TOWARD A RESTORATIVE APPROACH TO LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

DANIEL DEL GOBBO*

This article explores the relationship between legal ethics and restorative justice. It argues that the legal profession should be reoriented around restorative justice as the moral foundation of a more progressive approach to legal ethics and professional responsibility. It translates concepts from restorative justice into ethical terms, grounding ideas about interdependence, community involvement, and public accountability into a list of restorative principles that can be readily applied in the practice of law, and recommending a series of practices and regulatory measures that are consistent with a restorative principles-based approach. Ultimately, the article shows that such an approach has the potential to raise the moral consciousness of lawyers, facilitate collaboration within communities and across systems, and redefine the role of lawyers in the administration of justice, transforming conditions of law and society in a more equitable direction.

TABLE OF CONTENTS

INTRODUCTION

Legal ethics scholars have observed that there exists a "crisis" or "decline" in professionalism among Canadian lawyers today, with one commentator expressing "fear that the profession is no longer tethered to the fundamental ideals of a vocation or calling and, as

* Assistant Professor and Chair in Law, Gender & Sexual Justice, University of Windsor Faculty of Law. I wish to thank Amy Cohen, Jennifer Llewellyn, Anna Lund, Lindsey Pointer, Amy Salyzyn, Joshua Sealy-Harrington, Noel Semple, Gemma Smyth, Deanne Sowter, and David Tanovich for conversations and comments, and Keerthi Chintapalli for excellent research assistance. I am equally grateful to colleagues who provided feedback at the Canadian Association for Legal Ethics annual conference in Winnipeg, Manitoba in October 2025. My research in this article was generously supported by the OBA Foundation Chief Justice of Ontario Fellowship in Legal Ethics and Professionalism Research, 2024–2025.

This work is licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License. Authors retain copyright of their work, with first publication rights granted to the Alberta Law Review.

a consequence, has 'lost its way.'"[1] The reasons for the problem are complex, but one explanation is the lack of professional regulatory incentives, market forces, and cultural pressure on lawyers to conceive of themselves as higher moral agents in a public interest-minded profession rather than a merely client service or consumer-oriented one. Legal ethics rules and the "standard conception" of professional role morality that underpins them, the neutral partisan, reflect the liberal notions of client autonomy and interests-maximization as overriding values. The rules enable lawyers, firms, and other kinds of law practices — indeed, the rules arguably *require* lawyers in certain cases — to take legal actions on behalf of their clients that exacerbate power imbalances, harm community stakeholders, and contribute to relationships of substantive inequality. The consequences are gravest in cases involving historically marginalized groups. As the Supreme Court of Canada recognized in *R. v. Barton*, a 2019 case involving rape myths and stereotypes about Indigenous women and girls, "[t]rials do not take place in a historical, cultural, or social vacuum."[2] Lawyers "can — and *must* — do better" to protect the public interest.[3]

In this article, I argue that the decline in professionalism is related to the failure of legal ethics to promote the establishment of just relations as a grounding theory of justice. I find inspiration for this claim in restorative justice, which Jennifer Llewellyn defines as a relational theory of justice because it "aims at realizing the conditions of relationship required for well-being and flourishing."[4] I argue that restorative justice contrasts with the standard conception because it requires a critical assessment of the law's claims to neutrality and the relationships that law cultivates in accordance with substantive equality. Restorative justice forms the basis of a more progressive approach to legal ethics and professional responsibility because it requires lawyers and firms to pursue higher moral ends by higher moral means than conventional frameworks require. It entails a fundamental shift in understanding to whom or what lawyers ought to be accountable — not individuals per se, but communities, harms, and needs in a transformative way.

My argument proceeds as follows. In Part I, I provide an overview of restorative justice in Canada, with a focus on its relational theory underpinnings and the diversity of its origins and practices, including its relationship with the criminal law and Indigenous legal orders. Next, I translate concepts from restorative justice into ethical terms, grounding ideas about interdependence, community involvement, and accountability into a list of restorative principles that can be readily applied by lawyers and firms. Central to this discussion is a long-standing debate about the merits of rules-based approaches compared to principles-based approaches to legal ethics. Principles-based approaches, I explain, are more conducive to progressive theories that frame professional role morality in terms of moral activism and substantive equality specifically. In Part II, I recommend a series of lawyering practices and professional regulatory measures, including changes to the Federation of Law Societies of Canada's *Model Code of Professional Conduct*, which are consistent with taking a restorative

---

1 Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008) at 194–95. See also Toronto Lawyers Association, *Report on Civility and Professionalism in the Legal Profession* (Toronto: 2023) at 4, online (pdf): [perma.cc/4NS3-Q2M8].

2 2019 SCC 33 at para 198 [*Barton*].

3 *Ibid* at para 1 [emphasis in original].

4 Jennifer J Llewellyn, "Restorative Justice: Thinking Relationally about Justice" in Jocelyn Downie & Jennifer J Llewellyn, eds, *Being Relational: Reflections on Relational Theory and Health Law* (Vancouver: UBC Press, 2012) 89 at 91 [Llewellyn, "Thinking Relationally"].

principles-based approach.[5] I conclude by proposing the creation of a professional discipline system that responds restoratively to lawyers and firms that cause harm.

Relatively little scholarly work explores the relationship between relational theory and legal ethics.[6] Even less work explores this relationship by reference to restorative justice specifically.[7] I bridge these disciplines in this article because restorative justice offers more than just an alternative path for lawyers in criminal law settings. Restorative justice constitutes a distinct set of legal and moral obligations that, once implemented as legal ethics, has the potential to raise the moral consciousness of lawyers, facilitate collaboration within communities and across systems, and redefine the role of lawyers in the administration of justice, reaching beyond individual cases to transform conditions of law and society in a more equitable direction.

I. FOUNDATIONS

A. RESTORATIVE JUSTICE IN CANADA

Restorative justice is commonly associated with a range of facilitated, consensual encounters in which parties come together to reflect on harmful conduct and how they can move forward productively to address it. The concept has found greatest traction in the criminal law field, which means that restorative justice is frequently defined in contrast to retributive justice. Howard Zehr explains that in the retributive approach, crime is conceived as a violation of law defined by rule breaking.[8] Redressing the harm requires lawyers to identify the rule in question, the individual who should be blamed, and the punishment they deserve.[9] In the restorative approach, by contrast, crime is conceived as a violation of relationships that creates moral "obligations to make things right."[10] Redressing the harm requires lawyers to identify who has been affected, what their interests are, the individuals responsible for addressing those interests, community members that might have a stake in the matter, and the process for involving them in promoting accountability and preventing future occurrences.[11]

The concept of harm in restorative justice is a broad and systemic one because it understands the effects of the offender or respondent's conduct — the term "responsible person" is preferred in the restorative justice literature[12] — to extend beyond the immediate

---

5 (Ottawa: FLSC, 2022) [*Model Code*].

6 See notes 113–120 below and accompanying text.

7 See note 191 below and accompanying text.

8 Howard Zehr, "Restorative or Transformative Justice?", *Zehr Institute for Restorative Justice* (10 March 2011), online: [perma.cc/799W-ZRWL] [Zehr, "Restorative or Transformative"]. See also Howard Zehr, *The Little Book of Restorative Justice* (Intercourse, PA: Good Books, 2002) at 19–24; Howard Zehr, *Changing Lenses*: *Restorative Justice for Our Times (25th Anniversary Edition)* (Harrisonburg: Herald Press, 2015).

9 *Ibid*.

10 Zehr, "Restorative or Transformative", *supra* note 8.

11 *Supra* note 8 at accompanying text. For similar definitions, see Carrie Menkel-Meadow, "Restorative Justice: What Is It and Does It Work?" (2007) 3 Annual Rev L & Soc Science 161 at 162; Lindsey Pointer, Aparna Polavarapu & Alanna Ojibway, "Restorative Justice in Legal Education" (2025) 73:4 J Leg Educ 899 at 900–01.

12 For commentary on terms, see Theo Gavrielides, "Collapsing the Labels 'Victim' and 'Offender' in the Victims' Directive and the Paradox of Restorative Justice" (2017) 5:3 Restorative Justice 368; Amanda

parties to their broader social and cultural networks. As such, restorative justice reflects what Llewellyn and other restorativists call a "relational theory of justice" that is premised on the fact of our interconnectedness and the importance of establishing just relations marked by equal care, concern, and respect for other people.[13] Llewellyn explains that "[t]his relational view extends beyond interpersonal relationships to relations at the level of groups, of institutions, of systems, and of society."[14] Restorative justice seeks to identify the social conditions that require regulation and then inform legal processes to secure those conditions until such time as just relations exist. Restorativists have grounded these values in a wide range of legal, cultural, and other normative systems, including relational feminist theory, New Left traditions of informal justice and participatory democracy, Mennonite peacebuilding, Afrocentric knowledge and traditions, and Indigenous legal orders in Canada and globally.[15]

The relationship between restorative justice and Indigenous justice is complex and frequently misunderstood, with some (but not all) restorative approaches in Canada grounding their practice in Indigenous laws, knowledges, and worldviews, including kinship obligations that predate settler colonization, and with some (but not all) Indigenous dispute resolution processes identifying themselves as and bearing the hallmarks of restorative justice as described above.[16] Val Napoleon and Hadley Friedland explain that Indigenous peoples created laws to prevent and reduce conflicts that arise in their communities.[17] Most of these

---

Nelund, "The Marginalised Woman: Thinking Beyond Victim/Offender in Restorative Justice" (2017) 5:3 Restorative Justice 408.

13 Llewellyn, "Thinking Relationally", *supra* note 4; Jennifer J Llewellyn & Robert Howse, *Restorative Justice — A Conceptual Framework* (Ottawa: Law Commission of Canada, 1999); John Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002); Fania E Davis, *The Little Book of Race and Restorative Justice: Black Lives, Healing, and US Social Transformation* (New York: Good Books, 2019). For general accounts of relational theory, see Susan Sherwin, "A Relational Approach to Autonomy in Health Care" in Susan Sherwin et al, eds, *The Politics of Women's Health: Exploring Agency and Autonomy* (Philadelphia: Temple University Press, 1998) 19; Catriona Mackenzie & Natalie Stoljar, eds, *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (New York: Oxford University Press, 2000); Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (New York: Oxford University Press, 2011); Christine M Koggel, Ami Harbin & Jennifer J Llewellyn, eds, *Relational Theory: Feminist Approaches, Implications, and Applications* (London, UK: Routledge, 2025).

14 Jennifer Llewellyn, "Realizing the Full Potential of Restorative Justice", *Policy Options* (2 May 2018), online: [perma.cc/XU2Z-RH2K].

15 For commentary on the origins of restorative justice globally, see Elmar GM Weitekamp, "The History of Restorative Justice" in Gordon Bazemore & Lode Walgrave, eds, *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Monsey: Criminal Justice Press, 1999) 75; Paul McCold, "The Recent History of Restorative Justice: Mediation, Circles, and Conferencing" in Dennis Sullivan & Larry Tifft, eds, *Handbook of Restorative Justice: A Global Perspective* (New York: Routledge, 2007) 23; Barbara Tomporowski et al, "Reflections on the Past, Present, and Future of Restorative Justice in Canada" (2011) 48:4 Alta L Rev 815.

16 For commentary on the relationship between restorative justice and Indigenous justice in Canada, see Tomporowski et al, *supra* note 15; Catherine Bell & David Kahane, eds, *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004); Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Canada, 2006); Department of Justice Canada, *A Report on the Relationship Between Restorative Justice and Indigenous Legal Traditions in Canada*, by Larry Chartrand & Kanatese Horn, Catalogue No J4-51/2018E-PDF (Ottawa: Department of Justice Canada, 2016), online (pdf): [perma.cc/M8ME-AERA]; Jeffery G Hewitt, "Indigenous Restorative Justice: Approaches, Meaning & Possibility" (2016) 67:2 UNBLJ 313; Muhammad Asadullah et al, "Indigenous Justice and Restorative Justice: Exploring Perceptions of Convergence and Divergence in British Columbia and Saskatchewan" (2023) 6:2 Intl J Restorative Justice 235.

17 Val Napoleon & Hadley Friedland, "Indigenous Legal Traditions: From Roots to Renaissance" in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (New York: Oxford University Press, 2014) 225.

laws contain proactive and reactive elements that reflect the importance of healing, reintegration, and care — as well as separation and discipline in some cases — to maintain healthy relationships and reciprocal social environments.[18] Many of these elements are restorative in nature. For this reason, the rebuilding of Indigenous restorative justice and other forms of Indigenous dispute resolution is closely associated with the cause of promoting reconciliation with Indigenous peoples.[19] However, these issues remain fraught because measures purporting to integrate Indigenous legal orders into the settler colonial state frequently result in conceptual incoherence and structural violence to Indigenous laws.[20] Jeffery Hewitt explains that in contexts where restorative justice challenges the primacy of settler colonialism and the perpetration of carceral violence against Indigenous peoples, "[r]estorative justice is a location of decolonization in that Indigenous models of justice assist in revitalizing Indigenous laws through practice."[21]

Although the criminal legal system retains an overwhelmingly retributive and carceral orientation, restorative justice has been formalized in the system as a means of facilitating pre-charge diversion, sentencing, reintegration plans, and other extrajudicial matters in certain cases.[22] The Supreme Court of Canada has recognized the viability of restorative justice as a sentencing alternative under section 718.2(e) of the *Criminal Code*.[23] Correspondingly, the federal *Youth Criminal Justice Act* provides how and when extrajudicial measures, including restorative conferences and circles, should be convened to further the law's objectives to "encourage young persons to acknowledge and repair the harm caused to the victim and the community" and to "provide an opportunity for victims to participate in decisions related to the measures selected and to receive reparation."[24] As of 2025, the provincial and territorial governments reported over 350 known restorative programs across the country, many of them supported financially by the federal government in partnership with local police, prosecutors, non-profit organizations, and Indigenous community members.[25]

Less well known is that restorative justice has been theorized and practiced in a wide range of civil justice contexts, with Nova Scotia boasting the most systematic growth in

---

18 *Ibid* at 237–39. See also Chartrand & Horn, *supra* note 16 at 6.

19 This commitment is reflected by the Truth and Reconciliation Commission of Canada's Calls to Action, which include calls on governments, law schools, public servants, and other professionals to receive skills-based training in conflict resolution, intercultural competency, human rights, and anti-racism to promote reconciliation: Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: The Truth and Reconciliation Committee, 2015), online (pdf): [perma.cc/7W46-BXGK].

20 Karen Drake, "Indigenous Constitutionalism and Dispute Resolution Outside the Courts: An Invitation" (2020) 48:4 Federal L Rev 570.

21 Hewitt, *supra* note 16 at 317.

22 Kent Roach, "The Institutionalization of Restorative Justice in Canada: Effective Reform or Limited and Limiting Add-On?" in Ivo Aertsen, Tom Daems & Luc Robert, eds, *Institutionalizing Restorative Justice* (Portland: Willan, 2006) 167; Tomporowski et al, *supra* note 15; Hewitt, *supra* note 16.

23 RSC 1985, c C-46. For the interpreting case law, see *R v Gladue*, 1999 CanLII 679 (SCC) [*Gladue*] ("[t]he aims of restorative justice as now expressed in paras. (d), (e), and (f) of s. 718 of the *Criminal Code* apply to all offenders, and not only aboriginal offenders" at para 70).

24 *Youth Criminal Justice Act*, SC 2002, c 1, ss 5(b), 5(d), 19.

25 Federal-Provincial-Territorial Working Group on Restorative Justice, *Increasing the Use of Restorative Justice in Criminal Matters in Canada: Baseline Report*, Catalogue No PS4-266/2020E-PDF (Ottawa: Public Safety Canada, 2020), online: [perma.cc/3LCU-LRGF].

Canada and receiving global attention for its justice innovations.[26] Notably, the Nova Scotia Human Rights Commission is the first human rights tribunal in the country to take a restorative approach, linking the concept of just relations explicitly to public law and the public interest mandate of human rights enforcement.[27] The Commission explains: "The way human rights complaints are resolved should deal with possible harm to relationships (for example, employer/employee, landlord/tenant, customer/retailer). It is important that resolution helps restore those relationships."[28] Commenced in 2015 on a separate track, the Restorative Inquiry into the Nova Scotia Home for Colored Children, a process focusing on systemic racism and violence at a child welfare institution for African Nova Scotian children, was the world's first public inquiry or commission to take a restorative approach.[29] In other fields, there is significant literature testifying to the possibilities of restorative justice in civil procedure,[30] tort law,[31] family law,[32] labour and employment law,[33] health law,[34] education

[26] See Bruce Archibald & Jennifer Llewellyn, "The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia" (2013) 29:2 Dal LJ 297; Jennifer Llewellyn, "The Point and Promise of Restorative Communities: Insights From Nova Scotia" (2023) 6:1 Intl J Restorative Just 134 [Llewellyn, "Insights from Nova Scotia"].

[27] See Nova Scotia Human Rights Commission, "About the Process," online: [perma.cc/W59Y-ZQ8C].

[28] Nova Scotia Human Rights Commission, "Restorative Approaches," online: [perma.cc/5NYM-YTTN].

[29] Council of Parties, *Journey to Light: A Different Way Forward (Final Report of the Restorative Inquiry – Nova Scotia Home for Colored Children)* (Halifax: Government of Nova Scotia, 2019), online (pdf): [perma.cc/J9VG-FQDG]. The joint Federal/Provincial Mass Casualty Commission charged with examining the 2020 mass shooting incident in Nova Scotia is another prominent example of a restorative inquiry: *Turning the Tide Together: Final Report of the Mass Casualty Commission (Executive Summary and Recommendations)* (Ottawa: Privy Office Council, 2023) (Chair: J Michael MacDonald), online (pdf): [perma.cc/G7ZX-DRH8].

[30] See e.g. Carrie Menkel-Meadow, "Unsettling the Lawyers: Other Forms of Justice in Indigenous Claims of Expropriation, Abuse, and Injustice" (2014) 64:4 UTLJ 620; David Rosenberg, "Indigenization of Civil Litigation: Barriers and Opportunities" (2024) 6:1 Lakehead LJ 25; Laura Clerk, "Trauma-Informed Approaches to Class Action Claims Processes and Recommendations to Mitigate Future Harm to Indigenous Claimants" (2024) 82:2 UT Fac L Rev 137.

[31] See e.g. Edie Greene, "'Can We Talk?': Therapeutic Jurisprudence, Restorative Justice, and Tort Litigation" in Brian H Bornstein et al, eds, *Civil Juries and Civil Justice: Psychological and Legal Perspectives* (New York: Springer, 2008) 233; Noah Vardi, "Private Law as Restorative Justice: Notes on its Use from Historical Wrongs to Human Rights Litigation" (2019) 2 Roma Tre L Rev 110.

[32] See e.g. Joan Pennell & Gale Burford, "Family Group Decision Making: Protecting Children and Women" (2000) 79:2 Child Welfare 131; Heather Strang & John Braithwaite, eds, *Restorative Justice and Family Violence* (Cambridge, UK: Cambridge University Press, 2002); Gale Burford, John Braithwaite & Valerie Braithwaite, eds, *Restorative and Responsive Human Services* (New York: Routledge, 2019); Joan Pennell, *A Restorative Approach to Family Violence: Feminist Kin-Making* (New York: Routledge, 2023).

[33] See e.g. Deborah Thompson Eisenberg, "The Restorative Workplace: An Organizational Learning Approach to Discrimination" (2016) 50 U Rich L Rev (January) 487; Gregory D Paul, "Paradoxes of Restorative Justice in the Workplace" (2017) 31:3 Management Communication Q 380; Valerie Braithwaite & Eliza Ahmed, "Looking Beneath the Iceberg: Can Shame and Pride Be Handled Restoratively in Cases of Workplace Bullying" (2019) 2:2 Intl J Restorative Justice 209.

[34] See e.g. Downie & Llewellyn, *supra* note 4; Thalia González, "Restorative Justice Diversion as a Structural Health Intervention in the Criminal Legal System" (2023) 113:3 J Crim L & Criminology 541; James Tapp & Chelsea Verrinder, "The Spaces for Restorative Justice Practices in a Forensic Inpatient Mental Health Hospital: A Thematic Analysis of Group Case Supervision" (2024) 7:1 Intl J Restorative Justice 115.

law,[35] environmental law,[36] international law,[37] sexual violence policy,[38] and reconciliation and peacebuilding movements as well,[39] which speaks to its broad applicability and potential for more widespread use.

Given the complexity of restorative justice's origins and applications, fixed typologies of restorative practice are impossible to devise, with many facilitators tailoring their practice to the facts of individual cases and grounding their work in community. One of the risks of fixed typologies is that individual practice elements like circles and talking pieces may be abstracted from restorative justice's moral commitments, as if relational theory was nothing more than a skills-based concept.[40] Another risk is that practice elements originating in Indigenous laws, knowledges, and worldviews may be culturally appropriated by settler laws and institutions and applied out of context. As Amy Cohen and I have explained elsewhere, these concerns are particularly salient in light of restorative justice's mainstreaming in legal education in recent years — a phenomenon that raises challenging questions about co-optation by state power and neo-liberal rationality, the limits of incremental justice reform, and the gap between relational theory and restorative program implementation.[41] I cannot

---

[35] See e.g. Brenda Morrison, *Restoring Safe School Communities: A Whole School Response to Bullying, Violence and Alienation* (Sydney, Australia: Federation Press, 2007); Mara Schiff, "Can Restorative Justice Disrupt the 'School-to-Prison Pipeline?'" (2018) 21:2 Contemporary Justice Rev 121; Ernesto Lodi et al, "Use of Restorative Justice and Restorative Practices at School: A Systematic Literature Review" (2022) 19:1 Intl J Envtl Research & Pub Health 96; Thalia González & Mara Schiff, "The Uncertain Future of Restorative Justice: Anti-Woke Legislation, Retrenchment and Politics of the Right" (2024) 30:1 William & Mary J Race Gender & Soc Justice 1.

[36] See e.g. Chaitanya Motupalli, "Intergenerational Justice, Environmental Law, and Restorative Justice" (2018) 8:2 Wash J Envtl L & Pol'y 333; Miranda Forsyth et al, "A Future Agenda for Environmental Restorative Justice?" (2021) 4:1 Intl J Restorative Justice 17; Richard J Wallsgrove, "Restorative Energy Justice" (2022) 40:2 J Envtl L 133; Bas van Stokkom, "Environmental Restorative Justice: Towards Public Forums for Truth-telling and Restoration?" (2024) 7:3 Intl J Restorative Justice 541.

[37] See e.g. Claire Garbett, "The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice" (2017) 5:2 Restorative Justice 198; Theo Gavrielides, ed, *Routledge International Handbook of Restorative Justice* (New York: Routledge, 2019); Marta Sá Rebelo, "Exploring the Intertwining Between Human Rights and Restorative Justice in Private Cross-Border Disputes" (2019) 2:1 Intl J Restorative Justice 73.

[38] See e.g. Estelle Zinsstag & Marie Keenan, eds, *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (New York: Routledge, 2017); Daniel Del Gobbo, "Feminism in Conversation: Campus Sexual Violence and the Negotiation Within" (2021) 53:3 UBC L Rev 591 [Del Gobbo, "Feminism in Conversation"]; Sheila M McMahon, M Candace Christensen & Jelena Todić, "Transformative Justice and Restorative Justice Approaches to Campus Sexual Assault: A Scoping Review" (2024) 7:1 Intl J Restorative Justice 12.

[39] See e.g. Kerry Clamp & Jonathan Doak, "More than Words: Restorative Justice Concepts in Transitional Justice Settings" (2012) 12:3 Intl Crim L Rev 339; Jennifer J Llewellyn & Daniel Philpott, eds, *Restorative Justice, Reconciliation, and Peacebuilding* (New York: Oxford University Press, 2014); Valeria Vegh Weis & Chris Cunneen, "Can Indigenous Truth Commissions Overcome the Legacies and Contemporary Effects of Colonialism?" (2024) 7:1 Intl J Restorative Justice 43.

[40] Here, I challenge the premises of restorative "toolkits" and "toolboxes" that lack a strong theoretical foundation. See e.g. Emily Lopynski, "Restorative Lawyering: A Toolbox That Can Change the Profession" (2020) 54 U Richmond L Rev Online 21. For a complementary take on restorative justice being more than a toolkit, see Jennifer J Llewellyn, "Transforming Restorative Justice" (2021) 4:3 Intl J Restorative Justice 374 at 385 [Llewellyn, "Transforming Restorative Justice"].

[41] Amy J Cohen & Daniel Del Gobbo, "Pedagogies in the Meantime: Reflections on ADR and Restorative Justice in U.S. and Canadian Legal Education" (2025) 73:4 J Leg Educ 906. For commentary on the risks of co-optation, see Sharon Levrant et al, "Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?" (1999) 45:1 Crime & Delinquency 3; Angela P Harris, "Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation" (2011) 37:1 Wash UJL & Pol'y 13; Amy J Cohen, "Moral Restorative Justice: A Political Genealogy of Activism and Neoliberalism in the United

explore these concerns in detail here, but they underscore Llewellyn's point that "[t]he answer, then, to whether a particular practice is restorative cannot be found simply by some measure of its practice elements … but in the extent to which it reflects core relational principles."[42]

Restorativists have offered various principles-based approaches that reflect and elaborate restorative justice's relational underpinnings.[43] For her part, Llewellyn offers the following list of seven principles that are concise, generalizable, and have been successfully applied in Canada, including as grounding principles of the Nova Scotia Restorative Justice Program, one of the most well-established restorative programs for both adult and young offenders in the country.[44]

1. *Relationship focused.* "Restorative justice … takes as its aim the establishment of 'just' relationships—those reflecting the core commitments of equal respect, care/concern, and dignity."[45]

2. *Comprehensive/holistic*. "A restorative approach is comprehensive and holistic in its understanding and response. It is insufficient then … to focus narrowly on an incident without attention to its causes, contexts, and implications."[46]

3. *Contextual/flexible.* "A focus on relationships requires processes and practices that are flexible and responsive to context."[47]

4. *Subsidiarity, inclusion, and participation.* "[I]t is important that we involve those with intimate knowledge of the contexts and relationships at stake if we are to have the knowledge and capacities needed to address the harms and build a foundation for a new and better future.… Their inclusion must be meaningful to the process and its outcome."[48]

States" (2019) 104:2 Minn L Rev 889; Dean Spade, "Solidarity Not Charity: Mutual Aid for Mobilization and Survival" (2020) 38:1 (142) Social Text 131 at 136–46.

42 Jennifer J Llewellyn, "Responding Restoratively to Student Misconduct and Professional Regulation: The Case of Dalhousie Dentistry" in Burford, Braithwaite & Braithwaite, *supra* note 32 at 128–29 [Llewellyn, "Dalhousie Dentistry"].

43 The federal, provincial, and territorial ministers of justice and public safety met in 2018 to develop a list of principles for use in criminal matters: Canadian Intergovernmental Conference Secretariat, "Principles and Guidelines for Restorative Justice Practice in Criminal Matters" (2018), online: [perma.cc/E7W9-FPCC]. For similar lists, see Restorative Justice Consortium, "Principles of Restorative Processes" (December 2004), online (pdf): [perma.cc/H5AE-2LWC]; United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (New York: United Nations, 2006) at 33–38.

44 I have reproduced the principles as they appear in Jennifer J Llewellyn et al, "Imagining Success for a Restorative Approach to Justice: Implications for Measurement and Evaluation" (2013) 36:2 Dal LJ 281 [Llewellyn, "Imagining Success"]. See also Llewellyn, "Thinking Relationally", *supra* note 4 at 98–99.

45 Llewellyn, "Imagining Success", *supra* note 44 at 301.

46 *Ibid*.

47 *Ibid*.

48 *Ibid* at 302.

5. *Dialogical or communicative.* "The meaningful inclusion contemplated above through collaborative process requires communication. This is often expressed … as a commitment to dialogical processes."[49]

6. *Democratic/deliberative.* "Restorative processes connect the legitimacy of decision making to inclusive processes through which deliberation can take place."[50]

7. *Forward-focused, solution-focused, and remedial*. "A restorative approach is oriented towards the future, to understanding what has happened in order to understand what needs to happen to address the past with a view to creating conditions for restored relationships in the future."[51]

Later in this article, I take inspiration from these principles when I explain what a restorative principles-based approach to legal ethics and professional responsibility in Canada looks like.

B. RULES-BASED AND PRINCIPLES-BASED APPROACHES TO LEGAL ETHICS

The promise of taking a restorative principles-based approach invokes a long-standing debate among scholars about the merits of rules-based approaches compared to principles-based approaches to legal ethics and professional responsibility. Principles-based approaches are more conducive, I suggest, to progressive theories of legal ethics that frame professional role morality in terms of moral activism and substantive equality specifically.

1. RULES-BASED APPROACHES

The current and historically dominant model of legal ethics in Canada is the rules-based approach, whereby law societies prescribe a lengthy and typically closed list of rules of professional conduct for lawyers to follow.[52] Often, these rules take the form of prohibitions rather than permissions; that is, many of them contain negative statements about what lawyers cannot do — for example, they cannot break client confidences, misuse trust funds, or represent clients where there is a conflict of interest — instead of more positive statements about what lawyers should do. The rules are supplemented by legislation that governs lawyers and the case law that interprets these ethical sources.[53] One of the rationales for the rules-based approach is that rules are necessary to provide lawyers with clear instructions about what conduct is prohibited. Outside of limited exceptions like joint retainers and mortgage loan transactions, however, there is typically little contextual information provided in the

---

[49] *Ibid* at 303.
[50] *Ibid* at 304.
[51] *Ibid*.
[52] See Russell G Pearce & Eli Wald, "Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles" (2012) 2012:2 Mich State L Rev 513 at 525.
[53] In the child protection context, for example, there are legislative requirements on lawyers in cases where children are likely to suffer physical, sexual, or emotional harm: Deanne Sowter, "Ethical Discretion: The Complexities for a Lawyer Reporting a Child in Need of Protection" (2022) 100:1 Can Bar Rev 40.

rules to explain how they apply in challenging or high-risk practice areas. The problem is exacerbated by recent trends in the legal profession that Abdi Aidid, Gillian Hadfield, and other scholars identify as the process of juridification, rapidly changing market conditions, the emergence of new technologies, and the growing specialization and diversity of fields in which lawyers work.[54] The result is an ethical framework that has arguably failed to respond to emerging challenges and is partly responsible, I suggest, for the decline in professionalism facing lawyers today.

The rules-based approach is reflected by parts of the *Model Code* and provincial and territorial codes of professional conduct. As I explained in a prior article, the *Model Code* represents a minimum ethical standard for lawyers because many of its provisions freeze legal ethics in a series of prohibitions, transforming the content of professional role morality from what Lon Fuller calls a "morality of aspiration" into a "morality of duty," or legal justification and sanctions avoidance after the fact.[55] Consider Rule 3.1, for example, which provides that lawyers are held a standard of "competence," not excellence.[56] Citing Adam Smith's work on writing, Fuller describes the morality of aspiration as principles "which critics lay down for the attainment of what is sublime and elegant in composition," whereas the morality of duty is akin to basic grammar.[57] "[P]rinciples of good writing," Fuller explains, "'are loose, vague, and indeterminate, and present us rather with a general idea of the perfection we ought to aim at, than afford us any certain and infallible directions of acquiring it.'"[58]

In my view, the gap between these concepts is explained by the prevalence of the standard conception of professional role morality: the neutral partisan.[59] The conception regards lawyers' personal morality to be professionally extraneous and therefore potentially corrupting of the lawyers' ability to represent their clients' interests as resolute advocates in the common law system. Correspondingly, it holds lawyers to be morally unaccountable for their clients' actions within the bounds of legality. To be clear, the conception permits lawyers to lead what one might think of as an ethical double life, with Tim Dare, for example, explaining that lawyers can perform a neutral role in their professional capacity and a moral activist role in their personal capacity.[60] Indeed, the *Model Code* explicitly cautions lawyers

---

54 Gillian K Hadfield, "The Price of Law: How the Market for Lawyers Distorts the Justice System" (2000) 98:4 Mich L Rev 953; Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014); Dana A Remus, "Reconstructing Professionalism" (2017) 51:3 Ga L Rev 807; Abdi Aidid, "Juridification and Regulating the Modern Lawyer" (2024) 37:3 Geo J Leg Ethics 457.

55 Daniel Del Gobbo, "Legal Ethics and the Promotion of Substantive Equality" (2022) 100:3 Can Bar Rev 439 at 469 [Del Gobbo, "Substantive Equality"], citing Lon L Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969) at 5–6.

56 *Model Code*, *supra* note 5, r 3.1.

57 Fuller, *supra* note 55 at 6.

58 *Ibid*.

59 For statements of the standard conception, see William H Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics" (1978) 1978:1 Wis L Rev 29 at 36–37; Stephen L Pepper, "The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities" (1986) 1986:4 American Bar Foundation Research J 613; David B Wilkins, "Identities and Roles: Race, Recognition, and Professional Responsibility" (1998) 57:4 Md L Rev 1502; David Luban, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) at 23–55 [Luban, *Legal Ethics*]; W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010) at 36; Tim Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Abingdon: Routledge, 2016).

60 Dare, *supra* note 59 at 150.

against pursuing higher moral values in cases where that morality conflicts with their clients' instructions. Rule 5.1-1[1] confirms the role of lawyers as resolute advocates and reflects more broadly the culture of adversarialism that underpins the lawyer's duty of loyalty, sometimes called "commitment to a client's cause":

> [T]he lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.[61]

There is no "cab rank" rule in Canada; lawyers are free to reject potential clients at the intake stage so long as this right is exercised prudently without discrimination.[62] And many lawyers do, in fact, refuse to take on matters for a variety of legitimate reasons. After the point of intake, however, lawyers are generally required to provide their clients with formally equal access to the legal system without personal moral screening.[63] Given the stakes of the criminal law, the conception has been defended most vigorously in the criminal defence context, particularly in cases where lawyers are defending individuals belonging to historically marginalized groups.[64] It follows that lawyers who prejudge their clients' interests under law, or worse, lawyers who prevent their clients from availing themselves of the law's protections, are acting illiberally and therefore unethically because the lawyers are presuming to "know better" than their clients and the system itself, when really the lawyers know as little (or as much) as everyone else.[65]

The problems with the standard conception have been well-documented.[66] Legal ethics textbooks are replete with case studies of lawyers who took steps that were legal but nevertheless immoral, *inter alia*, because they exacerbated power imbalances, harmed community stakeholders, or contributed to relationships of substantive inequality. For example, Trevor Farrow explains that in the Indian Residential Schools litigation and ensuing claims process, the government and church defendants employed highly aggressive and culturally disconnected "blame the victim" strategies to limit and deny their responsibility for residential school-related damage.[67] Similarly, Janet Mosher explains how lawyers

---

61 *Model Code*, *supra* note 5, r 5.1-1[1]. Rule 5.1-1[5] adds: "A lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal." The Supreme Court of Canada has recognized the standard conception as relating to lawyers' duty of loyalty under these rules: *R v Neil*, 2002 SCC 70 at para 19; *Strother v 3464920 Canada Inc*, 2007 SCC 24 at para 1.

62 *Model Code*, *supra* note 5, rr 4.1-1[4], 6.3-1.

63 Lawyers may withdraw from matters at the post-intake stage in limited circumstances only: Andrew Flavelle Martin, "Loyalty, Conscience, and Withdrawal: Are Government Lawyers Different?" (2024) 46:2 Man LJ 5 at 10–11.

64 See David M Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28:2 Dal LJ 267 at 305–06.

65 For commentary on the liberal and positivist theories underpinning these ideas, see Simon, *supra* note 59; Allan C Hutchinson, *Legal Ethics and Professional Responsibility*, 2nd ed (Toronto: Irwin Law, 2006); Katherine R Kruse, "The Jurisprudential Turn in Legal Ethics" (2011) 53:2 Ariz L Rev 493; W Bradley Wendel, "The Limits of Positivist Legal Ethics: A Brief History, a Critique, and a Return to Foundations" (2017) 30:2 Can JL & Jur 443; Alice Woolley, "Is Positivist Legal Ethics an Oxymoron?" (2019) 32:1 Geo J Leg Ethics 77.

66 See Luban, *Legal Ethics*, *supra* note 59; Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass: Harvard University Press, 1993); Deborah L Rhode, *In the Interests of Justice: Reforming the Legal Profession* (New York: Oxford University Press, 2003).

67 Trevor CW Farrow, "Truth, Reconciliation, and the Cost of Adversarial Justice" in Trevor CW Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC

representing coercive controlling, and overwhelmingly male, partners in family law cases can exploit legal processes and systems "not to resolve disputes or to enforce rights, but, rather, to maintain control, to punish, and to harm" their intimate partners, who are overwhelmingly female.[68]

The standard conception is constitutive of the legal and professional environment that permits these kinds of harmful behaviours to take place. To use Robert Cover's phrase, the conception has formative effects on lawyers' professional identities, market conditions, and law practice cultures in which the intrinsic "violence of legal acts" and lawyers' refusal to accept professional responsibility for them have been normalized.[69] The Preface to the *Model Code* states that "more is expected of [lawyers] than forensic acumen."[70] Rule 2.1-1 adds that "[a] lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity."[71] However, if the rules otherwise frame the task of protecting the public interest as requiring little more than the forensic or "grammatical" skills implied by the methodologies of legal formalism and positivism — exploiting legal means without exercising personal moral judgment — then it is unsurprising that many lawyers would conceive of themselves as nothing more than contractors for hire, similar to lay people in other consumer-oriented jobs. Outside of limited exceptions like cause lawyering, there is little evidence to suggest that professional role morality tracks with personal morality in most cases.[72] As David Tanovich explains, there is a profound disconnect between "the role lawyers want to pursue" and "the role that they *perceive* the profession demands they play," leading to feelings of alienation from their clients, poor decision making, and the broader sense that the profession has lost its way.[73]

The rules-based approach is reflected by trends in professional regulation and enforcement as well. Michael Trebilcock classifies the range of initiatives that Canadian law societies undertake in two categories: "input regulation" and "output regulation."[74] The input regulation category consists of professional entry and maintenance requirements, including education, licensing, and requalification. The output regulation category consists of rules

---

Press, 2020) 130. See also Mayo Moran, "The Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools" (2014) 64:4 UTLJ 529; Kent Roach, "Blaming the Victim: Canadian Law, Causation, and Residential Schools" (2014) 64:4 UTLJ 566; Jennifer Leitch, "A Less Private Practice: Government Lawyers and Legal Ethics" (2020) 43:1 Dal LJ 315.

68 Janet E Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners" (2015) 32:2 Windsor YB Access Just 149 at 158. See also Jennifer Koshan, Janet Mosher & Wanda Wiegers, "The Costs of Justice in Domestic Violence Cases: Mapping Canadian Law and Policy" in Farrow & Jacobs, *supra* note 67; Deanne Sowter, "The Bounds of Legality: An Exploration of the Limits on Ethical Advocacy in Family Law" (2022) 25:1–2 Leg Ethics 4.

69 Robert M Cover, "Violence and the Word" (1986) 95:8 Yale LJ 1601 at 1601.

70 *Model Code*, *supra* note 5, Preface.

71 *Ibid*, r 2.1-1.

72 See Aidid, *supra* note 54 at 492, note 185. For commentary on cause lawyering, see Anthony V Alfieri, "Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists" (1996) 31:2 Harv CR-CLL Rev 325; Austin Sarat & Stuart Scheingold, eds, *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998); Basil S Alexander, "Pragmatic Assorted Strategies: How Canadian Cause Lawyers Contribute to Social Change" (2019) 90 SCLR (2d) 3; Amna A Akbar, Sameer M Ashar & Jocelyn Simonson, "Movement Law" (2021) 73:4 Stan L Rev 821.

73 Tanovich, *supra* note 64 at 270 [emphasis added].

74 Michael J Trebilcock, "Regulating the Market for Legal Services" (2008) 45:5 Alta L Rev 215 at 219.

focusing on the nature and quality of legal services rendered to clients and the regulatory mechanisms in place to enforce them, including standard-setting processes, professional discipline, and civil liability for negligence.

Trebilcock explains that output regulation can reflect one of three compliance orientations: "misconduct," "passive competence," and "active competence."[75] The misconduct orientation focuses on cases where lawyers broke the rules because they acted without integrity, honesty, or governability by law societies. The passive competence orientation focuses on cases of gross incompetence that come to law societies' attention through formal complaints, media reports, and other means that do not include active searches for incompetence. Finally, the active competence orientation conceives of law societies as taking a more capacious role in promoting competence, including, for example, continuing professional development (CPD), practice management guidelines, random audits in high-risk practice areas, lawyer mentoring, personal assistance services, and other therapeutic and reintegrative measures.[76]

Crucially, Trebilcock finds that output regulation under the rules-based approach "overwhelmingly fall[s] into the misconduct orientation category, only marginally engage[s] a passive competence orientation, and [has] almost entirely rejected an active competence orientation."[77] More recently, Amy Salyzyn has explained that this "policing model" of regulation has been supplemented by a "coaching model" that includes some active competence measures.[78] However, the continued focus on policing means that the rules-based approach is a largely reactive system. Generally speaking, law societies enforce the rules when they receive complaints about lawyers having broken them, conducting a formal administrative process in which they investigate complaints after the fact. In most cases, the targets of these complaints are individual practitioners, not firms or other law practices, which means the remedies that typically result from them (for example, restrictions on a lawyer's licence) are individual in nature. The process is structured in a way that concerns about firm culture, collegial supports and controls, and human rights issues within the profession are generally rendered outside the scope of regulation.

Relevant to these issues is Harry Arthurs's criticism of the "ethical economy" of professional discipline in Canada.[79] Law society tribunals are cash-strapped and resource-strapped. Consistent with efficiency ideology and "small government" perspectives on

---

[75] *Ibid*.

[76] Amy Salyzyn, "From Colleague to Cop to Coach: Contemporary Regulation of Lawyer Competence" (2017) 95:2 Can Bar Rev 489 at 509–10 [Salyzyn, "Contemporary Regulation of Lawyer Competence"].

[77] Trebilcock, *supra* note 74 at 225.

[78] Salyzyn, "Contemporary Regulation of Lawyer Competence", *supra* note 76 at 508–17.

[79] HW Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1995) 33:4 Alta L Rev 800 at 802; HW Arthurs, "Why Canadian Law Schools Do Not Teach Legal Ethics" in Kim Economides, ed, *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart, 1998) 105 at 112. For commentary on the ethical economy, see Alice Woolley, "Regulation in Practice: The 'Ethical Economy' of Lawyer Regulation in Canada and a Case Study in Lawyer Deviance" (2012) 15:2 Leg Ethics 243 [Woolley, "Ethical Economy"]; Del Gobbo, "Substantive Equality", *supra* note 55 at 449–54; Salyzyn, "Contemporary Regulation of Lawyer Competence", *supra* note 76 at 507; Andrew Flavelle Martin, "The Continuing Application of *Gladue* Principles in the Professional Discipline of Indigenous Lawyers: A Comment on *Law Society of Ontario v McCullough*" (2023) 5:2 Lakehead LJ 57 at 65–66 [Martin, "*Gladue* Principles in Professional Discipline"].

regulation and enforcement, the case law suggests that most law society prosecutions involve incidents where there is a clear moral consensus about the gravity of the lawyer's breach or the credibility of the profession is seriously implicated.[80] The most frequent targets of these prosecutions are sole and small firm practitioners, many of whom belong to and represent historically marginalized groups.[81] Salyzyn clarifies that most complaints against lawyers are closed privately by law societies or resolved informally by the parties, which means these complaints may not result in published decisions and cannot easily be tracked.[82] Acknowledging this, the fact remains that most prosecutions are focused on punishing individual "bad apples," and the most egregiously bad apples at that — a morally impoverished vision of discipline considering the range of therapeutic and reintegrative measures that could be undertaken instead.

2. PRINCIPLES-BASED APPROACHES

Principles-based approaches contrast with rules-based approaches in fundamental ways. Instead of prescribing a closed set of rules for lawyers to follow, principles-based approaches consist of positive, open-ended statements about legal ethics to which lawyers should aspire.[83] Although the line between rules and principles is not always clear, principles tend to be more permissive in their interpretation, rarely providing bright-line answers like many prohibitions do. One might think of them like Fuller's principles of good writing in this respect. They place a greater onus on lawyers to negotiate between different moral imperatives and make discretionary decisions consistent with their values, fostering a sense of higher moral purpose through reflexive practice. Russell Pearce and Eli Wald frame this task in relational terms, explaining that lawyers are required by principles-based approaches to communicate their intentions to their clients more thoughtfully, creating a dialogic relationship between lawyers, clients, and law societies about what protecting the public interest means.[84]

The *Model Code* reflects a principles-based approach to the extent that it outlines a positive and open-ended program. Recall that Rule 2.1-1 establishes the importance of integrity. Rule 3.2-2 adds that "[w]hen advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter."[85] The high-level framing of these principles is laudable, but there is relatively little detail provided to elaborate what integrity and honesty require in specific cases. Consider these principles in light of the significant debate among scholars about how legal ethics apply in the alternative dispute resolution (ADR) context.[86] Critics like James

---

[80] Woolley, "Ethical Economy", *supra* note 79 at 243–44.

[81] *Ibid*.

[82] Salyzyn, "Contemporary Regulation of Lawyer Competence", *supra* note 76 at 507–08.

[83] Pearce & Wald, *supra* note 52 at 531. For more on the distinction between rules-based and principles-based approaches, see Pierre Schlag, "Rules and Standards" (1985) 33:2 UCLA L Rev 379; Dan Awrey, "Regulating Financial Innovation: A More Principles-Based Proposal?" (2011) 5:2 Brooklyn J Corp Financial & Commercial L 273; Andrew Boon, "Professionalism Under the Legal Services Act 2007" (2010) 17:3 Intl J Leg Profession 195.

[84] Pearce & Wald, *supra* note 52 at 531.

[85] *Model Code*, *supra* note 5, r 3.2-2.

[86] See e.g. David Luban, "Settlements and the Erosion of the Public Realm" (1995) 83:7 Geo LJ 2619; Charles B Craver, "Negotiation Ethics for Real World Interactions" (2010) 25:2 Ohio St J on Disp Resol 299; Carrie Menkel-Meadow, "The Evolving Complexity of Dispute Resolution Ethics" (2017) 30:3 Geo J Leg Ethics 389; Andrew B Mamo, "Unsettling the Self: Rethinking Self-Determination in Mediation" (2023) 93:2 Miss LJ 463.

White, Walter Steele, and Gerald Wetlaufer suggest that it is impossible to negotiate effectively as a resolute advocate — indeed, it may be impossible to "negotiate" at all — without being dishonest to your counterpart in some degree.[87] Parts of the *Model Code* that reflect a rules-based approach are constructed differently. Rule 3.4, for instance, is a negative provision that explains a lawyer's duty to avoid conflicts of interest.[88] It contains over 40 subrules that cover various situations where problems can arise, including specific examples of conflicts and a checklist of factors that firms and other law practices can use when screening for them. Principles-based approaches do not entail the abolition of rules in contexts like this, but a balanced structure that combines the moral quality of principles with the clarity and predictability of rules, as necessary.

Historically, principles-based approaches have lent themselves to active competence efforts directed at both lawyers individually and firms on the institutional and structural levels. Entity regulation, sometimes called "compliance-based" regulation, is a proactive means of regulation that involves direct control over firms to ensure compliance, typically, with a principles-based approach.[89] Lynn Mather, Craig McEwan, and Richard Maiman explain that lawyers make ethical decisions in multiple and sometimes overlapping "communities of practice," including colleagues with whom lawyers interact in a particular field, institution, or workplace — for example, firms — and to whom the lawyers look for moral guidance.[90] Entity regulation seeks to educate lawyers and change legal and professional cultures in a systemic way, shifting the focus away from punishing individual rule breakers. It reflects the relational posture, as Khalil Shariff puts it, that "individual behavior is a result of more than simply initial skills and endowments," but "shaped significantly by the institutional structures in which actors are embedded."[91]

In the Canadian context, Adam Dodek's work on entity regulation and Salyzyn's work on ethical infrastructure confirm the importance of regulating firms by imposing institutional-level obligations.[92] The term "ethical infrastructure" was coined by Ted Schneyer to describe the "policies, procedures, systems, and structures—in short, the 'measures' that ensure lawyers in their firm comply with their ethical duties and that nonlawyers associated with the firm behave in a manner consistent with the lawyers' duties."[93] Ethical infrastructure can include, *inter alia*, measures to improve the firm's relationship with clients (for example,

---

87 Walter W Steele, Jr, "Deceptive Negotiating and High-Toned Morality" (1986) 39:5 Vand L Rev 1387 at 1390–91; Gerald B Wetlaufer, "The Ethics of Lying in Negotiations" (1990) 75:5 Iowa L Rev 1219; James J White, "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation" (1980) 1980:4 American Bar Foundation Research J 926 at 927–28. For a contrasting view, see Scott R Peppet, "Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining" (2002) 7 Harv Negot L Rev 83.

88 *Model Code*, *supra* note 5, r 3.4.

89 See generally Adam M Dodek, "Regulating Law Firms in Canada" (2011) 90:2 Can Bar Rev 381; Amy Salyzyn, "What If We Didn't Wait? Canadian Law Societies and the Promotion of Effective Ethical Infrastructure in Law Practices" (2013) 92:3 Can Bar Rev 507 [Salyzyn, "Effective Ethical Infrastructure"].

90 Lynn Mather, Craig A McEwen & Richard J Maiman, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (New York: Oxford University Press, 2001).

91 Khalil Z Shariff, "Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization" (2003) 8 Harv Negot L Rev 133 at 137.

92 Dodek, *supra* note 89; Salyzyn, "Effective Ethical Infrastructure", *supra* note 89.

93 Ted Schneyer, "On Further Reflection: How 'Professional Self-Regulation' Should Promote Compliance with Broad Ethical Duties of Law Firm Management" (2011) 53:2 Ariz L Rev 577 at 585. See also Ted Schneyer, "Professional Discipline for Law Firms?" (1991) 77:1 Cornell L Rev 1 at 10.

conflict prevention systems, retainer letters, and billing policies), measures to promote collegiality and development internally (such as promotion, supervision, and mentoring policies), and measures to support the profession and community at large (for example, firm self-assessments and practice advisory services).[94] Salyzyn explains that law societies can promote ethical infrastructure with or without committing to formal entity regulation.[95] Law societies can provide template documents and policies, for example, without mandating that firms use them. Either way, the creation of these measures brings practice-wide issues to the forefront and helps to build collegial support for their use, encouraging more ethical behaviour in the future.[96]

C. TOWARDS A RESTORATIVE PRINCIPLES-BASED APPROACH

As I intimated above, principles-based approaches have arisen in response to long-standing concerns that the standard conception is morally deficient. One of the most compelling critiques is that the standard conception enables lawyers — indeed, it arguably requires lawyers as a condition of loyalty in some cases — to compartmentalize the legal from the moral under the guise of neutral partisanship. Professional role morality has been effectively abstracted from the extralegal merits of the outcomes that result from it, resulting in what Sameer Ashar criticizes as "the removal of the lawyer-client relationship from the socio-political sphere and the chiseling of clients away from their political and racial solidarities."[97] The basic charge is that by relegating these merits outside the scope of regulation, the standard conception permits lawyers to evade professional responsibility for the harms their clients cause and the broader hierarchies of white supremacy, male domination, settler colonialism, and other intersecting systems of oppression that law entrenches.

I explained in a prior article that professional role morality should be interpreted to include a positive obligation on lawyers to promote substantive equality.[98] Far from exceeding what the law requires, the foundations of this interpretation can be found in lawyers' extant legal and moral obligations to respect the requirements of human rights laws pursuant to Rule 6.3-1[1].[99] Facilitating access to justice, I wrote, "requires lawyers to be mindful of history, patterns of systemic discrimination, the individual circumstances of community members affected by the law, and the social, cultural, and economic contexts in which conflicts arise."[100] In this article, I am making a similar claim that legal ethics should embrace a more substantive vision of the lawyer's role and what protecting the public interest means. Restorative justice provides the grounding for such an approach. I realize that I am making a contestable choice here. Restorative justice challenges liberal notions of rights and autonomy. Its focus on relationships conflicts with neutral partisanship that prioritizes client interests and self-maximization. However, I believe my choice is the correct one, and

---

94 See Salyzyn, "Effective Ethical Infrastructure", *supra* note 89 at 511–14.

95 *Ibid* at 547.

96 *Ibid* at 542, discussing how research suggests that "merely talking about ethics, and thereby making ethics salient, can help to attenuate unethical behaviour," citing a literature review: Linda Klebe Treviño, Niki A den Nieuwenboer & Jennifer J Kish-Gephart, "(Un)Ethical Behavior in Organizations" (2014) 65 Annual Rev Psych 635 at 643.

97 Sameer M Ashar, "Law Clinics and Collective Mobilization" (2008) 14:2 Clinical L Rev 355 at 359.

98 Del Gobbo, "Substantive Equality", *supra* note 55.

99 *Model Code*, *supra* note 5, r 6.3-1[1] ("[a] lawyer must not directly or indirectly discriminate against a colleague, employee, client or any other person").

100 Del Gobbo, "Substantive Equality", *supra* note 55 at 468.

certainly the morally aspirational one, because restorative justice supports a more progressive agenda than liberalism for how substantive equality can be achieved.

Liberal theory begins from the premise that individuals have the rational capacity, knowledge about their interests, and therefore the legal right to make free and independent choices about their own well-being, conceiving of our separateness as defining our autonomy.[101] As a law reform project, liberalism is generally focused on removing formal legal barriers and redressing forms of unlawful interference and interpersonal violations that prevent individuals from making free choices. In the legal ethics context, the historical remedy for such violations has been restraining or punishing individual rule breakers. Once these steps are taken, liberalism is generally less concerned with — indeed, it will frequently oppose — more substantive objectives that seek to redistribute resources between groups or challenge the intersectional hierarchies present at the structural level because individuals cannot "know" how other people's relationships can be improved for the better.[102] Liberalism claims to be morally neutral as to the content of those relationships so long as legal procedures in place for adjudicating them are formally equal to everyone.[103]

Relational theory, by contrast, begins from the premise that our interconnected nature is an unavoidable fact about who we are, how we live, and how we make choices in embedded social relation to other people, challenging the individualism of liberal theory as fictional.[104] Jennifer Nedelsky explains that human beings "have the capacity to interact creatively, that is, in an undetermined way, with all the relationships that shape us — and thus to reshape, re-create, both the relationships and ourselves."[105] However, relationships are not good in and of themselves because conditions of substantive inequality can prevent individuals from making choices, with historically marginalized groups facing the greatest obstacles.[106] In other words, relational theory is not backward-looking; there are no historical and presumptively just relations that need to be returned or "restored" by law (as the term "restorative" is used in its conventional sense).[107] Llewellyn clarifies that "[t]he latent potential of the equality of relationship at which restorative justice aims helps to see the sense in which 'restore' is intended — it is to bring out, or to realize, our full potential and capacities as relational beings."[108] On this view, restorative justice's understanding of relationships is

---

[101] See Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23:1 Yale LJ 16 at 32–44; Isaiah Berlin, *Four Essays on Liberty* (New York: Oxford University Press, 1970) at 122–44; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

[102] See Deborah L Rhode, "Feminist Critical Theories" (1990) 42:3 Stan L Rev 617 at 627–28; Tracy E Higgins, "Feminism as Liberalism: A Tribute to the Work of Martha Nussbaum" (2010) 19:1 Colum J Gender & L 65 at 66.

[103] There is a large literature critiquing liberalism's claims to neutrality from critical legal perspectives: see Rhode, *supra* note 102. For a recent Canadian work, see Joshua Sealy-Harrington, "The *Charter* of Whites: Systemic Racism and Critical Race Equality in Canada" (2023) 39:1 Windsor YB Access Just 544.

[104] See generally Nedelsky, *supra* note 13.

[105] *Ibid* at 45.

[106] See generally Christine M Koggel, *Perspectives on Equality: Constructing a Relational Theory* (Lanham: Rowman & Littlefield, 1998); Christine M Koggel, "A Relational Approach to Equality: New Developments and Applications" in Downie & Llewellyn, *supra* note 4 at 63.

[107] It is a common misconception that restorative justice seeks to return relationships to their prior state: see Margaret Urban Walker, "Restorative Justice and Reparations" (2006) 37:3 J Soc Philosophy 377 at 384.

[108] Llewellyn, "Thinking Relationally", *supra* note 4 at 102.

teleological — they are "going somewhere" — because restorative justice entails a higher moral objective: change the structural features of law and society to establish conditions of equal care, concern, and respect for other people. As Thalia González explains from a critical race theory perspective, restorative justice is "a way to confront injustice that becomes a political demand, specifically one for emancipation, for an end to domination and oppression, and the right to have a meaningful, rather than tokenized, voice."[109]

Framed in this manner, restorative justice challenges the standard conception because it requires a critical assessment of the law's claims to neutrality and the relationships that law cultivates in accordance with substantive equality. It entails a fundamental shift in understanding to whom or what lawyers ought to be accountable — not individuals per se, but communities, harms, and needs in a transformative way. Contrasting with more "inclusive" positivist theories that encourage moral behaviour among lawyers but nevertheless ground their sense of morality in the law, restorative justice is not constrained by formal legal institutions or even the state as a political entity and modality of governance.[110] Like other critical approaches, restorative justice contemplates that the legal system needs to change to become more just and that lawyers are responsible for making this change happen.[111] Accordingly, restorative justice is a form of what David Luban calls "moral activism" in legal ethics because it requires lawyers to pursue higher moral ends by higher moral means as central to their professional role.[112] Restorative justice, on this understanding, is inextricable from social justice, a movement that can follow but also diverge from and even seek to abolish traditional legal pathways.

There are many possible formulations of a restorative principles-based approach to legal ethics and professional responsibility. Given its relational underpinnings, restorative justice has values in common with other relationship-focused approaches that have been explored in the literature, including relational feminist care ethics[113] and related models of care-based lawyering,[114] Susan Brooks's writing on clinical legal education and interpersonal skills,[115]

---

[109] Thalia González, "Reorienting Restorative Justice: Initiating a New Dialogue of Rights Consciousness, Community Empowerment and Politicization" (2015) 16:2 Cardozo J Conflict Resolution 457 at 460.

[110] For commentary on inclusive positivism, also called "soft" or "incorporationist" positivism, see WJ Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon Press, 1994); W Bradley Wendel, "Legal Ethics and the Separation of Law and Morals" (2005) 91:1 Cornell L Rev 67 at 101–03.

[111] See Christine Parker, "A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics" (2004) 30:1 Monash UL Rev 49 at 66.

[112] See generally Luban, *Legal Ethics*, *supra* note 59.

[113] See Joan C Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993); Christine M Koggel & Joan Orne, eds, *Care Ethics: New Theories and Applications* (New York: Routledge, 2013); Ami Harbin, *Disorientation and Moral Life* (New York: Oxford University Press, 2016).

[114] See Stephen Ellmann, "The Ethic of Care as an Ethic for Lawyers" (1993) 81:7 Geo LJ 2665; Paul J Zwier & Ann B Hamric, "The Ethics of Care and ReImagining the Lawyer/Client Relationship" (1996) 22:2 J Contemp L 383; Francesca Bartlett & Lyn Aitken, "Competence in Caring in Legal Practice" (2009) 16:2–3 Intl J Leg Profession 241.

[115] Susan L Brooks & Robert G Madden, eds, *Relationship-Centered Lawyering: Social Science Theory for Transforming Legal Practice* (Durham, NC: Carolina Academic Press, 2010); Susan L Brooks, "Meeting the Professional Identity Challenge in Legal Education Through a Relationship-Centered Experiential Curriculum" (2012) 41:3 U Balt L Rev 395; Susan L Brooks, "Fostering Wholehearted Lawyers: Practical Guidance for Supporting Law Students' Professional Identity Formation" (2018) 14:2 U St Thomas LJ 412; Susan L Brooks, "Reimagining Lawyering: Supporting Well-Being and Liberation" (2023) 52:1 Hofstra L Rev 1.

Katherine Kruse's petition that lawyers should think beyond "cardboard clients,"[116] Thomas Shaffer's religious legal ethics based in Christianity,[117] and Susan Daicoff's writing on the "comprehensive law" movement.[118] Gale Burford, John Braithwaite, and Valerie Braithwaite's collection on restorative justice and responsive regulation has significant implications for legal ethics, including a chapter by Llewellyn that focuses on professionalism in the dentistry field.[119] Pearce and Wald have written most extensively on the links between relational theory and legal ethics in the United States context over several important articles, although without engaging deeply with restorative justice specifically.[120]

In my view, the restorative principles outlined above possess the legal foundation and moral quality to ground a restorative principles-based approach that is workable on a consistent basis.[121] I would revise the principles slightly and reframe them in ethical terms as follows. The principles are not free-standing models of practice, but positive, interconnected statements that build on one another and combine to frame the profession's commitment to protecting the public interest in a general sense.

1. *Relationship focused*. Lawyers should promote the establishment of just relations characterized by equal care, concern, and respect for others. This focus includes relationships between lawyers, clients, law practices, and the public at the interpersonal, institutional, and structural levels.

2. *Comprehensive*. Lawyers should be comprehensive and holistic in their understanding of the issues and legal response. It is insufficient to think narrowly about individual incidents without attention to their collective, historical, and systemic implications.

3. *Contextual and responsive.* Lawyers should be flexible and responsive to the facts of individual cases and the contexts in which they arise as circumstances change.

4. *Party-driven, inclusive, and participatory.* Lawyers should prioritize the interests of clients and other parties most affected by the issues, providing opportunities for clients to participate in matters directly. If possible, lawyers should consult with and involve community stakeholders with meaningful experience and knowledge

---

116 Katherine R Kruse, "Beyond Cardboard Clients in Legal Ethics" (2010) 23:1 Geo J Leg Ethics 103 [Kruse, "Beyond Cardboard Clients"].

117 Thomas L Shaffer, *On Being a Christian and a Lawyer: Law for the Innocent* (Provo: Brigham Young University Press, 1981); Thomas L Shaffer, "On Religious Legal Ethics" (1994) 35:4 Catholic Lawyer 393.

118 Susan Daicoff, "Law as a Healing Profession: The 'Comprehensive Law Movement'" (2005) 6:1 Pepperdine Dispute Resolution LJ 1; Susan Daicoff, "The Future of the Legal Profession" (2011) 37:1 Monash UL Rev 7; Susan Swaim Daicoff, "Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law" (2012) 52:3 Santa Clara L Rev 795.

119 Llewellyn, "Dalhousie Dentistry", *supra* note 42.

120 Pearce & Wald, *supra* note 52; Eli Wald & Russell G Pearce, "Beyond Cardboard Lawyers in Legal Ethics", Book Review of *Lawyers and Fidelity to the Law* by W Bradley Wendel (2012) 15:1 Legal Ethics 147; Eli Wald & Russell G Pearce, "Being Good Lawyers: A Relational Approach to Law Practice" (2016) 29:3 Geo J Leg Ethics 601.

121 *Supra* notes 44–51 and accompanying text.

of the issues as well. Lawyers should use culturally competent, trauma-informed, and other accessible practices to facilitate this participation.

5. *Communicative and transparent.* Lawyers should communicate clearly and honestly, while remaining respectful of client confidences, to provide high-quality service, build trust in the lawyer-client relationship, and empower clients to make well-informed decisions for themselves.

6. *Collaborative.* Lawyers should facilitate the use of collaborative, non-adversarial processes where possible, mindful of the importance of conducting these processes safely and effectively.

7. *Reparative and forward-looking.* Lawyers should take a reparative and forward-looking approach to the issues, brainstorming creative options to address harms and prevent conflicts from escalating harmfully or happening again.

II. APPLICATIONS

Restorative justice constitutes a distinct set of legal and moral obligations that, once implemented as legal ethics, have the potential to raise the moral consciousness of lawyers and transform conditions of Canadian law and society in a more equitable direction. In the remainder of this article, I recommend a series of lawyering practices and professional regulatory measures that are consistent with taking a restorative principles-based approach, some of which are aimed at lawyers and some of which are aimed at firms and other law practices. I conclude by proposing the creation of a professional discipline system that responds restoratively to lawyers and firms that cause harm. Generally speaking, the recommendations reflect the importance of active competence efforts that address matters proactively, build lawyers' capacities to make ethical decisions, and promote pathways for the profession to effect social change. As Amna Akbar, Sameer Ashar, and Jocelyn Simonson write, "[lawyers] have a responsibility to abate the violence of law and … draw on movement struggle to transform the construction and governance of our polities."[122]

As a first step, the Preface to the *Model Code* should be revised to include an overarching statement of the restorative principles as written above, followed by an explanation that lawyers and firms should use them to guide their interpretation of the subprinciples and rules to follow in a purposive and contextual manner. There are precedents for embedding restorative principles in Canadian legal frameworks and using them to guide interpretation and policy in this way.[123] Indeed, this change is not a radical one; the Preface contains some helpful language to this interpretive effect already.[124] By centering the restorative principles, the *Model Code* would outline what Natasha Vedananda calls a "philosophy of lawyering" to

[122] Akbar, Ashar & Simonson, *supra* note 72 at 883–84.

[123] *Supra* note 43 and accompanying text. See also Restorative Lab, *Report from the National Restorative Justice Collaborative Learning Conference (NRCLC) 2022* (Halifax: Restorative Lab, 2022) at 15–17, online (pdf): [perma.cc/CJJ9-8BM5].

[124] Notably, "[t]he Code sets out statements of principle followed by exemplary rules and commentaries, which contextualize the principles enunciated. The principles are important statements of the expected standards of ethical conduct for lawyers and inform the more specific guidance in the rules and commentaries": *Model Code*, *supra* note 5, Preface.

establish just relations, signalling a culture shift in how legal ethics are understood and the *Model Code* will be regulated and enforced in the future.[125]

Beyond this overarching statement, it is easier to theorize a restorative principles-based approach than explain how it should be applied in practice. Legal ethics are intended to be applied universally. Yet restorative justice is more than a set of techniques or practices that can be applied identically in every case. The issue gives rise to challenges for governance because restorative justice eschews the kinds of individual responses, efficiency-based thinking, punitive enforcement options, and instrumentalist means-ends rationality that law societies have conventionally relied upon. For example, there is no single "best practice" for client counselling in a restorative manner. There is no mandatory checklist that firms should complete to maintain a restorative workplace. Accordingly, my recommendations underscore the evolving nature of restorative justice and the correspondingly evolutionary, impressionistic, and sometimes messy process of translating its requirements on the ground, with many of the recommendations being encouragements rather than mandatory "must-dos." I hope the resulting discussion inspires critical reflection and debate between lawyers and within law practices about the meaning of just relations and our collective responsibility to establish them, cultivating a more public interest-minded profession as a result.[126]

A. LAWYER REGULATION

The restorative principles encourage lawyers to practice a wider range of interpersonal skills, emotional intelligence, communication ability, and other relational capacities than have been historically taught in Canadian law schools — what the Institute for the Advancement of the American Legal System refers to as the "character quotient" in its path-breaking 2016 *Foundations for Practice* study.[127] One of the most important skills is listening. Krista Tippett's definition of "generous listening," a take on the more commonly known term "active listening," is resonant here:

> Generous listening is powered by curiosity, a virtue we can invite and nurture in ourselves to render it instinctive. It involves a kind of vulnerability—a willingness to be surprised, to let go of assumptions and take in ambiguity. The listener wants to understand the humanity behind the words of the other, and patiently summons one's own best self and one's own best words and questions.[128]

---

[125] Natasha S Vedananda, "Learning to Heal: Integrating Restorative Justice into Legal Education" (2020) 64:1 NYL Sch L Rev 95 at 107.

[126] For commentary on the importance of critical reflection to legal ethics, see Hutchinson, *supra* note 65 at 55–56; Joshua Sealy-Harrington, "Twelve Angry (White) Men: The Constitutionality of the Statement of Principles" (2020) 51:1 Ottawa L Rev 195 at 255–56.

[127] Alli Gerkman & Logan Cornett, *Foundations for Practice: The Whole Lawyer and the Character Quotient* (Denver: Institute for the Advancement of the American Legal System, 2016), online (pdf): [perma.cc/T7R9-43GX].

[128] Krista Tippett, *Becoming Wise: An Inquiry into the Mystery and Art of Living* (New York: Penguin, 2016) at 29. See also Neil Hamilton, "Effectiveness Requires Listening: How to Assess and Improve Listening Skills" (2012) 13:2 Fla Coastal L Rev 145; Susan L Brooks, "Using a Communication Perspective to Teach Relational Lawyering" (2015) 15:2 Nevada LJ 477; Susan L Brooks, "Listening and Relational Lawyering" in Debra L Worthington & Graham D Bodie, eds, *The Handbook of Listening* (Hoboken: John Wiley & Sons, 2020) 361.

The practice of generous listening begins by asking open-ended questions. Tippett explains that questions elicit answers in their likeness: "So while a simple question can be precisely what's needed to drive to the heart of the matter, it's hard to meet a *simplistic* question with anything but a simplistic answer. It's hard to transcend a combative question. But it's hard to resist a generous question."[129] If lawyers do this, they are more likely to connect deeply with their clients, understand their experiences, and become emotionally invested in their welfare. There is significant literature on the benefits of fostering compassion, empathy, and other pro-social emotions in the legal system.[130] I have argued elsewhere that fostering these emotions can build lawyers' capacities for perspective-taking in human rights activism — to use Maksymilian Del Mar's words, the capacity to imagine the "needs, interests and values of another person as they are refracted in the concrete and particular experiences of persons in their relations with the world and others."[131]

Practicing these skills enables lawyers to have more horizontal, party-driven conversations with their clients, communicate more clearly and honestly, and resolve issues together through deliberation and dialogue. It may be impossible to equalize the power imbalances inherent in the lawyer-client relationship, with the conventional view being that clients define their goals and lawyers provide the expertise necessary to achieve them, but the process of collaborating on a path forward helps to foster conditions of mutual respect and trust.[132] The relationship will not always be frictionless. Power and affect are volatile; they can travel in complex ways such that relations between lawyers and clients have the potential to fluctuate, as William Felstiner and Austin Sarat put it, between moments of "resistance as well as acquiescence, contest as well as cooperation, suspicion as well as commitment."[133] But these relations should trend toward greater equality in the long run because the restorative principles empower clients to participate in matters directly and make better informed choices for themselves.[134]

The requirements to listen generously and communicate effectively are fundamental to every aspect of the lawyer-client relationship. From a regulatory perspective, they bear most directly on *Model Code* provisions that govern client counselling and advice, including provisions that require a client's informed consent to enter into retainer agreements and take

---

[129] Tippett, *supra* note 128 at 29–30 [emphasis in original].

[130] See Benjamin Zipursky, "*DeShaney* and the Jurisprudence of Compassion" (1990) 65:4 NYUL Rev 1101; Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston: Beacon Press, 1998) at 52–90; John Deigh, *Emotions, Values, and the Law* (New York: Oxford University Press, 2008); Martha C Nussbaum, *Upheavals of Thought: The Intelligence of Emotions*, 8th ed (New York: Cambridge University Press, 2008) at 441–54; Laura E Little, "Adjudication and Emotion" (2002) 3:2 Fla Coastal LJ 205 at 209; Kathryn Abrams & Hila Keren, "Law in the Cultivation of Hope" (2007) 95:2 Cal L Rev 319; Jonathan Herring, "Compassion, Ethics of Care and Legal Rights" (2017) 13:2 Intl JL in Context 158.

[131] Daniel Del Gobbo, "Lighting a Spark, Playing with Fire: Feminism, Emotions, and the Legal Imagination of Campus Sexual Violence" (2022) 45:1 Dal LJ 1 at 32, citing Maksymilian Del Mar, "Imagining by Feeling: A Case for Compassion in Legal Reasoning" (2017) 13:2 Intl JL in Context 143 at 150.

[132] See William LF Felstiner & Austin Sarat, "Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions" (1992) 77:6 Cornell L Rev 1447 at 1451. For critical takes on this view, see Gerald P López, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Boulder: Westview Press, 1992) at 23; Robert D Dinerstein, "Client-Centered Counseling: Reappraisal and Refinement" in Susan D Carle, ed, *Lawyers' Ethics and the Pursuit of Social Justice: A Critical Reader* (New York: NYU Press, 2005) 151.

[133] Felstiner & Sarat, *supra* note 132 at 1450.

[134] See generally Macfarlane, *supra* note 1.

steps in legal proceedings. Recall the example of Rule 3.2-2 that governs honesty and candour.[135] Pursuant to this and other rules, lawyers must ensure that clients understand the legal services being offered, the limits of client confidentiality, the lawyer's fee and billing arrangements, and other professional boundary issues like conflicts of interest. Clinical legal education scholars have written most extensively about the client service model that I envision here, sometimes referred to as "client-centred lawyering," with two of the objectives of clinic law being to reaffirm clients' dignity and agency and to challenge the subordination that clients otherwise experience.[136] In a restorative approach, the importance of practicing law in a manner that promotes these outcomes would be made explicit in the rules.

Form mirrors content here. Rule 3.1-1 provides that professional competence includes "ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action."[137] Building on this rule, the restorative principles encourage lawyers to identify their clients' interests as distinct from their positions (sometimes framed as rights claims), including their social, cultural, emotional, and psychological interests.[138] Put another way, lawyers should "let go" of their formalist assumption, as Tippett suggests above, that the legal aspects of a case predominate or otherwise bear directly on their clients' welfare — mindful that the costs of legal representation and other barriers to accessing justice include financial, temporal, reputational, and other equity-related costs — and provide more tailored and comprehensive responses accordingly.[139] Rights claims are frequently proxies for a client's underlying wants, needs, and desires that cannot be fully addressed by courts and tribunals.[140] In this respect, the restorative principles are allied with the so-called "rights plus" fields of collaborative law[141]

---

135 *Model Code*, *supra* note 5, r 3.2-2.

136 See Jillian Rogin, Sarah Buhler & Chantelle Johnson, *The Code of Professional Conduct and Access to Justice: Ethical Practice in a Legal Clinic Context*, Student Guide (Association for Canadian Clinical Legal Education, 2024) at 7, online (pdf): [perma.cc/R7ZX-4FP4], citing Corey S Shdaimah, "Legal Services Lawyers: When Conceptions of Lawyering and Values Clash" in Leslie C Levin & Lynn Mather, eds, *Lawyers in Practice: Ethical Decision Making in Context* (Chicago: University of Chicago Press, 2012) 317 at 317. See also Kruse, "Beyond Cardboard Clients", *supra* note 116.

137 *Model Code*, *supra* note 5, r 3.1-1(b).

138 See Carrie Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem Solving" (1984) 31:4 UCLA L Rev 754 at 840.

139 For commentary on the barriers to accessing justice in Canada, including their equality implications, see Constance Backhouse, "What is Access to Justice?" in Julia Bass, WA Bogart & Frederick H Zemans, eds, *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005) 113; Ab Currie, "A National Survey of the Civil Justice Problems of Low- and Moderate-Income Canadians: Incidence and Patterns" (2006) 13:3 Intl J Leg Profession 217; Patricia Hughes, "Advancing Access to Justice Through Generic Solutions: The Risk of Perpetuating Exclusion" (2013) 31:1 Windsor YB Access Just 1. For commentary on costs specifically, see Trevor CW Farrow, "What is Access to Justice?" (2014) 51:3 Osgoode Hall LJ 957 at 964–65; Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2016) 93:3 Can Bar Rev 639; Matthew Dylag, "How Ontarians Experience the Law: An Examination of Incidence Rate, Responses, and Costs of Legal Problems" in Farrow & Jacobs, *supra* note 67, 110 at 119–23.

140 See Daniel Del Gobbo, "Queer Dispute Resolution" (2019) 20:2 Cardozo J Conflict Resolution 283 at 292; Del Gobbo, "Feminism in Conversation", *supra* note 38 at 622.

141 See Wanda Wiegers & Michaela Keet, "Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities" (2008) 46:4 Osgoode Hall LJ 733; Martha E Simmons, "Collaborative Law at 25: A Canadian Study of a Global Phenomenon" (2016) 49:2 UBC L Rev 669; Deanne M Sowter, "Advocacy in Non-Adversarial Family Law: A Recommendation for Revision to the Model Code" (2018) 35 Windsor YB Access Just 401.

and therapeutic jurisprudence,[142] among others, which are similarly focused on promoting health and well-being as central to a holistic response.

Additionally, the restorative principles confirm that client interests can rarely be satisfied in isolation from their broader social and community networks. In practice, this means lawyers should consider the interests of other parties in a case and brainstorm how to meet them acceptably. To be clear, the restorative principles do not require lawyers to break client confidentiality or otherwise represent the other parties' interests in a manner that compromises the duty of loyalty, particularly in "hard cases" where their clients' interests and the other parties' interests conflict. Criminal defence lawyers, for example, cannot be required to concede to prosecutors that their clients should be incarcerated. However, the restorative principles do require lawyers to check their adversarial tendencies and think about issues and interests in a more sustainable, other-oriented way.[143] Resolutions that are mutually acceptable are often seen as more legitimate by the parties and therefore tend to be more durable because the parties invested time and energy in crafting them.[144] In many cases, there will be equality concerns that bear on the lawyers' treatment of the other parties' interests as well, particularly in cases involving historically marginalized groups or where the matter invokes a broader legal or political struggle (for example, employer-employee or landlord-tenant matters). Elaine Craig writes about the legal ethics of criminal defence lawyering in sexual assault cases, for instance, calling on lawyers to forbear from conducting harmful cross-examinations and other courtroom tactics that can revictimize survivors.[145]

Looking beyond the immediate parties, lawyers should consider the interests of community stakeholders with meaningful experience and knowledge about the issues as well — including stakeholders who would not otherwise meet the legal requirements of standing or intervention — finding opportunities for them to participate in the matter, where appropriate.[146] Conducting this assessment requires lawyers to understand what Llewellyn and Brenda Morrison call the "relational ecology" of a case: how incorporating other people's skills, perspectives, and expertise can meet their clients' interests; how creating such a process will frequently require collaboration between individuals, organizations, and government

---

[142] See Dennis P Stolle, David B Wexler & Bruce J Winick, eds, *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Durham, NC: Carolina Academic Press, 2000); Edna Erez, Michael Kilchling & Jo-Anne Wemmers, eds, *Therapeutic Jurisprudence and Victim Participation in Justice: International Perspectives* (Durham, NC: Carolina Academic Press, 2011); Jo-Anne Wemmers, "From Restorative to Transformative Justice: The Relevance of Therapeutic Jurisprudence for Restorative Justice" (2019) 2:3 Intl J Restorative Justice 470.

[143] For evidence of the harms of adversarialism, see Robert A Baruch Bush & Sally Ganong Pope, "Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation" (2002) 3:1 Pepperdine Dispute Resolution LJ 67 at 73, citing Daniel Goleman, *Emotional Intelligence* (New York: Bantam Books, 1995) at 13–33, 56–77; Aaron T Beck, *Prisoners of Hate: The Cognitive Basis of Anger, Hostility, and Violence* (New York: HarperCollins, 1999) at 3–39; Dan Simon et al, "The Adversarial Mindset" (2020) 26:3 Psychol Pub Pol'y & L 353.

[144] See Rebecca Hollander-Blumoff & Tom R Tyler, "Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution" (2011) 2011:1 J Disp Resol 1 at 15–16.

[145] Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montreal: McGill-Queen's University Press, 2018) at 131. The Supreme Court of Canada made a similar call in *Barton*, stating that "our criminal justice system and all participants within it should take reasonable steps to address systemic biases, prejudices, and stereotypes against Indigenous persons — and in particular Indigenous women and sex workers — head-on": *Barton*, *supra* note 2 at para 200.

[146] The tests for private and public interest standing are established respectively in *Finlay v Canada (Minister of Finance)*, 1986 CanLII 6 at 31–32 (SCC) and *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 37. The test for intervention is established in *R v Morgentaler*, [1993] 1 SCR 462 at 463.

agencies across multiple legal and social systems; and how the matter's resolution will have broader community-level and system-wide impacts.[147] Shin Imai illustrates how poverty lawyers and lawyers working with Indigenous peoples, for example, can foster such a "community perspective" in their work, requiring them to learn about their clients and build relationships within their constituencies to be effective.[148] Norman Veasey and Christine Di Guglielmo explain that in-house corporate counsel, to give another example, are uniquely placed to promote corporate social responsibility, ensuring that their companies follow international labour and environmental standards that might not otherwise be enforced in certain locales.[149]

Correspondingly, the restorative principles encourage lawyers to employ more participatory and inclusive processes that include the parties' family members, support persons, and other community stakeholders to help tell the story of the case, contextualize its impacts, and formulate the solution on a voluntary basis. Community involvement is a hallmark of many restorative justice programs, a feature which contrasts with most court-annexed mediation programs, for instance, where only the parties, their lawyers, and the mediator, typically, are allowed to participate.[150] The holding of circles and use of talking pieces is another hallmark, with the process helping to facilitate a more horizontal, non-hierarchical space for the parties and community stakeholders to meet, listen generously, and collaborate with one another.[151]

One of the most illustrative examples is circle sentencing, a criminal sentencing alternative that is claimed to have originated in the 1992 case of *R. v. Moses*.[152] Circle sentencing was inspired by the recognition that conventional sentencing practices in the Yukon failed to address the criminogenic disadvantages that many Indigenous communities in Canada continue to face, including poverty, addictions, family violence, intergenerational trauma, and historical dislocation from lands and cultures.[153] This recognition led to the creation of a legal process that brings together prosecutors, defendants, police and probation

---

147 Jennifer J Llewellyn & Brenda Morrison, "Deepening the Relational Ecology of Restorative Justice" (2018) 1:3 Intl J Restorative Justice 343.

148 Shin Imai, "A Counter-Pedagogy for Social Justice: Core Skills for Community Lawyering" (2002) 9:1 Clinical L Rev 195. See also Christine Zuni Cruz, "Toward a Pedagogy and Ethic of Law/Lawyering for Indigenous Peoples" (2006) 82:3 NDL Rev 863.

149 E Norman Veasey & Christine T Di Guglielmo, *Indispensable Counsel: The Chief Legal Officer in the New Reality* (New York: Oxford University Press, 2012) at 117.

150 For commentary on the role of community involvement in restorative justice, see Paul McCold & Benjamin Wachtel, "Community is Not a Place: A New Look at Community Justice Initiatives" in Gerry Johnstone, ed, *A Restorative Justice Reader: Texts, Sources, Context*, 1st ed (Portland: Willan, 2003) 294; Patrick M Gerkin, "Who Owns This Conflict? The Challenge of Community Involvement in Restorative Justice" (2012) 15:3 Contemporary Justice Rev 277; Fernanda Fonseca Rosenblatt, *The Role of Community in Restorative Justice* (New York: Routledge, 2015).

151 For commentary on the use of circles in restorative justice, see Michael J Gilbert, Mara Schiff & Rachel H Cunliffe, "Teaching Restorative Justice: Developing a Restorative Andragogy for Face-to-Face, Online and Hybrid Course Modalities" (2013) 16:1 Contemporary Justice Rev 43; Lindsay Pointer et al, "Teaching Restorative Justice" (2022) 25:3–4 Contemporary Justice Rev 271.

152 1992 CanLII 12804 (YKTC).

153 See Hugh J Benevides, "*R. v. Moses* and Sentencing Circles: A Case Comment" (1994) 3:1 Dal J Leg Stud 241; "How a Peacemaking Circle Program Born in the Yukon Became a Key Element in North American Justice Reform", *CBC Docs* (9 December 2022), online: [perma.cc/A7J7-3NAW]. For commentary on the criminogenic disadvantages faced by Indigenous peoples, see Lisa Monchalin, *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada* (Toronto: University of Toronto Press, 2016).

officers, and family and community members, including Indigenous Elders, working in tandem with professionals and other supports, including educational program officers, health care providers, and substance abuse counsellors, to make recommendations about how to proceed. To be sure, the balancing of individual and community needs in circle sentencing can be challenging to execute successfully. Criticisms of the process have raised questions about the gap between restorative justice's potential and the implementation of circle sentencing in some cases.[154] Accordingly, the evolution of the process holds important lessons about how lawyers can ensure that participation in restorative programs is meaningful.

If restorative programs are unavailable, lawyers should consider employing relational forms of mediation, collaborative law, and other ADR systems to effect similar outcomes. The *Model Code*'s guidance on the conduct of ADR is limited, consisting primarily of Rule 3.2-4 that provides "[a] lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings."[155] In a restorative approach, the potential of ADR to meet client interests, coordinate between systems, and engage broader communities would be more clearly supported. In transformative mediation, for example, a relational form of mediation developed by Robert Baruch Bush and Joseph Folger, the mediator encourages the parties to make "critical shifts" toward mutual recognition and empowerment with the goal of "transforming people from dependent beings concerned only with themselves (weak and selfish people) into secure and self-reliant beings willing to be concerned with and responsive to others (strong and caring people)."[156] Lawrence Susskind frames the task of resolving environmental law disputes in similarly relational terms, claiming it "requires that attention be given not only to the interests of the parties at the table but also to the needs and concerns of future generations.... The [parties] should feel their interests have been served, and the community-at-large should feel that a good precedent has been set."[157]

At all times, the restorative principles require lawyers to use culturally competent, trauma-informed, and other accessible practices to ensure that clients and community stakeholders can participate in these processes safely and effectively. The first idea, cultural competence, means that lawyers must understand how race, gender, ethnicity, class, ability, and other

---

[154] For commentary on circle sentencing as a criminal legal system-integrated process, including criticism from feminist, post-colonial, and anti-carceral perspectives, see Angela Cameron, "Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective" (2006) 18:2 CJWL 479; Emma Cunliffe & Angela Cameron, "Writing the Circle: Judicially Convened Sentencing Circles and the Textual Organization of Criminal Justice" (2007) 19:1 CJWL 1; Carmela Murdocca, *To Right Historical Wrongs: Race, Gender, and Sentencing in Canada* (Vancouver: UBC Press, 2013); William Hollingshead, "Indigeneity Through the Eyes of the Colonizer: An Analysis of Sentencing Circles" (2021) 3:1 York U Criminological Rev 24; Jonathan Rudin, *Indigenous People and the Criminal Justice System*, 2nd ed (Toronto: Emond, 2022).

[155] *Model Code*, *supra* note 5, r 3.2-4. The Commentary to Rule 3.2-4 provides the following additional guidance: "[a] lawyer should consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options and, if so instructed, take steps to pursue those options" (*ibid*).

[156] Robert A Baruch Bush & Joseph P Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*, 1st ed (San Francisco: Jossey-Bass, 1994) at 29.

[157] Lawrence E Susskind, "Mediating Public Disputes: A Response to the Skeptics" (1985) 1:2 Negotiation J 117 at 119.

systems of oppression inform the parties' interests and experiences of the legal system. According to Rose Voyvodic, cultural competence requires lawyers to have three attributes:

> KNOWLEDGE: about how "cultural" differences affect client experiences of the legal process as well as their interactions with lawyers;
>
> SKILLS: through self-monitoring, to identify how assumptions and stereotypes influence [the lawyer's] thinking and behaviour, as well as the thinking and behaviour of others, and to work to lessen the effect of these influences; [and]
>
> ATTITUDE: awareness of [themselves] as a cultural being and of the harmful effects of power and privilege; and the willingness and desire to practise competently in the pursuit of justice. [158]

Like other elements of a restorative approach, the requirement of cultural competence is a contextual one. Pooja Parmar's research on legal ethics and reconciliation, for instance, provides guidance to lawyers in cases where an Indigenous client's identity, knowledge, language, and cultural practices may not be easily translatable in settler legal contexts.[159] Samuel Singer's research on trans competent lawyering, although not framed primarily in ethical terms, suggests that competence requires lawyers who represent trans clients to acknowledge, eliminate, and transform, where possible, the legal and social barriers to accessing justice faced by trans people in Canada.[160]

The second idea, trauma-informed lawyering, means that lawyers should become familiar with how trauma is experienced in the body and provide legal services in a manner that promotes physical and psychological coping.[161] Trauma can result from single or chronic events and frequently has historical, systemic, and intergenerational manifestations, for example, in the context of residential schooling and other forms of racism and cultural genocide that continue to be experienced harmfully by Black, Indigenous, and other racialized peoples in Canada.[162] There is a growing literature on the professional implications

---

[158] Rose Voyvodic, "Lawyers Meet the Social Context: Understanding Cultural Competence" (2006) 84:3 Can Bar Rev 563 at 581–82. For complementary takes, see Gemma Smyth, "Strengthening Social Justice in Informal Dispute Resolution Processes Through Cultural Competence" (2009) 27:1 Windsor YB Access Just 111; Travis Adams, "Cultural Competency: A Necessary Skill for the 21st Century Attorney" (2012) 4:1 Law Raza 2; Cynthia Pay, "Teaching Cultural Competency in Legal Clinics" (2014) 23 J L & Soc Pol'y 188.

[159] Pooja Parmar, "Reconciliation and Ethical Lawyering: Some Thoughts on Cultural Competence" (2019) 97:3 Can Bar Rev 526.

[160] Samuel Singer, "Trans Competent Lawyering" in Joanna Radbord, ed, *LGBTQ2+ Law: Practice Issues and Analysis* (Toronto: Emond, 2019) 159; Samuel Singer & Amy Salyzyn, "Preventing Misgendering in Canadian Courts: Respectful Forms of Address Directives" (2023) 101:2 Can Bar Rev 319.

[161] For research on how trauma operates, see Judith Lewis Herman, *Trauma and Recovery* (New York: BasicBooks, 1992); Bessel A van der Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* (New York: Penguin Group, 2014).

[162] See Renee Linklater, *Decolonizing Trauma Work: Indigenous Stories and Strategies* (Halifax: Fernwood, 2014); Resmaa Menakem, *My Grandmother's Hands: Racialized Trauma and the Pathway to Mending Our Hearts and Bodies* (Las Vegas: Central Recovery Press, 2017); Edward C Valandra/Waŋbli Waṗháha Hokšíla, "Undoing the First Harm: Settlers in Restorative Justice" in Edward C Valandra/Waŋbli Waṗháha Hokšíla, ed, *Colorizing Restorative Justice: Voicing Our Realities* (St Paul: Living Justice Press, 2020) 325.

of trauma in criminal law, civil procedure, human rights, and corporate law contexts.[163] Melanie Randall and Lori Haskell explain that trauma-informed lawyering is a similarly relational approach as restorative justice because it "seek[s] to respond to people in ways that both recognize and take account of traumatic responses and their developmental consequences, and which avoids harming or retraumatizing them in delivering a service or implementing a policy."[164] Like cultural competence, the importance of trauma-informed lawyering is most relevant to the interpretation of Rule 3.1, which governs competence, and Rule 6.3-1[1], which provides that lawyers must respect the requirements of human rights laws.[165] In 2023, the Federation of Law Societies of Canada proposed draft amendments to the *Model Code* to require the use of culturally competent and trauma-informed practices as an element of competence, confirming this link.[166] As of 2025, these amendments have not yet been adopted. In a restorative approach, the relationship between these concepts and the requirement to provide legal services accessibly and equitably would be made explicit.

As I make these recommendations, I realize the restorative principles might seem countercultural because they run contrary to how most lawyers are taught and eventually come to practice. For many lawyers, there exists what Gemma Smyth calls a relational "skills gap" between the restorative principles and their current knowledge and abilities that will prevent lawyers from enacting them.[167] Client expectations, path dependence within firms, and other external pressures and constraints have profound effects on how lawyers think, act, relate to other people, and what they believe is possible and realistic to achieve. Additionally, the contextual nature of the restorative principles means they do not lend themselves to easy "one-size-fits-all" solutions. Lawyers should accept that they can (and will) make mistakes in implementing them because they are being asked simultaneously to improve their skills and capacities while challenging the assumptions that have influenced their professional development to date.

To help bridge this skills gap, the Law Society of Alberta (LSA) created a remarkable tool called the "Professional Development Profile" in 2022 that provides a series of competencies for lawyers to maintain safe, effective, and sustainable practices.[168] The LSA frames one of

---

[163] See Sarah Katz & Deeya Haldar, "The Pedagogy of Trauma-Informed Lawyering" (2016) 22:2 Clinical L Rev 359; Helgi Maki & C Tess Sheldon, "Trauma-Informed Strategies in Public Interest Litigation: Avoiding Unintended Consequences Through Integrative Legal Perspectives" (2019) 90 SCLR (2d) 65; Golden Eagle Rising Society, *Trauma-Informed Legal Practice Toolkit* (Vancouver: Golden Eagle Rising Society, 2020), online (pdf): [perma.cc/WJ43-XABB]; Gemma Smyth, Dusty Johnstone & Jillian Rogin, "Trauma-Informed Lawyering in the Student Legal Clinic Setting: Increasing Competence in Trauma Informed Practice" (2021) 28:1 Intl J Clinical Leg Education 149; Helgi Maki et al, eds, *Trauma-Informed Law: A Primer for Lawyer Resilience and Healing* (Chicago: American Bar Association, 2023); Anna Lund, "Teaching Trauma and Hope in Debtor-Creditor Law" in Mallika Kaur & Lindsay M Harris, eds, *How to Account for Trauma and Emotions in Law Teaching* (Cheltenham: Edward Elgar, 2024) 127.

[164] Melanie Randall & Lori Haskell, "Trauma-Informed Approaches to Law: Why Restorative Justice Must Understand Trauma and Psychological Coping" (2013) 36:2 Dal LJ 501 at 520–21.

[165] *Model Code*, *supra* note 5, rr 3.1, 6.3-1[1].

[166] Federation of Law Societies of Canada, *Consultation Report: Draft Amendments in Response to Call to Action 27, Model Code of Professional Conduct* (Ottawa: FLSC, 2023), online (pdf): [perma.cc/3TXW-W628].

[167] Gemma Smyth, Professor, University of Windsor Faculty of Law (4 July 2025) via e-mail [communicated to author].

[168] Law Society of Alberta, "Reflective Practice: Overview" (4 April 2023), online: [perma.cc/Q5QG-K8EF].

these competencies, "continuous improvement," as requiring lawyers to become "integrated reflective practitioners," citing Michele Leering's work on reflective practice below:

> [A]n "integrated reflective practitioner" is a professional who integrates theory and practice, critically reflects on practice (what one does), and theory (what one knows), and what one believes as a self-directed life-long learner, and then takes action based on that reflection to improve their practice. This kind of professional recognizes the power of reflecting collectively, learning from others and from other disciplines, to enhance professional services, increase professional knowledge, ensure rigour about one's own reflections, and generate new insights and interdisciplinary knowledge. [169]

The LSA explains the importance of reflective practice in terms that resonate deeply with a restorative approach. Reflective practice, it states, builds lawyers' emotional intelligence, which is essential to communicating effectively and "being able to relate better to your clients and to respect their views and emotions."[170] Reflective practice enables lawyers to integrate different areas of legal knowledge and formulate "new strategies and approaches to problem-solving."[171] Finally, reflective practice can help lawyers to recognize their positionality and change oppressive systems by

> becom[ing] sensitive to cultural, gender, race, class and other lived experiences and appreciat[ing] your own personal biases and the assumptions you hold about people, as well as the power imbalances inherent in your relationship to your clients and your professional privilege, all with a view to openness, integrity, authenticity and respect for others. [172]

Law societies should implement measures to promote reflective practice, including mandatory CPD programs and requirements that lawyers must submit written reflections on their practices as part of their annual reporting obligations. The LSA does not currently require its lawyers to complete CPD hours. However, the Law Society of Ontario, for instance, requires its lawyers to complete a minimum of nine substantive hours and three professionalism hours per year, a portion of which must focus on equality, diversity, and inclusion.[173] Mandatory CPD is a relatively small step, but requirements that facilitate this kind of experiential learning should be created and expanded to support a restorative approach.

---

[169] Michele M Leering, "Integrated Reflective Practice: A Critical Imperative for Enhancing Legal Education and Professionalism" (2017) 95:1 Can Bar Rev 47 at 49–50 [footnotes omitted], cited in Law Society of Alberta, "Reflective Practice: Types of Reflection" (8 March 2023), online: [perma.cc/K7CK-UMQT]. See also Richard K Neumann Jr, "Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education" (2000) 6 Clinical L Rev 401; Gemma Smyth, *Learning in Place: A Living Landscape in Practice*, 3rd ed (2023), online: [perma.cc/9LR8-JGNR].

[170] Law Society of Alberta, "Reflective Practice: Reflective Practice and the Law Society's Professional Development Profile" (2 March 2023), online: [perma.cc/D62N-7EAF].

[171] *Ibid*.

[172] *Ibid*.

[173] Law Society of Ontario, "Continuing Professional Development Requirement", online (pdf): [perma.cc/WCW8-HMTR].

B. LAW PRACTICE REGULATION

Complementing these efforts at individual regulation, the restorative principles also lend themselves to entity regulation and the creation of ethical infrastructure within firms and other kinds of law practices. Firms should be required to create and implement measures that improve the firms' relationships with clients, promote collegiality and development internally, and support the profession and community at large. The restorative principles should inform the design of these measures, reflecting the idea that proactive systems within regulated institutions are necessary to establish just relations on the institutional and structural levels. Given the range of legal business structures that exist in Canada, the requirements on firms should be flexible in this regard, encouraging firms to take ownership of the choices they make.[174] The requirements should be enforced through institutional self-assessments, with one or more lawyers in each firm being responsible for ethical oversight and reporting on compliance annually. At all times, law societies should provide firms with tools and resources to help them make ethical decisions consistent with the restorative principles. Lawyers working in challenging environments should be given additional support, conscious of the risks of increasing the regulatory burden on sole and small firm practitioners especially, many of whom face economic and equity-related barriers in their practices.[175]

Precedents exist for regulating firms in this manner. Principles-based approaches were adopted in New South Wales (NSW), Australia and in the United Kingdom in 2001 and 2009, respectively.[176] In both jurisdictions, the regulators provided an initial set of principles or objectives, pursuant to which lawyers and firms were charged with formulating a plan to achieve them. In NSW, for example, the regulator identified ten criteria that regulated entities, specifically "incorporated legal practices" (ILPs), are required to meet.[177] ILPs must build ethical infrastructure, called "appropriate management systems," corresponding to each criterion and charge one of their lawyers with responsibility for oversight as "legal practitioner director."[178] ILPs are then required to complete a self-assessment of these systems and report on their compliance using a standardized form.[179] The regulator can follow up with questions, commence an audit, and discipline the legal practitioner director, as necessary.[180] Schneyer characterizes the process as "non-adversarial collaboration," with the regulator playing more of a coaching role than a policing one.[181] In a 2010 study, Christine Parker, Tahlia Gordon, and Steve Mark found that complaint rates against ILPs decreased

---

[174] For commentary on the ethical implications of new business structures, see Canadian Bar Association, *Futures: Transforming the Delivery of Legal Services in Canada* (Ottawa: CBA, 2014) at 32–36.

[175] See Law Society of Upper Canada, *Working Together for Change: Strategies to Address Issues of Systemic Racism in the Legal Professions* (Toronto: LSUC, 2016), online (pdf): [perma.cc/DTN2-46S9].

[176] See Dodek, *supra* note 89 at 419–31; Salyzyn, "Effective Ethical Infrastructure", *supra* note 89 at 525–33.

[177] *Ibid*.

[178] *Ibid*.

[179] *Ibid*.

[180] *Ibid*. This process was governed by *Legal Profession Act 2004* (NSW), 2004/112 (Austl), until the Parliament of NSW replaced the legislation with *Legal Profession Uniform Law Application Act 2014* (NSW), 2014/16 (Austl), which maintained the general structure of the process.

[181] Ted Schneyer, "The Case for Proactive Management-Based Regulation to Improve Professional Self-Regulation for U.S. Lawyers" (2013) 42:1 Hofstra L Rev 233 at 237 [emphasis omitted]. See also Christine Parker, Tahlia Gordon & Steve Mark, "Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37:3 JL & Soc'y 466 at 473.

after entity regulation was instituted, leading to more ethical outcomes for clients and the public.[182]

In Canada, the foundations for entity regulation have already been established. Firms have been subject to financial reporting obligations and comprehensive practice reviews in several provinces and territories for many years.[183] Nova Scotia was the first jurisdiction to pass legislation enabling its law society to discipline firms in 2005, with the Nova Scotia Barristers' Society explaining that it takes a "Triple P" approach to regulation: "proactive, principled and proportionate."[184] In Saskatchewan, to give another example, rules came into force in 2020 that provide the following components of entity regulation:

- *Firm Registration and Designated Representative(s)*: all law firms must register with the Law Society and appoint a primary contact person as a Designated Representative.
- *Annual Report*: all law firms must complete annual reporting with separate reports for firms with and without trust accounts and with consideration for a succession plan.
- *Practice Management Assessment Tool*: all law firms must complete the Assessment Tool for sole practitioners or multi-lawyer firms once every three years to support the implementation of controls, effective client service, ethical practice, financial soundness, and risk management.[185]

The Saskatchewan rules followed a three-province consultation on entity regulation in 2016, with most of the responding lawyers agreeing that professional and workplace cultures and relationships have a significant influence on the way they practice.[186]

On a parallel track, the Canadian Bar Association's (CBA) Ethics and Professional Responsibility Committee released its "Ethical Practices Self-Evaluation Tool" in 2013 to support firms in examining how to build ethical infrastructure.[187] Salyzyn's research was formative in developing the CBA guidance, with one of its key innovations being its conceptualization of the process "not only in terms of the ethical duties that lawyers owe to their clients but also in relation to broader duties owed to the public" — a critical departure from the NSW and UK models that are more consumer-oriented.[188] Notably, the CBA guidance recommends that firms create "practices that promote access to justice" as a central objective, with a focus on reducing the barriers faced by self-represented litigants.[189] Collectively, these examples provide the impetus for law societies to think about ethical infrastructure more relationally. The restorative principles should be integrated into relevant law society frameworks, including governing legislation and policy, as the basis for

---

[182] Parker, Gordon & Mark, *supra* note 181 at 493.
[183] See Salyzyn, "Effective Ethical Infrastructure", *supra* note 89 at 533.
[184] Nova Scotia Barristers' Society, "How We Regulate", online: [perma.cc/33N5-M8KW]; *Legal Profession Act*, SNS 2004, c 28, s 45(5); Nova Scotia Barristers' Society, *Regulations Made Pursuant to the* Legal Profession Act, SNS 2004, c 28, ss 4.8–4.11, 9.7.1.
[185] Law Society of Saskatchewan, "Firm Regulation", online: [perma.cc/EBY8-D5XK]; Law Society of Saskatchewan, *Law Society of Saskatchewan Rules* (Regina: LSS, 2025) Part 9.
[186] Law Society of Alberta, Law Society of Saskatchewan & Law Society of Manitoba, *Innovating Regulation: A Collaboration of the Prairie Law Societies — Consultation Report, September 2016* (Law Society of Alberta, 2016) at 2, online (pdf): [perma.cc/ZU2N-MDX4].
[187] Canadian Bar Association, "Ethical Practices Self-Evaluation Tool" (2013), online (pdf): [perma.cc/BC2N-V767] [CBA, "Ethical Practices"].
[188] Salyzyn, "Effective Ethical Infrastructure", *supra* note 89 at 549.
[189] CBA, "Ethical Practices", *supra* note 187 at 12–13.

regulating firms in terms of the relations they establish, thus fostering "a culture in which access to justice is valued and promoted."[190]

C. PROFESSIONAL DISCIPLINE

My final series of recommendations pertains to enforcement. The restorative principles support the creation of a professional discipline system that responds restoratively to lawyers and firms that cause harm. In a path-breaking article, the possibilities of restorative discipline were canvassed by Jennifer Gerarda Brown and Liana Wolf in the US context.[191] Brown and Wolf explain that conventional discipline systems reflecting a misconduct orientation undervalue two elements of restorative justice: participation by a diverse group of community stakeholders and collaboration between them that focuses on addressing the consequences of harm.[192] Equally significantly, I would add, conventional systems fail to recognize that discipline should be therapeutic and reintegrative rather than punitive in nature. The focus should be transforming the conditions that led to the harm instead of punishing individual "bad apples." Collectively, these elements are consistent with the purposes of discipline in Canada to protect the public interest, uphold professional standards, and "preserve public confidence in the legal profession."[193] There is a strong evidence base for this claim. The empirical literature attesting to the potential of restorative programs to respond effectively to crime and other forms of wrongdoing is massive.[194] Brown and Wolf elaborate the justification for a restorative approach: "the legal profession both constitutes and creates community. By strengthening that community, a more restorative disciplinary process can in turn improve the morale of practicing lawyers, prevent ethical misconduct, and protect the public."[195]

I envision this professional discipline system as having two interconnected stages, the investigation and the response, each of which is conducted in a restorative manner. At the

---

[190] *Ibid* at 13.

[191] Jennifer Gerarda Brown & Liana GT Wolf, "The Paradox and Promise of Restorative Attorney Discipline" (2012) 12:2 Nevada LJ 253. Brown and Wolf's article was the focus of a symposium issue on restorative lawyer discipline that included the following articles: Linda Haller, "Restorative Lawyer Discipline in Australia" (2012) 12:2 Nevada LJ 316; John Braithwaite, "Paradox and Civic Republican Vision" (2012) 12:2 Nevada LJ 333; Katherine R Kruse, "The Promise of Client-Centered Professional Norms" (2012) 12:2 Nevada LJ 341.

[192] Brown & Wolf, *supra* note 191 at 254–55.

[193] See Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Thomson Reuters, 2022) (loose-leaf updated 2021, release 3), ch 26 at 1; Andrew Flavelle Martin, "The Immunity of the Attorney General to Law Society Discipline" (2016) 94:2 Can Bar Rev 413 at 414.

[194] In the criminal law context, the efficacy of restorative justice is frequently demonstrated by the large body of evidence showing that restorative programs have proven effective at reducing recidivism: see Joanna Shapland et al, *Does Restorative Justice Affect Reconviction? The Fourth Report From the Evaluation of Three Schemes* (London, UK: Ministry of Justice, 2008); Hennessey Hayes, "Reoffending and Restorative Justice" in Gerry Johnstone & Daniel W Van Ness, eds, *Handbook of Restorative Justice* (Portland: Willan, 2007) 426; James Bonta et al, "Restorative Justice and Recidivism: Promises Made, Promises Kept?" in Sullivan & Tifft, *supra* note 15 at 175; Lawrence W Sherman et al, "Are Restorative Justice Conferences Effective in Reducing Repeat Offending? Findings from a Campbell Systematic Review" (2015) 31:1 J Quantitative Criminology 1. Challenging the premises of this work, some restorativists suggest that the efficacy of restorative justice is properly and even more convincingly demonstrated by using relational metrics that do not reify the values underlying the criminal legal system: see Llewellyn, "Imagining Success", *supra* note 44; Tania Arvanitidis et al, "Evaluation: Widening Our Restorative Imagination" in Daniel Del Gobbo et al, eds, *Restorative Justice in North America: Canada and the United States* (Boston: DeGruyter Brill, 2026) [forthcoming in 2026].

[195] Brown & Wolf, *supra* note 191 at 255.

investigation stage, law societies would be charged with reviewing complaints against lawyers and firms to understand what happened, identify the relationships at issue, and establish a factual basis for restitution and healing. In most cases, the process would be initiated by a conversation between the law society's counsel and the lawyer or firm's "designated representative," to use the Saskatchewan term, in the hopes that information will be shared voluntarily and the lawyer or representative will acknowledge the harm and take responsibility for their actions.[196] In a significant departure from conventional procedures, this conversation would be guided by an external facilitator and take the form of a restorative conference or circle in which community members would be invited to share their perspectives, including clients, family members, colleagues, malpractice insurers, and other professional and personal supports that would not otherwise be allowed to participate. The conversation would focus more on the harm and its impacts, including climate and culture issues, and less on the formality of what rules, if any, have been broken. In cases where the process needs to be terminated, *inter alia*, because the lawyer or representative refuses to participate or there are significant risks that cannot be mitigated by using procedural safeguards (for example, risks of violence), the matter would revert to a formal tribunal hearing on the merits.[197] In this situation, the hearing would be conducted on a *de novo* basis. The proviso would apply that any information previously revealed in the process could not be used as evidence in the hearing or other parallel civil or criminal proceedings.[198] Correspondingly, the law society must be represented by different counsel in the hearing who was ethically "walled off" from the conversation preceding it.

At the response stage, the conversation would shift to consider how the lawyer, firm, or law society should address the harm, with everyone present making recommendations and ideally reaching a consensus about whether traditional forms of discipline, educational measures, or community-level or system-wide conditions and remedies should be included in a reparation and reintegration plan — for example, written apologies, mandatory training, substance use treatments, requirements that a firm change its policies, or requirements that the law society provide support. Law societies would be ultimately responsible for approving these plans and reporting on their outcomes, with the presumption being that consensus-based decisions will be respected to facilitate participation, collective control, and generate public "buy in."[199] At both stages of the process, careful attention must be paid to relevant systemic and background factors that help to contextualize the events, particularly in cases involving lawyers belonging to historically marginalized groups. Notably, in *Law Society of Ontario v.*

---

[196] In some restorative justice programs, respondents are required to admit causing harm, take responsibility for their actions, or enter a guilty plea as a precondition to participating: *ibid* at 310.

[197] This recommendation accords with the scholarly literature on restorative justice and other forms of consensual dispute resolution in cases where a power imbalance exists between the parties: see Del Gobbo, "Feminism in Conversation", *supra* note 38 at 636–49.

[198] To facilitate participation in restorative justice, considering the risk that a party's statements in the process could be subsequently used against them in criminal or civil court, restorative justice programs have relied on legislative changes, memoranda of understanding with police and prosecutors, confidentiality agreements, and similar forms of legal and evidentiary protections. For Canadian illustrations, see Council of Parties, *supra* note 29 at 246–47; Randy Munro, "Nanaimo Restorative Justice Program" (2006) 6 J Inst Justice & Intl Studies 47 at 47; Gabe Boothroyd, "Urban Indigenous Courts: Possibilities for Increasing Community Control Over Justice" (2019) 56:3 Alta L Rev 903 at 919; Tamera Burnett & Mandi Gray, *Avenues to Justice: Restorative & Transformative Justice for Sexual Violence* (Toronto: Women's Legal Education and Action Fund, 2023) at 34, online (pdf): [perma.cc/WK4A-V232].

[199] For commentary on consensus-based decisions and social justice, see Spade, *supra* note 41 at 145.

McCullough, a 2022 case, the Law Society Tribunal of Ontario (LSTO) held that *Gladue* principles should be applied in disciplinary matters involving Indigenous lawyers, concluding that the tribunal's mandate "can be informed and enriched by reconciliation."[200] Law societies must take these responsibilities seriously, cognizant of the fact that the *Gladue* framework has not realized its goal of redressing the high rates of incarceration among Indigenous peoples and that structural changes are necessary to establish just relations.[201]

The foregoing system builds on existing legal authorities and regulatory initiatives that provide a basis for testing and evaluation. For example, the LSTO is legislatively authorized to forgo prosecution in favour of its "invitation to attend" process, where lawyers are provided education, advice, and the opportunity to improve their practice instead of punishment.[202] The tribunal explains the process in *Law Society of Upper Canada v. Chima*, a 2017 case involving a lawyer alleged to have committed misconduct in a family law dispute, including failing to serve his client, engaging in sharp practice, and failing to treat the court with candour and respect.[203] The lawyer was trained in Nigeria and a recent immigrant to Ontario who had limited experience in the province when the events occurred.[204] The tribunal observed that the lawyer had expressed remorse and learned from his mistakes, noting that he was supported by colleagues and friends and "will conduct himself differently as a result."[205] It concluded that "[the lawyer], the clients that he serves and the public interest are best served by advice … rather than a penalty."[206]

Most recently, the Law Society of British Columbia (LSBC) approved its Alternative Discipline Process for lawyers experiencing health issues as a permanent regulatory program in 2025.[207] Lawyers may be eligible for the program if they acknowledge that a physical or mental health issue contributed to their misconduct. The program is voluntary and provides a framework for the lawyer and the LSBC's counsel to negotiate a consent agreement that is tailored to the lawyer's health needs and practice requirements. Complainants are informed of the process and invited to make a statement about how the lawyer's conduct affected them. The LSBC's Executive Director is then charged with reviewing the case, approving the agreement, and ensuring its terms are fulfilled based on a list of seven criteria, with public interest concerns being paramount.[208] Although they are not framed in restorative justice terms, these processes have elements in common with the system that I outlined above. As Brown and Wolf explain, restorative "discipline" in this context is not a misnomer because the etymology of the word "discipline" is shared with "disciple," a term that suggests an

---

200 2022 ONLSTH 63 at para 36. For commentary on this case, see Andrew Flavelle Martin, "*Gladue* at Twenty: *Gladue* Principles in the Professional Discipline of Indigenous Lawyers" (2020) 4:1 Lakehead LJ 20; Martin, "*Gladue* Principles in Professional Discipline", *supra* note 79.

201 For commentary on the *Gladue* principles and their limitations, see Murdocca, *supra* note 154; Marie-Andrée Denis-Boileau & Marie-Ève Sylvestre, "*Ipeelee* and the Duty to Resist" (2018) 51:2 UBC L Rev 548; Hadley Friedland, "To Light a Candle: A Solution-Focused Approach Toward Transforming the Relationship Between Indigenous Legal Traditions and the Criminal Justice System" (2023) 56:1 UBC L Rev 69; Benjamin Ewing & Lisa Kerr, "Reconstructing *Gladue*" (2024) 74:2 UTLJ 156.

202 The "invitation to attend" process is authorized by s 36 of the *Law Society Act*, RSO 1990, c L-8.

203 2017 ONLSTH 16.

204 *Ibid* at para 3.

205 *Ibid* at para 44.

206 *Ibid* at para 45.

207 Law Society of British Columbia, "Alternative Discipline Process", online: [perma.cc/5TM3-VDL9].

208 The criteria are provided in Law Society of British Columbia, *Law Society Rules* (Vancouver: Law Society of British Columbia, 2025) r 3-9.4(5).

emphasis on growth, mentorship, and development.[209] Restorative justice provides the foundation on which this growth is possible.

III. CONCLUSION

In this article, I have argued that the Canadian legal profession should be reoriented around restorative justice as the basis of a more progressive approach to legal ethics and professional responsibility, centering the lawyer's role in establishing just relations on the interpersonal, institutional, and structural levels. I translated concepts from relational theory into a list of restorative principles that led me, in turn, to offer a series of recommendations aimed at lawyers and firms. Many of the recommendations are provisional and framed as suggestions only in the hopes that this article will inspire critical reflection and future research about what legal ethics and substantive equality require in specific cases.

Looking to the future, the greatest benefit of taking a restorative principles-based approach might be its incitement to build capacity towards radical, full-scale justice transformation — what Akbar and other critical race theory scholars call "non-reformist reforms" to the profession and legal system more broadly.[210] Restorativists have extended their research on restorative justice to theorize the creation of restorative communities[211] and even cities.[212] Llewellyn writes that "[s]ecuring just relations require[s] attention to the conditions that shape and support relations every day across the various contexts and circumstances in which we relate to one another. It require[s] attention to the very nature and building blocks of our community."[213] Reflecting on the problems of mass incarceration and the school-to-prison pipeline, for example, Fania Davis explains that restorative justice is a "praxis of repairing relational damage that is nurtured by an active vision of radically transforming the justice system and its inherited and inherent racial inequities."[214] On this view, restorative justice is transformative justice because it holds that a commitment to just relations must reorient all of our legal and social practices.[215] Legal ethics should promote restorative justice, an ideal that reaches outside the limits of the state and formal legal mechanisms to imagine a world in which substantive equality exists.

---

209 Brown & Wolf, *supra* note 191 at 256–57.

210 Amna A Akbar, "Non-Reformist Reforms and Struggles over Life, Death, and Democracy" (2023) 132:8 Yale LJ 2497.

211 See e.g. Llewellyn, "Insights From Nova Scotia", *supra* note 26.

212 See e.g. Grazia Mannozzi, "The Emergence of the Idea of a 'Restorative City' and Its Link to Restorative Justice" (2019) 2:2 Intl J Restorative Justice 288.

213 Llewellyn, "Insights From Nova Scotia", *supra* note 26 at 138–39. See also Llewellyn, "Transforming Restorative Justice", *supra* note 40.

214 Davis, *supra* note 13 at 35.

215 For commentary on transformative justice, see INCITE! Women of Color Against Violence, *Color of Violence: The INCITE! Anthology* (Cambridge, MA: South End Press, 2006); Mariame Kaba, *We Do This 'til We Free Us: Abolitionist Organizing and Transforming Justice* (Chicago: Haymarket Books, 2021). For complementary accounts of restorative justice's potential to effect transformation, see Llewellyn, "Transforming Restorative Justice", *supra* note 40; M Kay Harris, "Transformative Justice: The Transformation of Restorative Justice" in Sullivan & Tifft, *supra* note 15 at 555; Dorothy E Roberts, "Black Mothers, Prison, and Foster Care: Rethinking Restorative Justice" in Burford, Braithwaite & Braithwaite, *supra* note 32 at 116.