

Precarious Professionalism - *Some empirical and behavioural perspectives on lawyers*

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An inaugural lecture is a celebratory occasion,¹ but I am afraid I am going to argue against a celebratory atmosphere. In a number of respects, government policy poses particular challenges to the professions,² but in this piece I'm going to focus on matters more directly within the professions own control and look specifically at their dark side. That is, I will concentrate on the precariousness(es) that the legal professions face which it can, or should, deal with more directly. I do not do this to suggest that generally lawyers are bad; many are good and some excellent. But I do they think there is work to do for lawyers, regulators and law schools. I'm going illustrate my arguments with a selection of some of the more interesting research in the field and some of the work that I have done. So while it's a rite of passage for me; and may be an ordeal for any lawyer prone to feeling defensive; I hope it is of interest.

With any talk, but particularly tonight, there is always the question: where should I start? I suspect that nearly every one of

¹ I am enormously grateful to UCL for the opportunity presented by working in such a vigorous and enormously talented Faculty. Our Dean, Professor Dame Hazel Genn, is a beacon to empirical researchers around the World, and leads the Faculty with great skill and energy. And I want to take a moment to thank Sylvie Delacroix, who founded the Centre for Ethics and Law and whose success led to a Leverhulme Fellowship which opened the door to my taking on the leadership of the Centre. Also, the Hon Mr Justice Blair, who chairs tonight's event has supported the development of the centre and has taken on tonight's role as Chairman with an enthusiasm and skill that is extremely gratifying.

I should also pay tribute to my co-authors, who are legion. I owe them all a great debt. It is invidious to single people out but Alan Paterson and Avrom Sherr have had a significant influence on me. Alan and Avrom have worked with me many times over the years and provided much wise guidance and support over that time. Avrom in particular, with Roger Burrige at Warwick, ran an inspiring legal practice course which introduced me to the idea that there could be a social science of lawyers and lawyering and, in 1989, Avrom said the fateful words, "I have a research job you might be interested in..." This led, via a most enjoyable time at Irwin Mitchell in practice and many happy years at Cardiff Law School, to here.

² Cuts to the legal aid and policy on courts fees being two particular areas of concern.

us thinks of ourselves as professionals. And many of us are, or have been, professional lawyers. So what does it mean to be a professional?

One way into this for the lawyers in the room is to ask ourselves: Why did we become a lawyer? Honestly now, peer back into the mists of time. Why did we do it? And if you are not a lawyer ask yourself the second question. Why do people want to be lawyers? It's not a trivial question. It provides some insights into what people see in the role, or what motivates them. I ask my students these two questions every year. What do they tell me?

The students who want to be lawyers give these answers:

1. For the interesting work.
2. For the chance to do good or to administer justice.
3. For the money and status that it brings.

The emphasis on each is broadly equal. Some rate one factor more than the other. Quite a lot put money front and centre.

What do those who don't want to be lawyers think the motivations of wannabe lawyers are? The reasons are the same but the emphasis is rather different. Money and status comes to the fore. They (and we) find it much easier to be cynical about others than ourselves.

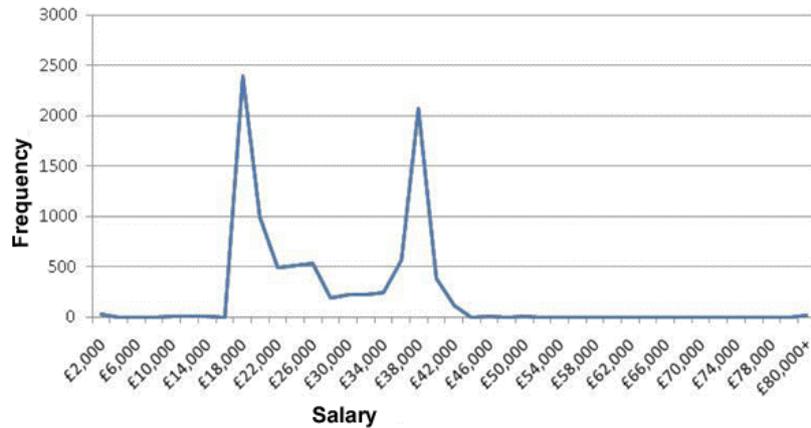
An underlying question is are these values and the balance between them important? That students should value interesting work should not surprise us: law students quickly come to prize the complexity and abstraction of their discipline. There are reasons to be worried about overly admiring those characteristics: but there is no doubting it is a characteristic of the law.³

The interest in doing good is of course heartening. It tends to lead to a desire to be a human rights or environmental lawyer, though I'm not sure they realise how few lawyers are human rights lawyers or that practising environmental lawyers do not on the whole regard themselves as doing God's work.⁴ And there is

³ See, for example, Elizabeth Mertz, *The Language of Law School: Learning to "Think Like a Lawyer"* (OUP USA, 2007).

⁴ See, for example, David Dana, "What Pressures Are There in Commercial Firms Away from a Public Service Orientation, and How Are They, or Can They Be, Reduced? Environmental Lawyers and the Public Service Model of Lawyering," *Oregon Law Review* 74 (1995): 57–83.

an interesting reaction when you show students what trainee lawyers actually earn.



These are the salaries of trainees before minimum salary was abolished. Students are surprised to see so many being paid what appears to them to look like so little - those on the left-hand spike.

It is always interesting, and a little depressing, to see how quickly they come to regard the right-hand spike as being the main, or sometimes only, place where the higher status and better quality work resides. That is, their values start to shift around the issue of status and money. But before I get into my argument, let me discuss what it is I am worried about losing?

Defining professionalism

What is this thing that I am worried may be precarious? Well at one level it is the idea that professions, “are devoted to the service of the public, above and beyond material incentives;”⁵ and that they are committed to, “the use of discipline knowledge and skill for the public good.”⁶ That commitment implies, says Freidson, “a duty to appraise what they do in the light of the larger good, [a] duty which licenses them to be more than passive servants of the state, of capital, of the firm, the client, or even of the immediate general public.”⁷ Under this view, professions must also appraise themselves, be self-critical or reflective and, as a result, they can have an influence separate from the individuals and institutions that they serve. A manifest and demonstrable commitment to the public good is what legitimately creates them

⁵ Magali Safratti Larson, *The Rise of Professionalism - A Sociological Analysis* (London: University of California Press, 1977)

⁶ Freidson, *Professionalism: The Third Logic* (Polity Press, 2001) p. 217

⁷ Ibid.

as a political force: professionalism depends upon serving the public interest but also upon proving to itself and to others that it does genuinely serve the public interest.

From this comes the idea that only a community of experts can be relied upon to manage the power associated with that knowledge in the public interest.⁸ This community of experts is necessary to protect the public interest from the forces of market, state and self-interest.

It is a plausible claim for law. Markets may encourage a race to the bottom in quality (or to the top in terms of prices).⁹ The state has a direct interest in lawyers not being able to restrain government. And because this places lawyers in a powerful position vis-a-vis their clients, the profession must restrain itself against overcharging, and otherwise exploiting its clients or others.

Alongside this view, grew a particular set of institutional traits expected of professions. They restrict entry and train hard to improve quality; they have a code of conduct to restrain temptations against clients and public good; and, the effects of this would restrain competition allowing them to rise above the market. They are separate from but rewarded by the market.

Of course, there were problems with this. It's a view seen very much from the perspective of the players. Can self-interest be restrained? Are the interests of the crowd pushed further back than they ought to be? Is it even accurate as a description?

Historically professional monopolies, regulation and practice arose out of market practice, what the state was willing to regulate

⁸ There are a large number of critiques of this position. See, for example, Richard L. Abel, *English Lawyers between Market and State: The Politics of Professionalism* (Oxford University Press, USA, 2003). Abel is less well known for his positive views on professionalism, R L Abel, "Taking Professionalism Seriously," no. 41 Ann. Surv. Am L. 41 (1989).

⁹ Richard Moorhead, "Why There Might Be a Market for Lemons: Some Thoughts on Competition, Quality and Regulation in Legal Service Markets," in *Understanding the Economic Rationale for Legal Services Regulation - a Collection of Essays*, ed. Alex Roy (London: Legal Services Board, 2011), 24–28; Christopher Decker and George Yarrow, *Understanding the Economic Rationale for Legal Services Regulation* (Legal Services Board: London, 2010), <https://research.legalservicesboard.org.uk/wp-content/media/Why-regulate-legal-services-RPI-report.pdf>.

or permit; and what professional organisations regarded as fair play.¹⁰

To give a recent example, damage-based contingency fees, were only recently permitted in litigation. They have, however, been permitted in tribunal cases for some time.¹¹ This permission was evolutionary rather than deliberate. Some lawyers tried them, first quietly then more openly; policy softened (through conditional fees); the judiciary grew more accustomed to the ideas behind contingent fees and relaxed restrictions. What was once assumed to be forbidden was recognised as established practice. The rules of the game had changed.

Such examples suggest that professional practice is constructed by interactions between lawyers as businesses; publics and the state, with markets and professional rules mediating. This interactionist approach is redolent of Alan Paterson's neo-contractualism;¹² Bert Kritzer's post-professionalism;¹³ or, Daniel Muzio and others' neo-institutionalism.¹⁴ The subterranean or even accidental nature of the process is emphasised by Andrew Abbott's ecological approach.¹⁵

For him, professions are part of a broader system of linked ecologies competing with others for the right to solve the public and the State's problems. Each professional, professional business and professional regulator is engaged with different bits of the market, public and state in a battle to persuade them that they are both legitimate and useful.

¹⁰ Stephen Mayson and Olivia Marley, *The Regulation Of Legal Services: Reserved Legal Activities – History And Rationale* (London: Legal Services Institute, 2010), <http://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal-activities-history-and-rationale.pdf>.

¹¹ Richard Moorhead, "An American Future? Contingency Fees, Claims Explosions and Evidence from Employment Tribunals," *The Modern Law Review* 73, no. 5 (2010): 752–784.

¹² A A Paterson, "Professionalism and the Legal Services Market," 3 *International Journal of the Legal Profession*, n.d.

¹³ Herbert M Kritzer, "The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World," 33 *Law and Society Review* 713-59, 1999.

¹⁴ Daniel Muzio, David M. Brock, and Roy Suddaby, "Professions and Institutional Change: Towards an Institutional Sociology of the Professions," *Journal of Management Studies* 50, no. 5 (2013): 699–721, doi:10.1111/joms.12030.

¹⁵ Andrew Abbott, "Linked Ecologies: States and Universities as Environments for Professions*," *Sociological Theory* 23, no. 3 (2005): 245–274, doi:10.1111/j.0735-2751.2005.00253.x.

If market, state and publics see enough legitimacy in what the professionals do then professional legitimacy, overall, is maintained. This organic view suggests that professions will survive because they can usually accommodate to these external audiences. In the process they adapt to the interests of those that they are trying to persuade.

What can we make of this? These theories describe but they do not evaluate. They tell us professions adapt, but do they adapt well? For me, this raises two interesting questions. Does there come a point at which professions can no longer satisfy their audiences that they meet their needs? Interestingly, those audiences include themselves. Secondly, is it possible to judge the value of professionalism that arises out of this interaction? It is in this sense that professionalism may be precarious: it may cease to be legitimate in the eyes of its key audiences; or, it may cease to have, in a more objective sense, sufficient value. It may cease to serve the public good.

To assess such things objectively is difficult but I want to do so against these key claims. Put simply I am suggesting professions exist to:

- Ensure their members are competent or more competent than non-professional competitors
- Ensure their members are ethical or similarly more ethical
- They must also develop solutions to clients problems which are the best solutions; be that the highest quality or the best value for money.
- Some solutions should encompass state-of-the-art knowledge about how they solve the problems they solve. In other words, some must lead developments in the field.
- Finally, professional regulators have to demonstrate their competence and relevance by showing themselves to be the best regulators of professional services. Or rather, better than markets and state-based regulation.

So let's begin with the first claim.

The claim to superior competence

I'm not going to dwell on this point. It has been well made by many others in this room.¹⁶ Does law admit and promote the best people?

There's a reason that Martha Costello is the central character of BBC's *Silk*. She is Northern –a cypher for working class - and female. Intuitively, audiences are encouraged to recognise immediately that she is likely to be better as a result.

It's a cultural stereotype, but at a subtler level it's also backed up by quite a bit of evidence.¹⁷ Universities and the professions have to raise their game if they are genuinely to identify the best students, best trainees and best pupils. Universities and firms may be close to doing that, but they can also do better.

Beyond recruiting the best people, what we mean by quality is a complicated question. Are we looking for competence or excellence?¹⁸ Compliance or aspiration? To whom is excellence addressed: to the clients' needs; to the system's needs; to the lawyer craftsman idea of a good job well done?¹⁹ How far can price limit quality?²⁰ We have not got time tonight for all these questions, so I must limit it further.

¹⁶ Peter Sanderson Hilary Sommerlad, *The Meaning of the Career Break: A Critique of Human Capital Explanations of "Ceiling Effects" in the Employment of Women Solicitors* (Cardiff: University of Wales, Cardiff, 1997); Hilary Sommerlad Peter Sanderson, "Professionalism, Discrimination, Difference and Choice in Women's Experience in Law Jobs," in *Discriminating Lawyers* (London: Clarendish Publishing, 2000), 155–182; Lisa Webley and Elizabeth Duff, "Women Solicitors as a Barometer for Problems within the Legal Profession – Time to Put Values before Profits?," *Journal of Law and Society* 34, no. 3 (2007): 374–402. Elizabeth Duff Michael Shiner, Andrew Boon, Avis Whyte, *Entry into the Legal Professions: Law Student Cohort Study (Year 6)* (Law Society, London, 2000); Alan Milburn, *Fair Access to Professional Careers: [Progress Report]* (London: Cabinet Office, 2012), https://update.cabinetoffice.gov.uk/sites/default/files/resources/IR_FairAccess_acc2.pdf.

¹⁷ See the work of the Sutton Trust, for example, and Milburn, *Fair Access to Professional Careers: [Progress Report]*.

¹⁸ Paterson and Alan A Sherr, A, "Quality, Clients and Legal Aid," *N.L.J.* 1992, 142(6555), 783-784, 1992; Sherr R. Moorhead and A Paterson, *Lawyers: The Quality Agenda: Volumes I and II* (HMSO, August 1994), n.d.).

¹⁹ Hilary Sommerlad, "Managerialism, and the Legal Profession: A New Professional Paradigm," *International Journal of the Legal Profession*, n.d., 159–186; Max Travers, "The Phenomenon of the 'Radical Lawyer,'" 28 *Sociology* 245-258, n.d.

²⁰ Bryant G Garth, "Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective," *Wisconsin Law Review* 639, 1983.

Let us forget about excellence for a minute. How many cases would we expect a lawyer to handle competently? Out of a hundred? How many? If professions guarantee competence we might argue that the number should be close to 100. Would we be right to? I do not know. I do not know how many clients can be let down before we start to doubt the claim to professionalism. Or maybe we should think of it in relative terms. How much better do professionals have to be for them to make a plausible claim to be a useful regulator of quality? If professionalism is not to be precarious, then should we not see the professions outperform the non-professionals?

I was involved in three studies which looked at just that.²¹ We compared the quality of non-solicitors and solicitors doing legal aid work under the legal help scheme.²² This is what we found.

We asked clients about service: clients were marginally more satisfied with advice given by non-solicitors. We looked at their results: the clients of non-solicitors were significantly more likely to get concrete outcomes. And we asked experienced solicitors to peer review the files. 1 in 4 files failed in both groups. The non-solicitors were significantly more likely to be providing good or excellent work than the solicitors. And solicitors were much more likely to be delivering basic levels of competence only.

In a second study, we used peer review again.²³ We looked at the quality of specialist legal aid contractors in solicitors firms and not-for-profit agencies. Here, solicitors' files failed 30% of the time. The not-for-profit agency files only failed 14% of the time.

In a third study, we looked at generalists and sent model clients (or mystery shoppers) with specialist problems.²⁴ The idea was that they should have sent these clients away. Some decided to

²¹ See, in particular, Richard Moorhead, Avrom Sherr, and Alan Paterson, "Contesting Professionalism: Legal Aid and Non Lawyers in England and Wales," *Law and Society Review* 37, no. 4 (2003): 765–808; Richard Moorhead, *Lawyer Specialization - Managing the Professional Paradox*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, March 22, 2010), <http://papers.ssrn.com/abstract=1571805>

²² Richard Moorhead et al., *Quality and Cost: Final Report on the Contracting of Civil, Non-Family Advice and Assistance Pilot* (Norwich: Stationery Office, 2001)

²³ Richard Moorhead and Richard Harding, *Quality and Access: Specialist and Tolerance Work under Civil Contracts* (Norwich: Stationery Office, 2004);

²⁴ Richard Moorhead and Avrom Sherr, *An Anatomy of Access: Evaluating Entry, Initial Advice and Signposting Using Model Clients*, ISBN 1-903372-87-9 (London: Legal Services Research Centre, 2003), <http://www.lsrc.org.uk/publications/modelclientpaper.pdf>.

advise the clients and get paid as a result. Levels of incompetent work in those circumstances were very high indeed.

Finally, a study conducted for the Legal Services Board (not by us) into the quality of will writing also provides a comparative assessment of quality.²⁵ Wills drafted for real clients were peer reviewed. Specialist will writers and solicitors had similar levels of failure.

So, on a rough averaging across these studies about one in four clients received substandard legal work. On the whole, the non-professionals were either no worse or better than the solicitors and they delivered more excellence. There is some good news. Solicitors were sometimes cheaper but that did not explain away the quality differences.²⁶ There was no evidence that being professionals improved quality. Absolute quality was, I submit, poor. Relative quality was no better. Even if we add in studies which paint a more positive picture of lawyers, such as Eekelaar and Maclean's work on family lawyers,²⁷ we do not get to a situation where we can always be confident about professional quality.

What about advocacy? Work led by a colleague at Cardiff, Angela Devereux, tested criminal defence advocates.²⁸ At the critical level 2 (which means they should be able to do crown court trials) simulation tests of cross-examination and examination in chief yielded failure rates of -44% and -49%. This involved small samples, and volunteers, but they were mostly experienced solicitors and barristers, and the results were extremely worrying.

The CPS Inspectorate also looked at the quality of prosecution advocacy.²⁹ It is comforting here that fewer advocates are found

²⁵ IFF Research, *Understanding the Consumer Experience of Will-Writing Services* (London and Birmingham: LSB LSCP SRA OFT, 2012), http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/lwb_will_writing_report_final.pdf.

²⁶ Moorhead et al., *Quality and Cost: Final Report on the Contracting of Civil, Non-Family Advice and Assistance Pilot*.

²⁷ John Eekelaar, Mavis Maclean, and Sarah Beinart, *Family Lawyers: The Divorce Work of Solicitors* (Hart Publishing, 2000); In crime see, Mike McConville et al., *Standing Accused, The Organisation and Practices of Criminal Defence Lawyers in Britain* (Oxford: Clarendon Press, 1994); Daniel Newman, "Still Standing Accused: Addressing the Gap between Work and Talk in Firms of Criminal Defence Lawyers," *International Journal of the Legal Profession* 19, no. 1 (March 2012): 3–27, doi:10.1080/09695958.2012.758039.

²⁸ A Devereux et al., "Quality Assurance for Advocates," 2009, 102.

²⁹ HM CPS Inspectorate, *Report of the Thematic Review of the Quality of Prosecution Advocacy and Case Presentation, July 2009*, n.d.,

to be incompetent. Although it is still close to 1 in 10. Overall though there is a significant and concerning level of lacklustre or poor performance.

<i>Overall quality of advocacy – Crown Court and magistrates' courts</i>										
Score	Crown advocates		Crown prosecutors		Associate prosecutors		External prosecutors		All advocates	
Very good	7	5.6%	5	6.3%	6	14.0%	15	12.4%	33	9.0%
Above average	21	16.9%	19	24.1%	9	20.9%	21	17.4%	70	19.1%
Fully competent	56	45.2%	22	27.8%	15	34.9%	50	41.3%	143	39.0%
Lacklustre	31	25.0%	22	27.8%	8	18.6%	31	25.6%	92	25.1%
Less than competent	8	6.5%	9	11.4%	5	11.6%	3	2.5%	25	6.8%
Very poor	1	0.8%	2	2.5%	0	0%	1	0.8%	4	1.1%
Total	124	100%	79	100%	43	100%	121	100%	367	100%

I am not suggesting, however, that clients are generally better off without lawyers. There is some work that suggests that, but on balance the evidence is against it.³⁰ Litigants are less likely to win their cases on their own than when represented by a lawyer. Some cannot function at all in the legal system on their own. Equally, whilst clients often benefit from lawyers, Jonathan Greiner's work suggests that it may depend on the context.³¹ He points to lawyers tending to be effective where: they operate in a party driven system where judges take a less interventionist role; where the law, and the facts, are complicated; and, where the lawyers themselves are specialist, experienced and adopt a particular style or strategy.

My final piece of evidence about the precariousness of quality claims is Gulati and Scott's *Three and a half minute transaction*.³² a

http://www.hmcpai.gov.uk/documents/reports/THM/ADV/ADV_thm_Jul09_rpt.pdf.

³⁰ Terry Thomason, "Are Attorneys Paid What They're Worth? Contingent Fees and the Settlement Process," (*Journal of Legal Studies: January 1991*), n.d.; Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 11, 2010), <http://papers.ssrn.com/abstract=1942350>.

³¹ Greiner, D. James, and Molly M. Jennings, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, April 11, 2012), <http://papers.ssrn.com/abstract=2038616>; D. James Greiner, Cassandra Wolos Pattanayak, and Jonathan Philip Hennessy, "How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court," *SSRN Electronic Journal*, 2011, doi:10.2139/ssrn.1880078; D Greiner, "Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?," 2011, 1–82.

³² Mitu Gulati and Robert E Scott, *The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design* (Chicago: University of Chicago Press, 2013).

marvellous book which looks at how blue chip law firms in New York and London deal with sovereign debt contracts. It's a complicated story and I'm going to spare you the details save to say the contracts can cover enormous sums, have begun to be litigated, and tend to include one clause which on Gulati and Scotts analysis, *the lawyers do not understand*.

This is alarming given the size and significance of such contracts. More broadly the book paints a sorry tale of how such contracts are drafted with this quote standing out as a signal of how bad things sometimes may get when lawyers are negotiating (or marking up) contracts:

"Most of what we mark up and send round, we don't understand at all."

Let me turn quickly to the middle order claims that are looking increasingly precarious: that the state of the art is led from within the professions. I cannot really do this topic justice in the time available. There are broad trends in dispute resolution: away from litigation towards negotiation, arbitration, ombudsmen and mediation.³³ That is, away from legal processes towards social (or economic) ones where the claims of lawyers to be pre-eminent or necessary are less strong.

I want to talk about a more prosaic subject, contracts. If we take a simple process like negotiating a contract between two businesses for the supply of software: Lawyer A takes instructions from his client and drafts a contract. She then engages in a series of negotiations with Lawyer B. He raises queries. They redraft the contract. The contract is then signed and put in a file. This contract has changed from the standard models of that law firm and of that client in random ways. Once in the filing cabinet, pretty much everyone forgets what those changes are until the contract is looked at should there be a problem.

Let's compare that with the approach of an interesting legal services innovator: Radiantlaw. They claim the following. Once the client's needs are understood in commercial terms (a key part in the process) a more systemic approach is taken. Contracts are simpler and prioritised around the client's needs. They structure negotiations round playbooks through which they manage and

³³ See for example, Genn et al, *Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure*, 1/07 (Ministry of Justice, 2007). On Ombudsmen, see, Sharon Gilad, "Why the 'Haves' Do Not Necessarily Come Out Ahead," *Regulation* 32, no. 3 (2010).

monitor their own negotiation and can predict, up to a point, they say, how their opposite number on the contract negotiation will respond. They seek to automate the processes as far as possible using programmers contracted out around the globe.

The end result, they claim, is contracts delivered more quickly, that help the clients make a bit more money and are delivered in a structured way which enables clients to keep track of all their contractual benefits and obligations. Each time Radiant learns a little bit more about delivering contracts quickly to improve the system. To me it builds systems engineering; negotiation theory; computer science and legal skill into a composite model.

It may also suggest that this state-of-the-art knowledge is not being evolved in universities, or the elite firms, but in relatively small and new start-ups. Some of these, though not Radiant, are not led by lawyers; and most are not led by conventional lawyer elites.

If we go back to Abbots' ecologies, we see multiple selves or types of expertise crowding into the professional space. They are each seeking to persuade markets, publics, even states that they are better. We might worry that we do not understand whether these new providers really do provide good quality services, whether they pose new risks. But in many ways we are in no better or worse position than we are as regard professional legal services generally.

As an occupational group, we may also be seeing the blending or absorption of lawyers into different kind of occupation. In-house lawyers are reluctant to be labelled as mere solicitors or barristers. Alternative business structures can absorb and redefine legal professionals. Corporate compliance mixes behavioural, managerial and legal tasks.

If this is better for clients and the public interest we cannot resist. One of our difficulties in answering *whether* such innovations are beneficial is that new knowledge sets are being developed beyond that which the professions, its regulators and law schools understand. With Radiant's contracts we may feel more comfortable leaving such decisions to private market choices. Take these other examples:

- Online Dispute Resolution that resolves the majority of cases without any human agency.³⁴
- An algorithm that predicts US supreme court outcomes – using just 6 Variables – better than experts.³⁵
- Machine learning software better at discovery of evidence tasks than humans.³⁶
- Software which tells you where to pitch your offer.³⁷
- Artificial Intelligence and IBMs Watson – if it can help diagnose cancer, what can it do for law?³⁸

There's a significant degree of public, professional and intellectual interest in how new systems are designed, who takes decisions about their design, and how to evaluate the benefits of the New. I do not see this as a site of radical risk, but equally we should not be complacent, we need to think about this largely market-driven process with neither a jaundiced nor an evangelical eye. We need to think similarly about the absorption of lawyers into other occupational groups.

Precarious ethics?

Let me move on to the third precariousness. Claiming to be more ethical is always a dangerous business; yet, lawyers routinely place their professionalism in opposition to mere business. Are lawyers more ethical than mere business? Parker, Nielsen and Rosen produce empirical evidence that corporations are as likely to be led down the creative compliance path by lawyers as they are to instruct their lawyers towards it.³⁹ In the context of debates

³⁴ Ethan Katsh, "ODR: A Look at History," in *Online Dispute Resolution: Theory and Practice* (The Hague: Eleven International Publishing, n.d.), 9–21.

³⁵ Theodore W. Ruger et al., "The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking," *Columbia Law Review*, 2004, 1150–1210.

³⁶ Maura R. Grossman and Gordon V. Cormack, "Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient than Exhaustive Manual Review," *Rich. JL & Tech.* 17 (2011): 11–16.

³⁷ See, Don Philbin, <http://www.pictureitsettled.com/about-don-philbin/>

³⁸ "IBM Watson," CT004, April 11, 2012, http://www-03.ibm.com/innovation/us/watson/watson_in_healthcare.shtml.

³⁹ Christine E Parker, Robert Eli Rosen, and Vibeke Lehmann Nielsen, "THE TWO-FACES OF CLIENTS AND LAWYERS: MARKET FOR

about non-lawyer ownership of, or investment in, law firms, Grout has argued it is not whether lawyers are owners or not that is likely to predict their ethicality, but what incentives they act under.⁴⁰

Quantitative evidence to establish whether or not ethics is a problem is very hard to come by.⁴¹ Interestingly, the CPS Inspectorate report referred to above suggested professional standards problems may have arisen in about 10% of cases.⁴² That's quite similar to findings when we looked at criminal defence practitioners during the public defender pilot.⁴³

The public's judgment is suggested by data that shows 35% trust lawyers and 30% do not.⁴⁴ They are ambivalent about lawyers, but not as ambivalent as they are about accountants; builders, estate agents, politicians or bankers for whom the figures get progressively worse. Of course, public mistrust of lawyers is probably infected by broader mistrust of the criminal justice system. Many struggle to understand how Jeffrey Samuels QC could represent Levi Belfield; or how he could cross-examine Milly Dowler's father in the way he did. The treatment of witnesses in rape cases is a similar point of mistrust and concern.⁴⁵ There are sensible questions to be asked about both cases, but not tonight.

In those cases the lawyer would justify their approach on the basis that they were fearlessly on the side of their client. Interestingly,

CORPORATE COMPLIANCE LEGAL SERVICES," *Yale Journal on Regulation*, no. 306 (2007).

⁴⁰ Paul A Grout, *The Clementi Report: Potential Risks of External Ownership and Regulatory Responses A Report to the Department of Constitutional Affairs*, October No. July (2005). (London: Department of Constitutional Affairs, 2005), <http://www.bristol.ac.uk/cmpo/publications/papers/2005/wp135.pdf>.

Compare, Harry McVea, "Legal Disciplinary Practices – Who Needs Them?," *Journal of Law and Society* 31 (2004): 563–577; Harry McVea, "Predators and the Public Interest – the 'Big Four' and Multi-Disciplinary Practices," *Modern Law Review* 65 (2002): 811–833.

⁴¹ For approaches and methodological challenges, see, Richard Moorhead et al., *Designing Ethics Indicators for Legal Services Provision* (London: Legal Services Board, 2012).

⁴² Cited n. 29

⁴³ Lee Bridges et al., "EVALUATION OF THE PUBLIC DEFENDER," n.d.

⁴⁴ Populus data collected for Which?, on file with the author, used with permission.

⁴⁵ "Adversarial Anxieties: Let's Not Stop Asking Questions," *Lawyer Watch*, accessed March 7, 2014, <http://lawyerwatch.wordpress.com/2013/02/09/adversarial-anxieties-lets-not-stop-asking-questions/>.

though, the public does not generally perceive lawyers to be on the side of their clients. The same survey found only 21% think lawyers act in the best interests of their client and 20% think lawyers act ethically.

Perhaps a reason is lawyer sophistry. Take the example of John Yoo and the notorious torture memos.⁴⁶ He attempted to redefine as arguably legal torture as an enhanced interrogation technique for the White House. Eventually disavowed, the US Department of Defence were able to use the opinion to justify their torture of detainees. Any lawyer involved in such cases can simply claim they're doing a job by raising arguable legal points, and that a client takes responsibility for any moral qualms about legal advice. Similarly, the client is able to say, my lawyer advised me it was within (or entirely within) the law. Importantly both benefit from the others' non-accountability.

Public scepticism stands in stark contrast to how professions typically think of their own ethicality. These quotes fall from accountants lips but the sentiments could be – and regularly are – repeated in similar vein by many professional leaders:⁴⁷

there is a fundamental quality inherent in this profession of integrity, ethics, and ideals and we are all very client service-oriented. We put at the forefront the needs of our clients.

James Schiro, then CEO PWC

“We are professionals that follow our code of ethics and practice by the highest moral standards. We would never be influenced by our own personal financial well-being.”

Gary Shamis,

American Institute of Certified Public Accountants

I'm not going to critique the idea of professionals as commercially disinterested.⁴⁸ It's a slightly ridiculous idea, and in any event

⁴⁶ Kathleen Clark, “Ethical Issues Raised by the OLC Torture Memorandum,” *Journal of National Security Law & Policy* 1 (2005): 455; W. Bradley Wendel, *The Torture Memos and the Demands of Legality*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, June 19, 2009), <http://papers.ssrn.com/abstract=1422603>.

⁴⁷ Taken from Maryam Kouchaki, *Professionalism and Moral Behavior: Does a Professional Self-Conception Make One More Unethical?*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, April 4, 2013), <http://papers.ssrn.com/abstract=2243811>.

⁴⁸ See, for example, Frank Stephen Cyrus Tata, ““Swings and Roundabouts”: Do Changes to the Structure of Legal Aid Remuneration Make a Real

professions do not live in a utopian world where no one needs to worry about money.⁴⁹ I want to concentrate on something different but related.

Does thinking of oneself as a professional make one more ethical? Experiments by Kouchaki show the very idea of professionalism can breed in a kind of complacency.⁵⁰ She primed students to think of themselves as either ordinary employees or professionals and then gave them tasks to do where they could cheat against an opponent. Each time she tested which group was most likely to cheat on the tasks. The one's primed to think like professionals were more likely to cheat. Believing themselves more ethical, they unconsciously became less so.

Of course, this only gets us so far. Professions are more than simply the idea of professionalism. They have rules, traditions, cultures and practices. The Bar's culture and approach is probably best exemplified by this passage from its code of conduct.⁵¹

[Barristers] must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person...

This passage has been developed for the cut and thrust of trial. That duty of fearlessness is restrained by duties of honesty, integrity, independence and an overriding obligation to the court in the administration of justice.⁵² As we will see there are similar principles governing solicitors. Duties to the rule of law, or the court or to integrity and duties to the client are sometimes in opposition. Deciding when a public interest duty inhibits the promotion of one's client is not always a straightforward task. It requires judgement and experience. It calls for independent and clear thinking. It requires objectivity.

Difference to Criminal Case Management and Case Outcomes?," *Criminal Law Review* 8 (2006): 722–741.

⁴⁹ I discuss the problem in Richard Moorhead, "Filthy Lucre: Lawyers' Fees and Lawyers' Ethics - What Is Wrong with Informed Consent?," *Legal Studies* 31, no. 3 (September 2011): 345–371, doi:10.1111/j.1748-121X.2011.00194.x.

⁵⁰ Kouchaki, *Professionalism and Moral Behavior*.

⁵¹ Bar Code of Conduct 2014, rC15.1 last downloaded 8th March 2014, <http://handbook.barstandardsboard.org.uk/handbook/part-2/#1568>

⁵² CD1 and rC16, last downloaded 8th March 2014, <http://handbook.barstandardsboard.org.uk/handbook/part-2/#1568>

In court, professional rules, the scrutiny of a judge and the zeal of an opponent keeps, it can be argued, the system in check. There are signs that the senior judiciary have concerns about whether the system is working appropriately⁵³ but tonight I am particularly interested in what happens away from the court room where there is sometimes no judge or opponent to scrutinise a clash of obligations. An interesting and related question is to what extent the values of commercial practice are influencing the ways in which law is being administered. If we think back to our students, and the potential for a shift in emphasis towards valuing status and money over other things, should we be worried that this is having an impact in the real world?

In this vein, we can note that law is not only increasingly seen as a business but as a business that is measured, and explicitly measured, in economic terms.⁵⁴ Profit per equity partner and other indicators of similar ilk are the basis of league tables. League tables are part of firms' status claims and a way of encouraging lawyers to join them. These external indicators are trickled down the firm through targets and bonuses. Hourly rates are the oil that greases this engine. Alongside that is an increasingly strident claim that lawyers are not deal breakers or pettifoggers but business focused advisers and business focused advisers for whom the client comes first.

It is important to emphasise that there is a lot to commend that approach: lawyers have been too insular, their advice not always useful in practical terms, but there are also problems. What might they be? Is there a difference between being practical and being too eager to please, even unprofessional?

The first question I'd like to raise is whether priming lawyers to think of their own value in primarily economic terms poses risks? Some psychologists call this the money prime. They show how money primes can affect decision-making and social relationships. Even being encouraged subtly to think about money before doing a task means one is likely to be more selfish; to be less helpful;

⁵³ See, *R v Farooqi* [2013] EWCA Crim 1649 and for a discussion Richard Moorhead, "Court of Appeal Criticism of Advocate Extends beyond the Man Himself," *Lawyer Watch*, accessed March 8, 2014, <http://lawyerwatch.wordpress.com/2013/10/02/court-of-appeal-criticism-of-advocate-extends-beyond-the-man-himself/>.

⁵⁴ See, for example, Marc Galanter and William Henderson, "The Elastic Tournament: A Second Transformation of the Big Law Firm," *Stanford Law Review*, 2008, 1867–1929. And Larry Ribstein, *The Death of Big Law*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, August 1, 2010), <http://papers.ssrn.com/abstract=1467730>.

and, to see others as less human. It also increases lying and cheating.

Another way of thinking of this is that it increases a business frame. This is where the Ford Pinto comes in.⁵⁵ The Pinto was susceptible to fuel tank explosions in low impact collisions. Gioia (1992) was a recall coordinator at Ford in the early 1970s, confronted with information about the need to recall the Ford Pinto car. He says the moral necessity of the recall was not apparent to him. He said the decision to recall the Pinto appeared to be a business decision, not a moral one. The business losses were within acceptable parameters. Gioia and his colleagues twice voted not to recall the Pinto. It has been estimated that 500-900 people died because of the fuel tank.

Couple that with the 'client first' idea. This quote from Lord Hunt, a former government minister and senior solicitor gets this across:⁵⁶

Putting the client first was bred into me. The regulatory objectives set out in the Legal Services Act serve to remind us of (and enforce) our higher duties, to the rule of law and the wider public interest..

*...but from day to day **the principal question in the mind of a solicitor will always be, 'what is best for this client?'** That is what it means to be a professional and it is where we differ — or are supposed to differ — from people in other walks of life. It is not a question of "box-ticking", for **we are trustees of the values we have inherited, with a duty to future generations.** (My emphasis)*

The claim that service to one's clients is what distinguishes a profession is a strange one. Most service providers would make the same claim, professional or otherwise. And in fact it is not the case that it is the client's interest that is first amongst equals when it comes to solicitors' competing professional obligations. The SRA Handbook and Code of Conduct is clear that it does not. Where two or more principles come into conflict, it says:⁵⁷

⁵⁵ Ibid.

⁵⁶ David, the Rt Hon Lord Hunt, *The Hunt Review Of The Regulation Of Legal Services* (London: The Law Society, 2009), http://governance.lawsociety.org.uk/secure/meeting/182044/Hunt_review_of_legal_services.pdf.

⁵⁷ SRA Handbook and Code of Conduct 2013.

“the one which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice.”

It may be that Lord Hunt’s emphasis is an example of the cognitive biases that play on professionals. Psychologically, lawyers are predisposed to align with their clients.⁵⁸ The research evidence suggests professionals and lawyers are natural partisans. We are more likely to overestimate prospects of success on a case if we are told we represent a party beforehand.⁵⁹ Accountants when called upon to make public interest decisions on accounts are significantly influenced by whether or not they think they are instructed by client or not.⁶⁰ To give an opinion or to conduct an independent investigation may be prone to similar problems. Client first really may well be bred into us already. It may not need emphasis.

Some of these biases are very subtle indeed. Gino and Margolis compares honesty under a promotion focus with a prevention focus.⁶¹ To simplify, in their experiments students are given a task and given either a promotion focus (which revolves around attainment, hope and/or aspiration) or a prevention focus (which revolves around responsibilities obligations and protection from negative outcomes). To paraphrase it one could say it is the

⁵⁸ See, Andrew M. Perlman, *A Behavioral Theory of Legal Ethics*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, September 4, 2013), <http://papers.ssrn.com/abstract=2320605>., for an excellent discussion of this area.

⁵⁹ Linda Babcock et al., “Biased Judgments of Fairness in Bargaining,” *The American Economic Review*, 1995, 1337–1343. See also, Zev J. Eigen and Yair Listokin, “Do Lawyers Really Believe Their Own Hype, and Should They? A Natural Experiment,” *The Journal of Legal Studies* 41, no. 2 (2012): 239–267., Jane Goodman-Delahunty et al., “Insightful or Wishful: Lawyers’ Ability to Predict Case Outcomes,” *Psychology, Public Policy, and Law* 16, no. 2 (2010): 133. All cited in Perlman, *ibid*.

⁶⁰ Don A. Moore, Lloyd Tanlu, and Max H. Bazerman, “Conflict of Interest and the Intrusion of Bias,” *Judgment and Decision Making* 5, no. 1 (2010): 37–53; Don A. Moore et al., *Auditor Independence, Conflict of Interest, and the Unconscious Intrusion of Bias* (Citeseer, 2003), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.9.2829&rep=rep1&type=pdf>; Dolly Chugh, Max H. Bazerman, and Mahzarin R. Banaji, “Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest,” *Conflict of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy* 74 (2005): 95.

⁶¹ Francesca Gino and Joshua D. Margolis, “Bringing Ethics into Focus: How Regulatory Focus and Risk Preferences Influence (Un)ethical Behavior,” *Organizational Behavior and Human Decision Processes* 115, no. 2 (July 2011): 145–156, doi:10.1016/j.obhdp.2011.01.006.

difference between get the job done (promotion) or do not make a mistake (prevention).

Being given a promotional focus increased the propensity of students to lie and to lie in return for money relative to the prevention/compliance focus. To provide a bit more detail, we can see the subtlety with which such effects can be induced. In one of the experiments, one group of students read the first statement before doing experiment. The second group read the second statement.

“This research project is being conducted to advance the ideals and aspirations pursued by applied social science.”

“This research project is being conducted with strict adherence to the standards and obligations required of applied social science.”

The first statement led to more lying than the second one. These findings are interesting for a number of reasons. They suggest the subtlety and potentially pervasive influence of framing tasks and organisational cultures on decision making. It also shows how the design of rules and the way they are framed may be important. Such findings may also throw an interesting light on the debate between aspirational principles and compliance oriented rules. Of course, one should not get too carried away; the experiments focus on the detriment of promotional frames. In so far as a promotional focus leads to higher levels of achievement, then the pros of promotion need to be weighed against the cons. Creativity may similarly lead to more propensity to be dishonest.⁶² The point is to develop organisational and professional frameworks with the best balance.

Is there any evidence that lawyers in different areas of work have different values? That they may be thinking about their work in different ways? Rachel Cahill-O’Callaghan and I have been doing some experimental work just beginning to look at these issues with lawyers.⁶³ We use Schwartz’s values instrument.⁶⁴ It categorises people on 10 values to see which are most important to them. For our purposes two values in that framework,

⁶² Francesca Gino and Dan Ariely, “The Dark Side of Creativity: Original Thinkers Can Be More Dishonest,” *Journal of Personality and Social Psychology* 102, no. 3 (2012): 445–459, doi:10.1037/a0026406.

⁶³ Moorhead et al, forthcoming, *The Ethical Consciousness of Lawyers*.

⁶⁴ Shalom H. Schwartz, “Basic Values: How They Motivate and Inhibit Prosocial Behavior,” in *Prosocial Motives, Emotions, and Behavior: The Better Angels of Our Nature*, ed. M. Mikulincer and P. R. Shaver (Washington, DC, US: American Psychological Association, 2010), 221–241.

achievement and power, are most consistent with a business frame.

In a small sample comparison of the values of lawyers to act for individuals and those who act for organisations showed those acting for organisations to appear to value achievement and power somewhat more highly than those working for individuals. That is, they appeared to have a stronger business frame. That does not mean they are less ethical of course. We have also been looking at whether people's values appear to have some relationship to their ethical decisions. It's not a simple picture, but the extent to which some respondents value power and achievement sometimes appeared to affect decisions.⁶⁵

We also interviewed senior lawyers in elite law firms and in-house lawyers.⁶⁶ How do they see their role? This quote was fairly typical.

I "always make sure that the client ...understand[s] the law. I think they also need to understand what the law is trying to achieve, so that if there is a grey area they know the correct way to interpret it."

Lawyers advised on the law. Clients took decisions. This position is consistent with a non-accountability conception of lawyering.⁶⁷ Also notice how that is emphasised by clients, not lawyers, interpreting the grey areas, the space between legal and illegal: the place where, if you like, ethical questions may sometimes (but not always) lurk.

Our interviewees were not unconcerned with the problems that arose. Here by way of example two interviewees expressing discomfort with the grey zone where there was:

"Ill-advised activity by some senior managers..."

And:

"the demands of management to do certain things, which ...hover on the edge of illegality."

⁶⁵ Cited n. 63

⁶⁶ Moorhead and Hinchly, forthcoming, *Professional Minimalism? the Ethical Consciousness of Commercial Lawyers*

⁶⁷ Stephen L Pepper, "The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities," *American Bar Foundation Research Journal*, 1986, 24.

The second of these interviewees expanded by explaining the way they were managed into a position whereby they were expected to accept ultimately that things that were once thought impossible (illegal) were possible (not unlawful):

“[O]k, you’re not really being asked to make it happen but you’re being asked to kind of... brainstorm these ideas which you feel deeply uncomfortable about, but which you kind of have to go along with because the top management has kind of given this undertaking to do everything it can to help....”

We cannot, nor should we want to stamp out all legal risk. Often the law is not certain, or it conflicts. Too cautious an approach would could lead to paralysis, and economically or socially harmful outcomes. That opens the door to a very interesting question: what kind of risk or unlawfulness is okay?⁶⁸ It is not an easy question. Our interviewees spoke of what is tolerated or simply part of a commercial approach. Ultimately the limits were determined not by professional ethics but by the criminal law and commercial practice.

“non-criminal” activity “sort of on the edge of commercial practice”

.... When you’re advising a best course of action which isn’t criminal, it’s just commercial, they can choose to ignore you, and you’re an employee.”

Permissible unlawfulness or risk usually depended on whether something was criminal or not or. Some spoke of limits in terms of whether it was not *clearly* criminal. An interesting question is the extent to which lawyers were simply advisers on, managers of, or constructors of, this ambiguity. We don’t have an answer to that question, though Parker et al give us a clue.⁶⁹ Another question is how the limits of commercial practice are determined and what counts as “criminal”: is it dishonesty; any breach of the law for which there is a regulatory sanction; or something else?

To push the issue a bit further, we also asked which of three interests (public, client or firm) was most important to them as lawyers. Most, but not all, said client over public, the same inversion of the professional rules that Lord Hunt made. Furthermore, some private practitioners saw the struggle as being

⁶⁸ We are conducting a study in to legal risk, ethics and compliance at the Centre for Ethics and Law which will report shortly.

⁶⁹ See above.

between client and firm interest. Some even went as far as saying the firm's interest came first. This quote was not quite at that extreme but gives you a sense of what was in play:

“I would say that the firm that I work for is primarily focused on its own commercial interests and I think it [sic.] would argue that it’s by placing importance on the other two that that is going to be best achieved.”

To crystallise this dilemma we asked them about an overbilling scenario. They were asked to imagine they were an assistant solicitor on a case where it appeared the client had been over billed by a partner. We asked them: what would they do? They might have a word with the partner, to try and persuade him of the business sense in reducing the bill, but the expected behaviour gravitated towards this:

“... well I know what they will do [laughs] ...is keep their mouth shut, and not look like idiot... because ...they don’t want to lose the firm money and look like people who want to give it away. ... you do that at some risk to yourself...”

Interestingly private practitioners tended to frame this as a business issue not a professional ethics issue and when it came to it, it was also a hierarchical issue. They served the firm and its hierarchy, they deferred to what the partner was assumed to want, and they did so partly to promote or protect themselves.⁷⁰ That is it was the values of power and achievement which influenced them most.

So what we saw was largely a business driven endeavour. Promotion was more emphasised than compliance. How was the culture of ethics managed? We asked about firm ethical infrastructure. How did firms encourage an ethical climate? Mostly – though not always - this was seen as being down to picking the right people and assuming they had the right training and would therefore follow the right rules. Here an assistant solicitor gives their view.

I don’t think I’ve ever come across any support or encouragement on [the ethics] front. ...it’s assumed that you’ve ...gone through your ethics training ...and you are meant to know it all. Nothing

⁷⁰ See also, Kimberly Kirkland, “Ethics in Large Law Firms: The Principle of Pragmatism,” *University of Memphis Law Review* 35, no. 631 (2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014907.

has ever, really ever, been said to me ...from the partners or in terms of training that in any way encourages it or supports it.

I should emphasise, this interview data derives from a small qualitative study.⁷¹ It is not conclusive of there being a problem. Indeed, most of our responders did not think there was a major problem. Academic scepticism may be ahead of reality.

But, if you look as a series of recent cases we could see there may be grounds for concern. The lawyer as hired gun may be trumping the lawyer as reputational intermediary.⁷²

Case studies of precarious ethicality

Firstly, Professor David Kershaw and I analysed Linklaters' role in Lehman Brothers off balance sheet accounting.⁷³ That story is too complicated to deal with fully here. In its broadest terms, Lehman needed an Opinion on Repo transaction to argue for an accounting approach which reduced their leverage. Linklaters provided opinions that particular Repo Transactions were 'true sales' (they were at English Law). There were other tests Lehman needed to apply to satisfy US accounting rules. Some evidence suggests the lawyer's advice was used by Lehman's to give impression the tests had been passed, when only one had been.

The question we posed there was: did or should Linklaters' have understood the consequences of giving their opinions; and if

⁷¹ Twenty interviews with commercial and in-house lawyers in a broader project of sixty interviews.

⁷² On reputational intermediaries, John C. Coffee Jr, "Attorney as Gatekeeper: An Agenda for the SEC, The," *Colum. L. Rev.* 103 (2003): 1293. Defences of the hired gun philosophy include Pepper, "Pepper 1986 Lawyer Amoral Ethical?"; D Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton) (Princeton University Press, 2009), <http://books.google.com/books?id=rU6rzfhRpogC&pgis=1>; Charles Fried, "Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, The," *Yale. LJ* 85 (1975): 1060. Important challenges and counterpoints include David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988); William H Simon, *The Practice of Justice: A Theory of Legal Ethics* (Cambridge: Harvard University Press, 1998); W. Bradley Wendel, *Legal Ethics Is about the Law, Not Morality or Justice: A Reply to Critics*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2011), <http://papers.ssrn.com/abstract=2185990>; Tim Dare, "Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers Tim Dare," *Legal Ethics* 7 (2004): 24–38.

⁷³ David Kershaw and Richard Moorhead, "Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession," *The Modern Law Review* 76, no. 1 (2013): 26–61, doi:10.1111/1468-2230.12001.

those consequences were reasonably foreseeable should they be obliged do anything? We do not know definitive answers to those questions. The case study is an interesting example of how lawyers can advise clients and those clients can then use that advice without, we think, there being sufficient responsibility built into the system. It also illustrates how the professional rules are built around litigation problems and almost totally ignore commercial, transactional practice.⁷⁴

A second example is the Nightjack case. Alistair Brett, then the much respected in-house lawyer at the Times, was approached by a journalist and his line manager with a scoop gained by hacking a police officer's email. It was a criminal offence and, it turns out, one to which there was probably not a defence. Yet Mr. Brett saw his job as helping them get the story out. He wanted to get the job done. It was a business frame with a promotional focus and he worked with a journalist to see that this was done.

As a result he persuaded himself that what they were doing was lawful, defensible and created an argument at the margins of plausibility to defend the process of producing the story. An unlawful search made possible an otherwise conventional search. Once the identity of the police officer was known it was an easy task to identify him from legitimate sources. That lawful search justified (in his mind) ignoring the initial illegal search, even though it was the illegal search which made the legal search successful. He compartmentalised the illegality and – fatally - helped hide it. From here, under legitimate pressure from his opponents, he reasoned himself into a position where he misled the court.⁷⁵ The desire to put the best gloss on a bad situation crossed from legitimate advocacy into professional misconduct.

A third, particularly topical case study is the ethical kaleidoscope that was the News of the World. Here at least four lawyers are involved: two in-house and two in private practice (in different firms). John Chapman within the newspaper group commissioned Laurence Abramson to *independently* investigate specific allegations

⁷⁴ A point also made by Joan Loughrey, in her excellent book, *Corporate Lawyers and Corporate Governance*, 1st ed. (Cambridge University Press, 2011).

⁷⁵ Brett's oral evidence to the Leveson inquiry is here, <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/wp-content/uploads/2012/03/Transcript-of-Afternoon-Hearing-15-March-2012.txt> The Solicitors' Disciplinary Tribunal decision is here <http://www.solicitorstribunal.org.uk/Content/documents/11157.2013.Brett.pdf>

about there having been widespread hacking at the NOTW. This was in the context of allegation made by Clive Goodman as part of a potential unfair dismissal claim, the royal editor previously jailed for hacking. The email defining his instructions said this:

“Because of the bad publicity that could result in an allegation in an employment tribunal that we had covered up potentially damaging evidence found on our email trawl, I would ask that you, or a colleague, carry out an independent review of the emails in question and report back to me with any findings of material that could possibly tend to support either of Goodman’s contentions. We will make available to you access the emails in question as soon as possible”⁷⁶

⁷⁶ Culture, Media and Sport Select Committee, *News International and Phone-hacking* (EV 202) paragraph 5(i)

That investigation did not, it appears, find specific evidence to support the allegations made by Mr Goodman, but did find something of concern which prevents Abramson. He said to Chapman that he could not say in his report on the investigation that he, “did not find anything that we consider to be directly relevant to the grounds of appeal put forward by [Goodman].”⁷⁷ The implication seems to be he did find something potentially relevant.

Abramson tells Chapman of his concerns and they decide those matters fall outside his specific instructions. This is in spite of the original instructions being to identify, “any findings of material that could possibly tend to support” Goodman’s allegations. They negotiate the wording of the advice – no longer independent presumably as a result- which does not mention the problems, only mentions the lack of evidence on the most specific allegations.

At a subsequent select committee enquiry, where Tom Crone (in-house lawyer at the NOTW) and Colin Myler (then the News of the World editor) give evidence, Mr Abramson's investigations are referred to in support of the claim that there is no hard evidence to support allegations of more widespread hacking. A partner from Farrers Solicitors (Julian Pike) acting for the newspaper at the time in civil claims for hacking gave evidence to the Commons Media and Sport Select Committee that (in the words of Pul Farrelly, the MP questioning him) the. “‘one rogue reporter’ defence that the company was still maintaining, including in front of this Committee, was not true”. He is then asked this:

Q1099 Paul Farrelly: *At what stage did it become clear to you that the line that we were being given was not the truth?*

Julian Pike: *It would have been at the point it was given to you.*

Q1100 Paul Farrelly: *Right, and what did you do, as a professional lawyer, about that?*

Julian Pike: *To be honest, I have not done very much.*

So Mr Pike does nothing (or not very much) to intervene or correct the misleading of a parliamentary select committee. There is an argument he was not under a specific obligation to as he is

⁷⁷ From an email draft passing between Mr Abramson and Mr Chapman where Mr Chapman suggests this phrase goes into Mr Abramson’s advice.

not acting for the clients in the relation to the hearings⁷⁸ and when Panorama threaten to make a program suggesting executives said things at the Committee known to be untrue, Mr Pike is reported as having threatened them with a libel suit. There is a strong argument that he is under an obligation not to do that having (arguably), constructed facts relating to any proceedings *which are not properly arguable*;⁷⁹ and/or suggested that the BBC was guilty of misconduct *where this is not supported by reasonable grounds*.⁸⁰

There are further unsavoury allegations, but I'm going to stop there. Where does it lead? It leads to Rupert Murdoch saying this to the Leveson Inquiry:⁸¹

I think the senior executives were all informed, and I -- were all misinformed and shielded from anything that was going on there, and I do blame one or two people for that, who perhaps I shouldn't name, because for all I know they may be arrested yet, but there's no question in my mind that maybe even the editor, but certainly beyond that someone took charge of a cover-up, which we were victim to....

So we see here Rupert Murdoch claiming that the organisation hid the truth from senior managers. Lawyers appear to have been involved on a number of significant steps along the way, culpably or otherwise.

A fourth case involves Standard Chartered Bank . Their in-house lawyers in London are alleged to have advised that a scheme to conceal Iranian payments from US regulators (through wire-stripping) was probably unlawful.⁸² It also seems that they had advice from outside counsel that it was unlawful. Yet they advised on how carry out the wire-stripping in a way which would

⁷⁸ An argument would go along the lines of the select committee nor being a court and Mr Pike not acting for the newspaper group in 'proceedings' before the committee. The broader question of whether other professional principles have been breached would remain.

⁷⁹ Indicative Behaviour 5.7 SRA Code of Conduct

⁸⁰ Indicative Behaviour 5.8 SRA Code of Conduct

⁸¹ Rupert Murdoch Transcript of Morning Hearing 26th April 2012, <http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/wp-content/uploads/2012/04/Transcript-of-Morning-Hearing-26-April-2012.txt>

⁸² Richard Moorhead, "On the Wire," *New Law Journal* no. 17 August (2012): 1080–1081; Benjamin M. Lawsky, *In the Matter of Standard Chartered Bank Order Pursuant to Banking Law*, 2012, the prosecutors order contains an interesting set of details from internal emails.

disguise the payments from regulators. Their approach appears to have been: it is probably (or definitely) unlawful, but this is how you should do it to minimise the chances of detection.

A fifth example: Clifford Chance, in the Excalibur litigation, argued for a client in litigation that their opponent was fraudulent. The trial judge's view (now Clarke LJ) was that these allegations were totally without foundation. Did the partner have sufficient basis to make an allegation of fraud as his professional rules require?⁸³

The sixth is the most extraordinary allegation of the lot. A partner from Allen & Overy is alleged to have pressured a witness to change their evidence prior to a serious bribery trial; and done so at a meeting with their client present, this meeting a prosecution witness in breach of their bail conditions.⁸⁴ There are other examples, the Stewarts Law partner who the Solicitors' Disciplinary Tribunal and a High Court Judge found lied to opponents;⁸⁵ or the polishing of evidence that Gloster J (as she then was) criticised in *Abramovich v Berenovsky*.⁸⁶

The full facts of these cases have not, may not ever, fully emerge. There may be exculpatory explanations but the facts as known suggest that even the largest firms, with the biggest reputations, may take a step too far in the service of the client interests contrary to the public interest in the administration of justice. They show how client first and business focus has the potential to go seriously awry.

Precarious regulation?

Let me turn to the final precariousness: the need for professional regulation to further ethics or quality. Our regulatory system is

⁸³ Richard Moorhead, "Excalibur Raises Serious Professional Conduct Concerns for Clifford Chance," *Lawyer Watch*, accessed February 18, 2014, <http://lawyerwatch.wordpress.com/2014/01/15/excalibur-raises-serious-professional-conduct-concerns-for-clifford-chance/>.

⁸⁴ Caroline Binham and Jane Croft (2013) *Allen Overy lawyers put pressure on witness, court hears*, Financial Times, 6th November 2013, <http://www.ft.com/cms/s/0/a33a65da-4706-11e3-bdd2-00144feabdc0.html#axzz2vGXdTVMP>

⁸⁵ *Shaw v Logue* [2014] EWHC 5 (Admin). See, Richard Moorhead, "What Any Person in My Position Would Do Is...", *Lawyer Watch*, accessed March 7, 2014, <http://lawyerwatch.wordpress.com/2014/01/18/what-any-person-in-my-position-would-do-is/>.

⁸⁶ *Berezovsky v Abramovich* [2012] EWHC 2463

bizarrely complicated. Reserved powers are somewhat arbitrary.⁸⁷ The definition of legal activity under the Legal Services Act 2007 excludes, “judicial or quasi-judicial nature (including acting as a mediator);⁸⁸ something which may become increasingly important with any growth in alternative and online dispute resolution.

There are eight active approved regulators, with professional bodies, the Legal Services Board, the Office of Legal Complaints, the Legal Ombudsman, the Legal Services Consumer Panel, the Office of the Immigration Services Commissioner; the claims management regulator; regulatory bodies for insolvency practitioner; the Solicitors’ Disciplinary Tribunal; and the Council of the Inns of Court.⁸⁹ That is on top of the normal jurisdictions of the Courts and the Advertising Standards Authority. Even Google appear to be getting in on the act.⁹⁰

Yet a recent review of regulation suggested widespread support for the propositions that these were improvements brought by the Legal Services Act:⁹¹

- lay membership of the approved regulators;
- separating the representative and regulatory functions of the approved regulators;
- opening up the market to new business structures and/or greater flexibility in business forms;
- the better handling of consumer complaints.; and,
- the introduction of a consumer panel.

The common concerns raised included that the system is overly complex; that the LSB is insufficiently independent of

⁸⁷ Mayson and Marley, *The Regulation Of Legal Services: Reserved Legal Activities – History And Rationale*.

⁸⁸ Section 12(4) Legal Services Act 2007

⁸⁹ This list is derived from, Legal Services Board (2013) A blueprint for reforming legal services regulation, http://www.legalservicesboard.org.uk/what_we_do/responses_to_consultations/pdf/a_blueprint_for_reforming_legal_services_regulation_lsb_09092013.pdf

⁹⁰ Richard Moorhead, “Regulation, Google-Style: A Few Quick Thoughts on Irwin Mitchell’s SEO Problems,” *Lawyer Watch*, accessed March 7, 2014, <http://lawyerwatch.wordpress.com/2014/01/30/1734/>.

⁹¹ This taken from an analysis of the LSB, Bar Council, Law Society, SRA and BSB responses to the legal services regulation review consultation conducted for the Lord Chancellor.

government (that from the LSB itself); that some regulation should be scaled back and that the LSB was overreaching or overly prescriptive (not a view I share even though I disagree with some of the substantive policy the LSB promotes). There are two major fault-lines.

The first is whether there is a need for greater independence of regulators from the professions. The professional representative bodies make the dubious claim that whilst the Legal Services Act brought significant benefits, including the weakening of professional dominance (through consumer representation and separation) they should nevertheless now be trusted to make the right judgments on professional regulation and be given back a dominant role.

On the second, whether there should be a single regulator or multiple regulators, I would make two points. One is whether split responsibility allows a race to the bottom. Another is speed. The quality assurance of advocates (QASA) is the most wretched example. This proposal began its formulation in 2006. It has proceeded in a painfully slow manner and has not improved much in substantive terms in the years it has been negotiated. We might even have had a proper pilot; a roll out and a third iteration in the period it has taken to get to where we are now, which is not a fully functioning scheme.

Market utopias

So if professional belief in its own quality and ethicality may be at risk, or a little utopian, and its regulatory structure are looking a bit shaky, what about the utopia that is markets? Liberalisation on its own is not the answer. Research on wills shows clients can make some rational choices on quality but also that they often get it wrong with potentially serious consequences.⁹² Equally consumers can be exploited in their belief that quality is related to price.⁹³ Gold plating is probably not a fiction where clients have high stakes and cannot judge quality. An increase in cost does not always lead to an increase in quality.⁹⁴ Conversely, Governments take evidence that lawyers are influenced by

⁹² IFF Research, *Understanding the Consumer Experience of Will-Writing Services*.

⁹³ Gillian K Hadfield, "The Price of Lawyers: How the Market for Lawyers Distorts the Justice System," *Michigan Law Review* 98 (1999): 953–1006.

⁹⁴ Simon Domberger and Avrom Sherr, "Economic Efficiency in the Provision of Legal Services: The Private Practitioner and the Law Centre," *1 International Review of Law and Economics* 29-49, 1981.

financial incentives as *carte blanche* to cut costs.⁹⁵ Austerity adds an extra impetus to this.

The more for less mantra when applied to the wafer thin margins of legal aid work is almost certainly going to substantially increase risks to quality. The same might be true of dramatic change in the personal injury market. Whether compromising quality is worth the reduction in public spending is a political not professional judgment but one which also relates to a core constitutional value, the rule of law. The professions cannot decide this question for governments, but they can influence it.

The professions' mistake has been to treat their own *judgment* as the acid test of whether quality, and so the rule of law, is fatally breached. An alternative approach would be to *evidence* that judgment and do so institutionally. They have not done so. The professions knowledge about the competence of their own members is to put it kindly modest. And they are being dragged kicking and screaming towards a relatively light touch scheme of Quality Assurance for Advocates.

Most importantly there will now be no baseline against which one can say whether legal aid cuts have significantly worsened quality.⁹⁶ It is, I believe, a massive failure of collective wisdom and – in some but not all quarters – of professional leadership.

More broadly, it is a failure of the professions and researchers that we cannot really say how cuts in quality will damage outcomes for clients and heap costs on the broader system. The professions woke up to the possibility that a research case could be made very late and whilst some researchers have struggled manfully with existing evidence to do produce helpful calculations, these were never going to persuade governments bent on cuts.⁹⁷

⁹⁵ G Bevan, "Has There Been Supplier-Induced Demand for Legal Aid?," *15 Civil Justice Quarterly*, 1996, p. 99. Compare, Ed Cape and Richard Moorhead, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (London: Legal Services Research Centre, 2005).

⁹⁶ At least in advocacy. There may be some peer review data for other aspects of legal aid work derived from file inspections.

⁹⁷ See, for example, Graham Cookson, *Unintended Consequences: The Cost of the Government's Legal Aid Reforms: A Report for The Law Society of England & Wales* (London: Kings College London, 2011), file:///C:/Users/LAWSuczrrm2/Downloads/unintended-consequences-cost-of-government-legalaid-reforms.pdf.

That said, there is something in the refuseniks complaints. That the question whether regulation really does work or simply imposes costs is a real and important one. We know very little about the effectiveness of the regulatory techniques used. Whether it is controls on education and training;⁹⁸ fit and proper person tests; COLP/COFAs; quality assurance systems and processes; quality marks; CPD; the role of insurers; specialisation panels; consumer rating websites; principles vs outcomes vs rules vs guidance; risk profiling, monitoring and supervision; in-house complaints procedures; and enforcement through the Legal Ombudsman, through the regulator action and through the disciplinary tribunals.

In terms of ethics the position is even more uncertain. Emphasis is put in education and training, especially pre-qualification, without any real evidence to back up its efficacy.⁹⁹ It's a cheap proposal as long as firms and the regulators don't bear the cost of the training or have to adapt to what is learnt.

The SRA did some interesting work benchmarking drivers of professional compliance.¹⁰⁰ That research claimed to have found evidence that professional pride was a significant driver of professional compliance; although the quotes it used were more redolent of professional fear. It is perhaps unsurprising that research based on the SRA asking firms what drove professional compliance suggested that a) they were culturally disposed to doing the right thing; that b) non-compliance was most likely to be inadvertent; and that c) reputational risk of being found out rather than actual punishment was sufficient incentive for them to comply.¹⁰¹

A more interesting finding, given that much of the SRAs knowledge on ethics depends on complaints being made to them (or conduct points being spotted by the Legal Ombudsman) was

⁹⁸ See, Julian Webb et al., *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales*, n.d., <http://letr.org.uk/the-report/index.html>.

⁹⁹ For more thoughtful approaches see, Andrew Boon, "Legal Ethics at the Initial Stage: A Model Curriculum Professor Andrew Boon," *Education And Training*, no. December (2010); Kim Economides and Justine Rogers, *Preparatory Ethics Training for Future Solicitors* (London: The Law Society, 2009).

¹⁰⁰ Karen Nokes and Laura Holloway, *Attitudes to Regulation and Compliance in Legal Services* (Birmingham: Solicitors' Regulation Authority, 2012), <http://www.sra.org.uk/documents/sra/research/attitudes-regulation-compliance-2011-research-findings.pdf>.

¹⁰¹ The research candidly acknowledges the potential biasing in the methods towards self-serving answers.

that most firms did not think either they or consumers were in a position to spot conduct problems in other firms. Many firms also said they did or would resist complaining against other firms. Maybe the introduction of Compliance Officers will improve self-reporting.

Some final thoughts

But for all that there are significant problems, I resist the urge to reject professionalism.¹⁰² I see daily in my contact with lawyers of all stripes, and online or in person, a belief in the idea that the service of clients and law in the public interest stands apart from self-interest. Legal aid practitioners struggling to make ends meet can be heroic. Bloggers (some of them) cultivate communities of interest and improvement.¹⁰³ And those slaving away in professionally related interest groups and committees are usually motivated by a sense of the greater good.

My belief, supported by some research, suggests that developing that public interest in quality and ethics must be a conscious process; it is work at an individual and organisational level.¹⁰⁴ Robust enforcement against business has driven improvements within it.¹⁰⁵ Legal services regulators also need to send strong signals to miscreants. They must send a strong message that no organisation is too big to regulate.

Some things they may need to regulate less or regulate differently. There is some evidence suggesting meta-regulation, independent regulators setting robust frameworks within which individual

¹⁰² See, also, Julia Evetts, “The Sociological Analysis of Professionalism Occupational Change in the Modern World,” *International Sociology* 18, no. 2 (June 1, 2003): 395–415, doi:10.1177/0268580903018002005; Robert Dingwall and Paul Fenn, “‘A Respectable Profession’? Sociological and Economic Perspectives on the Regulation of Professional Services,” *International Review of Law and Economics* 7, no. 1 (1987): 51–64.

¹⁰³ See, for example, “About,” *Pink Tape*, accessed March 9, 2014, <http://pinktape.co.uk/about/>; “Carl Gardner,” *Head of Legal*, accessed March 9, 2014, <http://www.headoflegal.com/about/>; “About & Contact | Nearly Legal,” accessed March 9, 2014, <http://nearlylegal.co.uk/blog/about-2/>; “About,” *UK Human Rights Blog*, accessed March 9, 2014, <http://ukhumanrightsblog.com/about/>; “Civil Litigation Brief,” *Civil Litigation Brief*, accessed March 9, 2014, <http://civillitigationbrief.wordpress.com/>.

¹⁰⁴ For a readable account of how a lawyer implemented management for integrity at General Electric, see, Benjamin W Heineman, *High Performance with High Integrity* (Boston, Mass.: Harvard Business Press, 2008).

¹⁰⁵ See, for example, John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights*, 2013.

firms negotiate their own detailed approaches, can work effectively.¹⁰⁶ Outcomes focused and entity based regulation is a step in that direction.

We also, though, need a significant cultural change. And by cultural change, I do not mean a shift in tone from the top, but a concerted re-engineering of how we think about and manage legal services, legal education and legal regulation. This quote on what a healthy policy on innovation in science looks like captures some of this idea:¹⁰⁷

What we need is: a deliberative science policy culture, emphasising reflexive learning and responsiveness; an open organisational culture, emphasising innovation, creativity, interdisciplinarity, experimentation and risk taking; top-level leadership and commitment to public engagement and to taking account of the public interest; and commitments to openness and transparency.

We need a more evidence based approach to the delivery and evaluation of legal services (and I don't just mean more research for academics, although we certainly need more than that). What hope do we have as a regulatory system if we do not learn and learn much more quickly from what works and what does not? I reiterate: if QASA was necessary in 2006, then how has the idea been improved in the 8 years to now, and why has it not yet been successfully implemented?

There are one or two green shoots of optimism. Professional regulators have rather modest research budgets, but the LSB in particular, and the SRA, BSB, the Advocacy Training Council and the Law Society are beginning to see the merit in research which looks at challenges rather than public relations. Firms are beginning to realise they lag behind accountants and others in terms of research and development. The Legal Education Foundation has the capacity to do enormous good and is showing significant interest in research. The professionally representative bodies should shift towards self-improvement and away from self-defence. For understandable reasons, they have introverted and their research and policy is based around matters of professional self-interest. I believe it weakens their voice, not

¹⁰⁶ Christine Parker et al., "Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour, The," *UNSWLJ* 31 (2008): 158.

¹⁰⁷ Jack Stilgoe, Richard Owen, and Phil Macnaghten, "Developing a Framework for Responsible Innovation," *Research Policy* 42, no. 9 (November 2013): 1568–1580, doi:10.1016/j.respol.2013.05.008.

strengthens it; but persuading their memberships to a more sustainable path will be extremely difficult.

I would emphasise the need for openness and inter-disciplinarity – regulators, practitioners and academics all have to get more comfortable with the influence of other disciplines on their worlds, particularly I suspect computer science and psychology.¹⁰⁸ And experimentation means something more than marketing. It means evidence-based testing of new ways of practising, teaching and regulating law.

Here the academy has a role in opening the eyes to the possibilities of (and problems with) innovation, the pitfalls of legal practice and the paths to professionalism. We need to work to build critical reflexivity into our students; into practitioners; and into our institutions. We need to search for what works, or at least what can improve things. And academia and practice need to engage with each other to develop knowledge in the field; to forward the state of the art rather than to fear it. We should all do these things in an open and transparent manner. We need debate, experiment and evidence; mutual respect, and challenge, not self-regarding judgment. Professionalism is precarious but it is also adaptable.

-end-

¹⁰⁸ On technology see for example Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services*, 1st ed. (Oxford University Press, 2008). On the latter see as examples, Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk and the Financial Crisis*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, November 22, 2011), <http://papers.ssrn.com/abstract=1932398>; Perlman, *A Behavioral Theory of Legal Ethics*.