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Andrew Flavelle Martin*

Law Society Regulation and the Lawyer-Academic

Can, and should, law societies regulate and discipline lawyers for their teaching and research? This article explores these largely overlooked but critically important questions in order to establish a foundation for further debate and discussion by lawyers, legislators, and law societies. It argues that professionalism precludes only low-value teaching and research—teaching and research with little pedagogical or epistemic value such that it is unlikely or unworthy to be protected by academic freedom—and that any chilling effect on lawyer-academics comes as much from uncertainty as from actual danger of regulatory consequences. The author concludes that law societies and other stakeholders should engage in consultation on these issues in the spirit of transparency and predictability. Indeed, even in the absence of purported or actual exercise of regulatory powers, lawyer-academics should embrace and aspire to their professional obligations in order to be better teachers and researchers—and better role models for law students.

Les ordres professionnels de juristes peuvent-ils, et devraient-ils, réglementer et discipliner les avocats pour leur enseignement et leur recherche? Cet article explore ces questions largement négligées mais d'une importance critique afin de jeter les bases d'un débat et d'une discussion plus approfondis entre les avocats, les législateurs et les barreaux. Il soutient que le professionnalisme n'exclut que l'enseignement et la recherche de faible valeur—'enseignement et la recherche ayant peu de valeur pédagogique ou épistémique de sorte qu'il est peu probable ou indigne d'être protégé par la liberté académique—et que tout effet dissuasif sur les avocats-universitaires provient autant de l'incertitude que du danger réel de conséquences réglementaires. L'auteur conclut que les ordres professionnels de juristes et les autres parties prenantes devraient engager des consultations sur ces questions dans un esprit de transparence et de prévisibilité. En effet, même en l'absence d'exercice supposé ou réel de pouvoirs réglementaires, les avocats-universitaires devraient assumer leurs obligations professionnelles et y aspirer afin d'être de meilleurs enseignants et chercheurs—et de meilleurs modèles pour les étudiants en droit.

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A is a professor at a leading Canadian law school. A is also licensed as a lawyer in Ontario, although they are non-practicing. A authors an article in a Canadian law journal in which A critiques the conduct of Lawyer B in recent litigation and argues that Lawyer B has violated the rules of professional conduct. A assigns this article as reading in their seminar course and repeats the critique and conclusion during class.

B takes issue with the substance of the critique and the manner in which it is expressed.

However, B declines to commence an action against A for defamation. Instead, B files a complaint with the Law Society of Ontario alleging that A in their research and teaching has violated their duty of civility, their duty of competence, and their duty to encourage respect for the administration of justice.

Could the Law Society of Ontario discipline A for their teaching and research? Should it? Would it?

Introduction

Two primary legal mechanisms constrain the teaching and research of Canadian professors. The first is employment and career consequences within the university. The other is civil liability, particularly in defamation. The counterweight to the first is the concept of academic freedom and the safeguards incorporated into collective bargaining, collective agreements, and the grievance process. The counterweight to the second is institutional defamation insurance, again within the collective bargaining and collective agreement context.[1] Neither of these counterweights are foolproof: even if they operate as intended there can still be substantial distress and imposition on the professor involved. But the legal issues involved are fairly well understood.

Law professors are different in that those who are lawyers face a potential third source of constraint: their professional obligations as overseen and enforced by law societies. Among the three sources, this one is the most amorphous and the least understood—despite its potentially massive implications for legal education and the legal academy. There are no reported disciplinary decisions concerning the teaching and research of lawyer-academics. There is but one Canadian blog post that recognizes the issue in passing.[2] Two Canadian academic articles and one book chapter at least feint in that direction.[3] To my genuine surprise, this issue seems largely ignored in the US.[4] Canadian law professors who are

1. But see e.g. Ameet Kaur Nagra, "A Higher Protection for Scholars Faced with Defamation Suits" (2013) 41:1 Hastings Const LQ 175; Kate Sutherland, "Book Reviews, The Common Law Tort of Defamation, and the Suppression of Scholarly Debate" (2010) 11:6 German LJ 656.

2. Cameron Hutchinson, "What Happens if I Get Sued for Publishing My Research?" (17 March 2020), online (blog): *Slaw* <www.slaw.ca/2020/03/17/what-happens-if-i-get-sued-for-publishing-my-research/> [perma.cc/8UKF-SZQF].

3. FC DeCoste, "Howling at Harper" (2008) 58 UNB LJ 121 ("in our legal tradition, the law school is a branch of the legal community, and the obligations of academic lawyers are constitutional by origin and professional in nature (and, despite the inclinations of many law professors, stubbornly so in both respects)" at 128); Bruce P Elman, "Creating a Culture of Professional Responsibility and Ethics: A Leadership Role for Law Schools" (2009) 27 Windsor Rev Legal & Soc Issues 93 ("academic lawyers must be as committed to ethical practice as are members of the practicing bar" at 105). Elman however goes on to focus on what might be described as professional and ethical teaching); Jon Thompson, "Preface," in James Turk, ed, *Academic Freedom in Conflict: The Struggle Over Free Speech Rights in the University* (Toronto: James Lorimer & Company, 2014) 7 ("there are professional codes of ethical conduct in disciplines ranging from medicine to mathematics" at 8).

4. But see Robert R Kuehn, "A Normative Analysis of the Rights and Duties of Law Professors to Speak Out" (2004) 55:2 South Carolina L Rev 253, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=621101> [perma.cc/232A-EA2J]; J Peter Byrne, "Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education" (1993) 43:3 J Legal Educ 315, online: <scholarship.law.georgetown.edu/facpub/1575/> [perma.cc/79YN-GV52] ("[p]rofessional ethical obligations attach to academic as well as to practicing lawyers" at 329). With respect, and although I agree with his position, Byrne provides no analysis for this assertion. See also "[a]n account of academic freedom for law schools that ignores our professional

lawyers thus face massive uncertainty, particularly those that are idealistic or risk-averse, or both. That uncertainty can and should be minimized if not eliminated. I start that process here.

In this article, I consider the appropriate role for law society regulation of lawyer-academics.[5] I ultimately reach three core conclusions. First, law society regulation, including the potential for discipline, constrains only low-value teaching and research, by which I mean teaching and research with little pedagogical or epistemic value such that it is unlikely or unworthy to be protected by academic freedom. Second, regulation of lawyer-academics is necessary for law societies to fulfill their mandate to protect the public interest. Third, law societies should regulate lawyer-academics using the same rules and tests that apply to the professional conduct of practicing lawyers. I build to some extent on my previous work,[6] though I refine my approach and revisit my assumptions. My goal is not to end debate on this subject, but to catalyze it. My motivation is not to increase the scope of regulation, but to identify and define—or encourage the identification and definition—of a safe area for lawyer-academics to operate within.[7]

My analysis is organized in five parts. I begin in Part I by explaining my approach and the scope of my analysis. Then in Part II I assess the likely impact of the law of lawyering, and specifically the rules of professional conduct, on academic freedom. I focus on the three duties most likely to be engaged by the teaching and research of lawyer-academics: the duty to encourage respect for and improve the administration of justice, the duty of civility, and the duty of competence. I argue that to the extent that professionalism appears to potentially constrain academic freedom, it

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obligations must become either a platitude or a denial of responsibility" (*ibid* at 339). See also Robert Ashford, "Socioeconomics and Professional Responsibilities in Teaching Law-Related Economic Issues" (2004) 41:1 San Diego L Rev 133, online: <digital.sandiego.edu/sdlr/vol41/iss1/10/> [perma.cc/5LLF-KAD5] (Ashford suggests that responsibilities of law teachers should be "informed" by the "spirit" of the rules of professional conduct at 140-142); See also Nicola A Boothe-Perry, "The New Normal for Educating Lawyers" (2016) 31:1 Brigham Young U J Pub L 53 ("[t]hose law professors who are also members of a state bar are subject to the ethical rules that govern the relevant jurisdiction. Law professors who are not bar members should nevertheless adhere to the ethical rules, in addition to maintaining compliance with applicable professional standards" at 71. Unfortunately, Boothe-Perry does not support or elaborate on these assertions).

5. My focus in this article is on Canadian law. I thus do not address, for example, the situation of a Canadian law professor who is licensed in a foreign jurisdiction. Neither do I address the issue of whether a Canadian law society can discipline a person who is a lawyer in that Canadian jurisdiction but a law professor in a foreign jurisdiction. I also do not address the responsibilities of Canadian lawyer-academics in their research and teaching about foreign jurisdictions.

6. Andrew Flavelle Martin, "The Limits of Professional Regulation in Canada: Law Societies and Non-Practising Lawyers" (2016) 19:1 Legal Ethics 169, DOI: <10.1080/1460728x.2016.1188541> [Martin, "Limits"].

7. Thanks to Andrew Luesley for clarifying this point.

constrains low-value teaching and scholarship. Part III considers the "can" question, i.e. whether law societies can as a matter of law regulate and discipline lawyer-academics for their teaching and research. I conclude that they can. Part IV then turns to the dicier "should" question, i.e. whether law societies should exercise those legal powers. I argue that they should, but that the policy decision must be theirs alone in order to preserve the independence of the bar. I then provide recommendations in Part V. If nothing else, law societies should actively consider these issues and provide guidance to lawyer-academics to dispel the current state of uncertainty. Finally, I conclude the article by reflecting on the implications of my analysis. Far from driving lawyer-academics out of the academy or to surrender their licenses, a commitment to professional conduct should improve both teaching and research.

I. *My approach and the scope of my analysis*

In this Part, I identify the scope of my analysis. I canvass here the key concepts—teaching and research, lawyer-academics, academic freedom, high-value versus low-value teaching and research—and explain two undercurrents to my analysis.

I adopt a purposive but bounded definition of lawyer-academics and their teaching and research activities. While I do not discount the importance of clinical faculty, I recognize that their teaching certainly constitutes the practice of law. Thus, law societies can and should regulate, and discipline where necessary, clinical faculty in the same way as they regulate other practicing lawyers, and so I do not consider them further in my analysis.[8] Neither do I consider, for those law professors who practice part-time, their regulatory liability for such practice,[9] or the

8. But see e.g. in the US literature Robert R Kuehn & Peter A Joy, "Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility" (2009) 59:1 J Leg Educ 97, online: <www.researchgate.net/publication/228298349_Lawyering_in_the_Academy_The_Intersection_of_Academic_Freedom_and_Professional_Responsibility> [perma.cc/TQP4-83DX]; Steven H Leleiko, "Opportunity to Be Different and Equal: An Analysis of the Interrelationships between Tenure Academic Freedom and the Teaching of Professional Responsibility in Orthodox and Clinical Legal Education" (1980) 55:4 Notre Dame L Rev 485, online: <scholarship.law.nd.edu/ndlr/vol55/iss4/2/> [perma.cc/9BM7-TYZW].

9. But see e.g. in the US literature Jett Hanna, "Moonlighting Law Professors: Identifying and Minimizing the Professional Liability Risk" (2001) 42:2 S Tex L Rev 421, DOI: <10.1111/jlse.12014>; Michael H Hoeflich & J Nick Badgerow, "Law School Faculty, LLP: Law Professors as a Law Firm" (2005) 53:4 U Kan L Rev 853, online: *KU ScholarWorks* <kuscholarworks.ku.edu/handle/1808/6850?show=full> [perma.cc/3MYS-Z4PC]; Rory K Little, "Law Professors as Lawyers: Consultants, of Counsel, and the Ethics of Self-Flagellation" (2001) 42:2 S Tex L Rev 345, online: <repository.uchastings.edu/faculty_scholarship/421/> [perma.cc/S9CP-GQSV]; Agnieszka McPeak, "The Internet Made Me Do It: Reconciling Social Media and Professional Norms for Lawyers, Judges, and Law Professors" (2019) 55:2 Idaho L Rev 205 at 217, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3418088> [perma.cc/98ZX-2ETY].

regulatory implications for lawyer-professors who give legal advice to their colleagues or students.[10] Likewise, I do not propose or consider a specific code of conduct for law professors or specific ethical issues that face law professors,[11] or a code of professional conduct for professors more broadly.[12] I orient my analysis around the activities of teaching and research instead of drawing boundaries or distinctions among those who engage in those activities. Thus, I do not distinguish among different kinds of law professors—full-time versus part-time, adjunct, tenure-track, and so on.[13] I define legal academics as those who engage in teaching and research.

While there are important debates to be had about the boundaries of teaching and research,[14] I do not attempt to resolve those debates here. Instead, I consider those activities in the broadest sense. I explicitly include what Craig Forcese terms "public engagement," i.e. "instances where professors engage a public beyond the confines of academia," such as government and civil society reports, op-eds, blogs, and social media.[15] As Cass Sunstein puts it, "One of the purposes of academic

10. See e.g. VA Legal Eth Op 1601 (Virginia Legal Ethics Opinions), 1999 WL 348740, online: <www.vsb.org/docs/LEO/1601.pdf> [perma.cc/Y66L-NP6Y].

11. But see e.g. in the US literature Wilson Ray Huhn, "A Proposed Code of Ethics for Law Educators" (1988) 6:1 JL & Religion 25, DOI: <10.2307/1051058>; Monroe H Freedman, "The Professional Responsibility of the Law Professor: Three Neglected Questions" (1986) 39:2 Vand L Rev 275, online: <scholarlycommons.law.hofstra.edu/faculty_scholarship/17/> [perma.cc/VEC5-LRZD]; Lisa G Lerman, "First Do No Harm: Law Professor Misconduct toward Law Students" (2006) 56:1 J Leg Educ 86, online: <scholarship.law.edu/scholar/242/> [perma.cc/4S39-BPSG]; Carol A Needham, "The Professional Responsibilities of Law Professors: The Scope of the Duty of Confidentiality, Character and Fitness Questionnaires, and Engagement in Governance" (2006) 56:1 J Leg Educ 106; Deborah L Rhode, "The Professional Ethics of Professors" (2006) 56:1 J Leg Educ 70; Kimberly M Tatum & Susan W Harell "Ethical Issues Faced By the Dual Professional: Lawyers as Faculty in Higher Education" (2007) 8:2 J College & Character 1, online: <www.degruyter.com/document/doi/10.2202/1940-1639.1165/html> [perma.cc/YU3F-D4NF]. In the Canadian context, see Kevin Mackinnon, "The Academic as Fiduciary: More Than a Metaphor?" (2007) 2007 CLEAR 1.

12. See e.g. Neil W Hamilton, "Academic Tradition and the Principles of Professional Conduct" (2001) 27:3 J College & University L 609.

13. I recognize that these differences may have implications for academic freedom in the context of the university. See e.g. J Peter Byrne, "Academic Freedom of Part-Time Faculty" (2001) 27:3 J College & University L 583, online: <scholarship.law.georgetown.edu/facpub/1690/> [perma.cc/26GN-HHRT].

14. See e.g. Craig Forcese, "The Expressive University: The Legal Foundations of Free Expression and Academic Freedom on Canada's Campuses" (2021) online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3850321> [perma.cc/F4E6-VCYC] ("'[a]cademic freedom' is a common term on Canada's university campuses with a long pedigree, but its content is poorly understood and there is remarkably little detailed treatment of the concept in the legal literature or caselaw. Indeed, there is considerable uncertainty about the concept's scope even in academia" at 25 [citations omitted]).

15. Craig Forcese, "The Law Professor as Public Citizen: Measuring Public Engagement in Canadian Common Law Schools" (2015) 36 Windsor Rev Legal & Soc Issues 66 at 70.

freedom is to permit professors to speak publicly without fear of reprisal, and those who write op-eds or publish with a trade press are doing what academic freedom is designed to permit them to do."[16] Similarly, social media can be a valuable tool for engagement with the public.[17] However, where lawyers represent themselves in court in matters connected to their research interests,[18] I consider that to be practice and thus the typical rules for practicing lawyers would apply.

The scope of the concept of "academic freedom" is key to my analysis. Academic freedom has two kinds of meanings. One is the autonomy of the university to govern itself.[19] My focus is on the other meaning, i.e. the ability of professors to teach and research—as Karen Drake puts it, "to pursue truth"—with protection from some kinds of consequences.[20] I particularly recognize here James Turk's functional and purposive description of academic freedom: "academic freedom is a professional right—a right necessary to fulfill one's professional obligations as a teacher and scholar."[21] Unlike the labour relations context, where the relevant potential consequences are employment consequences from the university as employer, in my analysis the relevant potential consequences are regulatory and disciplinary consequences from lawyer-academics' governing law societies. While academic freedom in the Canadian context is generally concerned with the protection from consequences imposed by the university, the United Nations Committee on Economic, Social and Cultural Rights has described it as including protection from "discrimination or fear of repression by the State or any other actor," which would include

16. Cass R Sunstein, "Professors and Politics" (1999) 148 U Pa L Rev 191 at 199, online: <scholarship.law.upenn.edu/penn_law_review/vol148/iss1/10/> [perma.cc/AVG4-AXDY]. See also Michael Horn, *Academic Freedom in Canada: A History* (Toronto: University of Toronto Press, 1999) ("[p]rofessors have used the concept of academic freedom to justify their right to participate in public life and express opinions on matters of public interest" at 5).

17. See e.g. McPeak, *supra* note 9 ("[l]aw professors can share their expertise, promote their institutions, and engage with scholars, students, media, and the public" at 228 [citations omitted]).

18. See e.g. *Alford v Canada (Attorney General)*, 2019 ONCA 657 (standing), 2022 ONSC 2911 (merits); Elizabeth Payne, "Law professor Amir Attaran files private criminal prosecution against Ford for removing mask while in quarantine," *Ottawa Citizen* (18 May 2022), online: <ottawacitizen.com/news/local-news/law-professor-files-private-criminal-prosecution-against-ford-for-removing-mask-while-in-quarantine> [perma.cc/A4Q2-4Q4K].

19. Karen Drake, "Finding a Path to Reconciliation: Mandatory Indigenous Law, Anishnaabe Pedagogy, and Academic Freedom" (2017) 95:1 Can Bar Rev 9 at 34, online: <cbr.cba.org/index.php/cbr/article/view/4399> [perma.cc/JPY8-8FRU].

20. *Ibid* at 34.

21. James Turk, "Introduction", in Turk, ed, *supra* note 3, 11 at 11-12. See also e.g. David Barnhizer, "Freedom to Do What? Institutional Neutrality, Academic Freedom, and Academic Responsibility" (1993) 43:3 J Legal Educ 346 (under the heading "Academic Freedom as Purposive Responsibility": "[a]cademic freedom is not an end in itself; it exists only so that higher ends may be achieved" at 348).

law societies exercising delegated provincial powers.[22] Moreover, whereas academic freedom as a labour relations protection may not adhere to all lawyers who engage in teaching and research, I use the scope of academic freedom as an important point of reference for all lawyer-academics.

Using this meaning and scope of academic freedom, I differentiate between high-value and low-value research and teaching. By low-value teaching and research, I mean teaching and research with little pedagogical or epistemic value, such that it is less likely and less worthy to attract the protection of academic freedom. Conversely, high-value teaching and research has more pedagogical or epistemic value, such that it is more likely and more worthy to attract the protection of academic freedom. High-value teaching and research, all else equal, is more likely to be effective teaching and research.

Two important undercurrents inform my analysis. The first is that, although teaching and research do not constitute the practice of law, and so law professors are non-practicing when they engage in these activities, law professors' teaching and research is better considered "practice-adjacent" or "quasi-practice" than truly extraprofessional conduct. Legal teaching and research, in critiquing the state of the law and purporting to identify what the law is and should be, shares many of the elements of the practice of law. Indeed, legal scholarship (especially in its role as doctrine in the Quebec civilian system) is often considered by judges and argued by the counsel appearing before them. At the same time, I recognize that law professors are not required to be lawyers. I do not suggest that non-lawyer legal academics are engaged in the unlicensed and thus unlawful practice of law. My point is that of the sphere of formally and definitionally extra-professional conduct, lawyer-academic teaching and research activities are those closest to the boundary (i.e. those closest to the practice of law). While there is disagreement in the literature over whether law societies should regulate extraprofessional conduct,[23] it follows that teaching and research by law professors who are lawyers is the subset of extra-professional conduct most worthy of law society regulation.[24]

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22. Committee on Economic, Social and Cultural Rights, *Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment 13*, UNECOSOC, 21st Sess, UN Doc E/C.12/1999/10 (1999) at para 39, online (pdf): <documents-dds-ny.un.org/doc/UNDOC/GEN/G99/462/16/PDF/G9946216.pdf?OpenElement> [perma.cc/TR2E-HB7R] [*General Comment 13*].

23. See below notes 108-109.

24. As the teaching and research activities of lawyer-academics are extraprofessional conduct, any discipline for those activities would be for conduct unbecoming as opposed to professional misconduct. The distinction, however, has little impact in application and thus is not important for my purposes.

The second undercurrent is that, without purporting to resolve the long-standing debates over the respective roles of law schools and law societies in preparing future lawyers, at least some law professors should demonstrate and model acceptable professional conduct—as expected in the legal profession—to law students. In the Canadian context, David Tanovich suggests that one reason for what he characterizes as "a professionalism crisis in law school" is "the failure of law professors, including sessional faculty, to sometimes serve as appropriate role models."[25] Norman Redlich makes a similar point about civility specifically.[26] Indeed, Robert Kuehn argues that, as role models for law students, lawyer-academics must have "greater sensitivity to ethical norms" than practicing lawyers.[27] Thus, to the extent that law society regulation encourages law professors who are lawyers to model professional conduct to students, that result is not

25.David M Tanovich, "Learning to Act Like a Lawyer: A Model Code of Professional Responsibility for Law Students" (2009) 27 Windsor YB Access Just 75 at 95, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=1816606> [perma.cc/NX2M-E5ZL]. See also Elman, *supra* note 3 ("[l]aw faculty members can, and should, be professional role models for their students" at 105).

26. Norman Redlich, "Professional Responsibility of Law Teachers" (1980) 29:4 Clev St L Rev 623, online: <engagedscholarship.csuohio.edu/clevstlrev/vol29/iss4/2/> [perma.cc/WKB3-9QGJ] ("[t]hrough the example of their professors, law students should develop habits of courtesy and respect for fellow lawyers… In a professional school, which seeks to set standards for the future conduct of lawyers, there is a particularly heavy responsibility on the part of the faculty to debate differences openly, civilly and without rancor. This is, after all, what we expect of participants in the adversary system. We should not expect less of law teachers" at 627). See also Douglas S Lang, "The Role of Law Professors: A Critical Force in Shaping Integrity and Professionalism" (2001) 42:2 S Tex L Rev 509 ("[i]t is clear that in order to effectively educate law students and prepare them for practice, law professors must, first and foremost, be *lawyers*, not just scholars. Since law professors direct the metamorphosis of a student's mind from a college student to a law school graduate ready for the Bar, professors must strive to be an example of the best of everything that it means to be a lawyer" at 513-514 [emphasis in original]). See also Roger E Schechter, "Changing Law Schools to Make Less Nasty Lawyers" (1996) 10:2 Georgetown J Legal Ethics 367 at 381-384, esp: ("there may be a subtle message of incivility inherent in our educational methodology that may condition our students to be tolerant and accepting of incivility in the workplace after they graduate. The rigor of the socratic method can all too often slide into a dismissive or sarcastic exchange in which the teacher communicates an unspoken but nonetheless powerful message that rude or mean-spirited wise cracks, and even temper tantrums, are entirely appropriate behavior, especially when you can get away with it… Additionally, some of us [law professors] no doubt criticize the courts, individual judges, and practitioners as a group in ways that suggest a kind of embryonic incivility" at 381). See also Boothe-Perry, *supra* note 4 at 71-72.

27. Kuehn, *supra* note 4 at 296. See also 297. And see on civility e.g. Jennifer K Robbennolt & Vikram D Amar, "The Role of Lawyers and Law Schools in Fostering Civil Public Debate" (2021) 52:2 Conn L Rev 1093, online: <opencommons.uconn.edu/law_review/451/> [perma.cc/624Z-2F4M] ("[i]n serving as institutional and cultural custodians, lawyers are required to assume particular roles. It is for this reason that professional rules of conduct encourage—and successful law schools teach—lawyers to separate the professional from the personal" at 1099, [citation omitted]). See also at Robert P Schuwerk, "The Law Professor as Fiduciary: What Duties Do We Owe to Our Students" (2004) 45:4 S Tex L Rev 753 ("[t]eaching virtue is hard…. It is done by having a lawyer living out the rules of ethics in the actual practice of law before students' eyes, and then insisting that those students live them out before hers" at 786).

problematic and is in fact desirable. Again, I do not argue that all law professors should be lawyers, but I recognize that there is value in at least some law professors modelling professionalism to their students, and law society regulation of lawyer-academics promotes that result. There is of course nothing stopping non-lawyer professors from modelling professional conduct if they so choose—but neither are they obliged to hold themselves out as such models. Indeed, they may embrace their relative freedom of conduct by explicitly warning their students against emulating that conduct.

II. *Teaching and research and the rules of professional conduct*

If the law societies were to regulate the teaching and research of lawyer-academics, what rules would be most applicable? I begin my analysis by canvassing the elements of the law of lawyering, particularly as expressed in the rules of professional conduct, that would be most likely to be engaged by the teaching and research of lawyer-academics: the duty to encourage respect for the administration of justice, the duty of civility, and the duty of competence. While I do not argue that law society regulation and discipline have no impact on the ability of lawyer-academics to fulfill their roles, I suggest that such an impact is minimal and positive instead of problematic.

Before moving onto these three duties and related concepts, I emphasize one way that law society regulation of lawyers, including lawyer-academics, reinforces academic values. There are many reported law society decisions in which past academic dishonesty goes to character and endangers an applicant's ability to become an articled student or a lawyer,[28] or constitutes grounds for discipline once a lawyer.[29] So long as the law society does not have a broader definition of academic dishonesty than the university community, there is no clash between academic freedom and the professional discipline of lawyer-academics for academic dishonesty.

28. See e.g. *Re Applicant 5*, 2012 LSBC 24; *Nsamba v Law Society of Ontario*, 2020 ONLSTH 62; *Dubey v Law Society of Ontario*, 2020 ONLSTH 134 at paras 38-42; *Olowolafe v Law Society of Ontario*, 2019 ONLSTH 155; *Seifi v Law Society of Ontario*, 2019 ONLSTH 56; *Law Society of Saskatchewan v Bachynski*, 2013 SKLSS 2; *Law Society of Saskatchewan v Frost-Hinz*, 2012 SKLSS 7.

29. See e.g. *Law Society of Upper Canada v Shane Smith*, 2008 ONLSHP 65; *Law Society of Ontario v Ranjan*, 2019 ONLSTH 90.

1. *The duty to encourage respect for the administration of justice—and to improve it*

The most readily apparent professional duty affecting lawyer-academics is the duty to encourage respect for the administration of justice.

The rule itself is brief: "A lawyer must encourage public respect for and try to improve the administration of justice."[30] The commentaries to the rule, however, demonstrate that the duty is a nuanced and complex one. Far from prohibiting "scrutiny and criticism," the commentary instead prohibits only "criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit" and "irresponsible allegations."[31] Moreover, the duty may indeed *require* criticism: "a lawyer should not hesitate to speak out against an injustice."[32]

I emphasize here that, while the heading to the rule merely identifies one duty—"encouraging respect for the administration of justice"—the rule itself contains a two-fold duty: not just to *encourage respect for* the administration of justice, but also *to improve* it.[33] The commentaries confirm that the duty to encourage respect is itself double-headed, at least with respect to judges: lawyers are called on to criticize them when that criticism is legitimate but also to defend them against illegitimate criticism.[34]

Given the impact and role of the case-law method, teaching law in common-law Canada necessarily involves critiquing and criticizing the decisions of judges and their reasons: their strengths and weaknesses, or even outright legal errors; the relative merits of concurrences and dissents; the incompatibility of different strands of case law; and the positive or negative implications of a decision for the law as a whole. Part of this process may involve critiquing the submissions of counsel, particularly in classes on advocacy, or the legal opinions on which parties rely, where those opinions are made public. Judges, and sometimes counsel, are often referred to by name.

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30. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009, as amended October 19, 2019), r 5.6-1, online: Federation of Law Societies of Canada <flsc.ca/resources/> [perma.cc/5BC7-RG7W] [FLSC *Model Code*]. In Quebec, see *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1, ss 12, 111 [Quebec *Code*].

31. FLSC *Model Code*, *supra* note 30, r 5.6-1, commentary 3.1.

32. *Ibid,* r 5.6-1, commentary 1.

33. See also *Stewart v Canadian Broadcasting Corp* (1997), 150 DLR (4th) 24 at 116 (Ont Ct J (Gen Div)) ("[r]ule 11 contains two separate directions. The lawyer should encourage public respect for the administration of justice. In addition, the lawyer should try to improve the administration of justice" at 116). With respect, the two duties are sometimes difficult to disentangle. In the US context see Kuehn, *supra* note 4 at 284-286.

34. FLSC *Model Code*, *supra* note 30, r 5.6-1, commentary 1.

Of course, litigators do essentially the same thing publicly in the normal course of practice—indeed, virtually every appeal involves assertions and arguments of legal or factual error. Many lawyers also do so privately, and sometimes publicly, when informing or advising clients or potential clients about the state of the law. They are, however, bound by the rules of professional conduct to do so properly.

Insofar as legal teaching and research is practice-adjacent, similar norms would seem to apply. Even if I am wrong that teaching and research is practice-adjacent, the commentaries to the rule emphasize that the duty applies to any statements, professional or extraprofessional: "The obligation outlined in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen."[35] The Quebec rules go further: "When a lawyer engages in activities which do not relate to the profession of lawyer, in particular in connection with a job, a function, an office or the operation of an enterprise…he must ensure that those activities do not compromise his compliance with this code."[36]

Teaching and research in legal ethics and judicial ethics is particularly perilous in light of this rule. In those fields, the conduct and not the reasoning of judges and lawyers—often specific named judges and lawyers—is at issue.[37] At the same time, professional responsibility counsel, law society

35. *Ibid*. See also *Law Society of Alberta v Rauf*, 2021 ABLS 3 at para 113 [*Rauf*], aff'g 2018 ABLS 13: This duty "is not restricted to a lawyer's professional practice."

36. Quebec *Code*, *supra* note 30, s 11(1).

37. See e.g. John Mark Keyes, "Loyalty, Legality and Public Sector Lawyers" (2019) 97:1 Can Bar Rev 129 (on lawyer Edgar Schmidt) online: <cbr.cba.org/index.php/cbr/article/view/4510> [perma.cc/EB7R-XYWV]; Andrew Flavelle Martin, "Folk Hero or Legal Pariah? A Comment on the Legal Ethics of Edgar Schmidt and *Schmidt v Canada (Attorney General)*" (2021) 43:2 Man LJ 198 online: <www.canlii.org/en/commentary/journals/16/3271/> [perma.cc/BQ6C-E4WS]; Andrew Flavelle Martin, "The Government Lawyer as Activist: A Legal Ethics Analysis" (2020) 41 Windsor Review of Legal & Social Issues 28 online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=3625992> [perma.cc/W2MQ-PC44] (on lawyers David Lepofsky and Michael Leshner); Brent Cotter, "The Prime Minister v the Chief Justice of Canada: The Attorney General's Failure of Responsibility" (2015) 18:1 Leg Ethics 73 (on federal Minister of Justice and Attorney General Peter MacKay); Alice Woolley, "The Resignation of Ronald Camp: Background and Reflections from Canada" (2017) 20:1 Legal Ethics 134; Micah Rankin, "Gerry Laarakker: From Rustic Rambo to Rebel with a Cause" in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) 225; Allan C Hutchinson, "Putting Up a Defence: Sex, Murder, and Videotapes" in Dodek & Woolley 40 (on lawyer Ken Murray); Elaine Craig, "The Ethical Obligations of Defence Counsel in Sexual Assault Cases" (2014) 51 Osgoode Hall LJ 427 online: <digitalcommons.osgoode.yorku.ca/ohlj/vol51/iss2/2/> [perma.cc/72GG-LAV3]; Elaine Craig, "Examining the Websites of Canada's "Top Sex Crime Lawyers": The Ethical Parameters of Online Commercial Expression by the Criminal Defence Bar" (2015) 48:2 UBC L Rev 257 online: <digitalcommons.schulichlaw.dal.ca/scholarly_works/43/> [perma.cc/76A6-5T5E]; Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-

panels and tribunals, and bodies such as the Canadian Judicial Council routinely evaluate these matters in the course of their functions.

I acknowledge, but reject, the concern that an enforceable commitment to encourage respect for and improve the administration of justice is itself inherently contrary to academic freedom.[38] For example, Howard Woodhouse, though not writing in the context of law schools, asserts that "[a]cademic freedom enables faculty and students to espouse views and articulate theories that differ from those dominant in their discipline, their university, and/or their society. Dissenting views can flourish because they are protected."[39] However, the duties of lawyers, particularly the duty to encourage respect for and to improve the administration of justice, are not analogous to a dissenting view. Teaching and research in accordance with professional responsibilities are not, for example, the secular equivalent of teaching and research from an enforced religious perspective. Elaine Craig has persuasively argued that "it is antithetical to the development of the skill of critical thinking about ethical issues in law to require that it be taught from one particular, and purported to be singularly authoritative, perspective."[40] Her analysis focused, however, on a particular kind of religious perspective, i.e. "the perspective that the Bible is the sole, ultimate, and authoritative source of truth for all ethical decision making."[41] The key difference between an internally-enforced religious perspective and an externally-enforced compliance with lawyers' professional duties is that lawyer-academics remain free, and perhaps even obliged where appropriate, to argue that the law—including but not limited to legal ethics and the law of lawyering—is wrong and should change. As David Rabban puts it, "[t]he obligation of law professors to teach professional concepts and skills…should not affect their academic freedom to express doubt about the intellectual coherence or social value of what they teach."[42]

Queen's University Press, 2018).

38. Byrne, *supra* note 4 at 329, frames this question as follows: "Does the attribution to law professors of professional obligations breach a bar on political neutrality by imposing an ideological context on legal academics?"

39. Howard Woodhouse, "Academic Freedom and Collegial Governance Under Threat at A Canadian University" (2019) 50 Interchange 113 at 114.

40. Elaine Craig, "The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program" (2013) 25:1 CJWL 148 at 165, online: <digitalcommons.schulichlaw.dal.ca/scholarly_works/52/> [perma.cc/69K3-45NN].

41. *Ibid* at 169.

42. David M Rabban, "Does Professional Education Constrain Academic Freedom?" (1993) 43:3 J Legal Educ 358 at 360. See also Lang, *supra* note 26 ("[n]o one expects professors to abandon the intellectual analysis of the Creed" at 517).

Indeed, Peter Byrne asserts that a commitment to competence, ethics, and the improvement of the administration of justice are definitional features of a law school, not barriers to academic freedom:

> a law school does necessarily embody some vague ideological commitments that may be binding on its faculty. Law schools surely affirm that the legal profession and the institutions it dominates ought to serve 'the public interest,' that existing laws should be improved, and that individual lawyers ought to be competent and ethical.[43]

For example, Horace Read argues that "[t]he responsibility of the academic [law] teacher in the administration of justice is the most obvious of his public responsibilities."[44] The lawyer's duty to improve the administration of justice arguably dovetails with the professor's responsibility to engage in and improve society.[45]

I acknowledge here that legal academics in traditions such as critical legal studies may argue that the Canadian justice system is irredeemably racist and oppressive.[46] However, such criticism if thoughtful and supported should not violate this duty. While I acknowledge that a hearing panel of the Law Society of Manitoba recently held that a lawyer violated this duty when he "equated the governance of Canadians and Manitobans with capricious fascist dictatorship as opposed to the Rule of Law" and repeatedly invoked comparisons to Hitler, that was far from a thoughtful and supported analysis—and was questioned on appeal.[47]

The duty to encourage respect for the administration of justice, properly understood, does not meaningfully constrain academic freedom in that it constrains only low-value teaching and research. Petty or dishonest criticism has low if any academic value. Indeed, as Michael Horn notes, "[l]egitimate restrictions on academic freedom do exist…[i]t does not justify defamation."[48] What about intemperate criticism? That brings me to civility.

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43. Byrne, *supra* note 4 at 330. See also Ashford, *supra* note 4 at 144, who asserts that law teachers have a duty but is vague as to whether that duty is a professional duty of lawyers.
44. Horace E Read, "The Public Responsibilities of the Academic Law Teacher in Canada" (1961) 39:2 Can Bar Rev 232 at 232 online: <cbr.cba.org/index.php/cbr/article/view/2391/2391> [perma.cc/5Z3A-HVA3].
45. See e.g. Sunstein, *supra* note 16 ("it is perfectly responsible, maybe even a civic duty, for law professors to participate in public affairs" at 200).
46. Thanks to Colin Jackson for raising this important point.
47. *The Law Society of Manitoba v Brian Attwood Langford*, 2020 MBLS 5, aff'd on other grounds 2021 MBCA 87 at paras 14-15.
48. Horn, *supra* note 16 at 6.

2. *The duty of civility*

The meaning and value of civility in the practice of law is contested,[49] all the more so after the affirmation by Moldaver J of the Supreme Court of Canada in *Groia v Law Society of Upper Canada* that "trials are not—nor are they meant to be—tea parties."[50] Nonetheless, Moldaver J did not explicitly question previous admonitions. For example, Abella J for the Supreme Court of Canada in *Doré v Barreau du Québec* invoked "transcendent civility" and admonished lawyers to speak freely but "to do so with dignified restraint."[51] Similarly, Steel JA in *Histed v Law Society of Manitoba* held that "[w]hile litigants and other interested persons may comment publicly on cases before the courts and may criticize judicial decisions in terms which some might consider offensive, lawyers are bound by the constraints of the professional standards which apply to all members of the legal profession."[52]

Does civility, including the prohibition on intemperate criticism of the justice system, impede teaching and research with a chilling effect akin to its purported effect on litigators? Put another way, does intemperateness have or add pedagogical or epistemological value beyond mere entertainment or edutainment? John Morgan, the mayor facing law society disciplinary proceedings for publicly alleging pervasive political bias in the province's judiciary, unsuccessfully asserted that to be an effective politician, "I need to be able to speak colourfully. I need to be able to speak emotionally… I need, at times, to be able to offend people."[53] Even if Morgan was correct in his explicit claim that a politician needs to be able to offend people in order to be effective, it is not obvious that lawyer-academics require an equivalent ability to be effective in their teaching and

49. See FLSC *Model Code*, *supra* note 30, ("[a] lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings" at r 5.1-5). See also Quebec *Code*, *supra* note 30 ("[a] lawyer must act with honour, dignity, integrity, respect, moderation and courtesy" at s 4). But see e.g. Alice Woolley, "Does Civility Matter?" (2008) 46:1 Osgoode Hall LJ 175 online: <digitalcommons.osgoode.yorku.ca/ohlj/vol46/iss1/6/> [perma.cc/Y42M-R9TH] (now Woolley J, Alberta Court of Queen's Bench); Alice Woolley, "'Uncivil by Too Much Civility?' Critiquing Five More Years of Civility Regulation in Canada" (2013) 36:1 Dal LJ 239, online: <digitalcommons.schulichlaw.dal.ca/dlj/vol36/iss1/9/> [perma.cc/78AB-T9HF]. *Contra* Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can Crim L Rev 97 (now Code J, Ontario Superior Court of Justice). But see also Amy Salyzyn, "John Rambo v Atticus Finch: Gender, Diversity and the Civility Movement" (2013) 16:1 Leg Ethics 97, DOI: <10.5235/1460728X.1.1.97>.

50. 2018 SCC 27 at para 3, Moldaver J for the majority [*Groia*].

51. 2012 SCC 12 [*Doré*].

52. 2007 MBCA 150 at para 79 [*Histed*], leave to appeal to SCC refused, [2008] SCCA No 67, 32478 (24 April 2008).

53. *Nova Scotia Barristers' Society v Morgan*, 2010 NSBS 1 [*Morgan*], discussed e.g. in Martin, "Limits," *supra* note 6 at 170-171.

research roles. Just as Michael Code has argued that incivility interferes with the ability of counsel and judges to fulfill their roles adequately and effectively,[54] incivility appears to distract from the learning process and from communicating and demonstrating the merits of academic research. For example, Redlich asserts in the context of teaching that "[i]t is possible to be demanding and intellectually rigorous without being demeaning."[55] Similarly, Jennifer Robbennolt and Vikram Amar assert that "[v]igorous debate, dissent, and zealous advocacy are all valued—and can all be done in a professional manner."[56] At the same time, if litigation is—for better or worse—unquestionably not a tea party, presumably teaching and research are not tea parties either, especially if I am correct that they are practice-adjacent.

Civility is likewise contested in the context of the university, although I do not assume the scope and meaning of the concept is the same in the academy as in the legal profession. Jamie Cameron, for example, while recognizing the intuition that "civility and respect are the hallmarks of effective and rational debate"[57] and acknowledging that "[r]udeness in most instances is counter-productive,"[58] argues that any enforcement of civility compromises academic freedom.[59] In particular, Cameron asserts a chilling effect and a "risk…that a focus on incivility will deflect attention from content and sideline messages that might be critically important."[60] With respect to Cameron, this chilling effect seems abstract and unconvincing in the absence of more concrete evidence and claims.

In contrast to Cameron, adjudicators and some commentators argue that civility is consistent with academic freedom. Horn, for example, argues that "civility, which is sometimes seen as an unacceptable limit on academic freedom, may in fact be one of its necessary conditions. The 'heckler's veto,'…is a negation of academic freedom, not an exercise of it."[61] Likewise, the United Nations Committee on Economic, Social and Cultural Rights observed in its 1999 *General Comment 13* that "[t]he enjoyment of academic freedom carries with it obligations, such

54. Code, *supra* note 49 (writing prejudicially).
55. Redlich, *supra* note 26 at 627.
56. Robbennolt & Amar, *supra* note 27 at 1099.
57. Jamie Cameron, "Giving and Taking Offence: Civility, Respect, and Academic Freedom" in Turk, ed, *supra* note 3, 287 at 292.
58. *Ibid* at 303.
59. *Ibid* at 292.
60. *Ibid* at 294.
61. Horn, *supra* note 16 at 6. See also Thompson, *supra* note 3 ("[t]his does not mean that there are no limits to academic freedom. One is implied: members of the academic staff do not have the right to limit the academic freedom of other members of the academic staff" at 8). See also below note 82.

as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds."[62] Counsel for the faculty association in *University of Waterloo and Faculty Association of the University of Waterloo* acknowledged "that there are limits on academic freedom based on ethical standards, and a Professor is not protected if he or she engages in such things as racist comment, harassment, or illegal or unfair action."[63] Charles Gillin argues, following *Re University of Manitoba*,[64] that "the right to speak publicly on a relevant issue is counterbalanced by the responsibility to speak with reasonable discretion" and that "academic freedom does not protect against what administrators might consider unreasonable breaches of social etiquette…[a]t least in some circumstances etiquette trumps academic freedom."[65] (Gillin explicitly acknowledges that *Re University of Manitoba* is problematic in that "the [arbitrator's] emphasis on etiquette confounds the underlying purpose of academic freedom to protect unwanted, knowledgeable speech."[66]) Similarly, shortly after *Re University of Manitoba,* the arbitration board in *Mount Allison University Faculty Association and Mount Allison University* noted that "[w]e have some reservation about whether the right to criticize the Employer can reasonably be extended to cover personal attacks on the President and other senior members of the administration."[67] Likewise, Forcese recognizes that "there is a prudential limit to academic freedom and speech," which from case law involves "accura[cy]," "appropriate restraint," and "respect for the opinions of others."[68] He specifically notes that academic freedom protects speech "if done honestly, in service of the academic enterprise, and *not simply to offend gratuitously, say in pursuit of a personal vendetta.*"[69] (While I recognize that not all civility breaches are gratuitous, their epistemic and pedagogical value remains unclear and

62. *General Comment 13*, *supra* note 22 at para 39.
63. 2001 CanLII 61020 (ONLA). See also Forcese, "Expressive University," *supra* note 15 at 42-43 on violence and hate speech.
64. *Re University of Manitoba and University of Manitoba Faculty Assn* (1991), 21 CLAS 438, [1991 MGAD No 19 (MBLA).
65. Charles T Gillin, "The Bog-Like Ground on which We Tread: Arbitrating Academic Freedom in Canada" (2002) 39:3 Can Rev Sociology 301 at 309, 310 DOI: <10.1111/j.1755-618X.2002.tb00622.x>. (See also "[f]aculty members have the right to speak publicly, but latent rules of etiquette may take priority," 315-316).
66. Gillin, *supra* note 65 at 317.
67. 1994 CanLII 18326 (NB LA).
68. Forcese, "Expressive University," *supra* note 15 at 40, quoting *Assoc des professeurs de l'Université Concordia c Université Concordia (grief de Petkov)*, 2014 LNSARTQ 42 at para 232
69. Forcese, "Expressive University," *supra* note 15 at 43 [emphasis added].

contested.) More generally, Turk notes that "as a professional right, it [academic freedom] has professional constraints."[70]

While this disagreement over civility for academics remains unresolved, on balance the purported chilling impact of civility on legal teaching and research does not seem damaging enough to relieve lawyer-academics from their professional obligations of civility. All else equal, civil teaching and research will be high-value teaching and research, and vice versa.

3. *The duty of competence*

A third relevant rule is competence.[71] Competence is potentially at issue when lawyer-academics in their teaching or research purport to give a doctrinal statement as to what the law is or to characterize a particular judge, counsel, or academic as incorrect in a statement of law. Just as with negligence, however,[72] a single error does not mean a lawyer is incompetent.

It is not clear that the lawyer's professional duty of competence, properly understood as being short of "perfection," would impair academic freedom in a meaningful way.[73] Indeed, while Cory J for the majority in *Dickason v University of Alberta* found that "there are serious difficulties inherent in any attempt to measure the competence and productivity of professors,"[74] and while the meaning of competence in an academic setting may differ from that of lawyers, the ability to mis-state the law—or at least the ability to repeatedly and frequently mis-state the law—in research or teaching appears antithetical to the pursuit of truth. Justice La Forest of the Supreme Court of Canada in *Mckinney v University of Guelph* recognized that "incompetence" is one of the few valid grounds for termination of even a tenured professor.[75] Similarly, in the US context, Robert Post explains that "unlike the First Amendment, however, academic freedom of research also *limits* dissent, for it requires that dissent be cognizable as an exercise of disciplinary competence."[76]

While it is not necessarily true that the concept of incompetence is the same for academics as for lawyers, and indeed incompetence is not

70. Turk, *supra* note 21 at 12, quoted in Forcese, "Expressive University," *supra* note 15 at 42.
71. FLSC *Model Code*, *supra* note 30, r 3.1-2. See also Quebec *Code*, *supra* note 30, ss 20-21.
72. FLSC *Model Code*, *supra* note 30, r 3.1-2, commentary 15.
73. *Ibid*, r 3.1-2, commentary 15.
74. *Dickason v University of Alberta (Human Rights Commission)*, [1992] 2 SCR 1103 at 1137, 95 DLR (4th) 439.
75. [1990] 3 SCR 229 at 283, 76 DLR (4th) 545.
76. Robert C Post, "Academic Freedom and Legal Scholarship" (2015) 64:4 J Legal Educ 530 at 535 online: <jle.aals.org/home/vol64/iss4/11/> [perma.cc/EW98-JE6M] [emphasis in original].

well-defined in the case law on academic freedom, a law professor who routinely misstated the law to an extent that violated their professional duty of competence would presumably be considered incompetent as a teacher and researcher. On the other hand, Sidney Hook argues that academic freedom includes "the right to heresy in the field of his competence… [t]he right in good faith to be wrong."[77] As Drake puts it, citing Hook: "If truth is to be identified, those who search for it cannot be constrained by prescribed dogma. They must be permitted to conduct their search without fear of reprisal in case it turns out that the truth is unpopular."[78]

Lawyers, including lawyer-academics, can legitimately disagree over anything from the statement of the holding in a particular case or the interpretation of a statutory provision, to doctrinal statements of the law broadly. However, it does not follow that some statements of the law cannot be objectively wrong. Again, all else equal, teaching and research that reflects the lawyer's professional duty of competence will be high-value teaching and research.

Following *Groia v Law Society of Upper Canada*, the professional duty of competence is also more specifically relevant to academics who teach and research in legal ethics. Recall that Moldaver J for the majority in *Groia* held that erroneous allegations of misconduct against opposing counsel are a matter of competence, not civility.[79] Presumably, erroneous allegations of misconduct against any lawyer or judge are similarly a matter of competence. That, however, brings me to what I term the *Laarakker* problem.

4. *The Laarakker problem for legal ethics teaching and research*

The appropriate role for lawyer-academics to critique the behaviour of lawyers, and presumably judges, depends on how one reads the reasons of the Hearing Panel of the Law Society of British Columbia in *Re Laarakker*.[80] Laarakker was the lawyer perturbed by his client's receipt of a demand letter asserting a legally hollow claim for damages purportedly incurred because of shoplifting by the client's teenage child.[81] Laarakker sent an intemperate fax to the lawyer who signed the letter and made intemperate blog posts about the lawyer.[82] The panel held that this incivility

77. Sidney Hook, "The Principles and Problems of Academic Freedom" (1986) 58:1 Contemp Educ 6 at 7.
78. Drake, *supra* note 19 at 39, citing Hook, *supra* note 77 at 7.
79. *Groia*, *supra* note 50 at para 96.
80. 2011 LSBC 29, penalty at 2012 LSBC 2.
81. *Ibid* at paras 8-11.
82. *Ibid* at paras 12-14.

constituted professional misconduct.[83] Read generally, *Re Laarakker* holds that another lawyer's unprofessional conduct does not justify incivility in response. That interpretation poses no problems for legal ethics teaching and research. But a closer reading suggests that where a lawyer determines that another lawyer has violated their professional obligations, the correct course of action is a complaint to that lawyer's law society and not public criticism of that lawyer's conduct:

> Even if the Ontario Lawyer [the author of the demand letter] can be considered to be a "rogue," it is not the Respondent's place to pursue some form of vigilante justice against that lawyer by posting intemperate personal remarks or by writing letters that do not promote any possibility of resolution of the client's legal dispute…. Clearly, the appropriate avenue for the Respondent to take would have been to file a complaint either with the Law Society of Upper Canada or the Law Society of British Columbia.[84]

Thus, it is unclear whether the core problem was Laarakker's incivility, the public nature of that incivility, the public criticism of another lawyer's conduct, or some combination of the three. Teaching and research are presumably not "vigilante justice,"[85] though *Re Laarakker* sets a low bar. A prohibition on all public criticism of another lawyer, at least so long as that public criticism is civil, would certainly impede academic freedom and is inconsistent with the lawyer's ability to criticize judges and the administration of justice itself.[86] Thus, the rules prohibit only "ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers," not merely any criticism.[87] Nonetheless, *Re Laarakker* suggests that a lawyer-academic who intends to criticize a lawyer's conduct should first make a complaint with the corresponding law society. A corresponding requirement would presumably apply to

83. *Ibid* at para 48.
84. *Ibid* at paras 45-46.
85. *Ibid* at para 45.
86. FLSC *Model Code*, *supra* note 30, r 5.6-1. See above notes 8-9 and corresponding text.
87. *Ibid*, r 7.2-1, commentary 3. See also Quebec *Code*, *supra* note 30 ("[a] lawyer must collaborate with other lawyers in the interests of clients and the sound administration of justice. He must therefore avoid any unfair practice or any conduct towards another lawyer which could abuse the other lawyer's good faith or trust. *He must also avoid criticizing, in an unrestrained or unfounded manner, his competence or conduct, the quality of his services or his fees*" at ss 132, [emphasis added]). See also The Advocates' Society, *Principles of Civility and Professionalism for Advocates* (Toronto: The Society, 2020) online: <www.advocates.ca> [perma.cc/8FCH-8FZL] ("[a]dvocates should not make ill-considered, gratuitous, derogatory, or uninformed comments about opposing counsel to others, including clients and the court" at s 42. The *Principles* also focus on the *forum* in which criticism is made, providing that "reasoned criticism based on evidence of lack of competence, unacceptable or discriminatory conduct, or unprofessional acts may be made *in the appropriate forum*" (s 42, [emphasis added]) but that social media is not such a forum (s 43)).

academics criticizing the conduct of a judge. However, such a broad reading of a single disciplinary decision would both strangle legal ethics teaching and research and misdirect the resources of law societies.

5. *Conclusion*

In this Part, I have canvassed how the law of lawyering, and particularly the rules of professional conduct, potentially engage the teaching and research of lawyer-academics. I have suggested that the potential effects on academic freedom are relatively minor at most. That is, the prospect of regulation and even discipline by law societies does not unduly negate the ability of lawyer-academics to fulfill their roles in the university. Law society regulation would constrain only low-value teaching and research; indeed, all else equal, teaching and research that complies with the rules of professional conduct will be high-value teaching and research. Now I turn to the legal question of whether law societies *can* regulate lawyer-academics.

III. *The can question: can law societies regulate lawyer-academics?*

Given that teaching and research by lawyer-academics engages at least some of the law of lawyering and the rules of professional conduct, in this part I consider whether law societies can indeed regulate the teaching and research of lawyer-academics as a matter of law.

1. *Constitutional considerations*

The starting point for my analysis in this Part is that despite the importance of academic freedom, the concept has yet to be constitutionalized or meaningfully codified in Canada[88]—although Canadian legislation and the *Charter* should be interpreted in accordance with Canada's obligations under international law, which have been interpreted to protect academic freedom.[89] While I flag the intriguing possibility that freedom of association could constitutionalize protections for academic freedoms insofar as such protections are the result of collective bargaining, I leave that argument for other scholars and another day. I also observe that, at

88. Contrast e.g. *Charter of Fundamental Rights of the European Union*, [2000] OJ Europ Comm C 364/01, Art 13: "The arts and scientific research shall be free of constraint. Academic freedom shall be respected."

89. See e.g. *Schreiber v Canada (Attorney General)*, 2002 SCC 62 at para 50; *General Comment 13*, *supra* note 22 at para 39 [emphasis added], interpreting Article 13 of the *International Covenant on Economic, Social and Cultural Rights* (1996) 993 UNTS 3: "Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions *without discrimination or fear of repression by the State or any other actor*." Thanks to Sara Seck for encouraging me to consider this important point.

least in Canadian law, academic freedom is not codified in statute in such a way that those provisions might be interpreted as overriding legislation on the legal profession. Thus, at least for the moment and for the purposes of this article, academic freedom in itself does not have the constitutional or sub-constitutional force to oust law society jurisdiction over lawyer-academics.[90]

Instead, the strongest potential protection for the teaching and research of lawyer-academics comes from freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*,[91] though that protection may be more nuanced than it first appears. It is certainly clear that the *Charter* applies to law societies and their rules of professional conduct.[92] It is equally clear, however, that lawyers accept limits on their *Charter* rights—in particular, freedom of expression—that the general public does not.[93] Put another way, infringements of lawyers' section 2(b) rights will be more readily justifiable under section 1 of the *Charter* than infringements of the section 2(b) rights of non-lawyers—or, in the administrative law context, a decision that the obligations of lawyers outweigh their *Charter* rights to freedom of expression will generally be reasonable.[94]

However, most of these precedents are potentially distinguishable because they consider practicing lawyers. The only exception is *Nova Scotia Barristers' Society v Morgan*, in which the panel held that law societies' constraints on even non-practicing lawyers are justifiable infringements of section 2(b) under section 1 of the *Charter*.[95] I have elsewhere questioned this holding in *Morgan* by suggesting that non-practicing lawyers may have stronger section 2(b) claims than practicing lawyers.[96] That suggestion, however, is at least partially rooted in a conception of political speech as "core" expression for the purposes of

90. See Forcese, "Expressive University," *supra* note 14 ("[i]f academic freedom has no basis in legislation, a legal breach of academic freedom can only stem from a contract, or some other common law principle" at 30-31, [citation omitted]. But see also 28, suggesting that academic freedom may provide a basis for common-law privilege under the law of evidence and 29, quoting from *McKenzie v Isla*, 2012 HRTO 1908 at para 35 on the reluctance of human rights tribunals to intervene in university speech contexts).

91. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2(b) [*Charter*]. In the US context see Kuehn, *supra* note 4 at 267-269.

92. See e.g. *Doré*, *supra* note 51 at paras 2-6; *Histed*, *supra* note 52 at paras 57, 93; *Re Klein and Law Society of Upper Canada* (1985), 50 OR (2d) 118, 16 DLR (4th) 489 (Div Ct).

93. See e.g. *Histed*, *supra* note 52 at para 79; *Doré*, *supra* note 51 at para 68.

94. See again e.g. *Histed*, *supra* note 52 at para 79; *Doré*, *supra* note 51 at para 68.

95. *Morgan*, *supra* note 16 (discussed e.g. in Martin, "Limits," *supra* note 6 at 171).

96. Martin, "Limits," *supra* note 6 at 169, 171.

section 2(b) of the *Charter* and thus would be more applicable to lawyer-politicians and political commentators than to lawyer-academics.

The viability of a parallel protection for lawyer-academics would depend in part on whether academic speech—teaching and research—is properly considered "core" expression or otherwise analogous to political speech. While not using "core" characterizations, Canadian courts have indeed recognized the value of university research and teaching. That value may protect academic speech in a similar way as political speech. For example, La Forest J in *Mckinney* stated that "[a]cademic freedom and excellence is essential to our continuance as a lively democracy"[97]—though, as Dwight Newman notes, "he gives it no specific legal force."[98] Similarly, the Information and Privacy Commissioner of Ontario has held that

> academic freedom is of vital importance to our society. It permits the free flow of information and academic opinion and encourages critical debate and the engagement of this country's best minds in causes, issues, and policies; even when such debate and criticism may be politically unpopular. Academic freedom protects our free and democratic society by allowing our scholars and academics to investigate controversial issues and unpopular views, without interference or scrutiny by the government or the public.[99]

(I acknowledge that the Commissioner here seems to be referring at least in part to the institutional-autonomy component of academic freedom.) Like political speech, these characterizations emphasize that freedom of expression protects and benefits not only the speaker but the listener and society at large—indeed, this very concept was first recognized in cases about the freedom of the press to report on the courts.[100] In a free and democratic society, criticism of the justice system and its participants must likewise be "core" expression and is not meaningfully distinct or even distinguishable from political expression. Nonetheless, if practicing lawyers within that system can legitimately be constrained, it is difficult to see how lawyer-academics would receive greater protection for their expression.

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97. *McKinney*, *supra* note 75 at 286-287, as quoted e.g. in Dwight G Newman, "Application of the *Charter* to Universities' Limitation of Expression" (2015) 45:1-2 RDUS 133 at 149.
98. Newman, *supra* note 97 at 149.
99. *Re University of Ottawa*, Order PO-3084 at para 29, 2012 CanLII 31568 (ON IPC).
100. *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1339, 64 DLR (4th) 577, quoting *Ford v Quebec (Attorney General)* [1988] 2 SCR 712 at 767, 54 DLR (4th) 577.

It might seem ironic that *Mckinney*, like much of the Canadian legal literature on academic freedom and universities,[101] focuses on whether academic freedom may preclude the application of the *Charter* to and within universities, yet I am suggesting that the *Charter* should protect academic speech. However, Paperny JA in *Pridgen v University of Calgary* noted that "there is no legitimate conceptual conflict between academic freedom and freedom of expression. Academic freedom and the guarantee of freedom of expression contained in the *Charter* are handmaidens to the same goals; the meaningful exchange of ideas, the promotion of learning, and the pursuit of knowledge."[102] Contrast in the US context Post, who emphasizes collegial evaluation and judgement of academic research: "Academic freedom of research is … nothing at all like a First Amendment right to say what one pleases without fear of legal repercussions … Unlike the First Amendment, however, academic freedom of research also *limits* dissent."[103]

Thus, it seems unlikely that law society discipline of lawyer-academics for their teaching or research constitutes an unjustifiable infringement of freedom of expression under section 2(b) of the *Charter*. I proceed with my analysis on the basis that, as a question of law, law societies can regulate and discipline lawyer-academics in their teaching and research.

2. *Interference with academic discipline*

The ability of universities to discipline lawyer-academics in their capacity as academics does not preclude law society discipline of lawyer-academics in their capacity as lawyers. This reality is a clear parallel to *Krieger v Law Society of Alberta*, in which the Supreme Court of Canada held that the potential for a Crown Attorney to face employment consequences for their conduct did not preclude law society discipline.[104]

3. *On balance: yes they can*

While there remains some doctrinal uncertainty given the absence of any direct precedent, I conclude that law societies can—as a matter of law—

101. Craig Jones, "Immunizing Universities from *Charter* Review: Are We 'Contracting Out' Censorship" (2003) 52 UNB LJ 261; Krupa M Kotecha, "*Charter* Application in the University Context: An Inquiry of Necessity" (2016) 26:1 Educ & LJ 21; Michael Marin, "Should the Charter Apply to Universities" (2015) 35:1 National J Constitutional L 29; Newman, *supra* note 97; Franco Silletta, "Revisiting Charter Application to Universities" (2015) 20 Appeal 79 online: <journals.uvic.ca/index.php/appeal/article/view/13596> [perma.cc/C693-NELK]; Kenneth Wm Thornicroft, "Rethinking *McKinney:* To What Extent Should Universities Be *Charter*-Free Zones?" (2020) 29:1 Educ & LJ 79; Forcese, "Expressive University," *supra* note 14 at 19-25.

102. 2012 ABCA 139 at para 117, quoted e.g. in Newman, *supra* note 97 at 152.

103. Post, *supra* note 76 at 533, 535 [emphasis in original].

104. 2002 SCC 65 at para 50 [*Krieger*].

discipline lawyer-academics for their teaching and research. Far from ending the analysis, this conclusion points to the next question: should law societies exercise this legal power?

IV. *The should question: should law societies regulate lawyer-academics?*

Even if I am correct that law societies *can* regulate lawyer-academics in their research and teaching, whether they *should* do so is a separate question.

I argue that law societies should regulate teaching and research by lawyer-academics for two reasons. First, such regulation is necessary for law societies to fulfill their mandate to regulate the profession in the public interest. Second, any negative effects on teaching and research are minimal or outweighed by positive effects, or both. However, such a policy decision should be left to the law societies—any legislative imposition would impair the independence of the bar.[105] Thus my goal here is to persuade law societies to regulate lawyer-academics, not to persuade legislators to require law societies to regulate lawyer-academics.

I also emphasize that, based on my analysis in Parts II and III, there is no compelling reason to regulate lawyer-academics any differently than other non-practicing lawyers, be they lawyer-politicians such as John Morgan or lawyer-pundits such as Ezra Levant.

1. *Law society regulation of lawyer-academics is necessary and appropriate to fulfilling the role of law societies*

The mandate of law societies is to regulate the legal profession in the public interest.[106] Failures of lawyer-academics to meet their duties of competence, civility, and to encourage respect for the administration of justice are legitimate and necessary subjects of law society regulation.

Law societies have a legitimate regulatory interest in the ability of lawyer-academics to return to practice in the future. Perhaps the ability and willingness to comply with the duty of civility and the duty to encourage respect for the administration of justice can easily and deliberately be turned on and off, such that present incivility and failure to encourage respect for the administration of justice is not necessarily predictive of future incivility and failure to encourage respect for the administration of justice. However, the ability and willingness to comply with the

105. While Cromwell J for the majority in *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 at para 80 declined to determine whether this principle constitutes a principle of fundamental justice, the court below had done so: 2013 BCCA 147 at paras 105-115.

106. See e.g. *Law Society of New Brunswick v Ryan*, 2003 SCC 20 at para 36; *Merchant v Law Society (Saskatchewan)*, 2002 SKCA 60 at para 57.

duty of competence cannot be turned on and off in the same way. The duty of competence is different: present incompetence is predictive of future incompetence. The law society has no role in policing a lawyer-academic's statement of what the law should be,[107] but has a valid interest in a lawyer-academic's ability to accurately identify a statement of what the law actually is. A lawyer-academic who routinely misstates the law in their research and teaching may potentially return to practice and do so in advising clients. Moreover, incompetent instruction of law students may contribute to incompetence of future lawyers.

The existing rules of professional conduct recognize that lawyers, even in their extraprofessional conduct, can damage public respect for the administration of justice, whether through incivility or otherwise. The consensus in the Canadian legal ethics community appears to be that law societies should largely avoid engaging with or regulating lawyers' conduct outside the practice of law, whether because such regulation is illegitimate or because scarce resources should be used to protect the public from the more tangible harms of practicing lawyers' professional conduct.[108] A competing minority view is that non-practicing lawyers, such as lawyer-politicians, are some of the highest-profile lawyers in the country and their misconduct reflect negatively on, and indeed undermines public confidence in, the legal profession.[109] The official position of law societies, as embodied in the rules of professional conduct, is that while "dishonourable" or "questionable" conduct outside practice is the legitimate target of professional discipline, they are "generally" concerned with extraprofessional conduct that goes to "professional integrity."[110] Thus, even if the ability and willingness to comply with the duty of civility and the duty to encourage respect for the administration of justice can easily and deliberately be turned on and off, such noncompliance by

107. But see Quebec *Code*, *supra* note 30 ("[a] lawyer must support respect for the rule of law. However, he may, for good reason and by legitimate means, criticize a legal provision, contest the interpretation or application thereof, or seek to have it repealed, amended or replaced" at s 12).

108. See e.g. Alice Woolley, "Legal Ethics and Regulatory Legitimacy: Regulating Lawyers For Personal Misconduct" in Reid Mortensen, Francesca Bartlett & Kieran Tranter, eds, *Alternative Perspectives on Lawyers and Legal Ethics: Reimagining the Profession* (New York: Routledge, 2011) 241; Martin, "Limits," *supra* note 6 ("[l]aw societies should have better things to do" at 172, quoting Adam Dodek).

109. Andrew Flavelle Martin, "Legal Ethics versus Political Practices: The Application of the Rules of Professional Conduct to Lawyer-Politicians" (2013) 91:1 Can Bar Rev 1 at 30 [Martin, "Political"]; Andrew Flavelle Martin, "Consequences for Broken Political Promises: Lawyer-Politicians and the Rules of Professional Conduct" (2016) 10:2 JPPL 337 at 345 online: <digitalcommons.schulichlaw.dal.ca/scholarly_works/91/> [perma.cc/425J-Q3GG] (I am not only *in* the minority on this point—as far as I can tell, I *am* the minority).

110. FLSC *Model Code*, *supra* note 30, r 2.1-1, commentaries 3 and 4.

lawyer-academics is of legitimate present concern, not just future concern, for law societies. Moreover, teaching and research by lawyer-academics is practice-adjacent. It is the closest that extraprofessional conduct can come to professional conduct. Thus, of all extraprofessional conduct, teaching and research by lawyer-academics is most indicative of professional conduct and most worthy of regulation by law societies. Thus, if there is any extraprofessional conduct that law societies should regulate, it is teaching and research by lawyer-academics.

The ability of universities to discipline lawyer-academics in their capacity as academics is no substitute for law society discipline of lawyer-academics in their capacity as lawyers. This reality is another clear parallel to *Krieger v Law Society of Alberta*, in which the Supreme Court of Canada held that the potential for a Crown Attorney to face employment consequences for her conduct was no substitute for law society discipline.[111] Just as the Attorney General can end the career of a Crown Attorney but cannot prevent them from continuing to practice law in another context,[112] universities can arguably end the academic careers of lawyer-academics but cannot stop them from returning to the practice of law. Conversely, the authority and responsibility of law societies to discipline lawyer-academics in their capacity as non-practicing lawyers by no means precludes their discipline by other authorities in other capacities.[113] Thus, for example, universities remain free (subject to collective agreements and other constraints) to discipline lawyer-academics in their capacity as members of the university community. Indeed, some kinds of misconduct, such as academic dishonesty, may not only legitimately but necessarily trigger consequences under both regimes.

The concern over the best use of scarce law society resources,[114] i.e. that law society resources may be diverted from addressing the more tangible and immediate harms done by practicing lawyers, is a legitimate one. However, that concern calls for prudence, not abdication. Moreover, the relatively limited number of lawyer-academics in Canada (as compared for example to the US) suggests that any regulation would not excessively detract from other regulatory priorities.

I acknowledge the existential concern that law societies may assert their authority over lawyer-academics in order to indirectly exert undue

111. *Krieger*, *supra* note 104.
112. *Ibid* at para 58.
113. See by analogy *Wilder v Ontario Securities Commission* (2001), 53 OR (3d) 519, 197 DLR (4th) 193 (CA).
114. Martin, "Limits," *supra* note 6 ("[l]aw societies should have better things to do" at 172, quoting Adam Dodek).

control over the legal academy and legal education. However, while such regulation may complicate and perhaps require recalibration of the tension or balance between law societies and the legal academy over control of legal education, that is not a sufficient basis for law societies to leave their mandates unfulfilled.

2. *The positive effects of law society regulation on teaching and research by lawyer-academics outweigh any negative effects*

The potential positive effects of law society regulation have been discussed above. First, the rules on competence, the duty to encourage respect for the administration of justice, and the duty of civility constrain teaching and research that is objectively incorrect, "petty," "intemperate," intellectually dishonest, or "irresponsible."[115] These are attributes of low-value teaching and research. To the extent that law society regulation constrains such conduct, it improves teaching and research. Second, modelling professional conduct is an important component of legal teaching (and research). Law society regulation of lawyer-academics promotes such modelling.

The potential negative impacts of law society regulation on teaching and research by lawyer-academics are important considerations but ultimately manageable. There are two main potential negative effects. One is that law society regulation may be abused to inappropriately target lawyer-academics. The second and most important potential negative impact is a chilling effect on teaching and research by lawyer-academics and the risk that that chilling effect will drive legal academics out of the profession or discourage them from joining the profession in the first place.

The risks of law society regulation being co-opted to inappropriately target lawyer-academics are real but manageable ones. I recognize that the regulatory jurisdiction of law societies risks being harnessed for retribution against lawyer-academics, parallel to its harnessing for retribution against lawyer-politicians,[116] be it by the subjects of their criticism, disgruntled students, grandstanding politicians, or merely those who disagree. I also recognize the potential apprehension that law societies might abuse their powers to retaliate or threaten retaliation against law professors who criticize the law societies themselves. There are two safeguards against these risks. The first is the ability of law societies and their discipline counsel to adopt robust processes to filter and divert at least most of the frivolous, malicious, tactical, or otherwise abusive complaints received. The possibility for disgruntled or dissatisfied students or other academics or lawyers to abuse the process does not negate the positive and necessary

115. FLSC *Model Code*, *supra* note 30, r 5.6-1, commentary 3.1.
116. See e.g. Martin, "Political," *supra* note 109 at 23.

role for investigations and discipline proceedings in other circumstances. The second safeguard is the supervisory jurisdiction of the superior courts through judicial review.

Perhaps the most important potential negative impact is a chilling effect on teaching and research by lawyer-academics and the risk that that chilling effect will drive legal academics out of the profession or discourage them from joining the profession in the first place. In 2016 I proposed this second effect as a solution for non-practicing lawyers who found their professional obligations constraining their activities as lawyer-politicians or lawyer-pundits: "The easy solution is for these non-practising lawyers to resign their licences …—but preferably before engaging in the prohibited conduct."[117] While admittedly somewhat glib, I did at least acknowledge that such a solution might be undesirable insofar as it "may discourage lawyers from using their skills and knowledge to serve in valuable roles as commentators, politicians or academics. Movement among these roles and the practising bar and the judiciary may be desirable."[118]

Any chilling effect, and this simplistic solution to it, is problematic because there is value in at least some law professors being licensed lawyers, as opposed for example to simply holding degrees in law or having practiced before surrendering their licenses to teach. One might argue that they make better law teachers.[119] Beyond that, however, lawyer-academics at least sometimes may achieve, promote, or fulfill the aspirations or duties of the legal profession better than practicing lawyers. For example, practicing lawyers may be more reluctant to criticize judicial appointments, even though such criticism can be consistent with—and indeed fulfill—the duty to encourage respect for and improve the administration of justice. Perhaps understandably, all but the bravest lawyer-academics, in all but the most extreme circumstances, are adamant to emphasize that they are criticizing the appointments process and not specific appointments.[120]

117. Martin, "Limits," *supra* note 6 at 172.

118. *Ibid*.

119. In the US literature see e.g. Amy B Cohen, "The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law" (2004) 50:3 Loyola L Rev 623 online: <digitalcommons.law.wne.edu/facschol/58/> [perma.cc/45LM-HH68]; James M Dente, "Need for More Professors Who Have Practiced Law" (1969) 18 Clev-Marshall L Rev 252 online: <engagedscholarship.csuohio.edu/cgi/> [perma.cc/7895-USTP]; Martin H Pritikin, "The Experiential Sabbatical" (2014) 64:1 J Leg Educ 33 <jle.aals.org/home/vol64/iss1/4/> [perma.cc/7CYS-JA4U]; Suzanne Rabe & Stephen A Rosenbaum, "A Sending Down Sabbatical: The Benefits of Lawyering in the Legal Services Trenches" (2010) 60:2 J Leg Educ 296 <jle.aals.org/home/vol60/iss2/7/> [perma.cc/E42E-TEBE]; Edward D Re, "Law Office Sabbaticals for Law Professors" (1995) 45:1 J Leg Educ 95; Emily Zimmerman, "Should Law Professors Have a Continuing Practice Experience (CPE) Requirement" (2013) 6:1 Northeastern U LJ 131.

120. See e.g. Richard Devlin & Adam Dodek, "The Achilles Heel of the Canadian Judiciary: The

Thus Richard Devlin and Adam Dodek characterize appointments as "the Achilles heel of the Canadian judiciary", but only directly question the merits of one such appointment.[121] For example, the only public criticism of a 2011 elevation of a judge from the Court of Appeal for Ontario to the Supreme Court of Canada came from two lawyer-academics, both of the Ontario Bar: Allan Hutchinson of Osgoode Hall and Jacob Ziegel of the University of Toronto—and even Ziegel would comment only on the process, albeit in stark terms.[122] From this perspective, lawyer-academics have a greater ability than practicing lawyers to fulfill lawyers' duties, specifically to improve the administration of justice through legitimate but controversial criticism.

This paradox can be explained in economic terms, though I would not reduce it to such terms. In the US context, Kuehn characterizes lawyer-academics as having special "economic freedom"—"by not having the same worries as practicing lawyers about offending paying clients or taking positions that might be viewed as conflicting with those of a current client."[123] He further argues that such economic freedom imposes a "duty to pursue justice."[124]

Ethics of Judicial Appointments in Canada" 20:1 Legal Ethics 43 at 58, 59; Hugo Cyr, "The Bungling of Justice Nadon's Appointment to the Supreme Court of Canada" (2014) 67:3 SCLR 73 online: <digitalcommons.osgoode.yorku.ca/sclr/vol67/iss1/3/> [perma.cc/TEK3-EDEQ].

121. Devlin & Dodek, *supra* note 120 at 58, 59-62.

122. Kirk Makin, "PM taps Ontario judges Karakatsanis, Moldaver for Supreme Court," *The Globe and Mail* (17 October 2011), online: <www.theglobeandmail.com/news/politics/pm-taps-ontario-judges-karakatsanis-moldaver-for-supreme-court/article557785/> [perma.cc/2BZV-HXMX]; Kirk Makin, "Nominees' ordeal likely to be tough, but not adversarial," *The Globe and Mail* (11 October 2011) A4, 2011 WLNR 21320517: "What I seriously question is the integrity of the process that led to [the judge's] nomination." See also more recent and more pointed criticism of other elevations by lawyer-academics: John Whyte, "Russell Brown doesn't belong on the Supreme Court," *The Toronto Star* (18 August 2015), online: <www.thestar.com/opinion/commentary/2015/08/18/russell-brown-doesnt-belong-on-the-supreme-court.html> [perma.cc/7J54-C7D8]; Leslie MacKinnon, "What the new Supreme Court of Canada judge brings to top court," *iPolitics* (2 July 2021), online: <ipolitics.ca/2021/07/02/what-the-new-supreme-court-of-canada-judge-brings-to-top-court/> [perma.cc/6AU9-5F6X] quoting Joshua Sealy-Harrington; Joshua Sealy-Harrington, "As an aside, I'll note that my comment about Canada being "replete" with "brilliant and thoughtful" racialized lawyers (left image) is not quite what I said. My full comment re *Indigenous* jurists (right image) differs and warrants particular emphasis in the current moment" (6 July 2021 at 13:21 PM), online: *Twitter* <mobile.twitter.com/JoshuaSealy/status/1412446606855655431>. But see also by a practicing lawyer on the elevation of Justice Mahmud Jamal to the Supreme Court of Canada: Riaz Sayani, "The Politics of Judging Our Judges," *The Toronto Star* (27 July 2021), online: <www.thestar.com/opinion/contributors/2021/07/27/the-politics-of-judging-our-judges.html> [perma.cc/GE5N-6VKW].

123. Kuehn, *supra* note 4 at 267-296. See also Byrne, *supra* note 4 ("[l]aw professors also bear obligations to society greater than those of scholars in purer disciplines. We have been given the niche from which to observe the legal system without being beholden to competing interest groups or clients" at 329). See also McPeak, *supra* note 9 ("[l]aw professors who are not actively practicing law face greater flexibility to discuss real cases and issues without fearing that they will breach confidentiality or other duties to clients" at 217, n 103).

124. Kuehn, *supra* note 4 at 296. See also Byrne, *supra* note 4 ("[s]urely we [law professors] should

Here I distinguish between past legal education and experience, on the one hand, and current membership in a provincial or territorial bar, on the other. A legal education is doubtlessly useful for politicians, commentators, and journalists, among others, and arguably indispensable for law professors. Likewise past practice experience. But it is not obvious that current membership in a bar is necessary or even advantageous for politicians, commentators, and journalists. Indeed, the constraints of professional obligations may impede their performance of their chosen roles.[125] The same might even be true for academics outside law schools, such as political scientists. In contrast, insofar as the role of the law school is at least partly to train and prepare future lawyers, there is a benefit in at least some law school faculty not just being legally trained but also being current lawyers—even if I am wrong and that status does indeed constrain their academic freedom to pursue the mission of the university. I also note that former lawyer-academics often make significant contributions as members of the judiciary. Such appointments require membership in the bar.

However, insofar as I am correct that law society regulation constrains—and is seen to constrain—only low-value teaching and research, this chilling effect should be minimal.

While I recognize that law society regulation of lawyer-academics is by definition a double standard,[126] that double standard is not inherently problematic—that is, it is not a negative effect. Lawyer academics face constraints not applicable to their non-lawyer colleagues in the law school or to their colleagues in other parts of the university. Those law professors (and other professors) who are not lawyers will not be constrained by law society regulation, while those who are lawyers will be so constrained. As I have argued, however, law society regulation constrains low-value teaching and scholarship. In this way, it is an additional mechanism to enforce what is essentially the same standard that applies to all law professors and may indeed promote higher-quality teaching and research. The narrow if not non-existent range of legitimate academic views that cannot be expressed by lawyer-academics can instead be expressed by their non-lawyer colleagues in law schools—or elsewhere in the university. If anything, the double standard thus diversifies teaching and research.

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devote effort to public education about the legal system, such as through expert testimony, journalism, or media appearances, to law reform, or to representation of unrepresented persons or viewpoints" at 329).

125. Martin, "Limits," *supra* note 6 at 172.

126. See by analogy Martin, "Political," *supra* note 109 at 20-23 (double standard as between lawyer-politicians and non-lawyer politicians).

3. *On balance: yes they should*

Given my analysis in Part II, responsible and responsive regulation of lawyer-academics by law societies, including but not limited to the enforcement of the rules of professional conduct, should improve research and teaching. In this context, law societies should strive to provide clarity and predictability to lawyer-academics about the manner in which this legal authority will be exercised. This brings me to my recommendations.

V. *Recommendations (responses and solutions)*

In this article, I have identified the present uncertainty around law society regulation of the teaching and research of lawyer-academics and considered the legal and policy questions involved. In this Part, I conclude my analysis by considering potential responses to the current situation.

As always, one potential response is for law societies to do nothing, i.e. to perpetuate the current uncertainty, and for lawyer-academics to continue on as before. However, this option is arguably the least helpful. Uncertainty over potential law society regulation has its own chilling effect separate from that of actual regulation. Indeed, uncertainty is potentially the greatest chilling effect. At the same time, it is certainly the one most amenable to amelioration. Whether Canadian law societies choose to take an active role or a hands-off role in the teaching and research of Canadian lawyer-academics, those lawyer-academics and their teaching and research would benefit from a clear articulation of that chosen role. To date, the law societies have had said little about academic freedom and related issues. Perhaps the closest that Canadian law societies have come to recognizing academic freedom is a brief passage in a single report of the Canadian Common Law Degree task force of the Federation of Law Societies of Canada:

> Law societies respect the academic freedom that law schools vigorously defend. There is a strong tradition within the legal education system, particularly in North America, to view law school education as not simply a forum for training individuals to become practitioners of a profession, but also as an intellectual pursuit that positions its graduates to play myriad roles in and make valuable contributions to society … The Task Force believes that its recommendations balance law societies' regulatory responsibilities with the importance of academic freedom and learning in law schools.[127]

127. Federation of Law Societies of Canada, *Task Force on the Canadian Common Law Degree: Final Report: October 2009* (Ottawa: FLSC, 2009) at 18, 25, online (pdf): <flsc.ca/wp-content/uploads/2014/10/admission8.pdf> [perma.cc/9B6A-TPDU].

I encourage the law societies in common-law jurisdictions, potentially through the Federation of Law Societies of Canada, and the Barreau de Quebec to develop and publicize a clear policy on these issues—one that would guide not only lawyer-academics but also law society investigatory and disciplinary personnel and disciplinary adjudicators. In so doing, they should consult widely and engage stakeholders such as the Canadian Association of Law Teachers, the Canadian Association of University Teachers, the Council of Canadian Law Deans, and the Canadian Bar Association and its member branches. To ensure the public interest and the views of the general public are adequately considered, lay benchers should be particularly involved in this process. An amendment to the rules of professional conduct, however, seems unnecessary. If the legislatures do not agree with the approach that the law societies adopt, they are of course free to amend the legislation governing the legal profession. However, such legislative action is undesirable insofar as it would detract from the independence of the bar.

In my view, it is hypocritical and elitist for lawyer-academics to hold themselves to, or be held to, a lesser standard than the one that the future holds for their students. There is no credible argument that breaches of competence or civility are necessary to high-value teaching and research. Neither do I believe that lawyer-academics require the ability to breach the duty to encourage respect for the administration of justice. Nonetheless, if I am incorrect and there is pedagogical or epistemic value, or both, in lawyer-academics having greater latitude to criticize lawyers and judges than have practicing lawyers, then legislatures, law society decision-makers, or courts could deliberately provide lawyer-academics with special protection against law society discipline for their teaching and research activities. The clearest options would be outright immunity or a special defence somewhat akin to the common-law "responsible journalism" defence against a defamation claim.[128] In the alternative, law societies could merely make a policy decision not to enforce or to deprioritize the enforcement of the rules of professional conduct against lawyer-academics in the context of their teaching and research, whether generally or specifically as to criticism of the administration of justice. While the law societies, by making such a policy choice, would potentially be fettering their own discretion and thus potentially be vulnerable to a legal challenge in the nature of mandamus, I assume they would do so only because there are legitimate and compelling public interest reasons for such an approach.

128. See e.g. *Grant v Torstar Corporation*, 2008 ONCA 796.

Despite the importance of law societies regulating not just practicing lawyers but lawyer-academics, practice-adjacent as they are, law societies may, for many potential reasons, not pursue this part of their role as a regulatory priority. Even so, I would argue that lawyer-academics should make good-faith and sincere efforts to comply with the rules of professional conduct, both in letter and spirit as the rules themselves require,[129] regardless of the realistic potential for law society discipline. Another response to these regulatory incentives and any purportedly compelling need for law professors to criticize the administration of justice in a manner and to an extent that is impermissible for lawyers would be for some minimal proportion of law professors to not become lawyers or to surrender their licenses. However, while there may be an advantage to some law professors not being lawyers, my view remains that most high-quality teaching and research will be achieved only if some, if not most, law professors are lawyers. Any valuable teaching and research that is constrained by the prospect of law society regulation can, in the alternative, be allocated to academics in philosophy and political science that are unconstrained by such regulation. By no means do I suggest that such academics are superior or inferior to lawyer-academics; instead, I simply emphasize that they are subject to different constraints on their teaching and research.

Conclusion

In this article, I have examined the interplay between the professional obligations of lawyer-academics and academic freedom by canvassing the legal and policy questions around whether law societies can and should regulate the teaching and research activities of their members in the academy. Both the legal uncertainty and the policy uncertainty have an unnecessary and remediable chilling effect. Even if the current academic consensus is correct that law societies should not generally regulate extraprofessional misconduct, there is a strong argument that teaching and research warrant regulation. The relevant professional duties of lawyers, presuming their nuances are appreciated, do not necessarily impede academic freedom—at least not in a meaningful and undesirable way. At most, the constraints imposed by the rules of professional conduct promote higher-value research and teaching by impeding low-value

129. FLSC *Model Code*, *supra* note 30, r 3.1.1, definition of "competent lawyer." While the text refers to professional conduct and not extraprofessional conduct—"complying in letter and spirit with all rules pertaining to the appropriate *professional conduct* of lawyers" [emphasis added]—lawyer-academics should refrain from a formalistic interpretation of their duty to meet the spirit of the rules of professional conduct.

academic expression in the form of criticism or other statements that are petty, insincere, unsupported, intemperate, or incorrect. Thus, law societies can fulfill their regulatory mandates without meaningfully impairing the teaching and research of lawyer-academics.

While I recognize that, despite my analysis here, it remains unlikely that law societies will actively regulate lawyer-academics, mere inaction or passivity is insufficient to address the issues I have raised. Instead, law societies should actively and publicly clarify their approach to the regulation of teaching and research by lawyer-academics sooner than later, so that careful consideration is not precluded by immediacy when such circumstances arise, and so that lawyer-academics can benefit from at least some degree of transparency, certainty, and predictability.

Moreover, university administrations and faculty associations should recognize that lawyer-academics are vulnerable to these kinds of professional complaints and proceedings, valid or not, as a direct consequence of their responsibilities and duties to the university. They should thus consider negotiating provisions in their collective agreements that would provide insurance for representation in these matters, parallel to defamation insurance. Even where current provisions may implicitly provide for this protection, explicit language would increase transparency and confidence among faculty.

In the meantime, and regardless of law societies' eventual position on these questions, lawyer-academics should risk any impulse to surrender their licenses to simplify their situations and become unconstrained in their teaching and research activities. They should instead embrace and strive to comply with their professional obligations and model that compliance to their students both in their teaching and their research. It may indeed make them better teachers and scholars.