

The Road to Justice Revisited: Current Trends in Professional Legal Ethics

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1. Introduction

In this article¹ I review three major trends that pose fundamental questions for legal actors and observers concerned about the future context, governance and methodology of ethical legal work: first, why is the increasingly global movement toward the ethicisation of law and legal work – which I see as the latest wave in the late Professor Cappelletti's 'Access to Justice Movement' – taking place now?² Second, what are the current reforms taking place across and beyond Europe, and within both civil law and common law jurisdictions, that seek to strengthen – and alter the balance between – the external regulation and internal education of lawyers' professional conduct? And third, how is the trend within legal education and scholarship toward incorporating ethical perspectives in academic (including socio-legal) and professional legal training evolving? In analysing these three converging trends and the novel ethical challenges they present to both legal practitioners and scholars I shall argue that our traditional positivistic tools are not so much defective, but rather inadequate, if we are to assume greater responsibility for understanding and influencing the formation of professional character within the legal sphere. Furthermore, I shall argue that the failure of both academic and professional associations to recognise and deal effectively with ethics has resulted, in part, in the current onslaught on professional status and the incapacity to defend legal markets against intrusion by the state and other professions. Legal professions are under siege: the market for legal services is increasingly competitive and subject to external threats and internal dissension and, above all, the capacity of legal professions to self-regulate – the traditional badge used to define and defend professional status – has almost everywhere been called into question, if not removed, as lawyers are forced to explain the declining scope, cost and quality of the services they offer.

1 Edited version of keynote address delivered to the Dutch (& Flemish) Law and Society Association (VSR - *Vereniging voor de Sociaal-wetenschappelijke bestudering van het Recht*: <http://www.ru.nl/vsr/> at the Conferentiecentrum Bovendonk te Hoeven on 8 December 2005.

2 M. Cappelletti & B. Garth (eds.) *Access to Justice*. (Milan/Alphen aan den Rijn: Giuffrè/Sijthoff and Noordhoff, 1978-1979). See also M. Storme & F. Carpi (eds.), *In Honorem Mauro Cappelletti (1927-2004). Tribute to an International Procedural Lawyer* (The Hague: Kluwer International, 2005).

These trends also present novel challenges for the socio-legal scholar: not only do we need to describe and map the evolving behaviour of lawyers – to examine, as we have always done, the various interactions between law, the legal profession and society – but we must now also seek to get under the skin of lawyers and to explore and explain the unfamiliar terrain of the internal world of law. Whether, as legal scholars, we should venture further still and actually seek to influence legal behaviour by consciously pushing it in an ethical direction is a question to which I shall return. In any event, we need to draw upon psychological and philosophical insights in order to see more clearly the boundaries of human experience within legal professionalism by engaging with a variety of disciplines that cross the humanities and social sciences. What moves and motivates lawyers to carry out ‘good work’ and pursue justice as opposed to profit? Can justice be taught? If so, when and where should it be introduced in the educational continuum? We can only answer such questions if we embrace and seriously engage with educational, psychological and ethical theory. I shall argue in favour of ethical positivism in socio-legal studies and the need to create what I shall call a new brand of ‘ethico-legal’ studies grounded in critical empiricism yet also sensitive to normative theory.³ In short, not only must we map the road to justice; we need also to travel along it ourselves so that we move toward, if not experience, this elusive ideal.

2. Lawyers’ Access to Justice – A Fourth Wave in the Global Access to Justice Movement?

A decade ago the under the chairmanship of Professor Franken – then Dean of the Leiden Law Faculty – a national investigation into the future of Dutch legal research was launched. The Franken Report noted common trends in both Dutch and international legal scholarship toward socio-legal research but also, significantly, sought to make positive recommendations including pleading for stronger links with the social sciences and humanities and greater use of comparative and ethical perspectives in legal analysis. The report was prescient and, for present purposes, it is worth remembering what the Franken Committee proposed on the topic of ethics:

“We plead for strong intellectual ties with ethics. Law faculties must deliver conscientious lawyers, not simple implementation officers. A lawyer must be constantly aware of the ethical content of his decisions. Especially attorneys and corporate lawyers, sometimes out of necessity for partiality, move on the boundaries of what is ethically allowed. Lawyers are to an increasing extent confronted with politico-legal considerations. The developments of the private professional sense of values is nec-

3 See D. Trubek, ‘Where the Action Is: Critical Legal Studies and Empiricism’ (1984) 36 *Stanford L. Rev.* 575. See also the discussion of Brian Tamanaha linking behaviourism and interpretivism in socio-legal studies: B.Z. Tamanaha, *Realistic Socio-Legal Theory. Pragmatism and a Social Theory of Law* (Oxford: OUP, 1997) ch.3.

essary for a socially responsible professional practice...Because numerous ethical, philosophical and political questions are submitted to the law nowadays, the search for normative starting points for the law to deal with such complex and controversial social issues gets much greater urgency. What does a lawyer base his principles and fair judgements on when he is asked to weigh the visions of parties concerned that are diametrically opposed to one another?"⁴

Today it is not clear whether this call has been heard adequately in the Netherlands and whether sufficient progress has been made in embedding 'a sense of direction' within the Dutch legal profession. Since then several other countries have accepted the challenge of exploring the ethical dimension in legal education and conduct and today most jurisdictions agree that ethical awareness, if not sophistication, amongst lawyers matters. But there remains doubt and confusion over just how prescriptive one should be with regard to instilling ethics throughout the legal profession and what exactly legal educators and scholars should be doing to imbibe legal values in the minds – if not souls – of future lawyers. Evangelical lawyers may not be trusted but there is also a sense amongst many that we are growing tired of the ubiquitous cynicism within and toward the legal profession.

While there may be superficial agreement on the broad ethical aims toward which lawyers' actions should be directed (normally this means conformity to minimal standards set out in the code of professional conduct)⁵ there is no clear consensus on whether or how lawyers should tread the path to justice. It may be possible to establish a negative consensus around where the profession should not to go – the dubious places and corrupt activities that are to be avoided if the profession is to maintain its professional status and discipline (though even here there will be disputes around the edges) – but not so easy to agree a single positive way forward to enlightened, humane legal practice. Indeed, lawyers today appear increasingly confused about their professional role if not detached

4 H. Franken, *Een eigen richting voor het recht...Eindrapport van de Verkenning-commissie Rechtsgeleerdheid*. (A sense of direction...The future of legal research in the Netherlands). Final Report of the Legal Education Review Commission, 1997, pp.55-56. See also reviews of legal education in other jurisdictions:: ACLEC, *First report on legal education and training*, (London,1996) para 1.19-20. Considered in B. Hepple, 'The renewal of the liberal law degree' (1996) 55*Cambridge L.J.* 470,484; H.W.Arthurs,'Half a league onward: The report of the Lord Chancellor's Advisory Committee on Legal Education and Conduct' (1997)31 *The Law Teacher* 1; J. Webb,' Ethics for lawyers or ethics for citizens? New directions for legal education.' (1998) 25 *J. Law and Society* 134. R. MacCrate, *Legal Education and Professional Development - An Educational Continuum. Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*. (Chicago, 1992); D. Pearce, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Commission* (Australian,1987); W.B.Cotter, *Professional Responsibility Instruction in Canada: A Coordinated Curriculum for Legal Education* (Montreal, 1992);

5 See D. Nicolson 'Making Lawyers Moral? Ethical Codes and Moral Character' (2005) 25 *Legal Studies* 601

from their moral foundations – lost in some moral maze rather than steadily trekking toward utopian justice – and it is precisely this lack of orientation that prompted the former Dean of Yale Law School, Anthony Kronman, to write an influential work on the American legal profession called, tellingly, *The Lost Lawyer*.⁶ If the road to law also leads to justice that for many modern lawyers may be purely accidental, for most of the time they appear to pursue economic goals that are some distance, if not totally divorced from, from justice.

I have chosen as my title “The Road to Justice Revisited” in part because I wish to pay tribute to the pioneering empirical study of access to law and legal services carried out thirty years ago in the mid 1970s by Schuyt, Groenendijk and Sloot in *The Road to Justice*.⁷ This Dutch study, despite not being fully translated into English, was nevertheless highly influential outside the Netherlands and set new rigorous standards in empirical socio-legal research and, in my own case, helped forge original interdisciplinary links with geographical research.⁸ This research also drew upon practical experiments with proactive legal services including mobile legal services and it is worth noting that today the road to justice takes place over both land and water.⁹ Moreover, distinguished UK socio-legal scholars have recently conducted wide-ranging empiri-

6 A.T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: Belknap, 1993); M.A. Glendon, *A Nation Under Lawyers: How the crisis in the Profession Is Transforming American Society* (Cambridge: Harvard Univ. Press, 1994). See also: S.M. Linowitz, *The Betrayed Profession, Lawyering at the End of the Twentieth Century* (Baltimore: John Hopkins Univ. Press, 1994); R. Nelson, *et al*, *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Ithaca: Cornell Univ. Press, 1992).

7 K. Schuyt *et al.*, *De weg naar het recht* “The road to law” (Deventer, Kluwer, 1976; english version: *European Yearbook in Law And Sociology* (1977) p.111.) For a review of the international ‘legal needs’ literature see: K. Economides, “2002: A Justice Odyssey” 34:1 *Victoria University of Wellington Law Review* 1 (2003).

8 K. Economides, “Law and Geography: New Frontiers” in *Legal Frontiers* ed. P.A.Thomas in *Applied Legal Philosophy Series* gen.ed. T.Campbell, Dartmouth, 1996, pp.180-207. See also: *Access to Justice in Rural Britain Project* (AJRBP): ESRC-funded project: 1984-87: E00232054. See Blacksell, Economides & Watkins, *Justice Outside the City*, (Harlow, Longman, 1991); reviewed by Jon T. Johnsen, “Rural Justice: Country Lawyers and Legal Services in the United States and Britain”, *Law & Social Inquiry* Vol.17: 3, 1992, 415-436. This project developed out of an attempt to set up a rural law centre (*rechtwinkel*) based in Exeter, see further: K. Economides, “Legal Services and Rural Deprivation”, *Bracton Law Journal*, Vol.15, 1982, pp.41-78. Economides & Blacksell, “Access to Justice in Rural Britain: Final Report” 16 *Anglo-American Law Rev.* 353 (1987).

9 See the discussion of the Norwegian ‘juss-buss’ by C.A. Groenendijk, “Juss-Buss: Alternatieve en actieve rechtshulp” in *Rechtshulp een bewijs van onvermogen*, March 1974, pp.72-84. This model has been adapted elsewhere: see K.Economides, ‘Devon Law Bus’ *Legal Action*, May 2003, pp 9-10. See also the delivery of legal services on the Amazon: S. Blore, ‘Justice in a water world: the law of the Amazon jungle’ *The Independent* 25 January 2006.

cal national studies of the *Paths to Justice* used by the British public – the demand side of the access equation – that further the approach first developed by Schuyt *et al.*¹⁰ What links all of these studies is the desire to map the physical access citizens have with the justice system.

Interestingly, twenty years earlier Lord Denning (or Sir Alfred Denning as he then was) published a series of lectures in 1955 also called *The Road to Justice*.¹¹ His approach was however very different and although perhaps moving in the same overall direction, and sharing a rejection of narrow black-letter law, he took a very different path to justice – it is tempting to describe these paths as being a ‘high’ road and a ‘low’ road to justice. Schuyt’s route was positivistic and sociologically sophisticated whilst Denning’s was unashamedly normative and bordered on being morally naïve.¹² Instead of discovering and mapping the various pathways that lead citizens to and within the legal system Denning concentrated on inviting lawyers – but also judges – to connect with the justice that lay beyond legality as expressed in formal rules (though he also appreciated the great practical importance of accessible legal services and independent legal institutions):

“May I ask you in your own progress in the law, not to rely over much on legality – on the technical rules of law – but ever to seek those things which are right and true; for there alone will you find the road to justice. When you set out on this road you must remember that there are two great objects to be achieved: one is to see that the laws are just: the other that they are justly administered. Both are important; but of the two, the more important is that the law should be justly administered. It is no use having just laws if they are administered unfairly by bad judges or corrupt lawyers. A country can put up with laws that are harsh or unjust so long as they are administered by just judges who can mitigate their harshness or alleviate their unfairness: but a country cannot tolerate a legal system which does not give a fair trial.”¹³

Denning’s lectures are more of a sermon in which he preaches on (and especially to) the ‘just judge’ and the ‘honest lawyer’ whilst calling upon the need for a ‘free press’ and ‘eternal vigilance’ in relation to fundamental freedoms. There is wisdom and foresight in his preaching and he was ahead of his time in his concern with character and what might be described as virtue ethics in legal practice. The particular virtues he extols are command of language, courage

10 H. Genn, *Paths to Justice: What People Do and Think about Going to Law* (Oxford, Hart, 1999); H. Genn and A. Paterson, *Paths to Justice Scotland: What People in Scotland Do and Think About Going to Law* (Oxford, Hart, 2001).

11 A. Denning, *The Road to Justice* (London, Stevens, 1955).

12 Denning was also sociologically naïve though, by concentrating more on the supply side of the access equation, he anticipated what later became known as the ‘social organisation theory.’ See L. Mayhew & A.J. Reiss, “The social organisation of legal contacts” (1969) 34 *American Soc. Rev.* 309; L. Mayhew, “Institutions of legal representation: civil justice and the public” (1975) 9 *Law & Society Rev.* 401.

13 *Id.* pp.6-7.

and courtesy.¹⁴ What links both Denning and Schuyt is a deep and genuine concern to explain and understand legal behaviour: but whereas Schuyt and his associates sought to describe accurately and objectively, from an external scientific standpoint, how, when and where lawyers function in the legal process; Denning, from an internal standpoint, looked at legal conduct from inside the soul of the professional lawyer and ultimately sought justice there.¹⁵

Based on a review of international experience in the developing field of legal ethics I want to open up the possibility of constructing a novel synthesis that combines the best of both of these approaches, perhaps building upon the earlier work of Nonet and Selznick calling for a jurisprudential sociology supporting responsive (or purposive) law informed by moral and policy precepts.¹⁶ But before attempting this we need to understand the forces that currently are moving lawyers deeper in the direction of ethics and away from their traditional and safe territory: the deontology of amoral, neutral partisanship.

The motivation to understand legal behaviour – both scientifically and emotionally – has been steadily growing over the past decade and today there is widespread interest in both the external and internal pressures pressing lawyers to look more carefully at ethics. But we need to ask why is this re-discovery taking place now and what lies behind it. The reasons for this universal trend are complex but, whatever the local conditions in any given jurisdiction, the call for increased ethical awareness carries favour because it may address, or redress, a perceived decline in respect for professional values. And professional values – as a form of cultural capital – matter for economic and other reasons. But it would be wrong to look at this issue only from the standpoint of the legal profession as both government and consumers of legal services also have a stake in ensuring that professional values are defended and survive the onslaught of commercial values. Professions everywhere are struggling to define their mission and understand their place in a changing society, asking themselves whether they remain a profession or, if the truth be told, whether in fact they are nothing more than a business. In the UK provincial and rural lawyers

14 Cf. C. Parker, *Just Lawyers. Regulation and Access to Justice* (Oxford: OUP, 1999) at p.87 who identifies four interwoven ideals or traditions in lawyers' ethical debates, treatises and codes:

- “ 1. The ideal of devoted service to clients in a legal system where citizens need advice and representation to use the legal system (the advocacy ideal).
2. The ideal of fidelity to law and justice if the system is not to be sabotaged by clients who will pay a lawyer to do anything (the social responsibility ideal).
3. An ideal of willingness to work for people or causes that are usually excluded from the legal system (the justice ideal).
4. The ideal of courtesy, collegiality, and mutual self-regulation amongst members of the profession (the ideal of collegiality).”

15 Mayhew and Reiss perhaps expressed this perspective in sociological terms through their 'social organization theory' that concentrated on the supply side of legal services:

16 P. Nonet and P. Selznick, *Law and Society in Transition: Toward Responsive Law* (New York: Harper & Row, 1978).

still uphold and defend traditional values and these practices differ radically from those associated with global law firms based in London and other urban conurbations.¹⁷ Similar divisions exist in other European countries as everywhere the defence of professional and humane values becomes increasingly difficult in the face of commercial values, competition and the inexorable pressure to make profit in order to survive. Faced with these commercial realities we need to examine the (professional) role and responsibilities of legal scholars and law teachers in communicating understanding of ethics to the next generation of lawyers.

There are three separate audiences all interested in re-discovering ethics for the salvation of the modern lawyer. These audiences, which no doubt overlap, may be classified as: educational, managerial and consumerist. First, for legal educators, ethics addresses a failure of the modern lawyer to connect with – let alone defend – liberal professional values by redressing the limitations of a dogmatic, formalistic and positivistic legal education concentrating exclusively on communicating knowledge of legal rules rather than a deep understanding of legal values. Ethics could help lawyers prepare for an uncertain future and unpredictable situations where ‘rules run out’. Second, for those managing professional bar associations – or particular law firms – where there is a crisis of collegiality and professional identity rooted in the fragmentation and regularisation of legal work and fuelled by the increasing use of technology, specialization and globalization. Ethics for this group may restore a collective sense of what it means to be a lawyer (and justify the right to charge higher fees), and regardless of where legal work is conducted. Ethics therefore supports professional *ethos*, and at many different levels (and it is no accident that both concepts share the same etymological root). Finally, for those concerned about declining standards of legal work, and public respect for lawyers – whether as regulators, managers or consumers of legal services – the ethical turn arguably supports both educational and regulatory strategies for supporting quality standards in legal work. It is tempting to see ethics as a kind of panacea capable of remedying all of the ills – moral or economic – afflicting the modern lawyer. The promise is that through promoting ethics and consciously travelling along the road to justice we shall also promote a more humane, prosperous, coherent and socially responsible professionalism, whilst at the same time dispelling increasing private doubts and public cynicism that undermine professional status and confidence. But will this promise be realised?

3. International Regulation of Lawyers’ Ethical Conduct

Having sketched the wider context that explains the background and motivation for the current move toward strengthening lawyers’ ethics we should now turn to questions of governance and how the legal profession, particularly within Europe, is responding to challenges to its right to self-regulation, a traditional

¹⁷ Economides, *infra*, n. 20.

badge of independent, autonomous professions. Over the past 15 years there has been increasing state intervention in the market for legal services but also, beyond the state in the private sector, increasing managerialist tendencies that purport to define and regulate the so-called ‘quality’ of legal work.¹⁸ Legal professions have become ever more accountable and less able to rely on the mere assertion of professional power and authority. Consumers question this power and no longer automatically accept the cost, arcane language or accuracy of legal advice. Other professions, notably accountants, compete openly for traditional legal work, the boundaries of which are contested and ever changing. Lawyers have not only lost, as Abel claims, control over their markets; they have surrendered also ideological control over their destiny and, in the eyes of the public and perhaps themselves, suffered a loss of confidence and moral authority. Some sections of the profession have not been too worried by this corporatist trend that puts profit before principle and may even welcome becoming ever more oriented toward business¹⁹ – while other (normally ‘old style’ traditional or peripheral) lawyers express fears that genuine professional values are moribund.²⁰ From a consumer standpoint perhaps these differing views are of little consequence if, through effective regulation or new technologies, standards and quality in legal work are maintained. If non-lawyers – or even machines – are capable of delivering accurate legal advice why bother with promoting legal ethics and humane professionalism? Indeed, for so long as high standards of competence in legal work are being delivered to citizens at reasonable cost, effectively policed by the professions and/or the state, one may well ask why any of us should be at all bothered by legal ethics and the need to travel the road to justice. Why not let lawyers, openly and honestly, travel the road to profit instead?

The pragmatic answer found in the majority of European countries would suggest that there is an increasing reliance on external regulation to maintain standards and a conscious assault on the professional power of lawyers who are no longer trusted. Whichever jurisdiction one turns to the statistics tell a similar story that highlight common trends: lawyers’ standards of conduct appear to be steadily declining whilst complaints against them are steadily increasing. Social advocacy, despite the current interest in *pro bono* work, is not as popular as it was in the 1970s. In the Netherlands and the UK legal aid offices and law shops

18 See D. Muzio and S. Ackroyd, “On the Consequences of Defensive Professionalism: Recent Changes in the Legal Labour Process” 32 *J. Law and Society* 615 (2005).

19 Robert Gordon describes this as ‘libertarian antinomianism’, see: “A New Role for Lawyers: The Corporate Counselor after Enron” 35 *Conn. L.Rev.*1185 (2003). See also Jane Jacobs, *Systems of Survival* (New York, Vintage, 1992) for a discussion of the moral foundations of commerce and politics.

20 K. Economides, “The Country Lawyer: Iconography, Iconoclasm and the Restoration of the Professional Image” in *Tomorrow's Lawyers* ed. P.A. Thomas, Blackwell, Oxford (1992) and M. Blacksell, K. Economides, C. Watkins, “Country Solicitors: Their Professional Role in Rural Britain” *Sociologia Ruralis* Vol.25, 1987, pp.181-196.

are in decline and, following the UK, there has been a recent review in the Netherlands into the desirability of the monopoly over rights of audience.²¹

Professional monopolies, restrictive practices and privileges have all come under siege and professional character itself attacked and often made the subject of ridicule.²² In England & Wales the *Clementi Review* has mounted a serious but not untypical challenge to professional self-regulation and restrictive practices.²³ From January 2006, the professional practices of English and Welsh lawyers will come under close external scrutiny and all legal work will become far more accountable, far less mysterious and subject to the broad interests of the public and consumers and that ultimate modern value: efficiency. But it is important to place this national trend in a wider European, if not, global, context. Four years ago there was an important conference held in Ghent supported *inter alia* by the *Council of the Bars and Law Societies of the European Union* (CCBE) and the *Union Internationale des Avocats* (UIA) called "Towards a new ethical framework for a legal profession in transition."²⁴ This meeting examined new structures of professional organisation such as multinational and Multi-Disciplinary Practices (MDPs) and their impact on ethics and evolving regulatory policy. But it also highlighted the fact that there was a common trend toward external regulation and concern about the internal ethics of the profession to which one response might be the development of common training, or at least a common ethical core, for transnational lawyering.²⁵

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- 21 See, eg, N.J.H. Huls & Z.D. Lacle, *Meer marktwerking binnen de advocatuur?*, (Den Haag: Boom Juridische Uitgevers, 2006) and the ongoing debate between the Dutch Minister of Justice and the Netherlands Bar Association: R. Parnham, "The Clementi Reforms in a European Context – are the proposals really that radical?" 8:2 *Legal Ethics* (2005) p.195.
- 22 M. Galanter, *Lowering the Bar: Lawyer Jokes and Legal Culture* (Wisconsin, Univ. of Wisc. Press, 2005).
- 23 Sir David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales. Final Report*, London, 15 December 2004; www.legal-services-review.org.uk/content/report/index.htm
- 24 See K. Raes & B. Claessens (eds.) *Towards a new Ethical Framework for a Legal Profession in Transition? Proceedings of the European conference on ethics and the legal profession, held at Ghent University (Belgium) on 25 and 26 October 2001* Intersentia, Antwerp, 2002. See also: D. S. Clark, "Comparing the work and organization of Lawyers Worldwide: The Persistence of Legal Traditions" in J.J.Barceló III & R. C. Cramton (eds) *Lawyers' Practice & Ideals: A Comparative View* (The Hague: Kluwer International, 1999) pp. 9-155. E. Godfrey (ed) *Law Without Frontiers. A Comparative Survey of the Rules of Professional Ethics Applicable to the Cross-Border Practice of Law* (London: Kluwer Law International & International Bar Association, 1995).
- 25 See A.Boon and J.Flood, 'Globalization of Professional Ethics? The Significance of Lawyers International Codes of Conduct' 2:1 *Legal Ethics* 29 (1999); H.Arthurs, 'A Global Code of Legal Ethics for the Transnational Legal Field' 2:1 *Legal Ethics* 195 (1999).

For some time now European institutions have been exercising increasing control over professional conduct. European law has also been fuelling debates on ethics, both directly and indirectly, regarding the free movement of lawyers and the establishment of uniform standards of professionalism.²⁶ Put simply, will the ethics of lawyers in one member state adequately support practice in another and who will guarantee that professional standards will not be compromised through the free movement of legal professionals, particularly in an expanded Europe? The *Clementi Review* in England & Wales should however be seen as part of a much wider European if not global trend giving outside bodies the power to regulate the delivery of legal services.

Beyond Europe there is one other trend worth noting that is known in the US as ‘entity regulation’.²⁷ It neither focuses on the collective regulation of the legal profession through profession-wide codes of conduct, disciplinary rules etc nor, at the other extreme, does it rely on legal education to guide and influence an individual’s ethical conduct. Instead there is an attempt to re-direct and focus attention on the law firm, as a training establishment, offering an interesting third way of tackling the problem of how to ensure the production of good legal work. There are strong parallels that may exist here between the family and the law firm, both of which may contribute to the incubation of professional values amongst lawyers. One of the major issues that should be addressed concerns how best to identify and articulate these values. Are there specific professional values unique to lawyers and legal work or are such values in fact shared with the other liberal professions?²⁸ Socio-legal scholars are well equipped to tackle such questions.

In this new regulatory climate where lawyers appear to be losing control to outside bodies at almost every level, legal ethics may be considered unimportant, even otiose. In other words effective regulation has apparently supplanted the need for the effective ethical education of lawyers and bad or defective lawyering will in future be managed through regulatory strategy designed to police and maintain standards of legal work. But the crucial question to ask here (and again it is one that the socio-legal community is ideally placed to answer) is whether in fact this regulation, however pervasive it may be, is in fact effective?

We should be cautious about what regulation will actually deliver and wise to lower our expectations. This regulatory strategy is unlikely to prove succes-

26 See Directive 98/5/EC of 16 February 1998 and the ECJ *Morgenbesser* decision of 13 November 2003, *Christine Morgenbesser v Consiglio dell’Ordine degli avvocati di Genova* Case (C-313/01) both of which facilitate the transfer of legal professionals through recognition of professional qualifications.

27 See E. Chambliss, “MDPs: Toward an Institutional Strategy for Entity Regulation” 4:1 *Legal Ethics* 45 (2001).

28 K. Economides, “What are Fundamental Legal Values?” in K. Economides *et al.* (eds.), *Fundamental Values. A Volume of Essays to Commemorate the 75th Anniversary of the Founding of the Law School in Exeter 1923-1998*. (Oxford, OUP, 2000) Ch.1.

successful in the long run if it is divorced from a parallel strategy directed at educating lawyers in professional values and ethics. First, lawyers are by virtue of their technical legal training perfectly adept at evading regulatory rules. There is an interesting body of socio-legal research (much of which is carried out in Rotterdam) that examines compliance and shows, for example in the fields of tax reform, organ donation and peak hour commuting how the *regulated* may often evade the aims of the *regulator* through ‘creative compliance’.²⁹ Lawyers as a group are far better than most others at understanding rules, including of course those that purport to control or regulate their own conduct, and therefore can avoid or use rules for purposes other than those intended by regulators, judges or legislators. Second, the regulatory approach tends exclusively to focus on negative or dysfunctional behaviour. It seeks to outlaw conduct and practices that undermine professionalism yet will do little if anything to promote positive behaviour that will support or instil ‘good lawyering’. The regulatory approach reinforces a pathological view of legal conduct and fails to offer positive models of good behaviour that motivate lawyers to become more ethical or professional. By focusing on superficial compliance with rules enshrined in codes designed to maintain ‘hygiene’ this approach almost assumes (perhaps correctly) that modern lawyers are naturally prone to egregious behaviour. A third more practical problem is that regulatory machinery itself tends to be slow, ineffective, expensive and prone to capture and in reality presupposes the existence of ethical lawyers.

4. Experimenting with Ethics in Legal Education

If regulatory strategy by itself is unlikely to take us far along the road to justice can legal education take us very much further? We need next to examine what elsewhere has been described as the ‘fourth wave’ in the Access to Justice movement: ‘Lawyers’ Access to Justice’.³⁰ Evidence of such a global movement clearly exists and reaches far beyond the Netherlands, the UK or indeed Europe. There appears to be ‘a worldwide trend’ toward introducing or strengthening the place of ethics in the modern law curriculum in order to promote the goal of ‘good lawyering’. Several common law jurisdictions (eg New Zealand, Australia, Canada) – and not only the US following its Watergate scandal – have now introduced, or are about to introduce, ethics into their law

29 D. McBarnet, ‘After Enron: corporate governance, creative compliance and the uses of Corporate Social Responsibility’ in J. O’Brien (ed.) *Governing the Corporation*, (John Wiley, 2005) and ‘Human Rights and the new accountability’ in T. Campbell and S. Miller (eds.) *Human rights and moral responsibilities of corporate and public sector organizations* (The Hague, Kluwer International, 2004). See also H. Elfers, *Income Tax Evasion: Theory and Measurement* (The Hague: Kluwer International, 1991).

30 See Economides *op cit* n.7.

curricula.³¹ Recently I taught on a compulsory legal ethics course in New Zealand and have attended international conferences and seminars discussing the place of ethics in legal education.³² Similar debates are also under way in Latin America and Asia – in Japan, Hong Kong, the South Pacific, India, Korea and Taiwan – about the ethical dimension to modern legal education.³³ It is interesting to note that very often it is the profession rather than academics that are the driving force behind this change. And, as already mentioned, ethics is also attracting increasing attention in the civil law systems throughout Europe and also at the transnational level of EU law.³⁴ Although legal ethics are now coming of age it would be wrong to think that this topic has only recently been discovered; in fact it would be far more accurate to say that legal ethics has been ‘re-discovered’. But it is worth noting that this current re-discovery of ethics is taking place within and after the academy so that the road to justice is passing not only through the law school but also entering continual professional development at the post-vocational stage. More interesting still is the attempt in some jurisdictions to strengthen moral or civic education prior to and beyond law school: in the UK, for example, increasing emphasis is being placed on teaching ‘citizenship’ to school children and also discussions are under way as to how to develop new forms of public legal education. The logic of such developments is worth noting for the future of legal ethics: for if moral values are strongly rooted in society itself one could argue that there is no need for a specific legal ethics for the professional lawyer.

Many countries are experimenting with introducing ethics to future lawyers and citizens but also raising questions about the obligations the former owe to the latter. Traditional legal ethics has limited lawyers’ duties almost exclusively to clients – where lawyers’ have an almost absolute duty to serve their client’s

31 See K.Economides (ed.), *Ethical Challenges to Legal Education & Conduct* (Oxford: Hart, 1998). D. Webb, “Ethics as a Compulsory Element of Qualifying Law Degrees: Some Modest Expectations” (2002) 4:2 *Legal Ethics* 109-126 (on New Zealand); M. A. Noone and J. Dickson, “Teaching Towards a New Professionalism: Challenging Law Students to Become Ethical Lawyers” 4:2 *Legal Ethics*, 2002, 127-145 (on Australia). On recent Canadian developments that incorporate an economic perspective on legal ethics – or ‘ethnomics’ - see: R. Graham, *Legal Ethics: Theories, Cases and Professional Regulation* (Toronto: Emond Montgomery, 2004).

32 See K. Economides and J. Webb, “Teaching Ethics and Professionalism: A Lesson from the Antipodes”, 4:2 *Legal Ethics*, 2002, 91-94. For accounts of international conferences see: S. Nelson, “Reflections from the International Conference on Legal Ethics from Exeter” (2004) 7 *Legal Ethics* 159-166; S. Brown, “A True Meeting of Minds: A Conference Report from Japan” (2005) 8:1 *Legal Ethics* 12.

33 See chapters on South Pacific and Brazil in Economides id. See also: H. Kim, “In Search of the ‘Soul of Professionalism’: The Case of Legal Education Reform Efforts in South Korea” (2002) 5 *Legal Ethics*, 27-33 (on South Korea); J. Gandhi (ed.) *Power and Passion: Study of Socio-Ethical Concerns of the Lawyers* (forthcoming, Gyan Publishing, Delhi, 2006) (on India); and Su-Po Kao, “The Legal Profession as an Intermediary: A Framework on Lawyers in Society” (2004) 7:1 *Legal Ethics* 39-53 (on Taiwan).

34 See K. Raes & B. Claessens, op cit.n.24.

interests – downplaying any obligations owed that may be owed to third parties, the Court or the wider public interest. Although we can see a consensus that ethics should be taught this is by no means universal nor is it clear how this should be achieved. Here in the Netherlands pioneering work by de Groot-van Leeuwen³⁵ is particularly interesting in showing how law students and practitioners differ as to how the same hypothetical ethical dilemmas should be resolved, suggesting that the seasoned practitioner is not always correct when it comes to finding the fairest solution. As ethical legal education matures and a literature capable of supporting rigorous learning of the subject becomes better established we may begin to find solutions to persistent pedagogic problems of how to teach ethics.³⁶ These difficulties do not negate the basic need to expose lawyers to ethics but at the same time they are sufficiently problematic in that they may have encouraged taking the easy path of too heavy reliance on regulation.

The approach I wish to advance involves more than just communicating or even debating codes of professional conduct and the ‘off-the-peg’ morality they contain. Let me try to highlight some of the challenges that arise in trying to promote deeper ethical awareness amongst lawyers through education. First, many lawyers and law students will resist – or even resent – ethical sermons. Many UK legal academics have now moved away from the strict positivistic view that separated law and morals for the past 200 years to arrive at a position today that says it is not so much what you think, but rather that you think about the ethical dimension to Law, including how you as an individual relate to your professional discipline. So the responsibility and role of the law teacher must be to present a range of options and approaches towards understanding (and practising) ethics in the law and to leave the student to decide which ethical path in law they intend to follow. It is more a case of handing down to subsequent generations an ethical map rather than insisting that any particular road to justice must be followed.

Lawyers universally assert that they are special, unique and that their work involves peculiar methods, values and practices that differ significantly from that of other professions. But I am not so sure. I suspect that the core underlying values associated with Law may be very similar to many other liberal professions. If so, I think there is more ‘good work’ to be done by law schools in terms of inculcating and truly educating the next generation in those fundamental values, and I prefer the term ‘values’ at this point to ‘ethics’ because I think we are not only referring to the ethical ideal of justice. There is a whole

35 See, eg, L.E.De Groot-van Leeuwen, “Lawyers’ Moral Reasoning and Professional Conduct, in Practice and in Education” in Economides, *op cit*, Chap.12; L.E.De Groot-van Leeuwen & Wouter T De Groot, “Studying Codes of Conduct: A Descriptive Framework for Comparative Research” 1:2 *Legal Ethics* 155 (1998); L.E.De Groot-van Leeuwen, “A Basic Structure of Judicial Ethics, Exemplified from the Netherlands” 6:1 *Legal Ethics* 34 (2003).

36 See M. Robertson, “Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective” 8:2 *Legal Ethics* 222 (2005).

set of understandings about what good legal practice implies that we need to communicate, and in many different ways, and we don't need to be too prescriptive about how law schools should do this job. In the common law tradition we do not have a lot of experience but clearly there are many paths that can be followed to a more enlightened view of ethics in law, including that of legal clinics. Other approaches that are worth mentioning in passing are the applications of film, literature and storytelling in sensitising lawyers to their ethical responsibilities that lie beyond their professional code of conduct.³⁷ But we should not forget that it is the legal profession – as much as, if not more than, legal and other academics – that has been the driving force behind the move to expose law students to legal ethics.

If I may I would like briefly to conclude my review of educational developments with a brief report on the situation in the UK. One perspective that has evolved in the UK and may have relevance elsewhere is the “outcomes approach”ⁱ. This approach is politically quite shrewd because it both respects the autonomy of the law school yet also enables law teaching to stay in tune with current expectations of the profession and indeed, beyond the legal profession, with the changing needs of the wider public. And what has happened in the UK is that the minimum expectations of the law degree – and looking beyond the law degree to both the vocational stage and continuing professional development – have now been encapsulated in some very general statements that offer guidance as to ends without narrowly proscribing means. There is an “outcomes statement” that guides the qualifying law degree but I should like also to explain the so-called “Day one requirements” that are being developed by the Law Society as part of its controversial Training Framework Review that will need to be demonstrated at the point of admission to the solicitors’ side of the profession.³⁸

5. New Directions for the Emerging Ethico-Legal Researcher

By way of conclusion I shall highlight two key challenges that confront the socio-legal (or ethico-legal) researcher. I wish to suggest that we need to do more than describe, explain or evaluate legal professions (or societies) that are in transition – we should also aim to influence legal behaviour and conduct, if

37 See K. Economides & M. O’Leary, “The Moral of the Story: Understanding Ethics in Legal Organisations and Practice” (forthcoming).

38 See ACLEC, *op cit* para. 2.4, p.72. See also the work of the *Ethics Education Forum* that was set up by the Law Society in the context of a major review of vocational training – the *Training Framework Review* (TFR) - to inform policy on how ethics should be introduced throughout the educational continuum. See J. Webb & A. Fancourt, “The Law Society’s Training Framework Review: On the Straight and Narrow or Long and Winding Road?” 38:3 *Law Teacher*, 2004, 293-325, at p. 310-11. See also, A. Boon, J. Flood and J. Webb, “ Postmodern Professions? The Fragmentation of Legal Education and the Legal Profession 32 *J. Law and Society* 473 (2005).

not directly as law teachers then indirectly as legal scholars and researchers. But in order to do this we need, in the words of Franken, ‘a sense of direction’. This will require not only a road map but also a sense of adventure and the will to travel along the road to justice. It will mean looking further in an outward direction but also, in reflective mode, looking inwardly so that we both understand what it is to be a lawyer and, furthermore, in some deeper sense commit to our professional values.³⁹

The first challenge is the pressing need to engage with theory so that we may have a clearer understanding of what constitutes “good lawyering” and how it may be achieved and maintained. I particularly welcome the engagement with educational theory but we need also to draw upon other fields.⁴⁰ Empirical research on what currently happens in law firms may provide a valid starting point but it will not be sufficient. It may be that current practice is not particularly good, and indeed it might even be totally unethical as portrayed in the Grisham novel, *The Firm*.⁴¹ The danger I wish to draw attention to is that if all we consider is current practice we risk simply reproducing and replicating, if not bad lawyering, then perhaps not very good lawyering. Put simply, you don’t get an ‘ought’ from an ‘is’. So I think we in the academy need to do further research that explores the core values of modern lawyering – the underlying determinants of good professional work – in order to identify benchmarks against which we can measure what constitutes good lawyering – and I think this research also needs to be the result of a sustained, collaborative and interdisciplinary effort. Academics cannot do this research in isolation; they need support from legal practitioners, other professions and other disciplines.

Finally we should also ensure that the ethics of our own community is in good shape. Empirical researchers need to be constantly alert to the ethical dangers their research may encounter and this will mean investing the time and resources to ensure that younger (and more seasoned) researchers understand their ethical obligations. The SLSA Ethical Statement points out one way of alerting researchers to the presence of ethical dilemmas and conflicts.⁴² In

39 See J. Webb, “Being a Lawyer/Being a Human Being” (2002) 5 *Legal Ethics* 130; D. Nicolson, “The Theoretical Turn in Professional Legal Ethics” (2004) 7 *Legal Ethics* 17.

40 See Robertson, *op cit*. See also M.W.Martin, *Meaningful Work. Rethinking Professional Ethics* (Oxford: OUP, 2000).

41 J. Grisham, *The Firm* (1993),

42 Available at: <http://www.kent.ac.uk/slsa/research/areas/research%20ethics.htm>. See further I. Harper, A.C. Jimenez, ‘Toward Interactive Professional ethics’ (2005) 21:6 *Anthropology Today* 10; M. Israel, “Strictly Confidential? Integrity and the Disclosure of Criminological and Socio-Legal Research.” 44:5 *British J. of Criminology* 715 (2004). <http://bjc.oupjournals.org/cgi/content/abstract/azh033?ijkey=50Jl90mFzBMQ2&keytype=ref>><http://bjc.oupjournals.org/cgi/content/abstract/azh033?ijkey=50Jl90mFzBMQ2&keytype=ref>; M.Israel Ethics and the Governance of Criminological Research in Australia. Report for the New South Wales Bureau of Crime Statistics and Research (2004).

arguing for a synthesis between ethical and scientific approaches to legal conduct, I believe we may draw inspiration from the vision of Justice Cardozo who, as far back as 1928, perceived the fundamental values that inform the practice of law and legal science:

“The law like science generally, if it could be followed to its roots, would take us down beneath the veins and ridges to the unplumbed depths of being, the reality behind the veil. The jurist must not despair because his plummet does not reach the goal at which in vain for two thousand years and more the philosophers have been casting theirs. Rather he will learn with some of the philosophers themselves in moderating his ambitions to recast to some extent his notion of philosophy and to think of it as a means for the truer estimate of values and the better ordering of life. He will hope indeed that with study and reflection there may develop in the end some form of calculus less precarious than any that philosopher or lawyer has yet been able to devise. In the meantime, amid the maze of contingency and regularity, he will content himself as best he can with his little compromises and adjustments, the expedients of the fleeting hour. They will fret him sometimes with a sense of their uncertainty. It should hearten him to keep in mind that uncertainty is the lot of every branch of thought and knowledge when verging on the ultimate.”⁴³

[http://www.lawlink.nsw.gov.au/bocsar1.nsf/files/R55.pdf/\\$file/R55.pdf](http://www.lawlink.nsw.gov.au/bocsar1.nsf/files/R55.pdf/$file/R55.pdf)

43 Mr Justice Cardozo, *Paradoxes of Legal Science* (1928) at pp134-135.