FOREWORD: PROFESSIONS AS CONTINGENT STRUCTURES IN A PERILOUS WORLD

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In John Grisham's *The Associate*, the hero goes through the ritual hazing all beginning lawyers are made to suffer – long hours going through massive numbers of tedious documents to find those that should be used in discovery and those that must be kept out.[1] It requires little legal skill or almost any skill except the ability to do without sleep. Law firms could charge for many billable hours sure in the knowledge their corporate clients would pay. Grisham's book was published in 2009 and the legal and professional services worlds have fundamentally changed since then. The nature of legal work, apparently immutable and resistant to change, has found itself subject to changes inflicted on other professions. One such challenge has come from general counsel in businesses who resent paying high fees for grunt work and another is the continuing impact of technology on the way work is performed and who actually performs it.

An Oxford study of the future of employment shows two developments in the 21st century are increasing the precarious nature of work.[2] First, the outsourcing of tasks to machines which are often operated by people in cheaper labour markets. The classic example is legal and business process outsourcing to India.[3] These are routine tasks which are relatively simple for machines to accomplish. Machines, too, have the benefits of not displaying confirmation biases or becoming tired. The second, more radical development is the ability of machines to take non-routine tasks and turn them 'into well-defined problems'.[4] They do this by using algorithms that work on big data sets, whether structured or unstructured. Machine learning thereby improves its work quality and flows the more it does. Frey and Osborne demonstrate that even where 'subtle judgement' (eg, in intensive care units in hospitals) is required machines can produce better results because they are rigorously unbiased in their decisions and

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1 John Grisham, *The Associate* (Doubleday, 2009).

2 Carl Benedikt Frey and Michael A Osborne, 'The Future of Employment: How Susceptible are Jobs to Computerisation?' (2017) 114 *Technological Forecasting and Social Change* 254.

3 Ernesto Noronha, Premilla D'Cruz and Sarosh Kuruvilla, 'Globalization of Commodification: Legal Process Outsourcing and Indian Lawyers' (2016) 46 *Journal of Contemporary Asia* 614.

4 Frey and Osborne, above n 2, 259.

recommendations.[5] Using a model based on United States ('US') labour statistics, Frey and Osborne estimate 47 per cent of the US workforce is susceptible to computerisation now and, as blockages in the technology are cleared, more will fall into the higher risk categories, even lawyers:

> For example, we find that paralegals and legal assistants – for which computers already substitute – in the high risk category. At the same time, lawyers, which rely on labour input from legal assistants, are in the low risk category. Thus, for the work of lawyers to be fully automated, engineering bottlenecks to creative and social intelligence will need to be overcome, implying that the computerisation of legal research will complement the work of lawyers in the medium term.[6]

The late Eliot Freidson argued that professions constituted a third logic between the market and bureaucracy, where market refers to consumer control and bureaucracy to control by managers. Professionalism is therefore an organised occupation that has the power to determine who will perform certain tasks.[7] Law in most countries appears to fit this model. Lawyers are granted monopolistic powers by the state which places them *primus inter pares* among those who work in the legal industry. The last part of the 20th century has seen this market closure eroded and authority given to a growing paralegal body of workers as the division of legal labour has intensified.

Freidson adopted the Weberian method of establishing ideal types in order to model professionalism in the world. When applied to the real world of medicine, Freidson demonstrates how the profession has altered through the 20th century into the 21st. The rise of insurance, hospitals and the incursion of the state into medical practice have attenuated the power of the medical practitioner, although doctors remain an esteemed and well-remunerated profession.[8] However, a number of students of the professions caution us about the prevalence of universalistic models of professionalism arguing for distinctions between Anglo-American and European models. According to Brock and Saks the field was dominated by Parsons and Freidson, which gave an American configuration to the field.[9] But this is now being contested by theorists of professions such as Scuilli and Evetts, who show how European professions differ from the US both in terms of history and form.[10] For medicine the twin processes of state control through institutions like the National Health Service, and increasing use of the techniques of New Public Management to monitor and audit doctors, nurses and others in Europe, create a different medical field to that found in the US.[11] Thus

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5 Ibid 260.

6 Ibid 267.

7 Eliot Freidson, *Professionalism: The Third Logic: On the Practice of Logic* (Polity, 2001) 19.

8 Ibid 182.

9 David M Brock and Mike Saks, 'Professions and Organizations: A European Perspective' (2015) 34 *European Management Journal* 1.

10 David Scuilli, 'Continental Sociology of Professions Today: Conceptual Contributions' (2005) 53 *Current Sociology* 915; Julia Evetts, 'Professionalism: Value and Ideology' (2013) 61 *Current Sociology* 778.

11 See Brock and Saks above n 9, 4–5. The distinction between the US and Europe is clearly delineated in the arguments over the repeal and reform of Obama's *Affordable Care Act* where US doctors are split in their views of reform: see Sandee LaMotte, 'What Doctors Think About the Affordable Care Act', *CNN* (online), 17 January 2017 <http://edition.cnn.com/2017/01/13/health/obamacare-doctors-opinions-aca/>.

we need to be sensitive to distinctions between different professions, their locales, and their theoretical rationales.

To attempt to define professions, professionalism and professionalisation is not exactly fruitless, but rather, as Llewellyn responded to Hoebel's question on what is law, it is best done *ex post* rather than *ex ante*, if at all.[12] Julia Evetts, however, provides a succinct conception of professions:

> Professionals are extensively engaged in dealing with risk, with risk assessment and, through the use of expert knowledge, enabling customers and clients to deal with uncertainty. To paraphrase and adapt a list in Olgiati and colleagues, professions are involved in birth, survival, physical and emotional health, dispute resolution and law-based social order, finance and credit information, educational attainment and socialization, physical constructs and the built environment, military engagement, peace-keeping and security, entertainment, the arts and leisure, religion and our negotiations with the next world.[13]

Her list is wide-ranging and recognises that in the 21st century the organisation and division of labour is such that historic categories are restrictive and exclusive rather than definitional and inclusive. This runs contrary to the Weberian notion of closure and market capture. We know from the neo-institutionalists that bright-line distinctions between managers and professionals can be hard to determine and that to interpret them as hybrids provides a richer, more nuanced picture of work in professional service firms.[14] There is a Foucauldian resonance here as power-knowledge emerges from the everyday scripts, interactions and routines, and we understand how the professional service is able to reproduce the professional class.[15]

The professional service firm is one of the distinct types of organisation that dominates the field today. Early histories of the professions show almost an absence of formal organisation.[16] With the advent of the teaching hospital during the French Revolution organisations for professionals start to become a reality. In law we have formalised legal education emerging at Harvard Law School in 1870 along with the Cravath idealisation of the corporate law firm at the turn of the century.[17] The large accounting firm, investment bank, law firm, and consulting

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12 See William Twining, 'Two Works of Karl Llewellyn – II: II The Cheyenne Way' (1968) 31 *Modern Law Review* 165, 176–7 n 33. See also K N Llewellyn and E Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (University of Oklahoma Press, 1941).

13 Julia Evetts, 'The Concept of Professionalism: Professional Work, Professional Practice and Learning' in Stephen Billett, Christian Harteis and Hans Gruber (eds) *International Handbook of Research in Professional and Practice-based Learning* (Springer, 2014) 29, 33 (citations omitted).

14 Justin Waring, 'Restratification, Hybridity and Professional Elites: Questions of Power, Identity and Relational Contingency at the Points of "Professional-Organisational Intersection"' (2014) 8 *Sociology Compass* 688.

15 Reading off Foucault we could argue that the surveillance and audit techniques in professional service firms gauge productivity (billable hours), willingness to commit (making partner) and determine social acceptability (activities in bar associations): Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, Vintage Books, 1977) [trans of: *Surveiller et punir: Naissance de la prison*, first published 1975]; Michael Power, 'Foucault and Sociology' (2011) 37 *Annual Review of Sociology* 35.

16 Penelope J Corfield, *Power and the Professions in Britain 1700–1850* (Routledge, 1995).

17 Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (University of North Carolina Press, 1983). Robert T Swaine, *The Cravath Firm and Its Predecessors, 1819–1947* (Ad Press, 1946) vol 1, 234.

firm signal the present state of the big global professional service firms. They are intertwined in webs of business, capital and trade and are imbued with immense influence and authority.

The articles in this volume address some of these themes and more. Organisation, ethics, education, technology, and risk are all scrutinised. It might be worth asking, although I have avoided it, why it is that studies of professions and professionalism tend to veer either towards an optimistic view or a rather more pessimistic one. This may have to do with the differences between functionalist and conflict approaches to the study of professions. But how we resolve these views is important because we will continue to live with professions; they will continue to be significant intermediators in society. In other words, we cannot avoid them, so we should come to terms with them. In the discussion that follows, I shall not treat the articles in order of printing but rather thematically.

Rogers, Kingsford Smith and Chellew face the organisation–professional dilemma head on as they analyse how large professional service firms are challenging the regulative bargain – how professions negotiate their societal position with the state.[18] Rogers et al take us into the theoretical and empirical morass of professions and firms. Organisations can exert considerable pressures that overcome professional ethics – big clients want their transactions done to their liking which can compromise ethical conduct. Indeed, Muzio et al argue it is the network effect of different professional service firms cooperating that creates opportunities for corrupt behaviours.[19] The nine largest law firms in Australia have formed their own 'Premier League', Law Firms Australia ('LFA'). One advantage of the LFA is that, because of the firms' size, they can institute management systems that attempt to audit behaviours so as to avoid a rogue 'Arthur Andersen' implosion.[20] We also see how they exert their power in debates and consultations over proposed regulations and directives. But rather than just being a distinct entity, the LFA has been able to form coalitions and alliances with other smaller firms and, as such, it has become a major player. The segue from regulation to ethics is apposite as Breakey and Sampford also venture inside large organisations and examine the ethics of in-house counsel in corporations and public service.[21] This is a difficult area as businesses will have codes of practice, staff handbooks and the like which everyone should follow. Certain professional groups such as lawyers, engineers and architects will have

18 Justine Rogers, Dimity Kingsford Smith and John Chellew, 'The Large Professional Service Firm: A New Force in the Regulative Bargain' (2017) 40 *University of New South Wales Law Journal* 218.

19 Daniel Muzio et al, 'Bad Apples, Bad Barrels and Bad Cellars: A "Boundaries" Perspective on Professional Misconduct' in Don Palmer, Kristen Smith-Crowe and Royston Greenwood (eds) *Organizational Wrongdoing: Key Perspectives and New Directions* (Cambridge University Press, 2016) 141.

20 Jonathan D Glater and Alexei Barrionuevo, 'Decision Rekindles Debate over Andersen Indictment', *New York Times* (online), 1 June 2005 <http://www.nytimes.com/2005/06/01/business/decision-rekindles-debate-over-andersen-indictment.html>.

21 Hugh Breakey and Charles Sampford, 'Employed Professionals' Ethical Responsibilities in Public Service and Private Enterprise: Dilemma, Priority and Synthesis' (2017) 40 *University of New South Wales Law Journal* 262.

their own professional codes of ethics. The question arises: what happens if they conflict? While they favour the ascendancy of the professional ethics, Breakey and Sampford realise that tensions persist and argue that different kinds of ethics can overlap, thereby reinforcing each other. Their schematic of public, private and professional values illustrates how the differences are of degree, not necessarily kind. They take us through a number of approaches to ethics in organisations, none of which on its own is sufficient. Behind their analysis the idea of the social licence to operate figures large and fits with their integrity model. Yet I wonder whether focusing on professional ethics in organisations is sufficient. In recent United Kingdom debates about ethics in alternative business structures, the key argument was about how to incentivise everyone in the organisation to behave ethically, not just the lawyers.[22] One thing which is increasingly clear is that to demarcate professionals in organisations might have unintended consequences. Professionals could form single profession groups that interact little with others, so perhaps an organisational ethics is necessary. The clearest, most catastrophic example of failure among professionals has been the Volkswagen emissions scandal, where professionals of all sorts, including lawyers, appeared to be absent in the decision-making.[23]

Hugh Breakey takes this further in his article, where he 'develops a model of an "ethics regime", describing the elements that contribute to empowering professionals with the moral motives and capabilities required to act morally'.[24] He teases out the capabilities, both personal and interpersonal, and the environmental qualities that go to form an ethics regime that will promote and strengthen the moral qualities of institutions. With this kind of framework and techniques, everyone would benefit.

I treat Breakey and Sampford on national exams and Kingsford Smith, Clarke and Rogers together as they pose an interesting tension. Breakey and Sampford baldly state early in their article '[f]inancial advising is not a profession'.[25] Kingsford Smith et al take banking as a profession and investigate the structures and processes that have allowed it to diverge from ethical standards.[26] There are groups of financial advisers who might be functionally equivalent to plumbers and so create doubts over their professionalism, but this is increasingly hard to sustain as the folk label of 'professional' is used more widely.[27] To rein the label back in puts us back in the definitional game in which there is no clear result. If

22 Richard Moorhead, 'Ethical Leadership for In-House Lawyers Initiative, Part I: Mapping the Moral Compass' (Report, UCL Centre for Law and Ethics, June 2016) <https://www.laws.ucl.ac.uk/wp-content/uploads/2016/06/Mapping-the-Moral-Compass-Exec-Report-.pdf>.

23 See generally 'Volkswagen emissions scandal' *Wikipedia*. <https://en.wikipedia.org/wiki/Volkswagen_emissions_scandal>. See also Paul Lippe, *Volkswagen: Where Were the Lawyers?* (October 13 2015) Legal Rebels <http://www.abajournal.com/legalrebels/article/volkswagen_where_were_the_lawyers>.

24 Hugh Breakey, 'Building Ethics Regimes: Capabilities, Obstacles and Supports for Professional Ethical Decision-Making' (2017) 40 *University of New South Wales Law Journal* 322.

25 Hugh Breakey and Charles Sampford, 'National Exams as a Tool for Improving Standards: Can Australian Financial Advisers Take a Leaf from the Professionals' Book?' (2017) 40 *University of New South Wales Law Journal* 385.

26 Dimity Kingsford Smith, Thomas Clarke and Justine Rogers, 'Banking and the Limits of Professionalism' (2017) 40 *University of New South Wales Law Journal* 411.

27 Cf Howard S Becker, *Sociological Work* (Aldine, 1970) ch 6 'The Nature of a Profession'.

there are dangers that some kinds of professionals will go rogue because of institutional pressures, can they be overcome? Breakey and Sampford argue for exams being part of a suite of mutually reinforcing procedures that could inculcate professional values among financial advisers, although they fully understand the difficulties in implementing such procedures. With banking it is hard to imagine, given the range of scandals and corrupt behaviour – LIBOR, Madoff, GFC – whether normal ethical conduct can be resumed. Is self-regulation feasible? Can it co-exist with external regulation? As Kingsford Smith, Clarke and Rogers opine, banking might have reached the limits of professionalism.

Are there alternatives? One is the de facto regulation offered by professional indemnity ('PI') insurance. Morgan and Hanrahan see PI insurance as a form of private regulation of advisers' conduct.[28] It is not a panacea, however, as there are constraints and limits to PI insurance that have to account for such things as moral hazard. Insurance does provide feedback loops; as companies gather data on claims, they can understand the actions that give rise to them and devise educational strategies to mitigate them. To refer to Evetts and risk again, insurance can be perceived as one of a portfolio of professional strategies to reinforce appropriate behaviours, but Morgan and Hanrahan argue for more interoperability among PI markets so consumers understand better.

Graham Greenleaf reviews the Susskinds book *The Future of Professions: How Technology Will Transform the Work of Human Experts.*[29] The book's radical thesis is that most professionals' work can be decomposed into tasks which are then amenable to technological solutions. As I argued at the beginning of this Foreword, more and more of the work done by professionals is succumbing to machines. Rather than lawyers we will have legal or knowledge engineers.[30] Perhaps the biggest transformations will come from the increased use of artificial intelligence and big data, as exemplified by ROSS Intelligence that researches bankruptcy law by using natural language processing on IBM Watson.[31] The aim of ROSS is not to displace lawyers but to augment and improve their capacities. Tasks that normally would take weeks are reduced to hours or days. In addition, the greater use of artificial intelligence creates the potential to improve access to justice, as governments reduce amounts spent on legal aid. This means there are interesting differences between the ways lower income clients and corporate clients are being serviced. Corporate clients will demand and receive bespoke legal services but with the routine tasks

28 John K Morgan and Pamela Hanrahan, 'Professional Indemnity Insurance: Compensating Consumers and Regulating Professionals' (2017) 40 *University of New South Wales Law Journal* 353.

29 Graham Greenleaf, 'Review Essay: Technology and the Professions: Utopian and Dystopian Futures' (2017) 40 *University of New South Wales Law Journal* 302.

30 The term 'legal engineer' is being adopted by tech companies working in spheres that involve law. See, eg, the team members of Monax, which creates smart contracts on blockchain: Monax, *Company: Team* (2017) <https://monax.io/company/team/>.

31 See ROSS, *Do More than Humanly Possible* (2017) <http://www.rossintelligence.com>. ROSS has been employed by a significant number of big law firms to assist with their research.

outsourced to cheaper labour sources or machines.[32] Individuals will probably find themselves interacting with machines and chatbots more. A prime example of this is Josh Browder's Do Not Pay parking ticket appeal chatbot, a free service that interrogates the client and then offers to write a letter to the appropriate authorities.[33] Online courts with or without judges will take over more minor disputes, which will reduce the need for lawyers.[34]

Are we then seeing the end of lawyers and the demise of the professions? Clearly not. But we are seeing transformations occurring which are going to have profound effects on how professions continue. Despite the technological transformations taking place, we cannot ignore the histories and cultures of professions. The articles in this volume demonstrate that. Yet technology and millennials are changing how professional service firms operate, if not the professions themselves.[35] Career trajectories will be different from those of the 20th century and despite the commercial pressures inherent in these developments, they have the potential to create more space and time for ethics and the values that contribute to a better society. But I will leave readers with one thing to think about. As AI improves – through self-learning, moves towards autonomy, and self-replication – how will we ensure the machines are ethical? Are we content to update them occasionally via software with the latest human ethical codes, or should we be thinking about a distinctive code of ethics for machines, and, if so, what would it look like?[36]

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32 Dana Remus and Frank Levy, 'Can Robots be Lawyers? Computers, Lawyers, and the Practice of Law' (article draft, 27 November 2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2701092>. See also Steve Lohr, 'AI is Doing Legal Work. But It Won't Replace Lawyers, Yet' *The New York Times* (online), 19 March 2017 <https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html?hpw&rref=technology&action=click&pgtype=Homepage&module=well-region&region=bottom-well&WT.nav=bottom-well>.

33 See Do Not Pay, *The World's First Robot Lawyer* <http://www.donotpay.co.uk/signup.php>. The site can handle parking appeals in the UK and New York and will also deal with landlords who refuse to carry out repairs. Do Not Pay uses IBM Watson, but a new venture to assist refugees operates on Facebook Messenger. For a fuller account of these see Joanna Goodman, 'Legal Technology: The Rise of the Chatbots' *Law Society Gazette* (online), 20 March 2017 <https://www.lawgazette.co.uk/features/legal-technology-the-rise-of-the-chatbots/5060310.article>.

34 See Courts and Tribunals Judiciary, *Online Dispute Resolution* (2017) <https://www.judiciary.gov.uk/reviews/online-dispute-resolution/>.

35 For the most complete treatment of AI in law see Joanna Goodman, *Robots in Law: How Artificial Intelligence is Transforming Legal Services* (ARK Group, 2016).

36 In relation to autonomous automobiles these are pressing questions phrased as the Trolley Problem, see Judith Jarvis Thomson, 'The Trolley Problem' (1985) 94 *Yale Law Journal* 1395. While the problem is couched as a human response to unbearable choices about whom to kill or injure, autonomous vehicles are being programmed to solve their own trolley problems.