

In-House Lawyers' Ethics

*Institutional Logics, Legal Risk
and the Tournament of Influence*

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Introduction

General Counsel have failed as guardians.

Ben W Heineman, Jr¹

THE MAIN AIM of this book is to examine, in-depth, qualitatively and quantitatively, the professionalism of in-house lawyers: how they balance client and public interests, or, in the words of Heineman, how they balance their partner and guardian roles.² We explore the status, role and, most importantly, ethicality of in-house lawyers. To do this, we interviewed 67 in-house lawyers and senior compliance personnel and surveyed 400 lawyers working in-house in business, for the government, and in the third sector. We look at the in-house role in general and within specific contexts.

Our work builds on the existing literature in two main ways. First we quantify concepts previously examined qualitatively, teasing out fresh understandings of role-orientation and contextualising these with similarly new quantitative explorations of professional orientation, organisational pressure, and other contextual factors (such as reporting arrangements and ethical infrastructure). We complete our quantitative analysis by testing for relationships between these orientations and more general indicators of ethical inclination, mapping, in a reductive but important way, the normative implications of in-house logics.

Secondly, we aim to deepen and enrich contextual understandings of in-house lawyering through extensive use of interview data. In particular, we take an emergent ‘commercial’ discipline, legal risk management, and consider how in-house lawyers conceptualise that discipline as professionals; how they define and how they manage risk. We see legal risk management as an instantiation of professional logics in the decision-making apparatus of organisations, thereby examining how the tensions between organisational imperatives, independence, and legality are manifest and resolved. Our survey and interview data help us understand not only the emergent discipline of legal risk management, but also general concepts relevant to understanding in-house lawyers: commerciality, professionalism, and ethics. Through our exploration, we hope to deepen

¹ Ben W Heineman Jr, ‘Caught in the Middle’ *Corporate Counsel* (April 2007).

² Ben W Heineman Jr, *The Inside Counsel Revolution: Resolving the Partner-Guardian Tension* (Ankerwycke, 2016).

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understanding of in-house ethics and explore a key area of in-house practice not adequately captured by existing paradigms.

We agree also with Kirkland's observation that it is necessary to understand ethical problems, such as the independence of in-house lawyers, within specific contexts.³ As a result, we push our analysis further by asking lawyers to respond to specific vignettes (realistic case studies) of risk problems. Through this multi-layered approach – from the general (professional and occupational concepts) to the specific (legal risk management) to the particular (legal risk cases) – we explore the terrain of in-house ethicality in significant depth and with particular regard to context, critically examining what would otherwise risk being abstract or nebulous. Drawing on institutional theory, we examine how in-house lawyers construct ideas of risk and ethicality, individually and institutionally.⁴ We assess the way the logics interact with each other and with broader notions of right and wrong. Through this detailed, and mixed methods approach, we hope to offer fresh insights on the in-house lawyer. Whilst it provides evidence relevant to the traditional question of whether in-house lawyers really are 'professionals' or mere employees, we think the more important contribution is to inform debate on how to make in-house lawyers *more* ethical. Improvement, not judgement, is the ultimate aim here.

We are incredibly grateful to the in-house lawyers who participated in the research and gave us the enormously rich data that enable us to explore ideas about professionalism. Our hope is that this book will speak to multiple audiences: in-house lawyers and those who employ them; those in private practice; regulators; academics interested in professionalism, in organisational dynamics and change, in lawyering, and in ethics; and those more generally interested in organisations and how they manage and respond to complexity. As far as we are aware, this work represents the most detailed profiling of in-house lawyers undertaken anywhere. What unfolds in the following eight chapters uniquely links data on organisations, individuals, individual and team identities, and approaches to professional principles to externally validated proxy measures of ethical inclination. In this way, we map the moral compass of in-house lawyers. Also uniquely, we are able to map out a diversity of identity and understandings about the in-house role and evidence likely links between those understandings and the ethicality of in-house lawyers.

CONTEXT

There are two main sets of stories about in-house lawyers – those lawyers who work for, and are employed by, corporations, public bodies, and/or the

³Kimberly Kirkland, 'Ethics in Large Law Firms: The Principle of Pragmatism' (2005) 35 *University of Memphis Law Review* 631.

⁴Patricia H Thornton, William Ocasio and Michael Lounsbury, *The Institutional Logics Perspective: A New Approach to Culture, Structure, and Process* (Oxford University Press, 2012).

third sector, rather than working on their own account or in law firms. Those two sets of stories are mainly about in-house lawyers working in the corporate sphere. The first set of stories is of occupational success. In-housers are increasingly well-paid, high-status, powerful individuals within both their organisations and the wider legal profession.⁵ The growth of in-house lawyer roles has been dramatic; they constitute a fifth of the entire current population of solicitors in England & Wales.⁶ Once the ‘forgotten men’ of the legal profession,⁷ women are now firmly in the majority in-house. Pivotal to the evolution of commercial legal services,⁸ in-housers are equally crucial to government legal functions.⁹ Even law firms have a cadre of their own General Counsel.¹⁰ General Counsel (GCs) increasingly take leadership positions in their host organisations, with each board-level GC appointment seen as a badge of honour for the in-house community. Importantly, the roles of in-house lawyers are increasingly defined widely to encompass business, law, and strategy. As purchasers of legal services, they exert powerful economic and cultural influence over their colleagues in private practice.¹¹ In-housers increasingly demand fee discounts, alternative billing, and ‘added-value’ services such as training and secondments from the firms they instruct.¹² In these ways, in-house lawyers have, or aspire to, *influence*. That influence is built partly on notions of in-house lawyers as value-adders, and partly on the notion that business, especially international business, is subject to increasing, and increasingly complex, regulation where they need inside help. As partners of their organisations, in-house lawyers are a success.

The second set of stories suggests that the in-house role is an ethically compromised endeavour. Some in-house lawyers have been shown to manage illegality through secrecy, to offload risk onto unwitting third parties, covering dubious conduct in the cloak of absolute legality, and otherwise aiding and abetting harmful conduct.¹³ General Motors’ ignition-switch scandal was related

⁵ Ben W Heineman Jr, ‘The General Counsel as Lawyer-Statesman’ (Harvard Law School Program on the Legal Profession Blue Paper, 2010).

⁶ Law Society, ‘Annual Statistical Report 2016’ (Law Society, 2017).

⁷ Karl Mackie, *Lawyers in Business: And the Law Business* (Springer, 1989).

⁸ David Wilkins, ‘Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship’ (2010) 78 *Fordham Law Review* 2067; John P Heinz and others, *Urban Lawyers: The New Social Structure of the Bar* (The University of Chicago Press, 2005) 297.

⁹ Ben Yong, ‘Government Lawyers and the Provision of Legal Advice within Whitehall’ (The Constitution Society and The Constitution Unit Report, 2013).

¹⁰ Elizabeth Chambliss, ‘The Professionalization of Law Firm In-House Counsel’ (2005) 84 *North Carolina Law Review* 1515; Jonathan Kembery, ‘The Evolution of the Lawyer’s Lawyer’ (2016) 19 *Legal Ethics* 112.

¹¹ On the potential for in-house lawyers to shape the ethics of the private practice law firms they engage, see Suzanne Le Mire and Christine Parker, ‘Keeping It In-House: Ethics in the Relationship between Large Law Firm Lawyers and Their Corporate Clients through the Eyes of In-House Counsel’ (2008) 11 *Legal Ethics* 201.

¹² Steven Vaughan and Claire Coe, ‘Independence, Representation and Risk: An Empirical Exploration of the Management of Client Relationships by Large Law Firms’ (Solicitors Regulation Authority Report, October 2016).

¹³ See further Chapter 3 of Deborah L Rhode, *Cheating: Ethics in Everyday Life* (Oxford University Press, 2018).

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to a culture hidebound by “a pattern of incompetence and neglect” significantly bolstered by the inadequacies of their in-house lawyers.¹⁴ An Enron GC was criticised for failing to inquire genuinely into fraudulent accounting transactions partly responsible for the company’s spectacular collapse.¹⁵ In-house lawyers at Arthur Andersen were rebuked for reminding colleagues of document retention policies (effectively encouraging documents to be shredded), when it was helpful to Arthur Andersen to have allegedly incriminating documents destroyed.¹⁶ An in-house lawyer at Apple was fired amidst investigations for acquiescing in the backdating of managerial stock options.¹⁷ An Energy Solutions in-house lawyer was criticised by a High Court judge for not resisting plans for paying employee witnesses bonuses if the company was successful in litigation. Those employees then appeared as witnesses.¹⁸ The GC at Tyco was accused but acquitted of improperly receiving and concealing unauthorised compensation and loans from the company, helping the former Tyco chairman and chief executive officer conceal thefts from the company.¹⁹ Within Siemens, about 2,000 bogus business-consulting agreements were created to hide, ‘more than \$1.4 billion in bribes to officials in 65 nations all across the globe’.²⁰ Casualties in the clear-out of staff that followed included the GC and head of the audit and compliance functions.²¹ Two former Barclays GCs have been interviewed in the UK under caution and many have been moved on.²² Two lawyers at Uber lost their jobs for their role in the company’s cover-up of a major security breach.²³ There is a raft of other examples, some of which we discuss later in this book. Government lawyers are not immune: two famous examples being from the US (John Yoo’s advice as regards the legality of the so-called ‘torture memos’ in the Iraq War)²⁴ and the UK (Lord Goldsmith’s advice about the legality of the invasion of Iraq).²⁵

¹⁴ Heineman (n 2) 1755–72.

¹⁵ Sung Hui Kim, ‘Inside Lawyers: Friends or Gatekeepers?’ (2016) 84 *Fordham Law Review* 1867, 1884; ‘USATODAY.Com – Unindicted, yet under a Shadow’, http://usatoday30.usatoday.com/money/industries/energy/2006-01-29-enron-unindicted-usat_x.htm, accessed 11 July 2016.

¹⁶ Yuri Mikulka and John M Horan, ‘General Counsel Under Attack: Criminal and Enforcement Proceedings, Investigations, and the Travails of In-House Counsel’ (Committee on Corporate Counsel Report, American Bar Association, 17 October 2007).

¹⁷ Kim, ‘Inside Lawyers’ (n 15) 1886; Mikulka and Horan (n 16).

¹⁸ *Energysolutions EU Ltd v Nuclear Decommissioning Authority* [2015] EWCA Civ 1262.

¹⁹ Sung Hui Kim, ‘The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper’ (2005) 74 *Fordham Law Review* 983, 990–91.

²⁰ Heineman (n 2) 1791.

²¹ *ibid* 1810.

²² Caroline Binham, ‘Ex-Barclays Bankers to Give Evidence to Fraud Agency’ *Financial Times* (London, 24 September 2014).

²³ Eric Newcomer, ‘Uber Paid Hackers to Delete Stolen Data on 57 Million People’ Bloomberg (21 November 2017), www.bloomberg.com/news/articles/2017-11-21/uber-concealed-cyberattack-that-exposed-57-million-people-s-data, accessed 17 April 2018.

²⁴ See, for example, W Bradley Wendel, ‘Legal Ethics and the Separation of Law and Morals’ (2005) 91 *Cornell Law Review* 67.

²⁵ Richard Moorhead, ‘Independence Play – Chilcot on the Legal Process | Lawyer Watch’, <https://lawyerwatch.wordpress.com/2016/07/07/independence-play-chilcot-on-the-legal-process/>, accessed 17 April 2018.

Despite these stories, away from the media's gaze, in-house lawyers can also prevent wrongdoing, investigate and respond to human rights abuses, ensure products and services are advertised and sold in legal and reputable ways, and – for listed companies and heavily regulated companies – can play a key role in ensuring companies deal fairly with markets and regulators. Whilst in-house lawyers are rightly scrutinised for their independence and their position as ethically risky insiders, there are also ethical opportunities to being an insider.²⁶ These opportunities exist where in-house lawyers have greater information; where they have greater and earlier influence on management decisions (to nip problems in the bud or shape decisions for the better); and where they are able to lead and proactively manage an organisation's legal functions in ways which strengthen the ethicality and legality of the organisation. Although we must also bear in mind that any claims by in-house leaders to be advancing ethical sophistication in their organisations is playing to a particular audience which demands an improvement in corporate culture.²⁷

PROFESSIONALISM

That organisational misconduct can be perpetrated and enabled, but also inhibited or prevented, by in-house lawyers is dependent on their embeddedness within organisations. Embeddedness makes egregious conduct both more and less likely. The impact of this embeddedness is contingent on how in-house lawyers themselves, and the organisations they work for, see their role. And central to our interest is the question of whether and how their role as professionals impacts on that contingency. What does being professional mean in such embedded in-house contexts? And how does being professional influence in-house lawyers, and their organisations, towards or away from misconduct?

Professions are traditionally seen as being distinct from occupations, and are granted status and privileges by the State as a result, garnering status, economic rewards, and regulatory advantages over 'mere' occupations.²⁸ But for professions to be given these privileges, professions must serve a useful purpose for society. A key question is: what *is* that purpose? One answer is that professions are created to ensure that a particular body of esoteric knowledge is used for the *public* good, rather than lawyers' self-interests, or the interests of government,

²⁶ Kim suggests in-house lawyers have a greater 'capacity to monitor' and possibly a greater 'capacity to interdict' in relation to unethical conduct, but this does not mean they have a greater willingness to interdict. See Sung Hui Kim, 'Gatekeepers Inside Out' (2008) 21 *Georgetown Journal of Legal Ethics* 411.

²⁷ See, for example, Martin Arnold and Banking Editor, 'Banking Standards Report Has More Questions than Answers' *Financial Times* (8 March 2016), www.ft.com/cms/s/0/61cb8166-e483-11e5-a09b-1f8b0d268c39.html#axzz4fHzrbk4JZ, accessed 17 April 2018.

²⁸ Alan A Paterson, 'Professionalism and the Legal Services Market' (1996) 3 *International Journal of the Legal Profession* 137.

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or for private interests such as powerful clients.²⁹ As a result, professions are interposed between market and state promising to put other interests before their own; typically, the interests of their client and of society.³⁰ So, for example, lawyers are obliged to protect the rule of law and the administration of justice as well as the best interests of their clients.³¹ When advising or implementing the client's legal plans, lawyers perform a balancing of individual and collective rights. They ensure, as far as possible, that a client is free to organise their affairs in the way which suits them best; that the client properly takes account of what the law requires of them; and the lawyer, when working for the client, behaves with integrity and in accordance with their professional obligations. As such, organisations are free to do business or implement policy in ways of their choosing, but with proper respect for the law.

In this way, professions traditionally claim a public-interest function. How is one to work out whether professionals really do perform that public-interest function? One way is to consider the traits of the professional group under consideration. If (in our case) in-house lawyers are properly qualified as lawyers, work to standards set by their profession, abide by rules of ethics and practice set by the profession; and manage their own work (because only they really understand that work), then on the face of it they are properly regarded as professionals.³²

Trait-based approaches have a number of weaknesses. Of primary interest to the debate about in-house lawyers is the increasing complexity of the environments within which professions work;³³ the diminishing role for self-regulation;³⁴ and the increasing influence of commercial forces that make traditional professional theories less descriptively accurate.³⁵ To some, these indicate the end of professionalism, or a new species, or renegotiation, of professionalism.³⁶ But

²⁹ See: Magali Safratti Larson, *The Rise of Professionalism – A Sociological Analysis* (University of California Press, 1977); Eliot Freidson, *Professionalism, the Third Logic: On the Practice of Knowledge* (University of Chicago Press, 2001).

³⁰ Freidson (n 31).

³¹ We come back to this below, but the regulatory codes of conduct for both solicitors and barristers in England & Wales place the public interest at the heart of professional obligations.

³² See, for example, Julia Evetts, 'A New Professionalism? Challenges and Opportunities' (2011) 59 *Current Sociology* 406; Roy Suddaby and Daniel Muzio, 'Theoretical Perspectives on the Professions' in Laura Empson, Daniel Muzio, Joseph Broschak and Bob Hinings (eds) *The Oxford Handbook of Professional Service Firms* (Oxford University Press, 2015).

³³ Hilary Sommerlad and others, *The Futures of Legal Education and the Legal Profession* (Hart, 2015).

³⁴ Andrew Boon, 'Professionalism under the Legal Services Act 2007' (2010) 17 *International Journal of the Legal Profession* 195.

³⁵ Hilary Sommerlad, 'The Commercialisation of Law and the Enterprising Legal Practitioner: Continuity and Change' (2011) 18 *International Journal of the Legal Profession* 73; Gerard Hanlon, 'Professionalism as Enterprise: Service Class Politics and the Redefinition of Professionalism' (1998) 32 *Sociology* 43.

³⁶ Evetts (n 32); Herbert M Kritzer, 'The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World' [1999] 33 *Law and Society Review* 713–59; Paterson (n 28).

to us they indicate the need to focus more acutely on the actual balancing of individual and collective interests that professionals undertake with a greater sensitivity to the context.³⁷

We adopt Abbott's idea of professional ecology and see in-house lawyers as part of a system of linked sub-systems that are, 'neither fully constrained nor fully independent',³⁸ that have their own ways of thinking of, and acting on, problems but that are influenced by other social sub-systems.³⁹ The task then is to examine whether in-house lawyers are distinct, different from their host organisations, and whether their distinctiveness is, in a meaningful way, professional.

Abbott's approach would suggest that in-house lawyers constitute a sub-system nested within the broader systems of their profession and their host organisations, where they compete for job satisfaction, influence and status. Each system and interaction between systems brings to bear ways of thinking relevant to the interaction (the piece of advice, the deal, the reputational mishap). These ways of thinking and acting can derive from the in-house lawyers as professionals, as lawyers, or more specifically as in-house lawyers; or from their organisations or industries (say as policy formulators or commercial actors). Through examining this interplay of ideas, it is tempting to get lost in the complexity; yet we think we can explore what it means to be an in-house lawyer and still maintain a strong focus on the normative dimensions to those ways of thinking. And, in exploring 'risk', we explore how a concept originating in organisational and scientific thinking is adapted to the language and intellectual architecture of lawyers.

The growing influence of in-house lawyers is an occupational success story; in-house lawyers are increasingly important parts of the social system that makes up their organisations and the business of law. But we need to go further if we are to ask whether that success-story is a professional one. The relationship with 'clients' is particularly interesting.⁴⁰ In-house lawyers are both part of and serve that client. They are dependent and constituent; servant and agent. Further, the more senior those in-house lawyers are in the organisation the more they become an important part of the client's directing mind. This mixed servant-agent role does not fit well with the historical archetype that one professional served many individual clients (and thus retained

³⁷ Lynn Mather and Leslie C Levin, *Lawyers in Practice: Ethical Decision Making in Context* (University of Chicago Press 2012).

³⁸ Andrew Abbott, 'Linked Ecologies: States and Universities as Environments for Professions' (2005) 23 *Sociological Theory* 245.

³⁹ *ibid.*

⁴⁰ For example, Simon is one of many suggesting in-housers conflate the interests of the organisation with the goals of its incumbent management. William H Simon, 'Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict' [2003] *California Law Review* 57.

their independence).⁴¹ A collapsing of the client–professional divide negates claims to professionalism if the professional simply emulates what the client wants without regard to the public interests the profession protects.

For a while this meant in-house lawyers were seen as professionally inferior. The tendency of lawyers to elide the eliteness of one’s clients with high professional status,⁴² and the growing corporatisation of legal practice, now makes in-house practice look less incongruous. Outside practice has itself become more dependent.⁴³ Furthermore, the growing power of in-house lawyers as agents of clients over private practice has bolstered the professional status of in-house lawyers in spite of, but also because of, that dependency.⁴⁴ In the profession’s everyday discourse, this building of professional reputation is most often framed in terms of advancing status and influence: values of self-interest rather than public interest. It does not really speak to professionalism in the terms we mean it. One could insinuate that in-house power and status manifests in their acceptance and promotion of client power not professionalism. Indeed, contrary to the idea that professionals resist ‘vulgar’ markets and bureaucracy,⁴⁵ in-housers are heavily influenced, as we will see, by commerciality and bureaucratic hierarchy. Nor does the conventional interpretation of professional power as exercised by expert lawyers over inexpert, atomised clients generally apply,⁴⁶ with some suggesting in-house lawyers are better seen as isolated, marginalised, or swamped by the cognitive and economic influence of an organised client.⁴⁷

We should pause here and note that the literature on in-house lawyers has tended to concentrate on public interest, rather than client interest, concerns.⁴⁸ The work often assumes or does not concern itself with the idea that in-house lawyers are able and willing to deliver on an organisation’s needs. This relative silence is an interesting contrast to one of the pre-eminent debates in the commercial world and government legal sector about lawyers not being sufficiently commercially aware or client-focused.⁴⁹ Our emphasis in this book is similarly on tensions between lawyers and the public interest, but we do seek

⁴¹ Although compare with patronage, and see Terence J Johnson, *Professions and Power* (Macmillan, 1972).

⁴² John P Heinz and others, ‘The Constituencies of Elite Urban Lawyers’ (1997) 31 *Law & Society Review* 441; Heinz and others (n 8); Steven Brint, *In an Age of Experts: The Changing Role of Professionals in Politics and Public Life* (Princeton University Press, 1996).

⁴³ Robert L Nelson, *Partners with Power: The Social Transformation of the Large Law Firm* (University of California Press, 1988); Vaughan and Coe (n 12).

⁴⁴ Vaughan and Coe (n 12); Christopher J Whelan and Neta Ziv, ‘Privatizing Professionalism: Client Control of Lawyers’ Ethics’ (2011) 80 *Fordham Law Review* 2577.

⁴⁵ Talcott Parsons, *The Social System* (Psychology Press, 1991). The caveat here, of course, is that large law firms have become, over time, increasingly bureaucratic organisations and one of many forms of ‘professional service firms’.

⁴⁶ Johnson (n 41).

⁴⁷ Pam Jenoff, ‘Going Native: Incentive, Identity, and the Inherent Ethical Problem of In-House Counsel’ (2011) 114 *West Virginia Law Review* 725.

⁴⁸ For an exception, see Heineman (n 2).

⁴⁹ See, for example, Gillian K Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy* (Oxford University Press, 2016).

to address in part the potential failure of lawyers to meet their organisations' needs. Indeed, one of the reasons for focusing on legal risk management is that it is an emergent discipline within legal practice, where lawyer competency may sometimes be described, as we will see in Chapter 5, as embryonic.

Should we also pause before taking the rising status and influence of in-house lawyers as a signal of professional vacuity? Are in-house legal professionals the useful idiots, or amoral adjutants, of their organisations? Or is something more interesting going on? Often the focus on public interest questions assumes a 'professional conflict' model: that public and business interests regularly conflict and that lawyers as 'professionals' should side with the public interest but as entrepreneurial employees would side with the business. A number of ideas about in-house lawyers have developed as a result of fearing the latter. One is that in-housers may have a different occupational identity to conventional private practice lawyers, more aligned with the ideology of business than of profession.⁵⁰ Nelson and Nielsen's were anxious about lawyer entrepreneurialism.⁵¹ Gunz and Gunz suspected that in-house lawyers did not generally feel a conflict between organisational and professional roles because they prioritised their organisational view.⁵² Jenoff, Kim, and others suggest cognitive and economic forces neutralise more professional instincts.⁵³ Mastenbroek and Peeters Weem suggest legislative drafters conform to the political imperatives when faced with professional-occupational conflicts.⁵⁴

This public interest gaze has a tendency too to focus on one role of the in-house lawyer: that of the lawyer as gatekeeper who exists to stop illegal conduct within the organisations in which they work.⁵⁵ The willingness of in-house lawyers to say 'No', when faced with proposals that their employer wants to do something illegal, is seen as a role which is essential to in-house professionalism and one which some in-house lawyers may be reluctant to

⁵⁰ See, for example, our discussion of Gunz and Gunz's work in Chapter 2.

⁵¹ Robert L Nelson and Laura Beth Nielsen, 'Cops, Counsel, and Entrepreneurs: Constructing the Role of inside Counsel in Large Corporations' [2000] *Law and Society Review* 457.

⁵² Hugh P Gunz and Sally P Gunz, 'The Lawyer's Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of in-House Counsel' (2002) 39 *American Business Law Journal* 241.

⁵³ Jenoff (n 47); Kim, 'Banality of Fraud' (n 19); Kim 'Gatekeepers Inside Out' (n 26).

⁵⁴ Ellen Mastenbroek and Tanja Peeters Weem, 'In Spagaat Tussen Brussel En Den Haag: De Europeanisering van Het Wetgevingsvak' ['Balancing between Brussels and The Hague: The Europeanization of Legal Drafting'] (Nijmegen, Radboud University Report, 2009); discussed in Berry Tholen and Ellen Mastenbroek, 'Guardians of the Law or Loyal Administrators?: Toward a Refined Administrative Ethos for Legislative Drafters' (2013) 35 *Administrative Theory & Praxis* 487.

⁵⁵ On gatekeeping, see: Reinier H Kraakman, 'Corporate Liability Strategies and the Costs of Legal Controls' (1984) 93 *The Yale Law Journal* 857; Reinier H Kraakman, 'Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy' (1986) 2 *Journal of Law, Economics, & Organization* 53; John C Coffee, *Gatekeepers: The Professions and Corporate Governance* (Oxford University Press, 2006); Christine Parker, Suzanne Le Mire and Anita MacKay, 'Lawyers, Confidentiality and Whistleblowing: Lessons from the McCabe Tobacco Litigation' (2017) 40 *Melbourne University Law Review* 999.

adopt.⁵⁶ Whether this is in fact the case is contested. Rostain provides a suite of reasons, and some pilot evidence, for thinking that general counsel in the US are ‘strong gatekeepers’.⁵⁷ Our evidence is more extensive, looks at a larger number, and wider range of in-house lawyers including GCs, and shows that some in-house lawyers plainly are unwilling to ever say ‘No’ to their employers, and that this is a problem.

Yet we seek to make a wider point. The desire to focus on binaries – are in-house lawyers independent? Are they good gatekeepers? Do they say ‘No’ to their clients? Are they lawyers or business people? – is something of a normative simplification.⁵⁸ To be clear, we do not think it is wrong to focus significantly on such concepts. If looking at issues such as independence were a failing, we would be as guilty as others. But we should not reduce professionalism to a test of these binaries. It is important to contextualise as fully as possible; to understand whether in-house lawyers are willing to say ‘No’, but also to understand *when* and *how* they do so. It is also important to understand how independence is manifested, managed and delivered other than, or in addition to, saying ‘No’; as well as the ways in which independence is compromised without a ‘Yes’/‘No’ question being put. And some generalisations – for instance, that in-house lawyers are less ethical than private practitioners – are founded on a thinly evidenced set of assumptions about private practitioners which fail to take account of the very different roles that such lawyers often play on the ground.⁵⁹

Much socio-legal work on the professions generally, and on in-housers more specifically, recognises the importance of context and the contingencies that make up ethical practice,⁶⁰ but we think it is possible to go further. Nelson and Nielsen’s characterisation of in-house lawyers as cops, counsellors and entrepreneurs,⁶¹ for example, is vivid and nuanced but elides ideas which we would argue are conceptually distinct. Their entrepreneurs liked to do work of high commercial value to their organisations (like deals); concentrated on getting practical results (like business-people); and used uncertainty in the law for business advantage, for example exploiting loopholes in the law (like regulatory entrepreneurs).⁶² In tying this cluster of ideas together, they mixed positive

⁵⁶ A classic discussion of this is Robert Jackall, *Moral Mazes: The World of Corporate Managers* (Oxford University Press, 2010).

⁵⁷ Tanina Rostain, ‘General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions’ (2008) 21 *Georgetown Journal of Legal Ethics* 465.

⁵⁸ Rosen was well ahead of us in arguing for a more nuanced framing of the role of in-house lawyers. See Robert Eli Rosen, ‘The Sociological Imagination and Legal Ethics’ (2016) 19 *Legal Ethics* 97; Robert E Rosen, *Lawyers in Corporate Decision-Making* (Quid Pro Quo Books, 2015); Robert Eli Rosen, ‘The Inside Counsel Movement, Professional Judgement and Organizational Representation’ (1988) 64 *Indiana Law Journal* 479.

⁵⁹ See, by way of contrast, Vaughan and Coe (n 12); Richard Moorhead and Victoria Hinchly, ‘Professional Minimalism? The Ethical Consciousness of Commercial Lawyers’ (2015) 42 *Journal of Law and Society* 387.

⁶⁰ Mather and Levin (n 37).

⁶¹ Nelson and Nielsen (n 43).

⁶² For example Doreen McBarnet, ‘Legal Creativity: Law, Capital and Legal Avoidance’ in Maureen Cain and Christine Harrington (eds), *Lawyers in a Postmodern World: Translation and Transgression* (Open University Press, 1994).

and negative potentialities, portraying the overall implications of an entrepreneurial role with ambivalence and scepticism from a public-interest perspective. Our work builds on and disentangles these separate ideas, through identifying in-house role orientations: a commercial orientation; an advisory orientation; an orientation around the exploitation of uncertainty; an ethical orientation; and an independence orientation. We articulate and test the presence of these orientations in survey work with in-house lawyers and examine their normative dimensions through looking at the relationships between these role orientations and ethical inclination.

One benefit of this approach is that we can probe Nelson and Nielsen's uncertainty about whether the three characterisations were types (individuals gravitated towards being one of the three) or dispositions (which most in-house lawyers could draw upon depending on the context of any problem they were trying to solve). This is an important distinction. Seeing characterisations of in-house role as dispositions suggests greater flexibility; a repertoire of options that in-house lawyers can draw upon (they can be entrepreneurial when a situation demands it, say). It also serves as a reminder that the context of a task or an organisation might significantly influence individuals towards one or other approach and also towards what that approach 'meant'.

If shifting between dispositions is important, then we need to redouble our attention to context. Independence needs to be called upon when there are conflicts between organisational values and professional ones. Yet Gunz and Gunz found a lack of such conflict in lawyers who had gone in-house. They wondered what explained the absence of such conflict: were professionals working within 'good' businesses? Was their professional identity too weak to recognise or be worried by such conflicts that did arise? Or were organisational and professional values harmfully aligned?⁶³ To better model the importance of context, we explore the tensions in host organisations between legal and other parts of the organisation and the existence of ethical pressure (the pressure to do things that are unlawful or unethical). We then relate these pressures to occupational and professional identity and so can explore the questions of alignment and professional identity. Unlike Gunz and Gunz, we *do* evidence conflict between professional and organisational values, getting a clearer understanding of the different responses to such pressure that are possible, and what supports an ethical response as a result. We also show that conflict can be associated with stronger, public-interest ideas about professional orientation.

ETHICS AND LAWYERS' ETHICS

Our understanding of professionalism depends on a balancing of individual and collective interests in the public interest; and seeing that balancing as being

⁶³ Gunz and Gunz (n 52).

influenced by the ecologies of profession, organisation, and beyond. How lawyers conduct that balancing raises the question of ethics and requires us to define what we mean when we speak of in-house lawyers' ethics in this book. We see two elements. Primarily, we mean the ethicality of the in-house lawyer *as lawyer*: acting in accordance with professional rules and principles. Independence, integrity, and protectiveness of clients' interests and of the rule of law are professional obligations that require balancing. Note the interests of individuals (the client, the lawyer's integrity), and the collective (through the rule of law). Whether, when, and how in-house lawyers are well placed to understand and implement their professional obligations is the primary concern of our analysis.

The second definition of ethics is broader, important, but less central to the role of in-house lawyers *as lawyers*. This 'general' ethicality is something that lawyers are often more sceptical of,⁶⁴ but that organisations and some lawyers are increasingly interested in: namely, taking account of and acting in accordance with widely held social norms. Professional and general ethicality are not necessarily absolutely distinct. Behaving with professional integrity or behaving in a way that maintains public trust overlaps with general ethical concepts,⁶⁵ albeit integrity to one's role might also sometimes conflict with those concepts. It is also possible for general ethicality to influence professional roles ecologically: a client's reputation, and therefore their best interests, may be served by not engaging in aggressive lawyering either because it prompts regulatory scrutiny or a public backlash. So, whilst we are less interested in ethics in this general sense, we do not exclude it from view; and we are mainly concerned with general ethics' influence on the lawyer's role *as lawyer*.

Ideally, to understand the ethicality of in-house lawyers, one would like to be able to examine their professional inclinations, relate those inclinations to actual behaviour, and examine that behaviour to assess its ethicality against general and professional standards. In the context of our quantitative work that was not practical. What we were able to do was to use established measures of general ethical inclination as proxies for evaluating likely behaviour. Measuring ethicality is of course both difficult and multi-dimensional, but measures of ethical inclination – moral attentiveness and moral disengagement – have been shown to be predictive of ethical misconduct (such as lying and cheating) and less prone to social response bias than other approaches.⁶⁶ These general ethical measures provide a normative perspective on the organisational and professional orientations we explore as defining the in-house role. As such, we are able to explore

⁶⁴ Steven Vaughan and Emma Oakley, "Gorilla Exceptions" and the Ethically Apathetic Corporate Lawyer' (2016) 19 *Legal Ethics* 50.

⁶⁵ See, for example *Wingate v Solicitors Regulation Authority* [2018] EWCA Civ 366.

⁶⁶ Scott J Reynolds, 'Moral Attentiveness: Who Pays Attention to the Moral Aspects of Life?' (2008) 93 *Journal of Applied Psychology* 1027; James R Detert and others, 'Moral Disengagement in Ethical Decision Making: A Study of Antecedents and Outcomes.' (2008) 93 *Journal of Applied Psychology* 374.

the extent to which, for example, being commercially oriented relates to general ethicality. And because professional ethicality generally requires one not to lie and cheat, for instance, we also see these measures as useful, if incomplete, indicators of professional ethicality.

The incompleteness of the indicators leads us onto another important part of the discussion. In general, empirical work on in-house lawyers focuses on role orientations. We go further, developing measures of professional orientation alongside role orientations.⁶⁷ We also examine, qualitatively, in-housers' own, often rather modest, understandings of their professional obligations through interviews and the vignettes of legal risk problems. We see often basic and quite intuitive understandings of their professional rules, and a hierarchy of professional principles which treats the client's interests as paramount. There are, however, important variations: some in-housers emphasise one set of interests – the client's needs; others emphasise two sets – ethics as a matter of integrity (their own) and the client's needs; and the third group emphasises three sets of interests – the client's needs, the needs of the lawyer to behave with integrity, and also the need to take account of broader concerns such as the interests of justice. In this way, we see a range of approaches within our cohort progressing from simpler to more complex professional ethical models.

We discovered that few of our in-house lawyers were influenced *only* by the client's interests, and that many had something of a justice-oriented view that extended beyond the client and their own integrity. But our recognition of this is tempered by finding also that it was not known to many that, under their code of conduct, *all* solicitors *are obliged* to recognise interests other than those of their client. This code is also clear that where there is a conflict between principles, the client's interest is *not* paramount unless it aligns with the public interest.⁶⁸ Further, we are able to identify a minority of lawyers in our sample who do seem to view client interests as paramount, even to the extent of allowing commerce to trump legality. In-house professional models are thus varied and generally out of line with professional rules. For some, that misalignment is serious enough to be critical.

Whilst the quantitative modelling of professional orientations is a distinctive feature of our research, we should emphasise it is a simplification. In particular, philosophically oriented readers will want to complicate or challenge the notion that lawyers must act in the public interest to be properly professional. The so-called 'standard conception' of lawyer's ethics suggests client primacy is in the public interest; it sees lawyers as having, 'special duties to the

⁶⁷ See: www.sra.org.uk/solicitors/handbook/handbookprinciples/content.page, accessed 17 April 2018. Very similar principles exist for barristers too as 'Core Duties'. These can be found here: www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/, accessed 17 April 2018.

⁶⁸ See para 2.2. of the SRA Principles: www.sra.org.uk/solicitors/handbook/handbookprinciples/content.page, accessed 17 April 2018. The position is the same for barristers in England & Wales. See Core Duty 1 and guidance C1, Bar Code of Conduct: www.barstandardsboard.org.uk/media/1918141/bsb_handbook_1_february_2018.pdf, accessed 17 April 2018.

client that allow and perhaps even require conduct that would otherwise be morally reprehensible'.⁶⁹ A defence of the lawyers who treat their client's interests as paramount would begin with such theories. Such a view is no defence to lawyers allowing commerciality to trump legality, however. And, in any event, the in-house lawyers we surveyed and spoke to did not conform to the 'standard conception' view of the lawyer as amoral agent. Often a strong client orientation sat alongside a purportedly strong ethical orientation. Our analysis of risk shows this ethical orientation emerges rather fitfully. We see resistance and sometimes acquiescence to requests for in-housers to advise or assist with unlawful or unethical action, and we see interestingly diverse attitudes to the autonomy of the client (an essential characteristic of the standard conception).⁷⁰ In particular, the idea that lawyers are 'mere' advisors, whilst the client decides, is an orientation which is strong but not dominant in our in-house lawyers. In-house lawyers may tend towards 'civil obedience' to their client's definitions of what they want, why and how, but that obedience is not total and there are opportunities to shape the object of their obedience because they are part of the client themselves and because of the uncertainties inherent in the facts and laws with which they work.⁷¹

Equally, through notions of ethical orientation, through understanding that in-house attitudes to exploiting uncertainty in law are critical, and through our detailed exploration of risk management, we see how some in-house lawyers make contextual, discretionary judgements about 'justice' (where justice is used to mean the legal – and not moral – merits of any given case). This could be argued to be broadly consistent with some jurisprudential approaches to legal ethics.⁷² And some in-housers draw upon common morality (what ordinary individuals would think of as right and wrong) to guide their actions in situations of uncertainty.⁷³ This is not to offer up 'idealized portraits of the moral [lawyer] agent.'⁷⁴ Rather, we would suggest that many of our in-house lawyers

⁶⁹ Tim Dare, 'Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers' (2004) 7 *Legal Ethics* 24.

⁷⁰ Stephen L Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities' (1986) *American Bar Foundation Research Journal* 24. Schneyer also writes of the importance of respect for a client's autonomy. See Ted Schneyer, 'Moral Philosophy's Standard Misconception of Legal Ethics' [1984] *Wisconsin Law Review* 1529.

⁷¹ Alice Woolley and W Bradley Wendel, 'Legal Ethics and Moral Character' (2010) 23 *Georgetown Journal of Legal Ethics* 1065. Wendel argues that, 'the law supercedes societal controversy and provides a moderately stable, provisional framework for cooperation, notwithstanding normative and empirical disagreement.' See W Bradley Wendel, 'Legal Ethics Is about the Law, Not Morality or Justice: A Reply to Critics' (Social Science Research Network Paper 2011) and W Bradley Wendel, *Lawyers and Fidelity to Law* (Reprint edition, Princeton University Press, 2012).

⁷² William H Simon, *The Practice of Justice: A Theory of Legal Ethics* (Harvard University Press, 1998) 138.

⁷³ David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988). See further, on the morally activist lawyer, Robert K Vischer, 'Legal Advice as Moral Perspective' (2006) 19 *Geo J Legal Ethics* 225.

⁷⁴ Woolley and Wendel (n 71).

were generally loyal in the standard conception sense, but sometimes justice-seeking, and moral too: their approaches straddle the three classical schools of thought on how lawyers should do ethics. Justice-seeking and, especially, moral agency are applied more tentatively though.

We do not say that in-house lawyers choose the approach best-suited to the problem before them, or that our analysis shows the standard conception (say) to be wrong, but we do think our data show the importance of focusing on what lawyers actually *do* when thinking about how lawyers should *be*.⁷⁵ We get some sense of the ethical risk posed by being exploitative of uncertainty, or in seeing one's role as the non-accountable adviser, both ideas associated with the zealous lawyer, but that is not to disprove the standard conception. It does, however, emphasise the behavioural dimensions to ethics: the orientations of lawyers – which may derive from an intellectual understanding of their role or a practical working-up of the role in an organisation – are important.⁷⁶ This nuance may be more important than more artificial debates about hypothetical notions of zeal. What lawyers ought to do must begin with a clear understanding of how lawyers actually behave in situ, and how this relates to their specific practice contexts, as well as wider organisational, social and economic conditions of their work. Professional ethics needs to be both practical and normative.⁷⁷

LEGAL RISK

In thinking ecologically about in-house practice we also ask how different systems (law, business, bureaucracy) interact to contest and solve problems.⁷⁸ The middle section of this book focuses on one such interaction: a relatively new and under-studied element of in-house lawyers' work, risk management. We see risk management as a paradigm example of the means by which in-house lawyers have gained greater status as managers within organisations, and as an important example of the embedding of in-house lawyers in the management of organisations.⁷⁹

⁷⁵ See: Deborah L Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford University Press, 2003); Sharon Dolovich, 'Ethical Lawyering and the Possibility of Integrity' (2001) 70 *Fordham L Rev* 1629; Wendel, 'Lawyers and Fidelity to Law' (n 71) 3.

⁷⁶ Jennifer K Robbenolt, 'Behavioral Ethics Meets Legal Ethics' (2015) 11 *Annual Review of Law and Social Science* 75; Andrew M Perlman, 'A Behavioral Theory of Legal Ethics' (2015) 90 *Indiana Law Journal* 1639.

⁷⁷ Alice Woolley, 'The Problem of Disagreement in Legal Ethics Theory' (2013) 26 *Canadian Journal of Law & Jurisprudence* 181; Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30 *Monash University Law Review* 49.

⁷⁸ Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (University of Chicago Press, 1988).

⁷⁹ KPMG, 'Beyond the Law, KPMG's Global Study of How General Counsel Are Turning Risk to Advantage' (General Counsel Survey, 2012); Roger McCormick, *Legal Risk in the Financial Markets* (Oxford University Press, 2010); Stuart Weinstein and Charles Wild, *Legal Risk Management, Governance and Compliance: A Guide to Best Practice from Leading Experts* (Globe Law and

Risk is typically defined as the likelihood of harm and the likely impact of that harm from a given hazard or set of hazards. Seen in negative terms, and associated with anxiety and undesirability,⁸⁰ Beck famously argued that risk went hand-in-hand with high technological innovation, scientific development, and the inability to fully know the dangers we face.⁸¹ Risk is thus elided with uncertainty and randomness;⁸² with rendering the future less uncertain whilst essentially unknown.⁸³ Equally, progress often entails risk: faster travel, better health interventions, improved financial instruments may all require the balancing of pros and cons, the weighing of risks and benefits, the pondering of unknowns. Similarly, risk is now a core organising principle for organisations and governments; much, some argue all,⁸⁴ regulatory activity is being defined or reconstituted in terms of risk. The nature and existence of a risk will depend on human behaviour, and the acceptability of risk is dependent upon cultural context.⁸⁵ And how organisations respond to and manage risk is becoming an important element of good governance.⁸⁶ Risk management is important too because it provides strategic focus. It enables, or purports to enable, managers to ‘see’ complex organisations and ‘target’ the risks that are revealed by focusing on the most ‘material’ potential harms.⁸⁷

For our purposes, the basic idea behind *legal* risk management is that the in-house lawyer helps their organisation decide which legal risks the organisation takes, or – and this is an important difference – the risks that the in-house legal team generates, and how the organisation can mitigate, avoid or otherwise minimise and protect itself against such risks. Risk management is a messy task: in fashioning systems measuring and governing risk, ‘knowledge claims [are made] ... both somewhat arbitrary and sincerely advanced’.⁸⁸ The application of expert rules, norms, and beliefs may often be symbolic.⁸⁹ Systems are established because management or regulators demand them, but the substantive quality of

Business, 2013); Deloitte, ‘Deloitte Global General Counsel Report 2011: How the Game Is Changing’ (London, 2011).

⁸⁰ Nikolas Rose, *Powers of Freedom* (Cambridge University Press, 1999) 160.

⁸¹ Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage, 1992).

⁸² There are those who argue that true uncertainty is wholly separate from risk, as risk requires that the likelihood of harm be capable of assessment. This is not a debate with which we need to concern ourselves here.

⁸³ Julia Black, ‘The Role of Risk in Regulatory Processes’ in Robert Baldwin, Martin Cave and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 317.

⁸⁴ Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing, 2007).

⁸⁵ *ibid* 8.

⁸⁶ Michael Power, *Organized Uncertainty: Designing a World of Risk Management* (Oxford University Press, 2007).

⁸⁷ Geoffrey P Miller, *The Law of Governance, Risk Management and Compliance* (Wolters Kluwer Law & Business, 2014) 544.

⁸⁸ Richard W Scott, ‘Lords of the dance: Professionals as institutional agents’ (2008) 29 *Organization Studies* 219, 221.

⁸⁹ *ibid* 222.

those systems is necessarily uncertain.⁹⁰ In Chapters 5 and 6, we explore how lawyers see risk as an opportunity to demonstrate value, through a systemisation and quantification of risk that enables organisations to take on legal risk as well as reduce it.

The interpenetration of logics is important: legal risk hybridises bureaucratic, legal, and commercial ideas, but to what end? It is not at all clear to us how robust the processes of systemisation and quantification are. Such hybrids call into question what skills and expertise are needed to engage successfully in quantified risk management. Yet, in-housers' evidence of the success of risk management relied mainly on their experience rather than data.

Similarly, we explore how legal risk management is shaped for, or by, social forces in what we call the tournament of influence. Being able to lead on and manage legal risk can be a basis for claiming managerial status, because it makes the legal function relevant in pan-organisational and strategic terms. It is a way of in-house lawyers talking the language of management. As we will see in this book, the conceptualisation and management of legal risk poses a series of questions about independence, about the quality of decision-making, and about the ability of professional lawyers to both promote their organisation's interests and protect the rule of law and the administration of justice.

More positively, in-houser proactivity emerges as being of central importance to evolving approaches in risk management. This proactivity is not a virtue we see as originating *from* professionalism. It is a response to external stimuli. Risk has shifted from something which is a 'fact of life', to something which must be anticipated, controlled (and perhaps accepted) or minimised. Organisations that lay claim to the benefits of modernity and markets are treated as responsible for the risks that arise from their actions (and inactions).⁹¹ This responsabilisation takes place through law, markets, and reputation. The dishonesty and cynicism exposed by corporate scandals means the public has recalculated the extent to which risks created by large corporates are tolerated as accidental. And because concern about legal risk is also reputational, it extends beyond the boundaries of legal questions: being perceived as doing something that is unlawful can be as harmful as actually doing something that is unlawful.

Uncertainty and reputation open up the need to look beyond the letter of the law to how the law *might* be interpreted or how it *might* develop or be reformed by legislatures. Uncertainty provides a practical reason for looking to develop standards which are in accordance with the spirit of laws, or which conform to the highest international standards. Whilst standard-raising arguments

⁹⁰Kim Pernell, Jiwook Jung and Frank Dobbin, 'The Hazards of Expert Control: Chief Risk Officers and Risky Derivatives' (2017) 82 *American Sociological Review* 511.

⁹¹Oberdiek states: 'modern life is distinctively risky. It is so both because risk permeates modern societies and because these ubiquitous risk are, in the main, morally cognizable'. See John Oberdiek, 'Risk' in Dennis Paterson (ed), *A Companion to Philosophy of Law and Legal Theory*, 2nd edn (Wiley-Blackwell, 2010).

are not supreme, some articulate them as an essential tool of integrity-based management.⁹²

The importance of legal risk is ratcheted up as regulatory institutions have begun to enlist organisations and professionals as regulatory surrogates, in particular giving them responsibilities for preventing and/or reporting bribery, money laundering, and terrorism (sometimes with extraterritorial effect).⁹³ Human rights obligations are increasingly relevant to business.⁹⁴ As a result, organisations have responded through systemising the, ‘way of dealing with hazards and insecurities induced and introduced by modernization itself’.⁹⁵ As organisations claim to manage the risk society, their sense of control may be exaggerated.⁹⁶ And the fluidity of legal risk, via uncertainty in law, may provide opportunities for creative compliance, sharp lawyering, and regulatory arbitrage. The definition, measurement, and control of risk may aid in the management of risk, but may also lead to box-ticking and complacency.⁹⁷ It may desensitise corporate actors to risk. It may window-dress the harms it is designed to address, or lay the risks off on those least able to understand and protect against them. Some claim legal risk management de-ethicalises those organisations that engage in it.⁹⁸ This raises an interesting set of questions about whether legal risk management is understood by in-house lawyers as a compliance issue (reducing the liabilities of the organisation) or whether in-housers see themselves as the guardians of legal/ethical imperatives, pushing back against corruption and terrorism, and promoting human rights.

Whether risk management really desensitises organisations or not depends in part on the approach of in-house lawyers, as we aim to show in this book. We saw a range of strategic responses in our data: there were late responders and expert opportunists. There were also different kinds of underpinning order: those who saw the in-house legal function and the organisation as separate; those who saw the natural order of the market as dictating what was done; those who saw risk as part of the constructed order of reputation; and those who sought an ethical order of authenticity in their approach to risk. Similarly, when our respondents discussed ethical problems in our vignettes, we saw those who took a defensive approach to problems (‘What evidence exists that will harm us?’; ‘Are there plausible defences to allegations of wrongdoing?’); those who took a more active approach (understanding what really happened, rather than

⁹² Heineman (n 2).

⁹³ On regulatory surrogates, see Carolyn Abbot, ‘Bridging the Gap – Non-State Actors and the Challenges of Regulating New Technology’ (2012) 39 *Journal of Law and Society* 329.

⁹⁴ John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (WW Norton & Company, 2013).

⁹⁵ Beck (n 81) 31.

⁹⁶ Jenny Steele, *Risks and Legal Theory, Legal Theory Today* (Hart Publishing, 2004) 48–49.

⁹⁷ Winmark, ‘The Legal World on Its Future, The Winmark Looking Glass Report’ (Thomson Reuters, 2012); Ernst & Young, ‘Turn Risks and Opportunities into Results’ (Global Report, 2012).

⁹⁸ Anthony V Alfieri, ‘The Fall of Legal Ethics and the Rise of Risk Management’ (2005) 94 *Georgetown Law Journal* 1909.

what damaging evidence exists and whether any defences are meaningful and of good quality); and those who took a more proactive approach ('Does wrongdoing signal a broader underlying problem?'; 'What are the best responses to tackling the immediate allegation of wrongdoing and any broader problem?'). In this way, different commercial, managerial and professional ideologies were at play: commercially driven or zealous advocate type lawyers might incline to a narrow, defensive approach; whereas those inclined to see a broader notion of ethicality as important to their role might look to behave in a different fashion. Personal inclinations were also shaped by the risk appetite and culture within in-houser's host organisations.

We seek to capture how these institutional logics are conditioned or moderated by professional reflexivity. It is rare, we would say, for in-house lawyers to challenge themselves via reflection based around their professional identity as lawyers, but they often claimed a more folksy ethicality. That 'doing the right thing' helped minimise legal and reputational risk because it decreased the likelihood of that thing being prohibited. We generally see varied, minimalistic, and poorly articulated notions of when professional obligations require restraint on managerial risk-taking. Their professional contribution to the ecologies within which they work was primarily seen as technical-rational knowledge. Wise counsel (or 'judgement') may provide a space which allows for some ethical influence, but it is a space which is pragmatic, results-oriented, and consequentialist, rather than professionally ethical in a more principled sense. The ethics that inhabit this space are more organisational or business ethics in nature than professional.

Being embedded in their organisations, external influences may shape the balancing of public and organisational interests at the heart of any hybrid notion of professionalism more strongly than professional ones.⁹⁹ Legal and regulatory frameworks may be more important than professional ones. In the US, the Securities and Exchange Commission, the Sarbanes-Oxley Act (SOX), the Foreign Corrupt Practices Act (FCPA), the Alien Tort Claims Act, a significantly stronger culture of prosecutor scrutiny of lawyers involved in corporate scandals, and higher levels of academic scrutiny are all seen as having a significant impact on the outlook of in-house lawyers.¹⁰⁰ There is the increasingly

⁹⁹For a discussion of various forms of lawyer regulation, see: Renee Newman Knake, 'The Commercialisation of Legal Ethics' (2016) 29(3) *Georgetown Journal of Legal Ethics* 715.

¹⁰⁰On which, see Daniel P Ashe, 'The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the US Foreign Corrupt Practices Act.' (2004) 73 *Fordham Law Review* 2897; David C Weiss, 'The Foreign Corrupt Practices Act, SEC disgorgement of profits, and the evolving international bribery regime: Weighing proportionality, retribution, and deterrence' (2008) 30 *Michigan Journal of International Law* 471; Courtney Shaw, 'Uncertain justice: liability of multinationals under the Alien Tort Claims Act.' (2002) *Stanford Law Review* 1359; David D Christensen, 'Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After *Sosa v. Alvarez-Machain*.' (2005) 62 *Wash & Lee L Rev* 1219; Roger C Cramton and others, 'Legal and ethical duties of lawyers after Sarbanes-Oxley' (2004) 49 *Vill L Rev* 725; and Leonard M Baynes, 'Just Pucker and Blow: An analysis of corporate whistleblowers, the duty of care, the duty of loyalty, and the Sarbanes-Oxley Act' (2002) 76 *John's L Rev* 875.

prevalent practice (which began in the US, but is now reportedly adopted by the UK's Serious Fraud Office), of certain prosecutors requiring the waiver of legal professional privilege as a demonstration of cooperation with that prosecutor when seeking a deferred prosecution agreement.¹⁰¹ In the UK, the Bribery Act and the Financial Conduct Authority's proposed changes to the Senior Managers Regime are two examples of a more responsibility-led approach to regulation likely to contribute to the evolving role of the in-house lawyer.

INSTITUTIONAL LOGICS AND REGULATION

In examining legal risk more minutely, we seek to demonstrate how particular institutional logics sometimes act 'as carriers of normative, coercive, and mimetic pressures.'¹⁰² Understanding institutional logics pushes us to articulate what 'categories, principles, and conceptual tools' lawyers use to define and frame their ethicality in particular.¹⁰³ And we must locate those in the complexities of context. Remuneration and status may be more tied towards risky behaviour.¹⁰⁴ Lawyers are prone to client-loyalty biases which compromise their assessments of risk.¹⁰⁵ Ethical fading, the ability to behave self-interestedly and allowing ethicality to fade whilst still believing oneself to be moral,¹⁰⁶ is a problem to which lawyers, with their training in seeing both sides of the same story and the separation of law and morals, may be particularly prone,¹⁰⁷ especially if they are most interested in law and business.¹⁰⁸ Behavioural science findings on framing, priming, biases and the like provide a number of clues as to how different social systems influence behaviour, sometimes sub-consciously. This is one reason why the orientations we explore throughout this book are important: frames of this kind limit or facilitate our inclination to think ethically.¹⁰⁹

¹⁰¹ See Paul J Larkin Jr and John Michael Seibler, 'All Stick and No Carrot: The Yates Memorandum and Corporate Criminal Liability' (2016) 46 *Stetson L Rev* 7; and Julie O'Sullivan, 'How Prosecutors Apply the Federal Prosecutions of Corporations Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction' (2014) 51 *Am Crim L Rev* 29.

¹⁰² Daniel Muzio, David M Brock and Roy Suddaby, 'Professions and Institutional Change: Towards an Institutional Sociology of the Professions' (2013) 50 *Journal of Management Studies* 699, 700.

¹⁰³ *ibid.*

¹⁰⁴ Donald C Langevoort, 'Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis' (2012) *Wis L Rev* 495.

¹⁰⁵ See the discussion in Perlman (n 76).

¹⁰⁶ Ann E Tenbrunsel and David M Messick, 'Ethical Fading: The Role of Self-Deception in Unethical Behavior' (2004) 17 *Social Justice Research* 223.

¹⁰⁷ Elizabeth Mertz, *The Language of Law School: Learning to 'Think Like a Lawyer'* (Oxford University Press, 2007).

¹⁰⁸ Richard Moorhead and others, 'The Ethical Identity of Law Students' (2016) 23 *International Journal of the Legal Profession* 235.

¹⁰⁹ Maryam Kouchaki and others, 'Seeing Green: Mere Exposure to Money Triggers a Business Decision Frame and Unethical Outcomes' (2013) 121 *Organizational Behavior and Human Decision Processes* 53; Francesca Gino and Dan Ariely, 'The Dark Side of Creativity: Original Thinkers Can Be

In the last chapter of the book we develop these ideas of institutional logics and examine what we see as having the most important influences on in-house lawyers. We draw on our data from in-house lawyers working in a variety of organisational settings: from the largest multi-national financial services organisations with more than a thousand in-housers, to the sole in-house lawyer working for a small charity. The lawyers we engaged with mostly worked in England & Wales. This is not to say that this book will not speak to those outside the jurisdiction. Indeed, many of the logics shaping in-house practice are not tied to a given jurisdiction. What will, however, differ from jurisdiction to jurisdiction is the underpinning regulatory framework governing the practices of in-house lawyers (and the extent to which those regulatory frameworks influence day-to-day professional practice).¹¹⁰ We discuss the framework for solicitors in England and Wales as the one most relevant to our respondents.

We have sought to go further than previous work on in-house lawyers by more clearly and more comprehensively isolating the professional and organisational logics at work.¹¹¹ That is not to say our measures are comprehensive or perfect, but rather that we are able to provide a more comprehensive and more carefully specified insight into the tensions inherent in in-house lawyer practice, an insight which more fully relates those tensions to the contexts within which in-housers work. Through quantifying these logics we seek a sense of which carry the most weight, both descriptively and normatively.

It is the ‘exploiting uncertainty’ orientation that is the most normatively problematic of the role orientations we explore. The commercial orientation, a focus of much concern in the literature to date, has a more nuanced relation to ethical inclination. And when we examine our interview data more closely, we begin see to how ‘cops’ might not simply stop illegality, but also police broader notions such as ethicality or reputation, and that much of the policing work is done through activity which falls short of, or is very different to, the act of saying ‘No’. What is more, a far broader range of activities and approaches may be as or more important in constructing and delivering ideas of ethicality and legality within organisations, with proactivity and being organised being particularly important.

There was variation in how reflective in-house lawyers are about the institutional practices they design and apply, and how conscious, or protective, they

More Dishonest’ (2012) 102 *Journal of Personality and Social Psychology* 445; Francesca Gino and Joshua D Margolis, ‘Bringing Ethics into Focus: How Regulatory Focus and Risk Preferences Influence (Un)Ethical Behavior’ (2011) 115 *Organizational Behavior and Human Decision Processes* 145.

¹¹⁰ We note here that solicitors granted title by the SRA are regulated by the SRA wherever in the world that they work. This is similarly true for other lawyers granted title out of England & Wales but working in England & Wales. We do not get into the debate in this book about norm conflict or double regulation.

¹¹¹ Patricia H Thornton and William Ocasio, ‘Institutional Logics and the Historical Contingency of Power in Organizations: Executive Succession in the Higher Education Publishing Industry, 1958–1990’ (1999) 105 *American Journal of Sociology* 801.

are of their own agency in these processes. But generally, beyond situations of ‘clear criminality’, dealing with dissonance between the lawyer’s and the organisation’s view of legality is often seen as a personal rather than professional choice, part of intra-organisational human politics. Certainly, choices about legal risk and legality are highly embedded in the culture of the organisation. In adapting to organisational logics in this way, professionals are at risk of abandoning a more civic-minded morality (or ‘social trusteeship’).¹¹² A more positive interpretation can be attempted by seeing the behaviours as those of *hybrid* professionals managing institutional complexity. Hybrids interpret conflicting institutional logics ‘to construct problems and solutions that [align] with all the logics at play.’¹¹³ In this way, the balancing and interaction of logics is crucial to understanding whether *and when* a socially useful professional hybrid is being constructed.¹¹⁴

Our answer is that professionalism in-house *is* at risk of being diminished, but being commercially oriented is not as much of a problem as being committed to exploit uncertainty. More legality-oriented notions of professionalism mitigate ethical disinclination. Faulty or weaker professional logics are a significant part of the problem: it is not simply about client pressures overcoming virtuous professionals. Those in-housers who get the balance of competing logics wrong risk creating ‘an inherent instability in the meaning of professionalism ... itself’,¹¹⁵ but those who get it right show us the conditions under which hybrids advance a positive ethic of in-house professionalism.

Thus our end-point is not whether the in-house legal role is generally or fundamentally compromised, but the circumstances and attitudes which make such compromise more or less likely.¹¹⁶ Heineman suggests that an embedded professionalism can be established alongside strategic and entrepreneurial approaches to the role.¹¹⁷ This depends on simultaneously managing in-house lawyers towards professionalism, meeting organisational goals, and being receptive to public interest goals as seen through the law and through reputational influences. Ethicality is not just about the willingness (or failure) to say ‘No’ when presented with an unlawful action, but also about the willingness and authenticity with which the legal function helps lead ethically in situations of

¹¹² Brint (n 42) 11, 103, 114.

¹¹³ Maria Blomgren and Caroline Waks, ‘Coping with Contradictions: Hybrid Professionals Managing Institutional Complexity’ (2015) 2 *Journal of Professions and Organization* 78, 78.

¹¹⁴ James Faulconbridge and Daniel Muzio, ‘Organizational Professionalism in Globalizing Law Firms’ (2008) 22 *Work, Employment & Society* 7; Aaron Cohen, *Multiple Commitments in the Workplace: An Integrative Approach* (Psychology Press, 2003); Crawford Spence and Chris Carter, ‘An Exploration of the Professional Habitus in the Big 4 Accounting Firms’ (2014) 28 *Work, Employment & Society* 946.

¹¹⁵ Spence and Carter (n 114) 5.

¹¹⁶ Graeme Currie, Nicola Burgess and Penelope Tuck, ‘The (Un)Desirability of Hybrid Managers as “Controlled” Professionals: Comparative Cases of Tax and Healthcare Professionals’ [2016] *Journal of Professions and Organization* 142.

¹¹⁷ Heineman (n 2).

uncertainty; its resistance to loop-holing; and the way in which it helps set a tone of authentic ‘spirit of the law’, not ‘letter of the law’, compliance. Thus whilst seeing lawyers as ‘cops’ or ‘counsellors’ draws on traditional models of the lawyer–client dyad, our research shows a web of organisational influences which emphasise, when working well, support for legality through institutional practice, the building of ethicality, and the management of integrity. As we have set out, we emphasise not only negative agency (there are problems around a reluctance to say ‘No’) and polycentric agency (in-house lawyers operating in networks of influence and decision), but also positive agency (the capacity for in-house legal teams to lead on ethical issues falling within their purview). The importance of proactivity (in the management of risk) represents a positive manifestation of more positive agency, but so does a willingness to see uncertainty through a lens not of opportunism but of ethicality and leadership.

Such balancing is complex but is already part and parcel, to greater and lesser degrees, of the everyday lives of in-house lawyers who help construct social order within their organisations and, when dealing with third parties such as suppliers and regulators, beyond.¹¹⁸ They construct such orders collaboratively, drawing on other resources if working in well-resourced and bureaucratically savvy organisations. They also do so with a clear eye on external frameworks. The professionalism of in-house lawyers is located in, and is influenced by, the choices made within their organisations, and those in turn are influenced by the regulatory frameworks and other environments influencing them.¹¹⁹

An important part of this relates not just to how in-house lawyers see their role, but also to how their *employers* see the in-house role. Ethical in-house practice is about individual understandings of the role; it is about the approach of in-house teams and about the organisations those teams work in; it is about understanding and drawing on all the obligations of professionalism; and it is about building a better infrastructure to manage the tensions within the role. We can but speculate on what corporate and governmental mishaps might have been avoided or managed better, with concomitant reduction in social and economic harm; or what stress could have been avoided, or how many careers could have been saved, by understanding and acting on this. We must recognise this complexity, and support the positive, as well as call out the negatives, if in-house lawyers are to influence their organisations legally, professionally, and ethically.

THE STRUCTURE OF THIS BOOK AND OUR CONCLUSIONS

The remainder of this book unfolds as follows. In Chapter 2, we set out our methods. Whilst it will be tempting for many readers to skip this chapter, it is

¹¹⁸Ruggie (n 94).

¹¹⁹Robert A Kagan, Neil Gunningham and Dorothy Thornton, ‘Explaining Corporate Environmental Performance: How Does Regulation Matter?’ (2003) 37 *Law & Society Review* 51.

important to understand the nature of our interview and survey cohorts and, we hope, it is also of interest to see how our measures of in-house identity and professional orientation are constructed from the survey data. In Chapter 3, we explore the place of in-house lawyers in organisational networks. Here, we set out some of the history of in-house roles, we explore our interviewees' reasons for starting their law careers in-house or moving in-house, how our interviewees perceived the changes to the role of the in-house lawyer, and their relationships with their employer organisation. We look at some of the day-to-day work of the in-houser and we finish by exploring the concept of ethical tension, which runs, in various forms, throughout this book.

Chapter 4 opens with a series of organisational scandals involving in-house lawyers, to show the potential significance of in-houser independence and saying 'No' to the organisation. We explore how organisational imperatives (in business, the commercial orientation) are always seen as legitimate; but that the influence of the in-house legal team has to be managed, protected, and sometimes fought for. We show how independence is relational, specific to the circumstances of each case, and – from the perspective of the in-house lawyers – best understood as having a temporal dimension, being part of a series of interventions and non-interventions on their part. And we show how saying 'No' is part of a continuum of context specific responses, and one requiring significant effort as well as internal human capital. An in-house lawyer may need to be both well-placed in the tournament of influence, but also resourceful and willing to organise alliances within the organisation, before they can say 'No'. 'No' is both decided and negotiated. It is also often avoidable if the in-house lawyer wants to avoid it.

Chapter 5 begins our look at legal risk management and how professional logics are instantiated in the decision-making apparatus of organisations. We do so first by showing how organisational imperatives and the technical and professional skills of lawyers are used to construct the notion of legal risk management. In notions of risk appetite, we see the balancing of organisational imperatives against more public-facing values. And in looking at how risk is defined and managed, we see instantiations of the legal role and influence of lawyers in their organisations. Chapter 6 raises the ethical dimensions to risk management. It asks whether approaches to risk diminish the ethicality of decision-making and what ethical issues are, or ought to be, raised. A particular interest is in whether in-house lawyers have redlines around risk-appetites and risk decisions, and what ideas shape those red lines.

Chapter 7 develops the idea of institutional logics by looking at in-house orientations, seeking to disentangle the multiple strands of thinking associated with in-house lawyers to examine the extent to which such ideas are prevalent in our sample of in-house lawyers, and at how that moves us beyond existing understandings. Chapter 8 seeks to evaluate these orientations normatively and link them to other dimensions of in-house practice: professional orientations,

team orientations, relationships with the organisation, and ethical pressure. Here we see that commercial orientations (being business-focused or, outside of business contexts, client-focused) are ubiquitous; they are inescapable. To wish for a purer form of professionalism without such orientations would be to offer a false prospectus, but we can focus on the nature and meaning of the orientations and their relationship to measures of ethical inclination. We demonstrate that there are distinctive but common orientations to the in-house role (commercial, ethical, etc), that individuals emphasise these orientations differently, and that those differences are associated with different ethical inclinations. For example, thinking of exploitation of uncertainty as part of the in-house role is associated with a weaker ethical inclination on all our indicators.

In Chapter 9, we speculate on the implications of our study. We see that, in the complex interactions between different value systems and the tournament of influence, there is a currently muted but important role for professional identity. We see significant weaknesses in the dominant approaches to professional identity, but we also show that where professional identity is stronger, then ethical inclination is *also* stronger. Furthermore, we show that ethical infrastructure is potentially important to generating a more resilient form of professionalism for in-house lawyers. Having sought to isolate the influences on in-house lawyer ethicality, we think about how those influences might be affected by regulation, both professional and beyond, and what in-housers might do for themselves.