

Corporate Lawyers: Values, Institutional Logics and Ethics

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Corporate Lawyers: Values, Institutional Logics and Ethics

Richard Moorhead*

US corporate scandals have often been followed by the question: ‘Where were the lawyers?’ Whilst this is less so in the UK, recent events suggest we should ask the question more persistently and critically. Private practitioners and in-house lawyers had roles in serious wrongdoing by BNP Paribas and Standard Chartered Bank, the News of the World and the Times.¹ Allen & Overy has been accused by a Crown Court judge of putting inappropriate pressure on a prosecution witness which led to an abortive trial.² Clifford Chance litigated a client’s fraud case which was found by a (now) Court of Appeal judge to be to be artificial and “replete with defects, illogicalities and inherent improbabilities.”³ That raised serious professional misconduct issues.⁴ Evidence during a Russian Oligarch’s trials was ‘polished’.⁵ Two former Barclays GCs have been interviewed under caution.⁶ In-house lawyers in General Motors have been in the spotlight for the way they dealt with fatal accident claims. And some banks had a practice of sending letters from fake law firms.⁷ Within this group, several lawyers have been fired, many investigated (including criminally) and at least one prosecuted successfully by their regulators. In others actions are pending.

A variety of explanations might be given for such cases. What I want to examine here is whether there are underlying flaws in the institutional logics applied to or by corporate lawyers. By corporate lawyers, I mean any lawyer whose clients or employer are predominantly corporations. By

* Professor of Law and Professional Ethics, Director, Centre for Ethics and Law, Faculty of Laws, UCL, London. This is the text of a lecture given at the Symposium on Corporate Lawyers & Corporate Clients: Power, Practice and Privilege at the Law School, University of Birmingham, 29-30 June 2015. Parts of the text draw heavily on R. Moorhead and V. Hinchly (2015) *Professional Minimalism? The Ethical Consciousness of Commercial Lawyers*, forthcoming, *Journal of Law and Society* and Richard Moorhead and Steven Vaughan (2015) *Legal Risk: Definition, Management and Ethics* (UCL, London) <http://ssrn.com/abstract=2594228> or <http://www.ucl.ac.uk/laws/law-ethics/research/papers/erc-executive-report-legal-risk-definition-management-ethics.pdf>

¹ David Kershaw and Richard Moorhead, ‘Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession,’ (2013) 76 *Modern Law Review* 26; Richard Moorhead, ‘On the Wire’ *New Law Journal*, 17 August 2012, 1080 ; a prosecution of an in-house and a private practice lawyer is pending before the Solicitors’ Disciplinary Tribunal <<http://www.sra.org.uk/sra/news/press/statement-chapman-abramson-sdt-august-2014.page>>.

² Caroline Binham and Jane Croft, “Allen and Overy put pressure on prosecution witness, court hears” *Financial Times*, 6th November 2013

³ *Excalibur Ventures LLC v Texas Keystone Inc and others* [2013] EWHC 4278 (Comm)

⁴ Richard Moorhead, 2014, ‘Excalibur raises serious professional conduct concerns for Clifford Chance’ <<http://lawyerwatch.wordpress.com/2014/01/15/excalibur-raises-serious-professional-conduct-concerns-for-clifford-chance/>>

⁵ *Berezovsky v Abramovich* [2012] EWHC B15 (Ch)

⁶ Caroline Binham, ‘Ex Barclays bankers to give evidence to fraud agency’ *Financial Times*, 24th September 2014 <<http://www.ft.com/cms/s/0/950db234-4406-11e4-8abd-00144feabdc0.html#axzz3S1JCqMOS>>

⁷ Michele Benedetto Neitz, ‘Shades of Enron: the Legal Ethics Implications of the General Motors Scandal’ <<http://www.legalethicsforum.com/blog/2014/06/professor-michele-benedetto-neitz-shades-of-enron-the-legal-ethics-implications-of-the-general-motor.html>> and *United States District Court Southern District Of New York, United States of America - V. - BNP Paribas, S.A, Statement Of Facts*, <<http://www.justice.gov/sites/default/files/opa/legacy/2014/06/30/statement-of-facts.pdf>>

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institutional logics I speak, perhaps a little glibly, to a theoretical hinterland which calls on the work of Daniel Muzio, James Faulconbridge and others.⁸

I am particularly interested in the ideas that, “Professions [act] as carriers of normative, coercive, and mimetic pressures,” and in questioning the extent to which professionalism is, could or should be a restraint on managerial risk-taking. To what extent, in other words, do professions “retain normative value besides their privileged labour market position.”⁹

In this sense I see an exploration of institutional logics as identifying what “categories, principles, and conceptual tools”¹⁰ lawyers use to define and frame issues and, in particular, what categories, tools and principles lawyers use to define ethical issues. This involves engaging in how reflective they are about the institutional practices they design and apply and how conscious, or protective, they are of their own agency (or role) in these processes.

Similarly Abbott’s claims about professional systems as part of an ecology of other systems is of interest:¹¹ to what extent are corporate lawyers part of a distinctive professional system, constraining and contesting their position with others: professional managers, risk specialists, compliance personnel and the like?

But in drawing on this sociological work, I also emphasise the growing importance and utility of behavioural science. Findings on framing, priming, biases and the like provide a number of clues as to how different social systems influence behaviour, sometimes sub-consciously, and I want to begin the task of showing how some of that learning may also apply to the intellectually sophisticated being that is the corporate lawyer.

A more common way of putting the issue under examination is the claim that the practice of law is a business not a profession; that clients are too powerful; and that lawyers (too often) neglect their ethical obligations. I note that professional bodies have questioned the adequacy of education and training in the field of ethics.¹² The Legal Education and Training Review also evidenced a strong consensus within the professions (as surveyed) about the need for education in the area.¹³

I note also, the general paucity of empirical study of the professional ethics of commercial lawyers in England and Wales.¹⁴ This is doubly surprising given the importance of London as a centre for global business. Even in the United States the literature concentrates mostly on in-house lawyers – seen as

⁸ Faulconbridge, J. and Muzio, D. (2007). ‘Re-inserting the professional in the study of PSFs’. *Global Networks*, 7, 249–70. Faulconbridge, J. and Muzio, D. (2008). ‘Organizational professionalism in global law firms’. *Work, Employment and Society*, 22, 7–25. These quotes that follow derive from *Professions and Institutional Change: Towards an Institutional Sociology of the Professions*, Daniel Muzio, David M. Brock and Roy Suddaby, *Journal of Management Studies* 50:5 July 2013.

⁹ See Muzio et al

¹⁰ See Muzio et al

¹¹ Andrew Abbott, “Linked Ecologies: States and Universities as Environments for Professions*,” *Sociological Theory* 23, no. 3 (2005): 245–274.

¹² Andrew Boon, *Legal Ethics at the Initial Stage: A Model Curriculum* (2010); Kim Economides and Justine Rogers, *Preparatory Ethics Training for Future Solicitors* (2009).

¹³ Webb et al., *Setting Standards: The future of legal services education and training regulation in England and Wales* (2013, LETR), Executive Summary.

¹⁴ Flood has written thoughtfully about ethics amongst global lawyers (see, for example, John Flood, ‘Transnational Lawyering: Clients, Ethics and Regulation’ in *Lawyers in Practice: Ethical Decision Making in Context*, eds. Lynn Mather and Leslie C Levin (2012) but his empirical work focuses on commercial lawyers from a sociological rather ethical perspective. Janine Griffiths-Baker study of conflict of interests had a significant focus on commercial firms, see *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* (2002).

a particularly conflicted group. In the UK, there has been John Flood's estimable work on globalisation, relevant but not directly about ethics, and Janine Griffiths-Baker's very interesting account of conflict of interest but not much else. Steven Vaughan's work with Claire Coe on ways in which institutional clients may influence independence of corporate practice is coming.¹⁵

Today I want to talk about three studies I am involved in relevant to this evening's look at the institutional logics and values of commercial lawyers:

In one study, now called the professional minimalism study, twenty-one interviews were conducted with generally (very) senior interviewees from elite practice: twelve were employed in large companies (FTSE 100) and public sector organisations and nine in large or very large private practice firms.

A second study, authored with Steven Vaughan, *Legal Risk: Management and Ethics*, is based on interviews with 34 senior in-house lawyers and senior compliance staff in large corporates and similarly complex organisations.

The third study is one of a number of studies looking at values, lawyers and law students. It takes the issue of values and looks at a group of 100 elite lawyers from private practice and blue-chip corporates and poses the question might their values influence their ethical decision making? Indeed, what are their values?

Let me turn then to what kinds of things I think we learn from these studies.

1. Professional Minimalism

This research asked lawyers how they understood ethics. We explored this through semi-structured questions but also vignettes to see how they approached ethical dilemmas. We reached the conclusion that the professional ethical consciousness of commercial lawyers in-house or in private practice was minimalistic in a number of ways.

Firstly, they said ethical issues occurred infrequently. It followed that they thought ethics was not much relevant to what they saw themselves as doing.¹⁶ Where specific ethical problems were recalled, interviewees almost always distanced themselves from those problems: other firms; clients; old employers; or other groups in the firm (young lawyers, if the partners were being interviewed; partners, if the associates were being interviewed) were responsible, or the problems occurred years ago. Ethics was something that arose elsewhere, at a distance, for someone else.

Secondly, there was a strong tendency to equate unethical conduct with criminal illegality. Our respondents leaned heavily on criminality, and dishonesty in particular, as determining the boundaries of what was acceptable. Consistent with a view that professionals might bias towards

¹⁵ "Independence, Representation, and Risk: An Empirical Exploration of Large Law Firm Management of Client Relationships" – expected to be published by the SRA in the late summer of 2015.

¹⁶ We do not regard interviews such as these as being a good vehicle for exploring the frequency of ethical problems. There is too much of a bias against admitting to there being a problem (especially because one is dealing with elite groups). Nevertheless, as our interviewees proceeded they began to recall some matters of concern.

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risky conduct,¹⁷ some even emphasised the need to be *knowingly* involved in criminality or the need for conduct to be *clearly* criminal if it was to give rise to ethical concerns.

Thirdly, ethical consciousness was minimal in the sense that there was relatively little discussion of professional principles or professional conduct rules, either when practitioners were asked to talk about what ethics meant to them or when faced with the ethical dilemmas.

Indeed, practitioners often did not discuss, still less dwell on, the professional conduct dimensions to any problem. Where such things were mentioned it was generally specific rules (the conflict rules, the rules on client money, the duty to the court) rather than general principles that they focused on. This is contrary to the intent of the current codes of professional conduct.

There is a notable exception to this principle blindness. What could that principle be? It was of course the idea that the lawyer should pursue the client's best interests. This was recognised and emphasised by all. Indeed, we heard earlier in this symposium it was emphasized by a leading practitioner as "being in their DNA". Many interviewees believed in the pre-eminence of this principle, yet that is a view contrary to the Solicitors' and the Bar's Code. There was hostility to the idea of the public interest and little if any mention of the public interest in the administration of justice other than through the duty to the court.

An interesting indication of how corporate logics can overlap with the professional 'client first' logic can be seen in this quote:

companies aren't in a position to have morals, they haven't got a soul... [They are] taking actually what are not moral or ethical decisions once you are outside the area where this is straight dishonesty...(Private Practitioner)

Note the modifier to dishonesty again.

This position is commercially and psychologically convenient for the participants but its problems can be seen if we remember, for example, bank lawyers that sent letters from fake law firms. When this was exposed the Companies lined up to say they had acted 'entirely within the law' whilst beating a hasty retreat. They did so, as far as we know, because they had not breached the Business Names Act.

We can see also how professional advice can be advice but also a form of mutually assured irresponsibility. The lawyer tells the business, "You've not breached the breached the Business Names Act so as far I am aware it's not unlawful" and the CEO feels they can then go on the Today programme and say they have acted "entirely within the law". Note the shift from negative to positive to exaggerated.

As one of our respondents noted:

And if the law firm has given them advice that it's legal, then they can go to the regulator and ...say, 'we've taken legal advice and we're comfortable.'(Private Practitioner)

This brings us to our fourth ethical minimalism: the role of ambiguity. For our respondents, ambiguity was a shelter inhabited almost exclusively by the client's best interests. It is possible to see ambiguity as something which creates a space for ethical judgment but this is not how most

¹⁷ See, for example, Langevoort n.30 and Donald C. Langevoort, 'Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking' (2010) 96 *Cornell L. Rev.* 1209.

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practitioners, especially private practitioners, saw it. For them, ambiguity diminished rather than heightened ethical relevance and played an important role in limiting their ethical consciousness.

Deciding when, whether and how something is ambiguous influences an individual lawyer's decision to say no, to advise against or to facilitate the exploitation of law's ambiguity. Ambiguity may also influence how advice is shaped and presented.

Consider the following description of how Standard Chartered Bank's lawyers advised their risk committee on its ill-fated wire-stripping. The Bank wanted to clear payments from Iranian clients through US banks. Their internal lawyers' advised it was probably unlawful and external advice that supported that view robustly.

Essentially, Standard Chartered Bank could not lawfully process Iranian payments without conducting due diligence on US soil. Yet they wanted to set up a speedy due diligence scheme outside the US, to get the payments through quickly and keep their clients happy. They did this and then hid the Iranianess of the payments from SCB in the US.

The US prosecutor describes the advice of a senior in-houser to SCB's risk committee, quoting – it seems - from , “A 2006 memorandum from SCB's General Counsel advising SCB's Audit and Risk Committee that”:

“certain US\$ clearing transactions handled in London were processed with the name of the Iranian Bank excluded or removed from the „remitter field“” despite the “requirement that due diligence in respect of „U-turn“ payments should be undertaken by our office in New York.” SCB's chief legal counsel strategized, much as he had in 1995, that “it is reasonable to undertake due diligence on behalf of New York outside the US” even though “we are potentially placing our SCB New York office and the Bank at risk if our due diligence procedures are not fully effective.”¹⁸

It was not possible for the due diligence procedures of the type envisaged to be fully effective and lawful. The legal argument was not that it was lawful but that the US regulators might not be able to enforce against the Bank *as long as the US branch of SCB did not know that the transactions were Iranian transactions*. The result? Ambiguity and a monumental failure to protect the client's interest, the rule of law and the public interest in the administration of justice. Professional ethical minimalism. I would argue that the idea of reasonableness used is an entirely self-serving, commercial one to divert attention from its illegality and perhaps (we cannot know for sure because we were not in any discussions) to mislead the risk committee.

The active use of ambiguity sometimes gave our respondents, especially in-house lawyers, a sense of discomfort about bending too strongly to their clients' imperatives. They comforted themselves with the view that they were their employer's agent, the business decided what constitutes acceptable risk, and the business (not the lawyers) were ethically responsible for sharp practice or other problems. Take this quote as an example...

[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. [In-House Lawyer]

¹⁸ *New York State Department Of Financial Services, In the Matter of Standard Chartered Bank, New York Branch, New York, New York, Order Pursuant To Banking Law § 39, citing Memorandum entitled Iranian Business from SCB's General Counsel to SCB's Audit and Risk Committee dated February 23, 2006, SCB INT 0017372, <http://www.dfs.ny.gov/about/ea/ea120806.pdf>*

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Note here the way the lawyer is not even responsible for interpreting the law: ultimately, the business is.

Finally, I should reiterate that saying the approach of our interviewees is ethically minimalist is not the same as saying they are behaving unethically. The ethically minimalist position is consistent with the idea of the zealous lawyer, doing all they can within the law for their client.¹⁹

This is not the place to rehearse all the arguments for and against the zealous lawyer paradigm but I would emphasise that professional rules and principles are supposed also to act as a restraint on lawyerly zeal. A minimalist understanding of those rules and principles significantly weakens the impact of that restraint.

To put it another way, all lawyers, be they in-housers or private practitioners, were very clear in seeing ethical problems not principally through the lens of professional principles, but through the social and economic lenses of business. They were conscious of business and of law, but they were not much conscious of ethics as defined by their own profession's principles. In these ways in-house and private practise were similar.

Let me now concentrate on some areas of difference. With research of this kind, we cannot say, as is often assumed, that in-house lawyers are more likely to be unethical than private practitioners. Our interviews suggested in-house lawyers may be exposed more directly to pressure to push the envelope of ambiguity. The commercial and pragmatic influences of their organisations may well be stronger on in-house lawyers, but they are far from weak influences on private practitioners.

Conversely, some in-housers also had a broader notion of ethicality than private practice. Other notions of fairness might enter into their decision making process. Corporate codes and a culture of ethical leadership, where they were in place and taken seriously, helped them take (they thought) more ethical decisions although ultimately the balance to be struck remained the company's calculation not theirs.

Private practitioners *could* plausibly claim greater independence. They *could* walk away from instructions, or exit relationships, more easily than an in-house lawyer can walk away from their job, but they too have their own de-ethicalising tendencies. The traditional notion that a lawyer is not responsible for whether and how they advance a client's legally dubious case, coupled with the idea that they were often advising on the more difficult, ambiguous questions allowed them more leeway to discount any notion of public interest in their work than in-house lawyers.

A final ethical minimalism was displacement. Ethical problems were generally a matter for their managers or employers not for them. Institutional hierarchies and pragmatism appeared to shape their decision-making more than professional principles. Discussions of our vignettes were richly infused with notions of hierarchy and reputation. In particular, where ethical concerns were advanced these were often framed as reputational concerns to be made as part of a 'business case'.

Something which I think might cut both ways was that in-housers' qualms about ethics were stronger than private practitioners. They may have been stronger because they were more often in the position of framing or managing legal problems. That role may have given them a stronger sense of their own agency (or control) over how legal issues were dealt with.

¹⁹ See references at n 58.

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Because in-house lawyers were more likely to suggest they had a voice in a normative (or business) judgment about whether risky activities were the right thing to do, their discomfort may have been higher. They were involved in the process of corporate decision-making in a way private practitioners were generally not and this made it harder for them to disclaim responsibility.

Conversely, this may also have given them more opportunity to influence towards good than private practitioners who more clearly saw themselves as technicians for whom such questions were not relevant.

Equally they may have just seen more behaviour of concern.

This sense that the ethical lives of in-house lawyers are richer but more challenged may explain why some have begun to take a questioning position on the sector's identity and approach.²⁰

2. The Legal Risk Study

Legal risk management is something of a buzzword in legal practice. The aim is to better define, mitigate, manage and contain legal risk. In the broadest terms, it combines professional judgement with proceduralisation and, for some, a more genuine grappling with changing behaviour and evaluating the impact of risk programs. The aim is not to avoid all risk, but to embrace some: to have appetite for taking risk and systems for managing it.

Professional objectivity and independence are necessary for risk assessment to be accurate and useful to the business but are they in tension with the pressures on in-house lawyers to be commercial team players? The logic of having appetite for legal risk involves sometimes accepting, even welcoming, tolerance for conduct which may be, even may be likely to be, unlawful. It is relatively easy to see how this fits with an obligation to promote the client's interests but at what stage is the obligation to protect the rule of law engaged?

Legal risk management is thus a fitting together of professional and commercial logics, which tolerates, normalises, and sometimes promotes the desirability of taking risks with law. It feeds the business's appetite for procedures of control and in-house lawyers able to deliver good legal risk programs (in their employer's eyes) are able to demonstrate the strategic and managerial capacities critical to their status within the organisation.

Indeed, In-housers are very sensitive to their place in the corporate network of influence. That sensitivity sometimes requires a negotiation between the lawyer's view of what is lawful and right, and their view of what is tolerable. Corporate codes and commercial arguments about long-term sustainability vs short term opportunism were stronger drivers in that negotiation, and of their thinking, than professional principles.

When asked more specifically whether the management and assessment of legal risk raised professional ethics issues our interviewees broke down into three broadly similar sized groups:

- those who considered that the management of legal risk did not raise ethical issues;
- those who considered that the management of legal risk might raise ethical issues in theory, but because they had ethical employers such conflicts did not arise in practice; and,

²⁰ See, for example, Ben W. Heineman, Jr., William F. Lee and David B. Wilkins (2014) 'Lawyers as Professionals and as Citizens: Key Roles and Responsibilities in the 21st Century' https://clp.law.harvard.edu/assets/Professionalism-Project-Essay_11.20.14.pdf

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- those who considered that professional ethical problems could and did arise (occasionally there was suggestion that such problems were fairly frequent).

A somewhat qualified example of the first type can be seen in this quote:

"I don't have any absolute no-no's, that's me taking a risk, isn't it? I don't have any no's.

...there may well be examples where the most senior lawyers are in great difficulty, but I would have thought that's because they need to do something or they don't do it, rather than, for example, I'm going to resign because no-one's taking my advice." [In-house lawyer]

As with the professional minimalism study you can see this lawyer seeking refuge in the comfort of hierarchy and the business not him having agency.

The closest articulation of professional rule of law obligations came implicitly when interviewees talked about the concept of 'comfort'. Interviewees talked about getting 'comfortable' with law's ambiguity but not allowing that ambiguity to be abused. Here, each piece of advice was part of a broader series of interactions where the lawyers worked to persuade their colleagues of their utility, relevance and commitment to the business. This meant compromises needed to be made from time-to-time as part of the cost of having the legal department influence the company. Thus, one of the terrors of in-house lawyers was being perceived as 'difficult' and colleagues not then coming to them for advice when they ought. Information and power could evaporate at the same time as independence was asserted.

It follows that, professional claims to independence by our interviewees were subtle and not naïve. Independence did not either exist or not exist – it manifested along a continuum and could be weaker or stronger, at different times and in different contexts. Our interviewees understood independence was (sometimes) in tension with their need to serve, and be seen to serve, the business. Conversely, professional independence could be reinforced by the business (e.g. where the business leadership explicitly supported legal's more independent role).

More generally a corporate discipline was at work that protected the discretion of senior decision-makers and disciplined lawyers towards corporate norms. That discipline reminded lawyers that they were there to support the business; that they advise and do not decide. I see the corporate logic of hierarchy enforcing a powerful strain within a particular notion of professional ethics: non-accountability, I merely advise the client decides. The land of SCB and the fake banks.

The discipline was also sometimes more directly disciplinary. Some saw or had experienced CEOs publicly or more subtly 'calling out' lawyers for being obstructive. Promotion and getting allocated interesting work incentivised behaviour. In general, in-house lawyers and the businesses they worked for had an allergy to the word 'no'. The power of No should not be exercised by anyone other than the ultimate decision-maker. The lawyer's role as adviser generally precluded them from being the ultimate decision maker unless the business allocated them the responsibility and power to do so.

I do not mean to suggest that for in-house lawyers saying 'no' was impossible, or that advising in robust terms never occurred, but saying 'no' was seen as a last resort. Many saw avoiding the need to say no as a mark of their skill. Saying 'no' was also a process which required political coalition building within the business if it was to succeed. 'No' could be hard and dangerous work.

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Discomfort and concerns about independence meant that on occasion our in-house lawyers felt that their companies were taking unreasonable or perhaps untenable positions on the legality of their action. We sought to explore the outer limits of the comfort/discomfort boundary: what were our interviewees' 'redlines'? How did they define the ethical boundaries which they would not cross?

We noted the following characteristics of these discussions:

- The ability of our interviewees to articulate specific redlines was limited.
- There was often no apparent reliance on general ethical principles either from their business' Code of Conduct, or from external professional principles (e.g. in the SRA Handbook).
- There was a tendency to look to the business to provide ethical leadership (just as they looked to the business for a sense of risk appetite).
- Those who indicated no red-lines tended to a view that the business, not the lawyer, took all ethical decisions. They were not responsible.

Whilst professional principles were generally not called upon, professional status was perceived as useful. It helped establish a level of independence within the businesses and a basis for making claims on that independence and on the public interest. It was also said to form the basis of a claim for higher objectivity.

Whilst lawyers and businesses like to project a belief in legality or working within the law, in reality this could mean something different: not risking serious criminal sanction and having a defensible, if sometimes weak (or risky) argument, that behaviour was otherwise within the law.

Sometimes such arguments were a response to conflicts between incompatible international standards or the feeling that total compliance with complex and changing law cannot be achieved. Sometimes the arguments may have been a cover for creative or selective compliance or the obfuscation of non-compliance.

In many respects, the findings overlap with the professional minimalism piece. If, as sometimes appeared to be the case, the limit of tolerable conduct is defined predominantly by criminal conduct how is it *professionally* ethical? Furthermore, given the profession's fondness for commercial awareness as a concept, it is interesting to note the language used here in describing the kinds of decisions in-housers were uncomfortable with. They talked about:

"non-criminal" activity "sort of on the edge of commercial practice" [In-house lawyer]

And:

.... 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." [In-house lawyer]

The final point which I would emphasise from the risk study is the sense that those corporates that adopted a richer, perhaps more values-based, approach to ethics and compliance saw that a minimalistic approach was an ineffective way to drive behaviour. Ben Heineman, former in-house leader at General Electric, is an example: fond of exhorting commitment both to the letter of the law and the purpose of the law.²¹ The idea is that a commitment to stronger professionalism can support a commitment to better corporate governance and vice versa. You have to be committed throughout the company to doing the right thing, for people throughout the company to do the right thing, and that includes a maturer attitude to interpreting law.

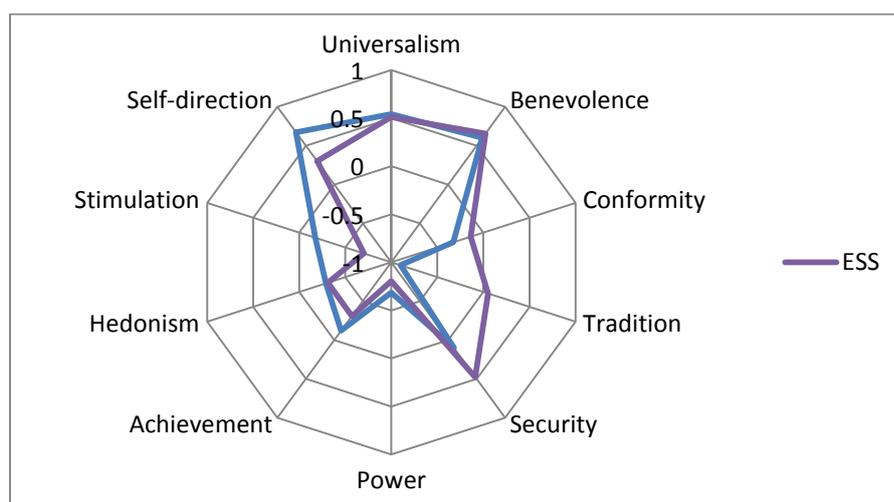
²¹ See n. 20

3. The Values Studies

What I have tried to show so far is how professional ethical frameworks, at least the way they are interpreted – but probably also the way they are designed – mean they have minimal influence on problem framing and decision-making. We have also seen how the idea of risk frameworks interacts with the professional frameworks. Here we see elements of concern but also elements of hope. These elements of hope take lawyers into the more touchy-feely world of culture and the sometimes baffling and fashionable world of behavioural science.

If I had longer I would take you through evidence that suggests the financialisation of legal practice; the business frame of commercial awareness; and shallow professional frames are likely to be associated with a greater incidence of ethical problems.²² Instead, I will focus on some work I have been doing with Rachel Cahill-O’Callaghan, Cat Denvir and others on values. We have been measuring the values of lawyers and law students and seeking to examine potential links between values and ethical decision-making.

We use Shalom Schwartz values tools. These are widely used and well validated. The basic theory is that each person’s values can be broadly understood across 10 dimensions. You will see from the attached graph the ten dimensions. This graph compares 100 lawyers (a mixture of commercial private practitioners and senior in-house lawyers) with a representative sample of the European adult population.



To simplify somewhat, both groups tend to value universalism (fairness or justice) and benevolence (the interests of our in group or those close to us) highly. The lawyers value self-direction (the ability to think things through and decide things for themselves) significantly more highly. They also value stimulation and (socially recognised) achievement more. Similarly, they value power (which overlaps strongly with economic rewards) a bit more and security, tradition and conformity a good deal less.

So what? Schwartz predicts, and has demonstrated with other researchers, that some of these values are more or less associated with ethicality than others. So universalism and benevolence are the most pro-social values, achievement and power the least. Value the achievement and power more and you’re more likely to be unethical. If you value conformity tradition and security more then Schwartz thinks you will generally be associated with more ethical conduct. On self-direction,

²² See, for example, Moorhead R. (2014) Precarious Professionalism: Some Empirical and Behavioural Perspectives on Lawyers. *Current Legal Problems* 67(1):447-481 and 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>.

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stimulation and hedonism he is less clear in his predictions but suggests that some of these may be associated with less ethical decisions.

My interest in this is not really to set up some kind of deterministic, causal link between values, particular environments and behaviour. However, I am interested in whether lawyers from different types of practice, law students heading in different directions, and so on have different values and whether those values are the result of students and lawyers picking the environments that suit them best or their environments shaping them.

So, for instance, we did find in looking at the values of this group that those lawyers in private practice who working in highly regulated sectors had somewhat different values: they valued justice, conformity and tradition more.

Table 1: Ranking of importance of values to those lawyers working in (or for clients in) highly and less regulated sectors

	IHLs		PP		
	Highly	Less	Highly	Less	
Universalism - tolerance	7	5	4	8	*
Conformity to rules	5	9	5	12	*
Tradition	17	17	14	18	***
Power Dominance	18	15	18.00	17	*

More interesting again is the question as to whether a person's values may *influence* their decision making. Note the emphasis on influence not on cause. When doing this work, we give our respondents ethical problems to deal with. One is a problem where the lawyer is asked to advise a company on how it should handle transactions over dual use items to a rogue regime. Dual use items are engineering items that can be used to make weapons.

They are told they advise the business that these transactions are highly likely to be unlawful. Think sanctions busting. They are then asked:

- Prior to the company deciding what to do, should you also advise the client on how to handle the transactions so the regulator is significantly less likely to scrutinise them?

I have conducted this experiment with a number of groups of lawyers. Generally, about one in four say they *would* advise their clients in this way and the remainder say they *would not*. The immediate question for now is not whether this is the right or wrong answer but how the values of these two groups might differ.

What we discover is that those more inclined to help 'cover up' illegal transactions on average value achievement and power significantly more highly than those who say no they would not do so.

So what?

In doing this experiment, I'm often using the survey as part of the training experience for the lawyers. It helps open their minds to their own subjectivity. Decisions are, up to a point, matters of personal preferences, sometimes subconscious personal preferences.

It's of interest also because *if* we see legal practice as increasingly emphasising power and achievement we can see how we might be reinforcing these values and influencing decisions in a riskier direction.

The third point, for students of zealous advocacy, is that if the traditional claim to zealous advocacy were correct then we might see different results. Proponents of zealous advocacy claim it as a kind of selfless putting of the client before all else. Yet, at least in values terms, the most zealous lawyers here were the ones who were most likely to have more strongly self-interested values: power and achievement is about the self not about the client.

We have another very interesting study of about 1,000 law students here and in the US examining the values, professionalism and ethical outlook of law students. This study looks at whether the ethics of law students might degrade – in psychologically measurable terms- during law school and also whether the values, professionalism and ethical outlook of students heading into business law are different from those heading into others types of jobs. Time forbids me from saying more about that here, but watch this space.

4. Conclusions

So what would I say by way of conclusions? Firstly, I think there is potentially a serious problem. A broad raft of evidence points in that direction. And the list of corporate problems I spoke of at the beginning point to the capacity of firms often held out as the best firms to make mistakes. I want to emphasise that I don't think these are bad firms, or bad apple lawyers. I think they probably made bad decisions and believe they can be trained, possibly more effectively regulated and certainly better managed way from that.

I should say also I don't doubt that I sometimes overstate or simplify the problem and want to emphasise that it is important to remember that ethics is not the only logic to be attended to: efficiency, creativity and innovation are all important, but their importance equally does not mean there is not work to do on ethics.

Secondly, I think there is an appetite for some change. I sometimes get criticised but more often get approached by practitioners after giving talks like this. Those approaches come with quite insistent support. COLPs and In-house lawyers are particularly willing to engage. The Ethical Leadership Initiative for IHLs, Paul Gilbert, Steven Vaughan, Stephen Mayson and I have recently launched hopes to tap into this.²³ We're starting a major study with in-house lawyers to stimulate an in-house lawyer and evidence led policy debate.

Thirdly, many of the concerns I have mentioned are concerns also for corporate governance. In some ways my anxieties are part of a broader picture. The question for corporate lawyers might be reshaped as, not how should I put the client's interest first, but how should I put the interests of good corporate governance first. There are shared interests with those working on banking standards and the like which are not best served by superficial claims about the superior professionalism of lawyers. Such claims are worryingly naïve in the context of what we know already about lawyer involvement in banking's problems. Those interests involve, I suspect, a clearer articulation of the expectations of lawyer advising corporations, internally and externally. It is also really interesting to hear what compliance officers and their ilk think about what lawyers do, how they approach independent investigations and disaster management, what they think approaches to legal professional privilege should be, and the like. It would be doubly interesting to hear, for

²³ <https://elihls.wordpress.com/>

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example, what non-execs expect and want from lawyers. There should be much more research in this area.

Fourthly, the Code of Conduct is hopelessly silent on the problems of commercial practice and its principles are seen as either irrelevant or unchallenging. They are of course neither. Work needs to be done to change that.

Finally, ethical leadership in lots of firms is, I would say, generally weak. I'm going to leave you with one last quote, but whether you think I am right or wrong about the specifics I have discussed tonight I am going to emphasise that we need to talk about ethics more, we need to teach it more and better, research it a whole lot more, and firms need to manage significantly more and more effectively. They should not assume – as many do – ethics is safe because they have chosen the right sorts and those 'right sorts' had training on it on the LPC. To illustrate this, let me give you one last quote from our interviewees. It came from an associate in a leading law firm:

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 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.

A final example of professional minimalism. It needs to change.

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