL. LAW., Apr. 1990, at 67 (discussing the effects of the Court's upholding of *Keller*); Alan I. Rothenberg, *Changes on Tap in California*, 15 B. LEADER, Sept.-Oct. 1990, at 28 (discussing the effects of the Supreme Court's decision).

710. See Luban, *supra* note 701.

711. Nelson and Trubek provide a succinct account of the current, and preliminary, state of thinking about professional ideology. See Nelson, *supra* note 695, 15-27 (Robert L. Nelson et al. eds., 1992).

712. *Id.* at 15.

713. *Id.* at 16-18. Only recently, and in a very preliminary way, one critical scholar

the critical account suggests.⁷¹⁴

This emerging perspective is important. It recognizes the role ideology plays in maintaining jurisdictional claims, but is also sensitive to the capacity of professional ideology to serve transformative ends. A number of scholars have begun to explicate this point. Schneyer, for example, examines how the ABA's drafting of a new ethics code (only seven years after it revised its original 1908 rules for the first time in 1969) was a response to shore up the legal profession's beleaguered image and to display the ABA's primacy as "lawgiver for the entire profession."⁷¹⁵ But, as he shows, the newly-drafted code was also viewed by various segments in the bar to actually have some "bite." Moreover, proposed ethical reforms generated immense and intense discussion by lawyers and public commentators. This, Schneyer suggests, indicates that reforming the code was more than a rhetorical exercise. Rather, it articulated an ethical vision that was viewed as meaningful and, consequently, was potentially transformative.⁷¹⁶

Gordon's work has also developed this theme persuasively. Gordon's historical study of elite lawyers argues that they had "ideal" as well as material interests and that they struggled to create the capacity to integrate both into their work and their lives.⁷¹⁷ The ideology of professionalism, Gordon and Simon tell us, can create a "set of legitimate and socially desirable aspirations" and can be a "source of inspiration and ideas for the reform of lawyering."⁷¹⁸

has suggested that professional ideology might be viewed in more than this instrumental fashion. See Richard L. Abel, *Taking Professionalism Seriously, 1989 Annual Survey of American Law*.

714. As Nelson, Trubek, and Solomon state:

Over time, the American bar has constructed an account of the nature of lawyer professionalism that constitutes a key element in the dynamic system we call the legal profession. The norms, traditions, and practices that make up this account serve a variety of purposes. They generate the claims that allow lawyers to maintain jurisdiction over work. They become part of each lawyer's professional identity, to some extent providing coherence and meaning in everyday life . . . (t)hey provide a set of dispositions that lawyers use to interpret their situations and orient their choices according to an internalized world view that delimits but does not necessarily determine action.

LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 22-23 (Robert L. Nelson et al. eds., 1992).

715. See Schneyer, *supra* note 690, at 106.

716. *Id.* at 139-43.

717. See, e.g., Robert Gordon, *The Ideal and the Actual in the Law*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA (Gerald L. Gelson ed., 1983).

718. See Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 22-23 (Robert L. Nelson et al. eds., 1992).

Haber, also makes a related point in his study of American Professions.⁷¹⁹ He shows well how professional culture and ideology were resilient enough to be transplanted from England and thrive in a quite different social and cultural milieu in pre and post-Revolutionary America. The core of this professional ideology, Haber argues, is a belief in honor and gentlemanly authority. In Haber's view, a system of ethics is adopted by professions to persuade both others *and* themselves that professions such as law are more than mere businesses. The symbolic message of a system of ethics is thus not simply that the professional role derives from contract (*i.e.*, to define relations with others), but also from duty.

What each of these studies demonstrates is that monopoly theory has simply failed to comprehend the complexities of professionalism as a social and cultural system. Its chief weakness lies in its one-dimensional understanding of professional motivation. A system of ethics and self-regulation has symbolic importance both to maintain professional group identity and to create a discourse with which those expectations can be evaluated and reshaped.

In California, the debate over self-regulation resonated on several levels. In terms of symbolic politics, the profession sought to maintain the legitimacy of professional status and the primacy of the Bar as the source of ethical rule making and enforcement. But the ideology of professionalism that sustains the professional world view also incorporates notions of ethicality and public service that properly create expectations about the standards of professional behavior as well as the discourse to critique it. As the California example shows, the organized bar is one important source of professional ideology, particularly in its lawyer regulatory function. While self-regulation need not be an attribute of the legal profession—and it may ultimately be viewed as illegitimate—it is improperly dismissed as it has been in much of the literature as solely self-serving. Nevertheless, it is likely to remain a controversial and problematic prerogative.

IV. CONCLUSION: THE FUTURE OF SELF-REGULATION IN CALIFORNIA

Historically, self-regulation has played a significant role in allowing the legal profession to successfully assert its mandate as a distinct and privileged occupational group, whose jurisdiction and status are protected

719. See generally HABER, *supra* note 111.

both by the state and by ideological control. In California in the mid-1980s, both of these dimensions of professional control were fundamentally challenged as the state threatened to assume a more intrusive stance towards the Bar and as critics attacked the legal profession's political and cultural hegemony. In response, the Bar mobilized its traditional ideology of professionalism in an attempt to justify its self-regulatory powers and reassert its cultural authority. The Bar's success was mixed. Although it underwent considerable scrutiny, the Bar retained its ability to self-regulate largely free from external control. But this was due as much to the pragmatic concerns of the state legislature (which was dubious of creating an alternative lawyer regulatory agency *de novo*) as to the persuasiveness of the profession's ideological claims. What the California experience makes clear nonetheless is that self-regulation, while perhaps no longer an essential attribute of professionalism, continues to be an important resource for the Bar in its attempt to assert both occupational uniqueness and the authority to speak for the legal profession as a whole. This is so because lawyer regulation remains one of the most powerful public arenas to shape and articulate professional ideology.

But, despite its continued significance for the Bar and for the profession, the future of self-regulation in California remains problematic, particularly when viewed from a user's perspective. The Bar responded to these most recent challenges to its self-regulatory powers with vehemence. It increased expenditures for discipline (and the Bar dues to pay for them) and reformed its disciplinary system (albeit largely under outside pressure). Yet the data from the California example far from vindicates the Bar's record in "reforming" lawyer discipline. It is true that the Bar does not do *nothing* in lawyer regulation, as its harshest critics suggest. After all, numerous lawyers are processed through the disciplinary system, many clients are reimbursed for their losses stemming from unscrupulous lawyers, and the disciplinary system does have an increased capacity to identify repeat violators, and, at least in a very preliminary way, to prevent some disciplinary violations. However, it is far from clear that this is all that the system does or that even this amount of increased disciplinary enforcement will prove to be adequate.

For example, one plausible interpretation of the California story is that the Bar functions most effectively to respond to and quiet those complaints and critics that create the most trouble for it, while the vast majority of matters remain effectively eliminated from the disciplinary system. Such a skeptical interpretation of the "reforms" in the California lawyer discipline system need not stem from imputing evil motives (or even uniform motives) to the Bar. But it recognizes and highlights inherent contradictions and tensions in the lawyer disciplinary system itself. For example, as critics have effectively pointed out, there is a conflict of

interest in having an organization serve as a trade association (whose mandate is to further the profession's interests) and as a prosecutorial agency (whose aim is to protect the public from members of its own profession). Much classic work in law and society scholarship has shown how in different settings, at the micro-level, professional ideals of independence and client interest are constrained by lawyers' needs for maintaining the system in which the profession operates and, ultimately, by self-interest.⁷²⁰ As the California example suggests, the same may be true at the organizational level as well.

Further, both organizational and structural factors limit the very capacity of the Bar's system for lawyer regulation. The system itself often embodies contradictory goals, since it is based on at least two competing models, one focusing on efficient prosecution (*i.e.*, identifying and punishing miscreants) and one animated by consumerist ideals (*i.e.*, satisfying client needs for competence and service). Moreover, it is unlikely that any single system of lawyer regulation can be effective (at least at a cost that anyone is willing to pay) in addressing all forms of professional misbehavior in all the varied contexts and organizational forms in which lawyers work. Indeed, for many lawyers in many practice settings (*e.g.*, large firm lawyers, lawyers in governmental practice, and elsewhere where the Bar's disciplinary apparatus has little reach) the current system of self-regulation is, in many respects, simply irrelevant.

Because of this, self-regulation will remain a very costly, precarious, and controversial prerogative for California lawyers.⁷²¹ Its legitimacy

720. See generally Abraham Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, LAW & SOC'Y REV. June 1967, at 15; Stewart Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115 (1979).

721. One of the first actions taken by incoming State Bar President Margaret Morrow in 1993 was to establish a committee of external evaluators to examine the efficiency and effectiveness of the Bar's new—and costly—lawyer discipline system. See *State Bar of California, Report of the Discipline Evaluation Committee to the Board of Governors* (August 27, 1994) ("Alarcon Report"). For the State Bar court's response to the Alarcon Report recommendations, see *Response of the State Bar Court to the Report of the Discipline Evaluation Committee* (November 1994).

questionable, its efficacy debatable, Bar self-regulation has survived its most recent "crisis" but will likely not remain unchallenged for long.⁷²²

722. Attacks on the Bar have continued, fueled in part by dissatisfaction with the high cost of maintaining the current discipline system. On January 3, 1995, State Senator Quentin L. Kopp (I-San Francisco) introduced legislation (SB 60) that would reduce annual bar dues dramatically—the same dues that have risen so dramatically to finance reforms in the discipline system. This legislation would also require the Bar to conduct a plebiscite of its members to determine whether they want to retain the Bar as a mandatory membership organization or transform it into a voluntary organization, with the California State Supreme Court taking over direct authority for lawyer discipline. The State Bar Commission on the Future of the Legal Profession and the State Bar, established in 1993, recommended by a 13-8 vote to maintain the Bar as a mandatory membership organization. For a discussion of the Committee's majority and minority positions on this issue, *see* CAL. BAR J., Feb. 1995, at 1, 14-15.