

In dependence

Oakley, Emma; Vaughan, Steven

DOI:

[10.1111/jols.12143](https://doi.org/10.1111/jols.12143)

License:

Other (please specify with Rights Statement)

Citation for published version (Harvard):

Oakley, E & Vaughan, S 2019, 'In dependence: the paradox of professional independence and taking seriously the vulnerabilities of lawyers in large corporate law firms', *Journal of Law and Society*, vol. 46, no. 1, pp. 83-111. <https://doi.org/10.1111/jols.12143>

[Link to publication on Research at Birmingham portal](#)

Publisher Rights Statement:

Checked for eligibility: 11/02/2019

This is the peer reviewed version of the following article: Oakley, E. and Vaughan, S. (2019), In Dependence: The Paradox of Professional Independence and Taking Seriously the Vulnerabilities of Lawyers in Large Corporate Law Firms. *Journal of Law and Society*, 46: 83-111. doi:10.1111/jols.12143, which has been published in final form at: <https://doi.org/10.1111/jols.12143>. This article may be used for non-commercial purposes in accordance with Wiley Terms and Conditions for Self-Archiving.

General rights

Unless a licence is specified above, all rights (including copyright and moral rights) in this document are retained by the authors and/or the copyright holders. The express permission of the copyright holder must be obtained for any use of this material other than for purposes permitted by law.

- Users may freely distribute the URL that is used to identify this publication.
- Users may download and/or print one copy of the publication from the University of Birmingham research portal for the purpose of private study or non-commercial research.
- User may use extracts from the document in line with the concept of 'fair dealing' under the Copyright, Designs and Patents Act 1988 (?)
- Users may not further distribute the material nor use it for the purposes of commercial gain.

Where a licence is displayed above, please note the terms and conditions of the licence govern your use of this document.

When citing, please reference the published version.

Take down policy

While the University of Birmingham exercises care and attention in making items available there are rare occasions when an item has been uploaded in error or has been deemed to be commercially or otherwise sensitive.

If you believe that this is the case for this document, please contact UBIRA@lists.bham.ac.uk providing details and we will remove access to the work immediately and investigate.

IN DEPENDENCE: THE PARADOX OF PROFESSIONAL INDEPENDENCE AND TAKING SERIOUSLY THE VULNERABILITIES OF LAWYERS IN LARGE CORPORATE LAW FIRMS

EMMA OAKLEY* AND STEVEN VAUGHAN**

Abstract

In this paper, and drawing on the work of Martha Fineman and others, we deploy a vulnerability lens as an heuristic device to push against the concept of professional lawyer independence as enshrined in statute and promoted by legal services regulators. Using interviews with 53 senior partners and others from 20 large corporate law firms, we show how the meaning and practice of independence are profoundly mediated by the contexts, relationships and interactions of corporate lawyers' everyday working lives. Vulnerable to competition from other firms, the demands of clients, the shift over time from 'trusted advisor' to 'service provider', regulatory requirements, pressures to make profit and so on, these corporate lawyers appeared prone to developing and normalising potentially risky and irresponsible practices. We therefore argue that a debate about corporate legal regulation is better based upon a richly theorised concept of inter-dependence that takes seriously the causes and effects of practitioner vulnerabilities in particular circumstances.

* Law School, University of Birmingham, Birmingham, B15 2TT

E.L.Oakley@bham.ac.uk

** Faculty of Laws, University College London, Bentham House, Endsleigh Gardens, WC1H 0EG

steven.vaughan@ucl.ac.uk

Acknowledgements

We are grateful for comments on earlier drafts from the anonymous reviewers, Richard Abel, Martha Fineman, Joanna Gray, Maria Lee, Robert Lee, Richard Moorhead, Hilary Sommerlad, Elen Stokes, and Richard Young. We are also grateful for the patience of the JLS editors. The usual disclaimer applies.

INTRODUCTION

In this paper we argue that the concept of the independent lawyer enshrined in statute and promulgated by regulators is a convenient myth. It draws heavily and uncritically upon individualistic liberal constructions of autonomy, and historically contingent constructions of professional practice, which do not reflect reality. These, in turn, legitimise ‘light touch’ approaches to legal services regulation that further erode meaningful independence. As such, current conceptualisations of professional independence (and taken-for-granted assumptions about its content, operation, and value) may serve to validate and exacerbate the very practices and potential harms independence is ostensibly intended to prevent. We draw on empirical data from interviews with 53 senior partners and others from 20 of the world’s largest law firms to suggest that a more fruitful starting point for thinking about professional independence is one that better reflects the realities of individual and collective legal practice in an interconnected, interdependent, and hyper-competitive world of global legal services. To do this, we utilise theories that challenge mainstream political and philosophical constructions of individualistic independence and self-sufficiency as either achievable or desirable guarantors of human agency. In particular, we draw upon relational accounts of autonomy, together with Martha Fineman’s vulnerability thesis, to argue that taking seriously the occupational and relational stresses and strains of corporate lawyering *as vulnerabilities* can help sensitise us to the situational and systematic hazards of contemporary corporate legal practice in more nuanced and effective ways. Such may also enhance claims for more responsive, effective regulation.

We accept that the elision of vulnerability and elite corporate lawyers may, initially, be difficult to swallow. However, we use vulnerability in a context typically associated with social advantage rather than disadvantage precisely because our data, along with much existing research, shows that neither the social advantage of corporate lawyers nor the current regulatory framework governing legal practice adequately support the long-term professional viability of the sector. This is because current regulatory perspectives fail to take seriously the vulnerabilities of lawyers to clients in a global corporate marketplace.¹ Lawyers are vulnerable to competition, client pressure, regulatory obligations, the demands of other stakeholders, desires for profit making etc. Clients are vulnerable to the market, to state interference, to regulatory action. Legal services regulators are vulnerable to the individuals and law firms they regulate, to government pressures, to the profession and professional associations seeking dominance in a globalised market etc. Over time, the relationship between the lawyer and the state, and between the lawyer and the client, has manifestly changed. The dominant regulatory rhetoric suggests that clients need protecting from their lawyers. In the case of large, multi-national, multi-billion-dollar corporates and financial institutions as clients, who exert significant buying power in a hyper-competitive legal services market, this regulatory orientation simply does not reflect

¹ We are grateful to one of the anonymous reviewers for this useful phrasing.

reality. This is compounded by assumptions, which our data show to be false, that the internal regulatory structures of large corporate law firms sufficiently foster professional independence and practice, adequately protecting firms, lawyers, and clients alike. The result is a regulatory framework that leaves the internal workings of large corporate law firms singularly under scrutinised. This regulatory confidence is unwarranted and unwise. It underestimates the extent of occupational control that powerful clients exert over large corporate law firms and leaves considerable space for the co-development of potentially risky and irresponsible practices – practices that may have wider consequences for us all. We illustrate this last point in particular using the phenomenon of what we term the ‘shadow client’ – a now standard market practice in which the client-practitioner relationship is mediated by third parties who appoint the lawyer on behalf of the client and pay the lawyer’s fees.

Our article unfolds in three parts. In part one, we provide a brief overview of how professional independence has been conceptualised in the academic and regulatory literature on professions.² What is most striking here is that classical, liberal conceptions of independence continue to inform professional regulatory discourse relatively untouched by the considerable empirical and philosophical challenges to their validity. Part two considers the interfaces between concepts of independence, agency, and autonomy. Here, we introduce Fineman’s vulnerability thesis,³ in which she suggests that we replace a focus on the independent, self-sufficient liberal subject with the concept of the universally vulnerable subject. We deploy the concept of vulnerability as an heuristic device to reflect more contextually upon the institutional and occupational hazards corporate lawyers face, and how they make sense of and respond to these. We also draw upon Catriona Mackenzie’s taxonomy of sources and states of vulnerability to flesh out our vulnerability lens. This helps sensitise us to the particular ways in which powerful social actors, such as corporate lawyers, may become relationally and situationally vulnerable to a range of context-specific harms, as well as (unintentional) causes of harm for others.⁴

In the final part of the paper we present the findings of our semi-structured interviews and situate them within the debates set out in parts one and two. Here, we illustrate our City lawyers’ discursive understandings of: (i) the concept of professional independence; (ii) the inter-dependence, inter-connectedness, and attending challenges of contemporary legal practice; and (iii) their responses to the perceived shift in the power balance towards their corporate clients. Drawing on the concepts and mechanisms set out in part two, we use our data to consider the various, complex, direct and indirect

² For in-depth accounts, see: B. Green, ‘Lawyers’ Professional Independence: Overrated or Undervalued’ (2013) 46(3) *Akron Law Rev.* 599; E. Myers, ‘Examining Independence and Loyalty’ (1999) 72(4) *Temple Law Rev.* 857; R. Gordon, *The Independence of Lawyers* (1988).

³ M. Fineman *The Autonomy Myth* (2004); M. Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010) 60 *Emory Law J.* 251.

⁴ C. Mackenzie, ‘The importance of relational autonomy and capabilities for an ethics of vulnerability’ in C. Mackenzie, W. Rogers, and S. Dodds (eds), *Vulnerability: New essays in ethics and feminist philosophy* (2014).

ways in which corporate lawyers' professional judgement may be adversely influenced by the inter-dependent nature of their occupational work in ways which current constructions and institutions of professionalism and professional independence do not adequately address.

OUR METHODOLOGY

In 2014, we were engaged by the Solicitors Regulation Authority to conduct, on its behalf, a piece of work on the changing nature of lawyer-client relationships in large corporate finance law firms.⁵ Between December 2014 and March 2015 we conducted 53 interviews, speaking with a mix of senior corporate and finance partners (often heads of department with many decades of experience), compliance officers for legal practice (COLPs),⁶ risk officers and others, from 20 leading English and US law firms delivering corporate finance legal services from England & Wales. Our starting point was the 196 law firms that the SRA categorises as 'high impact'. Using a random sequence generator to determine the order in which we made contact,⁷ we approached 37 'high impact' firms with a request to participate; of which 17 failed to reply or declined to participate.⁸ There was no difference, in size, practice areas, or type (e.g. US headquartered/UK headquartered) between those who agreed and those who did not. Some firms declined to participate because of a stated lack of time; a couple were wary of the subject matter of the study. While, therefore, the number of firms (n=20) is small, and questions could be raised about self-selection bias and the reliability of our data,⁹ the problems we demonstrate below suggest that the possibility of a self-selection bias in those firms that *were* willing to take part (i.e. the risk that we may have missed firms with the most egregious problems) seems relatively low. Our data does not paint the profession in a particularly positive light and the issues we found were widespread. This, coupled with the lack of comparable research in England & Wales, and the difficulty in gaining access to such elite organisations,¹⁰ makes us comfortable with the response rate and spread of participating firms.

⁵ C. Coe and S. Vaughan, *Independence, Representation and Risk* (2015).

⁶ COLPs are tasked with ensuring that systems and processes are in place for the lawyers in their law firm, and the firm itself, to achieve compliance with the SRA's regulations. See further: S. Aulakh and J. Loughrey, 'Regulating Law Firms from the Inside' (2018) 45(2) *J. of Law and Society* 254.

⁷ While such does not necessarily mean our data is representative, using a generator is one way to reduce sampling biases.

⁸ In the social sciences, this response rate is considered very good indeed. See: Y. Baruch and B. Holtom, 'Survey response rate levels and trends in organizational research' (2008) *Human Relations* 1139.

⁹ N. Golafshani, 'Understanding reliability and validity in qualitative research' (2003) 8 *The Qualitative Report* 597.

¹⁰ On which, see: L. Webley, 'Qualitative approaches to empirical legal research' in P. Cane and H. Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (2010); and S. Vaughan, 'Elite and Elite-lite Interviewing' in A. Franklin and P. Blyton (eds) *Researching Sustainability* (2013).

An interview topic guide was created in conjunction with the SRA.¹¹ This covered questions on the changing nature of lawyer-client relationships, independence, and risk management. Most interviews were between 45 and 55 minutes long, and were anonymous. The SRA did not, and does not, know which law firms we contacted and/or which partners, COLPs and others participated. Below, we deploy identifiers ('EH Corporate 6', for example) when we quote from the interviews, which were transcribed by a third party transcription company and then anonymised before being coded. Our use of qualitative data allows us to confirm, confront and/or contest (depending on the issue) the ways in which independence is supposed to be manifested (as set out in current scholarship, rules of professional conduct, and associated case law) and the extent to which these speak to the actual practices and beliefs of the lawyers we interviewed. As such, we use this data to add a richness and depth to the existing work on lawyer independence.

THEORISING AND REGULATING PROFESSIONAL INDEPENDENCE

Professional independence is classically considered both a hallmark and bulwark of professional practice,¹² with collective independence (self-regulation) and individual independence (detached, unbiased judgement) being indelibly entwined. Professional independence at the organisational/occupational level (defined in terms of communal self-regulation and autonomy over educational, ethical, and disciplinary matters) is typically considered to inculcate and foster the independence of individual practitioners, insulating them from the distorting influences of the state, market, clients, customers and other stakeholders.¹³ In this way, professional independence is thought to ensure that professionals exercise their professional judgement in particular cases in accordance with communal standards of competence and ethicality, and in a detached fashion. As a consequence, professionals and their specialist knowledge may simultaneously serve the wider public interest, as well as that of their clients.

Professional independence in both the scholarly and regulatory literature has historically tended to take this view for granted, and so frame lawyer independence primarily in terms of a three-way relationship between lawyer, client, and state. This relationship comprises two core dimensions: (i) the capacity to advise clients independent of state or regulatory interference; and (ii) lawyer independence from clients.¹⁴ As such, there already exists an inherent tension or "paradox of professional independence" between duties to the client, duties to the court, and the wider public

¹¹ Based on broad themes emerging from existing literature, discussed in this paper, on lawyer-client relationships in large firms.

¹² T. Rostain 'Self-Regulatory Authority, Markets and the Ideology of Professionalism' in R. Baldwin, M. Cave and M. Lodge (eds) *The Oxford Handbook of Regulation* (2010) 169

¹³ Green, op. cit., n. 2; Gordon, op. cit., n. 2.

¹⁴ Green, op. cit., n. 2; Gordon, op. cit., n. 2.

interest.¹⁵ This may go some way to explaining why professional independence, despite retaining its rhetorical appeal, remains an elusive concept. In this paper, however, we consider whether the concept of professional independence presents a more fundamental paradox. This is highlighted by two broad strands in the literature on professions and professionalism.

To admittedly oversimplify, mainstream ‘official’ views of professional independence reflect benign, functionalist accounts that draw predominantly on the work of Durkheim, and uncritically define professions as self-perpetuating, public-interest oriented institutions. By contrast, later monopolistic or conflict accounts grounded in work of Marx and, in particular, Weber, view professions as context-specific self-legitimising projects to win exclusive rights to practise in specified occupational fields and thereby achieve high social status and enhanced income (‘monopoly rents’). Here, a claim to detachment (to independence) is the counterpart of law’s claim to be a closed system of reasoning open only to a few.¹⁶ While the first view retains great discursive power and institutional support, the social organisation of professions as a whole, as well as corporate legal practice in particular, reflects complex, temporal, historic and context-contingent relationships of interdependence and interconnectedness as well as self-interest. Mather et al, for example, challenge the notion of a single, community-wide concept of lawyer independence, suggesting that it, along with (other dimensions of) professionalism, necessarily has multiple meanings that reflect the different contexts and conditions of situated legal work.¹⁷ Relatedly, professional identities and practices reflect wider relations of power. How power flows between client and practitioner influences who controls the definition, content, and manner of work, as well as attending constructions of professionalism,¹⁸ and the nature and extent of practitioner autonomy.¹⁹ This has changed considerably over time.

Once a relatively numerically small and homogenous guild-like institution,²⁰ the legal profession in England & Wales is today a large and highly fragmented occupational field that runs from the smallest, single-handed high street practice advising individual consumers to global law firms with thousands of employees, one of the most profitable sectors of the UK economy.²¹ The focus for this

¹⁵ See, for example: P. Margulies, ‘Lawyers’ Independence and Collective Illegality in Government and Corporate Misconduct, Terrorism and Organized Crime’ (2006) 58 *Rutgers Law Rev.* 939; R. Cramton ‘The Lawyer’s Professional Independence: Memories, Aspirations, and Realities’ in J. Davidson (ed) *The Lawyer’s Professional Independence: An Ideal Revisited* (1985).

¹⁶ . See: M. Saks, ‘Defining a Profession: The Role of Knowledge and Expertise’ (2012) 2 *Professions & Professionalism* 1; M. Larson, *The Rise of Professionalism: A Sociological Analysis* (1977); and Hilary Sommerlad, ‘Socio-legal studies and the cultural practice of lawyering’ in D. Feenan (ed) *Exploring the ‘Socio’ of Socio-Legal Studies* (2013).

¹⁷ L. Mather et al., *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (2001) 37. See also: L. Levin and L. Mather (eds), *Lawyers in Practice: Ethical Decision Making in Practice* (2012).

¹⁸ T. Johnson, *Professions and Power* (1972) 42-47.

¹⁹ id.

²⁰ E. Krause, *Death of the Guilds: Professions, States, and the Advance of Capitalism* (1996).

²¹ Legal Education and Training Review, *Setting Standards: The Future of Legal Services Education and Training Regulation in England and Wales* (2013) 77.

paper is the corporate hemisphere: massive, global law firms advising global corporations and financial institutions.²² This corporate hemisphere is an important, and under explored, site of English legal practice.²³ In 2017-2018, the combined annual turnover of *just the top ten* of the top 200 English & Welsh firms was £13.8billion.²⁴ This was more than a third of the turnover of the *entire* legal services sector in England & Wales for the same year. The solicitors working inside these law firms are regulated by the Solicitors Regulation Authority,²⁵ which derives its mandate from the Legal Services Act 2007 (LSA) and operationalizes its regulation of solicitors via the SRA Handbook.²⁶ Independence is referred to in the regulatory objectives set out in the LSA, in that legal services regulators are required to “encourage[e] an independent, strong, diverse and effective legal profession.”²⁷ However, the 2007 Act is silent on what independence means, and the associated case law is sparse. The Legal Services Board (LSB) is the over-arching regulator of legal services, sitting above the SRA. In 2010, the LSB set out what it understood to be the meanings of the regulatory objectives in the LSA: “Independent primarily means independent from government and other unwarranted influence.”²⁸ One step down, the SRA’s Handbook contains 10 “mandatory Principles” with which all solicitors must comply. Principle 3 states that a lawyer should, “not allow [his/her] independence to be compromised.” The guidance to this Principle states that:

““Independence” means your own and your firm’s independence, and not merely your ability to give independent advice to a client. You should avoid situations which might put your independence at risk - e.g. giving control of your practice to a third party which is beyond the regulatory reach of the SRA or other approved regulator.”

The SRA and LSB guidance does not offer up to those in practice substantive advice on what independence means, and/or how to counter potential challenges to that independence. The LSB is silent on what might constitute “other unwarranted influences” and this is mirrored by a similar lack of definition in the SRA’s guidance that a firm should not “give away control” of its practice. Likewise, the courts in England & Wales have said little on lawyer independence. Of thousands of rulings by the Solicitors Disciplinary Tribunal, only a handful engage with what the principle of independence means and the benchmark that it sets.²⁹ Even then, active engagement is sparse. As

²² J. Heinz and E. Luhmann, *Chicago Lawyers: The Social Structure of the Bar* (1982).

²³ On the empirical research that does exist, see: R. Moorhead and V. Hinchly, ‘Professional Minimalism: The Ethical Consciousness of Commercial Lawyers’ (2015) 42(3) *J. of Law and Society* 387.

²⁴ See: <https://www.thelawyer.com/top-200-uk-law-firms/>

²⁵ <http://www.sra.org.uk/home/home.page>

²⁶ <http://www.sra.org.uk/solicitors/handbook/handbookprinciples/content.page>

²⁷ Legal Services Act 2007, s. 1(1)(f).

²⁸ LSB, ‘The Regulatory Objectives – Legal Services Act 2007’ (LSB, undated) 11. See:

http://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf

²⁹ See: *In the matter of Paul Francis Simms*, Lawyers Disciplinary Tribunal, 2 February 2004, para 76; *SRA v Brian Laurence Miller and David Joel Gore*, SDT Case Case No. 10619-2010, 3 October 2011, para 178; *In the*

such, the standard of independence is unclear. The consequence of this lack of regulatory detail is that the individual solicitors who are intended to be governed by ‘independence’ are also left free to determine what this amounts to in practice, something which, for a variety of reasons, they may be poorly positioned to judge, let alone effectively act upon.

As such, it is essential to consider both social transformations and how constructions and enactments of professionalism and professional independence reflect power relations between practitioner and client in particular times, places and contexts. Johnson identifies three typologies of professionalism which inform how professionalism operates as a form of occupational control: (a) collegiate models where the practitioner defines the content and manner of their work, and therefore retain relative autonomy; (b) patronage models, where the client controls the content and manner of work reducing or negating practitioner autonomy; and (c) mediative models in which the state (or another third party) intervene and modify the relationship between practitioner and client, ‘rebalancing’ autonomy in the direction of either client or practitioner.³⁰ The current regulatory framework can be conceptualised as an attempt by the state to ‘mediate’ the relationship between client and practitioner in favour of clients (conceptualised as ‘consumers’) based on the assumption that lawyers exercise too much power and autonomy over the content and manner of their work. By contrast, and as we will show, corporate law operates on the basis of patronage professionalism, in which high-status, powerful clients already significantly define and control the client-practitioner relationship, and the content and manner of work. Furthermore, practitioners’ power and autonomy is inversely related to the status of the client.³¹ The higher the client’s status, the less power and autonomy the practitioner typically has over the content and manner of their work. In an occupational context therefore, corporate lawyers’ social and professional status provides little resilience. These contextual and relational challenges are nowhere reflected in the formal rules that treat professional independence as a self-evident and self-perpetuating logic of professional practice. We come back to this below.

INDEPENDENCE, AUTONOMY, AND AGENCY

The concepts of the independent lawyer and professional independence articulated in official narratives draw heavily and uncritically upon constructions of independence in liberal political discourse. This includes highly individualistic constructions of agency and self-hood which emphasise

matter of David Peter Barber and Others, SDT Case 9698-2007, 21 July 2009, para 273; *SRA v Tax and Legal Consultancy Limited*, SDT Case No. 10722-2011, 11 October 2011, para 39; *Reed v George Marriott* [2009] EWHC 1183 (Admin) para 46; *Crown Dilmun v Sutton* [2004] 1 BCLC 468 para 118.

³⁰ Johnson, op. cit., n. 18., 45.

³¹ id. See also: Heinz and Luhmann, op. cit., n. 21.

hyper-rational autonomy and self-sufficiency.³² From this perspective, independence means the capacity to make rational choices free from distorting and manipulative external influences (notably from the state).

Communitarian and feminist commentators, amongst others, however, highlight how hyper-individualist, hyper-rational, and abstract concepts of autonomy and agency ignore the profound and inescapable ways in which individual self-identity, autonomy and agency are socially embedded and constructed. They also highlight the ways in which social dependency, collectivity, and collaboration support and enable, as well as constrain, individual agency, rather than constrain it.³³ This has led some to conclude that the concept of autonomy should be abandoned.³⁴ Martha Fineman rejects autonomy as one of the “foundation myths” of western, capitalist liberal political theory and suggests an alternative based on a theory of universal dependence, vulnerability and resilience.³⁵ According to Fineman, vulnerability is a constant aspect of being human, since our embodied state leaves us all inescapably prone to “harm, injury and misfortune.”³⁶ Exposure to and experiences of vulnerability are also, however, particular and variable, reflecting individuals’ contextual and structural location, well as their specific embodiment.³⁷ As such, vulnerability is not merely inherent in our embodied state, but reflects our position within, and in relation to, wider social, political, economic and institutional arrangements. This is important for later.

For Fineman, the solution to vulnerability is resilience, which is found “in the assets or resources an individual accumulates and dispenses over the course of a lifetime and through interaction with and access to society’s institutions.”³⁸ Resilience provides an individual with the “means and ability to recover from harm or setbacks.”³⁹ In addition, and by contrast with the non-interventionist state supported by liberal concepts of self-sufficient autonomy, the universality of vulnerability, argues Fineman, places an obligation on the state to create conditions and institutions which collectively

³² Fineman, op. cit. (2004), n. 3, p. 8.

³³ See, for example: A. MacIntyre, *After Virtue* (1981); M. Sandel, *Liberalism and the Limits of Justice* (1998, 2nd edn); C. Mackenzie and N. Stoljar (eds), *Relational Autonomy* (2000); C. Gilligan, *In a Different Voice* (1982); J. Benjamin *The Bonds of Love: Psychoanalysis, Feminism, and the Problem of Domination* (1988); K. Abrams, ‘From Autonomy to Agency: Feminist Perspectives on Self-Direction’ (1999) 40(3) *William and Mary Law Rev.* 805.

³⁴ See, for example: Gilligan (id.); Benjamin (id.); Abrams (id.).

³⁵ Fineman, op. cit. (2004), n. 3.

³⁶ id., p. 28.

³⁷ Fineman, op. cit. (2010), n. 3.

³⁸ M. Fineman and A. Grear, ‘Vulnerability as Heuristic’ in M. Fineman and A. Grear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (2013) 2.

³⁹ Martha Fineman, ‘Vulnerability, resilience, and LGBT youth’ (2013) 23 *Temp. Pol. & Civ. Rts. L. Rev.* 307, at 320.

protect against, diminish, and compensate for vulnerability.⁴⁰ As we will come to show, our work suggests that current regulatory approaches to solicitors in large law firms fail to do this.

Fineman's thesis is developed specifically to think about the ways in which foundational concepts such as autonomy and independence operate in tandem with a stigmatised concept of dependence, in particular failing to recognise the social value of (unwaged) caring labour. However, as a theory of citizen-state relations, her ideas potentially have much to offer an exploration of (legal) professionalism and those who would seek to rejuvenate it, in particular via professionals' commitment to deploy their specialised knowledge and expertise in the wider public interest. For example, they allow us to critique discourses of professionalism and professional regulation on their own terms - as forms of occupational control which claim to institutionalise and protect arrangements for managing our common vulnerabilities, providing resilience to professionals (here corporate lawyers), their clients and the wider public by solving important social problems using expert knowledge in a fragmentary modern world

1. Vulnerability and Corporate Lawyers

The concept of vulnerability and its uses are not unproblematic and, rather like independence, it is a somewhat elusive and elastic notion. Vulnerability has also become something of a zeitgeist term,⁴¹ increasingly ubiquitous, but meaning different things, in lay, academic, and governing discourses. The potential for the term "to justify coercive or objectionably paternalistic social relations, policies, and institutions, which often function to compound rather than ameliorate the vulnerability of the persons or groups they are designed to assist"⁴² is well documented.⁴³ Conversely, however, assumptions about vulnerability and invulnerability may found damaging regimes, discourses and practices of *non*-intervention. This highlights dangers in "the contrast, implicit in... [prevailing lay and] policy discourses, between...vulnerable 'others' who must be protected and all other citizens who are represented as somehow invulnerable."⁴⁴ When we bracket off the elite and powerful as 'invulnerable', we fail to ask important questions about "who benefits from (dominant) narratives of vulnerability".⁴⁵ We not only reinforce constructions of vulnerability which support discourses of excessive scrutiny, stigmatisation, and othering; we leave less obvious but not necessarily less

⁴⁰ Fineman, op. cit. (2010), n. 3, p. 269. See further: M. Fineman, 'The vulnerable subject: Anchoring equality in the human condition' (2008) 20 *Yale JL & Feminism* 1.

⁴¹ K. Brown, 'Questioning the Vulnerability Zeitgeist: Care and Control Practices with 'Vulnerable' Young People' (2014) 13(3) *Social Policy & Society* 371, at 371.

⁴² Mackenzie, op. cit., n. 3, 34.

⁴³ See for example, V. Munro and J. Scoular, 'Abusing Vulnerability? Contemporary law and policy responses to sex work in the UK (2012) 20(3) *Fem Leg Stud* 189, J. Lindsey, 'Developing Vulnerability: A Situational Response to the Abuse of Women with Mental Disabilities (2016) *Fem Leg Stud* 24, 295; S. Bielefeld, 'Cashless Welfare Transfers for 'Vulnerable' Welfare Recipients' (2018) 26(1) *Fem Leg Stud* 1, 14

⁴⁴ Mackenzie, op. cit., n. 3, 37.

⁴⁵ Bielefeld, op. cit., n. 54, 14.

harmful forms, sources, relationships and consequences of vulnerability “unexplored and underexplored”.⁴⁶

In particular, as Fineman observes,

“institutions as well as individuals are vulnerable to both internal and external forces. They can be captured and corrupted. They can be damaged and outgrown. They can be compromised by legacies of practices, patterns of behavior and entrenched interests”.⁴⁷

While we may not intuitively conceptualise corporate lawyers as ‘vulnerable’, concerns about the capture of legal regulatory regimes, law firms, law schools, and so forth, and the corrosion, damage and (ir)relevance of legal professionalism strike a more familiar chord. The precariousness of professionalism as an institutionalised form of occupational control in the globalised, neo-liberal world of corporate legal practice,⁴⁸ whether it provides sufficient resilience to practitioners, clients and wider publics, or serves predominantly as a legitimising device, is a dominant theme in the existing literature.⁴⁹ As we will now show, writing and research on corporate lawyers is replete with accounts of lawyers’ working vulnerabilities (though not so labelled), as well as concerns about the wider consequences of these.⁵⁰

Corporate practice has been enriched and changed as a consequence of globalisation, which has, in turn, fractured the homogeneity of the profession and in other ways been a significant factor in the erosion of classical professionalism.⁵¹ We have seen increased competition for work,⁵² the rise of the in-house legal function that has allowed clients to better understand which legal services they need and (negotiate) how much those services are worth,⁵³ together with processes of outsourcing and

⁴⁶ R. Dehaghani and D. Newman ‘We’re Vulnerable too: an (alternative) analysis of vulnerability within English criminal legal aid and police custody’ (2017) 7(6) *Onati Socio-Legal Series* 1199.

⁴⁷ Fineman, *op. cit.* (2004), n. 3, p. 18.

⁴⁸ Johnson, *op. cit.* n. 18.

⁴⁹ See, for example, R. Moorhead ‘Precarious professionalism: some empirical and behavioural perspectives on lawyers’ (2014) 67(1) *Current Legal Problems* 447.

⁵⁰ See accounts which speak to the mental and physical impacts of mega-lawyering, including: R. Collier, ‘Wellbeing in the legal profession: reflections on recent developments’ (2016) 23(1) *IJLP* 41. For discussions on the influence of the banking sector on corporate lawyers during the financial crisis, see: D. Kershaw and R. Moorhead, ‘Consequential responsibility for client wrongs: Lehman Brothers and the regulation of the legal profession.’ (2013) 76 *Modern Law Rev.* 26. For the relationships between partners in US law firms and their clients, see: R. Nelson, *Partners With Power* (1988).

⁵¹ See for example: H. Sommerlad, ‘Managerialism and the legal profession: a new professional paradigm.’ (1995) 2 *IJLP* 159

⁵² D. Sokol, ‘Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Further Study’, (2007) 14(1) *Indiana J. of Global Legal Studies* 5.

⁵³ R. Moorhead et al., *In-House Lawyers’ Ethics* (2018); R. Nelson and L. Nielsen, ‘Cops, Counsel and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations’ (200) 34 *Law & Society Rev.* 457.

unbundling aspects of work as part of a drive towards efficiency.⁵⁴ New entrants, technological innovation,⁵⁵ and the significant knock-on effects of the financial crisis also impact on how much clients have available, or are willing, to spend on external counsel.⁵⁶ These changes reduce the social distance between lawyer and client, and so lawyers' autonomy.⁵⁷ Furthermore, the institutionalisation of professionals as employees within professional service firms does not eradicate professionalism but rather alters the norms, ideologies and practices associated with it.⁵⁸

Other work has shown how lawyer autonomy in large firms has decreased over time because of the rise in salaried partners, and the growing divide between the proletariat associates and the bourgeoisie equity partnership,⁵⁹ a reification of profit (which makes large firms more similar to other professional service organisations and promotes a 'money prime' business ethic),⁶⁰ increasing pressure from clients, and the normalising of potentially harmful lifestyles (a long hours, macho culture which can lead to significant mental and physical health problems).⁶¹ In this hierarchical, bureaucratic context, discourses of professionalism remain important, but change. Under this 'new professionalism',⁶² based on organisational rather than occupational control, professionals are subject to "standardisation and management of work practices",⁶³ their limited degrees of discretion tied more closely tied to the interests of their firm than their profession. Thus the organisational framework within which corporate lawyers work simultaneously places them under enormous physical, emotional and logistical stress, yet rewards them handsomely for their trouble. The upshot of this is a disciplinary discourse,⁶⁴ in which overwork, poor wellbeing and other aspects of 'new professionalism' become common cultural markers of status and prestige, as well as personal sources of social capital and self-esteem, simultaneously threatening and benchmarking 'superior' practice. In this way, poor well-being is experienced as high work satisfaction,⁶⁵ with attending consequences for corporate legal practice.

⁵⁴ M. Regan and P. Heenan, 'Supply Chains and Porous Boundaries: The Disaggregation of Legal Services' (2010) 78 *Fordham Law Rev.* 2138.

⁵⁵ R. Susskind, *The End of Lawyers* (2008); M. Saks and D. Muzio, *Professions and Professional Service Firms: Private and Public Sector Enterprises in the Global Economy* (2018).

⁵⁶ C. Whelan and N. Ziv, 'Privatizing Professionalism: Client Control of Lawyers' Ethics' (2012) 80(6) *Fordham Law Rev.* 2577; M. Trotter, 'More for less' (2013) 16(1) *Managing Partner* 28.

⁵⁷ Johnson, op. cit. n. 18, 41.

⁵⁸ J. Evetts 'A New Professionalism? Challenges and Opportunities' (2011) 59(4) *Current Sociology* 406; Johnson, op. cit. n. 17.; Mather et al, op. cit. n. 16.

⁵⁹ J. Hagan and F. Kay, *Gender in practice: A study of lawyers' lives* (1995).

⁶⁰ D. Muzio, 'The professional project and the contemporary re-organisation of the legal profession in England and Wales' (2004) 11 *IJLP* 33.

⁶¹ See: I. Campbell, I. and S. Charlesworth, 'Salaried lawyers and billable hours: a new perspective from the sociology of work' (2012) 19(1) *IJLP* 89.

⁶² Evetts, op. cit. n. 58.

⁶³ id.

⁶⁴ id. 411.

⁶⁵ J. Chan, 'Conceptualising legal culture and lawyering stress' (2014) 21(2) *IJLP* 213, at 213.

Given the above, ours is far from the first study to show how powerful clients can threaten lawyers' autonomy.⁶⁶ However, it is the first to suggest that the nature and intensity of that threat, amongst others, and the role that professionalism as an ideology plays in this may benefit from the application of a vulnerability lens. We acknowledge the disquiet and scepticism of some towards the idea of corporate lawyer vulnerability. And, to be clear, we are not suggesting that the vulnerabilities of corporate lawyers and of more structurally marginalised and oppressed citizens are equivalent. Rather, that neo-liberal social transformations create and intensify institutional, practitioner, and citizen vulnerabilities, and reduce resilience in ways that warrant extending the term to incorporate those not conventionally considered vulnerable. In this way, we can conceptualise and investigate the interconnected, cumulative, recursive and relational nature of vulnerability in our complex world, how neo-liberal ideologies corrode institutional, occupational and personal forms and relationships of resilience,⁶⁷ and make more effective claims for state responsiveness. Corporate lawyers may be powerful people working in powerful organisations but they are significantly less powerful than the corporate clients and institutions they serve. They create and facilitate on behalf of their powerful clients a wide array of products, transactions and arrangements that structure and inform almost all aspects of our everyday lives. In return for this, they are richly rewarded, both financially and in terms of social status. It is their *relative* power that makes their vulnerabilities to clients and market pressures, and their position as a source of vulnerability and harm to others, so serious.

Having reflected on the concepts of independence and vulnerability and problematised how corporate lawyers may be vulnerable, we now turn to our interview data. In so doing, we are able to explore the ways in which those we spoke to conceived of their professional obligations and their relationships with clients. That is, we now begin to ask what our data tells us about how vulnerability manifests in practice.

OUR DATA: CORPORATE LAWYERS' UNDERSTANDINGS OF INDEPENDENCE

In the sections that follow, we see how our interviewees conceived of their own independence, showing how they understand and experience professional independence as subtle, profoundly contextual, and relational. We then turn to a particular problem in practice, which we term 'shadow clients', that presents striking challenges to lawyer independence. Our data allows us to deploy vulnerability as a heuristic device with the aim of reflecting upon the institutional and occupational hazards corporate lawyers face, and how they make sense of and respond to them.

⁶⁶ See, for example (in addition to those studies cited above): R. Abel, *Lawyers on trial: Understanding ethical misconduct* (2010); R. Abel, *Lawyers in the Dock* (2011); S. Shapiro, *Tangled loyalties: conflict of interest in legal practice* (2002); and the *Legal Ethics* special issue of comparative studies of lawyer discipline (2012, volume 15(2)).

⁶⁷ See also: Dehaghani and Newman (op. cit., n. 46); and M. Fineman and J. Fineman (eds) *Vulnerability and the Legal Organization of Work* (Routledge, 2018).

Most of our interviewees simultaneously believed that professional independence was ‘important’ while possessing a limited understanding of the concept. This reflects the complex, nuanced nature of the term, and ambiguities about what exactly professional independence is. It also reflects other findings that situated legal practice is only loosely, indirectly, and often remotely related to formal conduct codes.⁶⁸ Alarming for a key regulatory principle, however, a handful rejected the relevance of the concept altogether, while others were entirely unaware of the concept.

Q “How you would describe professional independence?

A Crikey, I’ve never even heard the expression. Is that as an individual or a practice?”
[EH Finance 4]

Certainly, if we were looking for a clear archetype of liberal independence (consciously and critically reflective, dispassionate, detached, and individualistic) we did not find it. Nevertheless, concepts of independence retained significant purchase among our interviewees, operating in a range of sometimes contradictory and unanticipated ways that reflected the context of their everyday working lives. Reflecting relational theorists’ constructions of the mutually-informing and socially-constituted relationship between capacity-to-act and status-recognition, for example, many associated (or, perhaps more accurately, lamented) a decline in the meaning and purpose of their relationships with clients with their capacity to advise as ‘independently’ as they might wish. They also associated this with changing times. For example, in keeping with much previous work, many lawyers spoke of a shift in identity and status from ‘trusted advisor’ to one of ‘facilitator’ or ‘hired hand’.⁶⁹ For some, the lawyer-client relationship had become so entirely one-sided that professional independence, both in terms of autonomy and detached disinterested reflection, had indeed become a myth:

“Because, most law firms, we’re hired hands and we’re instructed to do things, and if your client says ‘I want you to go in there and be a Poodle’, you go and be a Poodle, and if they say ‘I want you to go there and rip these guys to pieces’, that’s what you try and do.” [EH COLP 2]

If we define professional independence (and professionalism) by the application of deliberative, dispassionate reflection (rather than simply responding to external stimuli) the above raises cause for concern. The ‘poodle problem’ expressed by COLP 2 was a particularly emphatic example, however. As the quote immediately below, together with others thereafter, suggest, the situation is often more complex and nuanced. Moreover, it appears that there is significant ambivalence on the part of client

⁶⁸ See: Mather et al, op. cit., n. 17.; Levin and Mather, op. cit., n. 17.; and Joan Loughrey, *Corporate lawyers and corporate governance* (2012).

⁶⁹ See: H. Sommerlad, ‘The commercialisation of law and the enterprising legal practitioner: continuity and change’ (2011) 18 *IJLP* 73; and G. Hanlon, ‘Professionalism as Enterprise’ (1998) 32 *Sociology* 43.

and lawyer alike about the effect of widespread social and institutional changes to the professional relationship that both parties sense have taken place.

“I was at a dinner of senior partners of City firms and [X] who was at [Y] years ago, large corporate law firm] then became Chairman of [Z] and then Chairman of [A] Bank was speaking. And some question after dinner was asked of him and he was asked what would he really like from his City law firm advisors? And he said, “Well what I would really like is a senior lawyer who could provide wise counsel to me as Chairman and to the Board.” To which the response from the questioner said, “Well [A] Bank has twenty firms on its panel, we can’t get anywhere near the Board. You have a sort of senior lawyer gatekeeper. We would all love to give you wise counsel but with twenty law firms to choose from none of us can get near you.” And that sort of hit home to me how far removed in ways we have become from giving independent wise counsel, to use an old term, to people who need it.” [EH COLP 12]

Nostalgic reminiscences about a past ‘golden age’ are notoriously unreliable,⁷⁰ and it is important to be wary of reading off from such anecdotal reverie in any straightforward or simplistic way. Nevertheless, the above quote suggests that although unable to forensically define it, on some level both clients and their lawyers value independence and influence, and perhaps share a sense of loss that wider social and organisational transformations have altered an important qualitative aspect of the relationship between lawyer - as ‘trusted advisor’ - and client. This quote, and others, also potentially highlights the ways in which these organisational transformations have altered relationships and expectations between even those most senior members of client and legal firms alike where we might expect power, authority and independence to be greatest. This raises questions about how lawyer independence as a form of relational autonomy may further decline and alter as these senior members depart the field. It also raises questions about the ‘wisdom’ of the counsel corporate clients receive.

Our interview data suggests an orientation to professional values that privileges client interest above all others.⁷¹ The previous quotation exemplifies the dispersed nature of power within major clients, and the difficulties large law firms have in maintaining long-term relationships with institutional clients (giving to issues of knowledge, trust and loyalty).⁷² The paradoxical relationship between proximity and distance also highlights the problematic nature of constructions of detachment and disinterestedness paradigmatically associated with liberally-informed conceptions and regimes of professional and personal autonomy. Highlighting the socially-constituted and contextual nature of

⁷⁰ See: R. Gordon, *Taming the Past: Essays on Law and History and History in Law* (2017).

⁷¹ This phenomenon has been seen elsewhere. See: Moorhead, *op. cit.* n. 49.; and S. Vaughan and E. Oakley, ‘Gorilla Exceptions and the Ethically Apathetic Corporate Lawyer’ (2016) 19(1) *Legal Ethics* 50.

⁷² Together with ‘agency’ problems in lawyers knowing who their client is and is not (i.e. the corporate entity rather than any individual in the corporate entity).

advice, and also the dilemmas and dispositional vulnerabilities or risks of balancing embeddedness with autonomy, many participants described how they needed to be ‘close’ to their clients to develop the necessary understanding of the client’s business, as well as client trust, in order to give good ‘objective’ advice. The following example highlights the challenges of this balancing act:

“We are here to give commercial legal advice and if one was to think that commercial legal advice could be in some way altered because of the proximity of a relationship, that wouldn’t be right. That said, the proximity of a relationship on a commercial level, and understanding your client, is extremely important, because that does help you to shape the commerciality of the advice that you are giving.” [EH Corporate 3]

Here, one might argue that the level of influence that makes independence potentially useful is not mutually exclusive from closeness sought for commercial purposes, although the two serve very different ends. That is, close enough for the lawyer to be able to stand back and say ‘No’ to their clients, while also being close enough to understand the client’s business, be valued by, and win and retain instructions from them.⁷³ Such also highlights the potential for vulnerability arising from closeness to operate positively, enriching the relationship and understanding between corporate lawyers and their clients and so enhancing autonomy: the closer we are the more able we feel to say ‘No’, but also the greater risk of being rejected with the consequences which that brings.

Recognising the potential zeitgeist quality of a vulnerability lens, we think it is useful to distinguish the “different sources and states of vulnerability”,⁷⁴ and stipulate as precisely as possible what a person or institution is vulnerable *to*, the *form* of vulnerability to which they are subject, together with the *source* of that vulnerability.⁷⁵ To do this, we draw upon Mackenzie’s “taxonomy of vulnerabilities”⁷⁶ as a working vocabulary for deploying Fineman’s thesis to think about the specific ways in which the social, political, economic and institutional arrangements of corporate legal practice expose lawyers to an array of hazards and harms, creating, in turn, wider hazards and harms (vulnerability) for others. In addition to ‘ontological’ or ‘inherent’ vulnerability, Mackenzie distinguishes ‘relational’ (or ‘situational’) vulnerability, which is “context specific... caused or exacerbated by social, political, economic or environmental factors... [and] may be short-term, intermittent or enduring”.⁷⁷ She also distinguishes *dispositional* (potential) “vulnerabilities that are not

⁷³ We note here calls, from the US, for a ‘client-centred’ approach to lawyering that is concerned with respecting clients as the holders of problems seeking solutions. See: D. Binder and P. Bergman, *Lawyers as Counselors: A Client Centered Approach* (2012).

⁷⁴ Mackenzie, op. cit., n. 4., p. 38.

⁷⁵ *id.*

⁷⁶ Mackenzie, op. cit., n. 4., p. 33.

⁷⁷ Mackenzie, op. cit., n. 4., p. 39.

yet or not likely to become sources of harm”⁷⁸ and *occurrent* (occurring) vulnerabilities “that place a person at imminent risk of harm”.⁷⁹ This, in turn, helps us consider whether particular (re)sources of ‘resilience’ may or may not be adequate to address particular kinds of vulnerability – for example, whether professional independence provides resilience to client pressure. Finally, to help think about institutional vulnerability, we draw broadly upon Mackenzie’s concept of *pathogenic* vulnerability. A particular form of situational vulnerability, it sensitises us to the ways in which measures intended to alleviate inherent or situational vulnerabilities can have the “paradoxical effect of increasing vulnerability”.⁸⁰ In our context, we use the term to identify the unintended consequences of, for example, regulatory measures such as universalist definitions of professional independence, risk-based or light-touch regulation, and the ways in which these can exacerbate the practices and pressures they aim to ameliorate and constrain.

Our data shows that there are tensions in play, between professional independence as a resource for resisting undue client influence and advancing the firm’s business aims. In this respect, it is important to consider how growing (self) perceptions of lawyers as service-providers rather than advisors intersect with shared norms and interests of facilitating commerciality to shape how corporate lawyers conceptualise and enact independence. This includes whether and how such changes are perceived as a threat. In this instance, presentationally at least, although our interviewees suggest that perceptions of lawyers-as-service-provider create potential relational vulnerabilities, they do not believe these risks alter their advice-giving activities. In other words, corporate lawyers sense that they possess the resilience to prevent from materialising the dispositional risks their acknowledged status-change poses to their professional independence. However, this jars with our interviewees’ descriptions of professional independence in terms of not being “beholden” and attempting to deal with clients on an “equal” footing:

“With these really big clients you’ve always got to make sure that you’re dealing with them eye-to-eye rather than on your knees.” [EH COLP 9]

Here, for example, COLP 9 invokes not the imagery of the risk of a slight or even moderate imbalance in the lawyer-client power relationship but rather one of complete dominance. This language suggests our interviewees are well aware of the potential vulnerabilities posed by clients to their professional independence. However, in terms of both assessing capacity to act, and recognising one’s status to act, ‘not being beholden’ sets the bar far below that which we might ideally expect of

⁷⁸ *id.*

⁷⁹ *id.*

⁸⁰ *id.*

an independent public interest-oriented professional. We may well question, therefore, whether our lawyers' (and regulators') confidence in their sense of professional independence is well-placed.

Our research confirms work on corporate lawyers outside the UK that has tended to conclude that the demands of business are altering the context and relations within corporate-finance law firms in ways that are likely to intensify the relational and situational vulnerabilities of corporate lawyers, collectively, organisationally and individually, reshaping and reducing their relational autonomy. In his seminal work, *Partners with Power*,⁸¹ Robert Nelson found that although law firms diversify their portfolio of clients and rarely rely on a single client for more than 5% of their business (a form of strategic, organisational resilience), individual partners often depend on a single client for 40% of their billings. In this way, organisational forms of resilience and individual situational vulnerabilities may exist side-by-side, with the upshot that organisational responses to potential relational/situational vulnerabilities may be less inhibitory and more presentational than they initially appear. This raises concerns about whether and to what extent regulators' confidence in light-touch regulation is deserved.⁸²

Nelson's work also showed that partners almost never perceived a significant ethical conflict with a client; instead, they took on the moral outlook of their clients. Mirroring Nelson's findings, while all of our interviewees recognised a shift towards a service-provider paradigm, and some actively disliked it, only a minority thought it was of concern. As such, their independence was a form of self-deception. This reflects other work suggesting that instead of a legal 'profession' in those specialising in corporate-finance law, we now have a capitalist service industry.⁸³ Our data, however, presents a more complex picture. Marina Oshana argues that liberal concepts of authenticity (acting according to values with which one identifies and endorses) fail to capture the range of more tenuous relationships an actor may have with the decisions they make.⁸⁴ In keeping with this, many of our lawyers sensed that the service-provider paradigm was here to stay, accepted it as a *fait accompli*, and treated it with a degree of ambivalence and resignation, rather than wholehearted endorsement.

1. The Relational Nature of Lawyering

⁸¹ Nelson, op. cit. n. 50.

⁸² On which, see: Loughrey, op. cit. n. 68.

⁸³ See: Sommerlad, op. cit. n. 69; Hanlon, op. cit. n. 69; E. Chambliss, 'Measuring Law Firm Culture', in Austin Sarat (ed) *Law, Politics and Society: Law Firms, Legal Culture and Legal Practice* (2010); M. Galanter and W. Henderson, 'The Elastic Tournament: The Second Transformation of the Big Law Firm' (2008) 60 *Stanford Law Rev.* 1867; M. Regan, *Eat What You Kill: The Fall of a Wall Street Lawyer* (2004); A. Boon and J. Levin, *The Ethics and Conduct of Lawyers in England & Wales* (2008).

⁸⁴ M. Oshana, *Personal Autonomy in Society* (2006).

Reflecting many of the findings above, Moorhead and Vaughan showed how in-house lawyers understand and experience professional independence as subtle, profoundly contextual and relational:

“Our interviewees understood that professional 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. sometimes respondents reported a deliberate attempt to align the professional claim to independence with a leadership desire to do, and be seen to do, the right thing within their businesses).”⁸⁵

All of our own interviewees spoke of the relational nature of corporate lawyering, including, as set out above: a shift in the balance of power to clients and the potential pressure this may place on lawyer independence; qualitative shifts in nature of the relationship; and shifts in (self) perceptions to service-providers/facilitators, the situational/dispositional vulnerabilities that this may cause, and their consequences for lawyer independence.

“I think lawyers are regarded as being part of the service industry. And with most service industries the client can dictate the speed and the scope of what they want to be delivered. So, I think it has much moved towards the client specifying what they want out of their lawyers and managing the whole process; rather than saying to the lawyers, ‘Can you give me some advice because I’m consulting you as a professional?’” [EH Corporate 13]

Clients dictating the “speed and scope” of the lawyer’s activities may be perfectly appropriate on some occasions; and amount to inappropriate influence on others. Despite acknowledging the theoretical risk of client capture, very few interviewees could think of particular instances where they had witnessed the independence of other lawyers compromised by client capture: not, at least, to a degree that had made them wholly uncomfortable. Few of our interviewees felt that their own independence, or that of others in their firm, had been, or was likely to be, captured. From their own subjective perspective, therefore, our lawyers, for the most part, felt both individually and collectively appropriately ‘independent’ and ‘resilient’ in the face of client pressure:

“Most grown up law firms behave in an appropriate way with their clients and I don’t see even with [the firm], even our top ten global clients who are very important to our firm, I can’t think of a single incident where the undue influence of one of those clients put the firm in a position where we were not complying with our general professional duties.” [US COLP 1]

⁸⁵ R. Moorhead and S. Vaughan, *Legal Risk: Definition, Management and Ethics* (2015) 27.

This quotation, once again, raises the question of ‘standards’: what sort of behaviour lawyers consider proper and improper, as well as how onerous or otherwise their professional duties are. The data offered up so far, then, links back to Johnson’s construction of professions as a means of controlling an occupation. Here, the client has the power to control the definition of the relationship (service-provider/technical-expert/facilitator) as well as the content and manner of the work. Our corporate lawyers have no power to define themselves in this way, and so are resigned and ambivalent, but also pragmatic, about their decline in status.

Mackenzie suggests that vulnerability has two dimensions: an objective dimension, which makes someone susceptible to harm; and an individual’s subjective sense of vulnerability. The two may not correlate.⁸⁶ This may be because the person has adequate access to resources that create resilience, meaning that the threat is neither felt nor realised.⁸⁷ Alternatively, however, our lawyers may be prone to ‘misrecognise’ their vulnerability to relational/situational risks and harm,⁸⁸ especially where this results from, facilitates, or acts as a proxy for something situationally or occupationally valued. We have previously noted, for example, research showing how corporate lawyers maintain a high-level of work satisfaction despite having a low levels of well-being.⁸⁹

Our lawyers’ sense of self-resilience therefore leads to one of two conclusions. First, while corporate lawyers and their firms may be dispositionally vulnerable to field-specific hazards and harms, such as undue client pressure, they nevertheless possess adequate resources of resilience, in terms of independence and otherwise, to (discern how to) resist these and act ‘properly’. In this case, the vulnerabilities do not materialise, and there is little cause for concern. Alternatively, we may wonder whether and to what extent lawyers working in similar structural conditions and sharing similar dispositions with their clients have developed shared world views, informing their preferences in the first instance, leaving them poorly placed to discern ethical problems independently, let alone respond. This seems especially likely if ‘facilitating commerciality’ is a core shared norm.⁹⁰ As such, we think the second hypothesis more likely. The inability of our interviewees to cite specific instances where they or other lawyers found their independence compromised illustrates, we think, just what Nelson found in his work in the US: long-term relations between lawyers and corporate clients lead to the former assimilating the values and worldviews of the latter. As such, these lawyers feel they are expressing their own views and hence have not lost their independence (which they perceive as a very low hurdle in any case), despite the considerable challenges to independence that they acknowledge.

⁸⁶ Mackenzie, *op. cit.* n. 4, 45-6.

⁸⁷ *ibid.* 46.

⁸⁸ Janet Chan and others, ‘Lawyering Stress and Work Culture: An Australian Study’ (2014) 37 *University of New South Wales Law Journal* 1062.

⁸⁹ Chan, *op. cit.* n. 65.

⁹⁰ This is certainly the case with in-house lawyers. See: Moorhead, *op. cit.* n.53

Such misrecognition may be especially likely where those risks and harms seem routine and mundane.⁹¹ As Ronit Dinovitzer and others have noted, the greatest threat to lawyers' independence is not those extreme breaches for which ethical codes most explicitly provide (outright lying and stealing, for example) but rather the low-intensity dilemmas of everyday occupational life.⁹² It is precisely these everyday dilemmas to which lawyers are most routinely exposed, less likely to pay heed, or feel less fearful will result in negative consequences. Where there are bright-line prohibitions against certain conduct, our data (happily) suggests that solicitors would not compromise what they saw as their independence by acceding to their client's wishes:

"Yeah, we've had a client asking for some commercial advice which we had to effectively, this is just in my experience, effectively it said, "How do I defraud my creditors?" and this wasn't a question of a mistake about what their proposal being a potential fraud on the creditors, this was how can I get this money out of here basically. Well I knew full well that ... they wanted us to assist and that wasn't that difficult, we wrote back to them and said "This is illegal, we're not going to do it, we recommend that you don't do it," but that was the end of that retainer. That was the end of that. But in the end you've only got one reputation."
[EH COLP 11]

Here, we see that although there is a potential or dispositional vulnerability it is unlikely to be subjectively felt or materialise, since the commercial and reputational risk of acceding outweighs the risk of the client failing to recognise their obligation of independence and losing that client, along with future work. However, this arguably has little to do with the detached independence or occupationally-informed norms of ethical superiority associated with and expected of classical professionalism, but rather reflects a more actuarial orientation; a risk calculation. This is about protecting reputation and/or facilitating commerciality, which are utilitarian concerns, rather than deontological concerns to 'do the right thing'.⁹³ Furthermore, this does not illuminate what happens in the very many situations where there is no clear breach of a cultural norm or formal rule, where the dilemma is relatively mundane, and where there is a band of formally lawful/ethical responses, the choice of which depends upon the degree of flex between the substance and spirit of a rule and the

⁹¹ This resonates with the work on lawyers and ethical fading. See: A. Perlman, 'Unethical obedience by subordinate attorneys: Lessons from social psychology.' (2007) 36 *Hofstra L. Rev.* 451.

⁹² R. Dinovitzer et al, 'Reconsidering Lawyer Autonomy: The Nexus Between Firm, Lawyer, and Client in Large Commercial Practice' (2014) 51(3) *American Business Law J.* 661.

⁹³ We would argue that 'being seen' to do the right thing, which our lawyers also spoke of, likewise reflects utilitarian, actuarial motivations to protect reputation and promote commerciality, rather than professional duty in the classic sense.

interpretative latitude a lawyer feels willing or able to exercise.⁹⁴ In short, it does not tell us what enables and constrains lawyers' sense and use of discretion in situations of indeterminacy.⁹⁵

Such situations potentially provide corporate lawyers space in which to be more or less independent, but this is likely to depend very much on the context, and how various formal and informal controls intersect and play out in particular situations.⁹⁶ In situations where clients have more power to define the professional relationship, and control the content and manner of work, lawyers' use of discretion is likely to be distorted by client wishes and pressure.⁹⁷ As Chan et al's work suggests, lawyers in such situations may be particularly vulnerable to client pressure,⁹⁸ and in ways which current regulation and conceptions of professional independence are ill-suited to prevent. This may be further exacerbated by actuarial professional discourses and decision-making. This is illustrated by the quote below:

R "I've got a friend at a certain bank...this British bank that's Asia based and it had three lawyers. Now it's got I think in excess of 200.

I It's amazing, isn't it.

R It's a stressful job because the Board's come up to you and saying, "You're the head of legal risk on the compliance side, you tell me what I can and can't do. Where's the line?" I could tell you what's left of that. I can tell you what's right of that. But there's a big fuzzy mark in the middle. And these guys get chewed up and sacked. Surely it's really easy, you just go up to a really good brand [of law firm] in whichever jurisdiction it is and you ask for them to confirm whether you can or cannot undertake certain activity. But the opinions are all so capped, it doesn't resolve what you can and cannot do." [EH COLP 8]

The quote also illustrates the potential role of personal vulnerability in the form of 'making the wrong decision'. Furthermore, while the capping of opinions provides individuals and firms with resilience, operating as a form of covering, capping also provides a legally-sanctioned discretionary space and

⁹⁴ This is what Cyrus Tata refers to as ethical indeterminacy. See: C. Tata, 'In the interests of clients or commerce? Legal aid, supply, demand, and 'ethical indeterminacy' in criminal defence work.' (2007) 34(4) *J. of Law and Society* 489. On the quotidian, routine nature of much lawyer misconduct, see: Abel, op. cit., n. 66 (2010 and 2011).

⁹⁵ On this, see: H. Hart and A. Sacks 'The Legal Process: Basic Problems in the Making and Application of Law', cited in R. Lempert 'Discretion in a Behavioural Perspective: The Case of a Public Housing Eviction Board' in K. Hawkins (ed) *The Uses of Discretion* (1992).

⁹⁶ Mather et al, op. cit. n. 17, p. 180.

⁹⁷ Johnson, op. cit., n. 18.

⁹⁸ Chan et al, op. cit., n. 88.

scope for clients to act in potentially more risky, irresponsible, harmful and hazardous ways.⁹⁹ These practices once again highlight concerns with independence in a professional arena preoccupied by utilitarian considerations of reputation, rather than deontological concerns to ‘do the right thing’. For example, capping can be seen as a form of localism in which practitioners focus on producing practical, technical solutions to their clients’ (and their own) immediate problems,¹⁰⁰ with minimal, if any consideration of the ethical, wider or long-term consequences of these.¹⁰¹ Indeed, as the following section on the relatively new phenomenon of ‘shadow clients’ shows, this not only facilitates the creation of products and practices capable of causing all manner of wider social hazards and harms, it can also erode the lawyer-client relationship itself.

2. Independence and the Problem of ‘Shadow Clients’

The example of shadow clients shows how market practice (practice that is not only not prohibited, but also considered standard) may develop within particular practice areas or transacting communities, posing a powerful challenge to lawyer independence. This concerns the situation where a borrower effectively appoints lawyers to act for the bank from which it wants to borrow money. In our SRA report, we termed this the ‘shadow client’ problem.¹⁰² This situation arises because borrowers typically pay the banks’ legal fees and so feel justified influencing whom the bank instructs to give the bank legal advice. In this situation, the borrower becomes the ‘shadow client’ of the (bank’s) law firm, with significant influence over that firm’s appointment, remuneration, and potentially the scope of its work, but without direct instruction. Consequently, these situations likely do not directly engage the SRA conflicts of interest rules because the borrower is never (technically) a client of the (bank’s) law firm on the matter.¹⁰³

This raises several independence issues. Critically, interviewees told us that while this ‘shadow client’ practice has existed for decades, it is becoming increasingly common practice for the sponsor (a particular type of buyer) on a private equity transaction to appoint the law firm that will advise the lender *well before* that lender bank has been chosen. This means that the scope of that law firm’s role and its terms of engagement are agreed with the sponsor, instead of the bank that will ultimately be

⁹⁹ Capping refers to placing a financial cap on the amount of money recoverable should the legal opinion provided by the law firm be incorrect. This, in turn, provides cover for the firm.

¹⁰⁰ Johnson, *op. cit.*, n. 18, pp. 69-70.

¹⁰¹ See: Moorhead and Hinchly, *op. cit.*, n. 23.

¹⁰² Here, we drew on the notion of a ‘shadow director’ from company law. This term is defined in s. 251(1) of the Companies Act 2006 as, “means a person in accordance with whose directions or instructions the directors of the company are accustomed to act.” Leslie Levin has written about a different form of shadowing, namely the ways in which younger solo and small firm practitioners in New York learn unethical practices from their more experienced seniors. See: L. Levin, ‘The ethical world of solo and small law firm practitioners’ (2004) 41 *Hous. L. Rev.* 309.

¹⁰³ Chapter 3, SRA Handbook. The situation may be quite different under the various rules of lawyer conduct in the US. On which, see Shapiro, *op. cit.* n. 66.

the law firm's client. The law firm acting for the bank is potentially motivated more by satisfying the borrower on the other side of the table (because that is where the next deal will come from) than by satisfying their client. Law firms acting for banks may also take instructions on which pieces of advice to give, and which points of law to take, from the other side (the borrower). As such, corporate lawyers, along with their clients, are made vulnerable to market practice, and are certainly aware of this:

“Basically the lender and the sponsor clients are not actually getting the best advice because one or the other of the lawyers is concerned about a view that the sponsor or lender client will have of them in taking particular positions on points. So, actually on both sides of the table I've had sponsor clients saying to me and I've had lender clients saying into me, 'Hang on, what on earth is this lawyer doing? These are points that I do not want to give'. But it's because – cahoots is an emotive word – but it's almost like they're in cahoots because they're frightened to damage their reputation with someone who might be on the other side of the table who they perceive is perhaps a better work bringer. So, actually their advice is being coloured. In that particular situation I mentioned it was the lender who in their view was being prejudiced because the sponsor was calling the shots.” [EH Finance 7]

In the quote below, we see, once again, how the euphemistic language of dispositional or theoretical vulnerability, rather than actual experience of it, is deployed:

“I think there is a genuine potential, I only say a potential, for ethical conflict if your fees are being paid by a third party.” [EH Corporate 2]

On the one hand, we could see this as simply a matter of professional conflict - an everyday aspect of occupational life in large organisations; a 'potential' problem which, in the language of US COLP 1 above, 'grown up' law firms possess adequate resilience to manage. What is more pertinent from our perspective, however, is precisely how these conflicts are interpreted, *normalised* by and responded to in corporate legal practice, and the potential dangers of this. Our concern is illustrated by the following conversation, typical of interview discussions relating to the 'standard practice' of 'shadow clients' and which many partners found bemusing we considered problematic. As this example shows, not only may corporate lawyers in large law firms be prone to misrecognise the vulnerabilities to their professional independence that such arrangements pose, but also who is their client:

R “We have one very significant client, well they're actually not a client, we have one institution in our capital markets practice which always requires us to act for the underwriters so they're never our client but our relationship is they always refer they always say to the underwriters 'You've got to use XXX'.

- I Does that present any professional issues?
- R I'm not sure it presents any professional issues.
- I Independence issues?
- R I think it can get a bit awkward sometimes, if you've got a really difficult issue on a deal and particularly if the borrower or originator, issuer, doesn't see it as a difficult issue and just thinks you're being difficult or if one of the underwriters or one of the lenders raises a particular issue, which may be totally unreasonable, but because you're their counsel you've got to represent it and fight for it. Yeah that can be awkward. I suppose it might cross your mind that unless you handle it properly you're not going to get a referral in the future but I don't think it changes the way we do it." [US Finance 3]

This "very significant client" who is "not actually a client" highlights the relational and situational vulnerabilities of corporate lawyers to become blinded to relationships which may compromise their professional independence in a variety of ways, and is arguably also an example of relational vulnerability in which a dispositional/potential risk is recognised but its occurrence is not. "[A]wkward" is an understatement of the complex and dynamic professional independence challenges that shadow clients pose. This practice also highlights the interdependent and interconnected world in which lawyers in large firms operate, and of the vulnerability of corporate lawyers to very powerful clients and other transacting parties. It illustrates, in particular, how novel, potentially-hazardous, ethically-dubious practices may become routinised and unremarkable aspects of occupational life. This practice falls foul of neither the LSB's prohibition on "unwarranted influence", nor the SRA guidance on "giving control" of the law firm to a third party (discussed above). As such, professional regulation does not appear to provide the most basic resilience for corporate lawyers to this commonplace but arguably highly risky practice. Nor does it appear to protect the vulnerability of, or provide resilience to, the weaker transactional client (the lender).

What this, and our other data, show is that there are a variety of ways in which all the actors involved in the relationships between corporate lawyers and their clients in a global market are relationally and situationally vulnerable. Over time, the relationship between the lawyer and the state, and between the lawyer and the client, has manifestly changed. The dominant regulatory rhetoric suggests that clients need protecting from their lawyers.¹⁰⁴ In the case of global corporates and financial institutions as clients who exert significant buying power in a hyper-competitive legal services market, this regulatory orientation simply does not reflect reality. Simultaneously, the paradigm of legal services

¹⁰⁴ See also: Loughrey, *op. cit.*, n. 68.

offered by large law firms to their clients has changed over time from lawyers as professionals and advisers to their clients, towards service-providers engaging with consumers.¹⁰⁵ Current regulation, together with our data, illustrate two interwoven difficulties that Fineman identifies with “foundation myths” such as independence. First,

“while rhetorically constant [they] may actually convey very different aspirations, values, and concepts from one generation to the next, or across different groups within society at any one time.”¹⁰⁶

Even within the relatively small sphere of corporate finance lawyers, independence was differently understood by the various members of that community. Second, where foundational concepts are “little more than unrealizable myths they can have real and negative societal consequences,”¹⁰⁷ especially where they are used or intended to set standards for measuring and evaluating the appropriateness of individual and institutional behaviour.¹⁰⁸ While regulation may have symbolic importance,¹⁰⁹ we would argue that the current framing of independence by the regulators puts forward an unrealizable myth of the hero-lawyer able to resist pressures from her firm, her colleagues, her clients, the lawyers on the other side, representative bodies and the regulators themselves. Such also perpetuates an unrealistic ability both to spot and resist pressures, and is firmly based on the idea of an individualistic and consciously rational actor. Current framings suggest that regulators have little in-depth understanding of the relational and situational vulnerabilities of corporate lawyers, or at least misplaced faith in the capacity of large firms to protect lawyer independence and deploy it effectively.

CONCLUSION

Although professional independence retains great discursive power and institutional support, the social organisation of professions as a whole, as well as corporate legal practice in particular, reflect complex relationships of interdependence and interconnectedness. These complex relationships are profoundly shaped by the vast social, economic, and technological transformations of globalised late capitalism.¹¹⁰ It is therefore important to cast a critical eye over the concept of professional independence to consider whether it serves its purported purpose of protecting lawyers’ professional

¹⁰⁵ See: Sommerlad, op. cit. n. 69; Hanlon, op. cit. n. 69.

¹⁰⁶ Fineman, op. cit. (2004), n. 3., p. 25.

¹⁰⁷ id.

¹⁰⁸ id.

¹⁰⁹ W. Van Der Burg, ‘The expressive and communicative functions of law, especially with regard to moral issues’ (2001) 20(1) *Law & Philosophy* 31.

¹¹⁰ G. Hanlon, ‘The Entrepreneurial Function and the Capture of Value – Using Kirzner to Understand Contemporary Capitalism’ (2014) 14(2) *Ephemera*; G. Hanlon, ‘Institutional Forms and Organizational Structures: Homology, Trust and Reputational Capital in Professional Service Firms’ (2004) 11(2) *Organization* 187.

judgement from susceptibility to inappropriate and distorting influences of capital, clients, and other third parties. Our data has opened up to scrutiny understandings and practices of independence among corporate lawyers previously invisible to external review. Reflecting the nature and intensity of concerns about the harms and hazards of globalised corporate legal practice, we deployed vulnerability lenses to explore the situational, relational, and institutional vulnerabilities our lawyers faced, and their implications for professional independence, as well as more broadly.

Paying particular attention to the constraining and enabling effects of intersecting structures of power and privilege between corporate lawyers and their clients, we have illustrated that while the concept of professional independence remains (for the most part) meaningful, its meaning and practice are profoundly mediated by the contexts of corporate lawyers' everyday working lives. Our lawyers operated in conditions of intense competition and pressure, and their aspirations, motivations, norms, conduct rules, and associated practices were refracted through, negotiated with, and closely reflected, those of their clients. This fundamentally influenced their concepts and practice of professional independence. While able to identify potential risks associated with a downward shift in the meaning and status of their work and relationships with clients – from 'trusted-advisor' to 'service-provider' – our lawyers overwhelmingly felt that they and their firms were sufficiently resilient to counter these. Nevertheless, their standards of professional independence were low, and, as the 'shadow client' example illustrates, they appeared prone to developing and normalising potentially risky and irresponsible practices.

Vulnerability lenses sensitise us to the linkages between institutional, practitioner, client, and public vulnerabilities,¹¹¹ and to the role precarious professionals may play in exacerbating systemic vulnerability (such as the hazards and harms caused when irresponsible but standardised business practices go awry). Furthermore, it is those most conventionally identified as vulnerable who typically suffer most. The financial crisis, and ensuing policies of austerity, are a recent example of this.¹¹² Taking seriously the situational and relational vulnerabilities of those not conventionally considered vulnerable helps us think more carefully and effectively about these profound social changes. We are also able to evaluate state responsibilities in light of those vulnerabilities. This includes what practitioners and institutions need in particular contexts to become not only more resilient in their own right, but to provide better resilience against systemic vulnerabilities. Corporate legal decision-making takes place in conditions of high-stakes, low-visibility, strict client confidentiality, frequently wide rule-indeterminacy, and profound power imbalance. The normative communities in which lawyers are most firmly embedded are those of corporate business, primarily their clients.¹¹³ It is these

¹¹¹ Dehaghani and Newman, op. cit. n. 46, p. 1220.

¹¹² Moorhead and Kershaw, op. cit., n. 50.

¹¹³ D. Wilkins 'Legal Realism for Lawyers' (1990) 104(2) *Harvard Law Rev.* 468, at 513.

relationships that primarily inform lawyers' use of discretion. Consequently, there is a real danger that current legal services regulation legitimises existing institutional/law firm arrangements and practices without, in reality, providing any real inhibitory or other guidance. We therefore suggest that professional independence as currently constructed is conceptually and practically unsuited to capture the occupational challenges of lawyering in an increasingly interconnected and complex world in which clients exert powerful influence over their lawyers. Indeed, such liberally-informed constructions leave regulators, and the state, poorly placed and motivated to identify and address the situational and relational vulnerabilities faced and posed by corporate legal practice, operating as a source of institutional and systemic vulnerability in its own right.¹¹⁴

Given the above, we argue that a debate about corporate legal regulation is better based upon a richly theorised concept of inter-dependence that takes seriously the causes and effects of practitioner vulnerabilities in particular contexts. Such is preferable to an elusive, contested and ultimately unobtainable concept of professional independence. This does not necessarily mean rejecting the concept of professional independence, but rather accepting that professional agency is situationally, relationally, and contextually constructed. As such, professional independence is vulnerable to corruption and corrosion in ways which orthodox constructions and institutions of professionalism are ill-equipped to address.

¹¹⁴ Mackenzie, *op. cit.* n. 4.