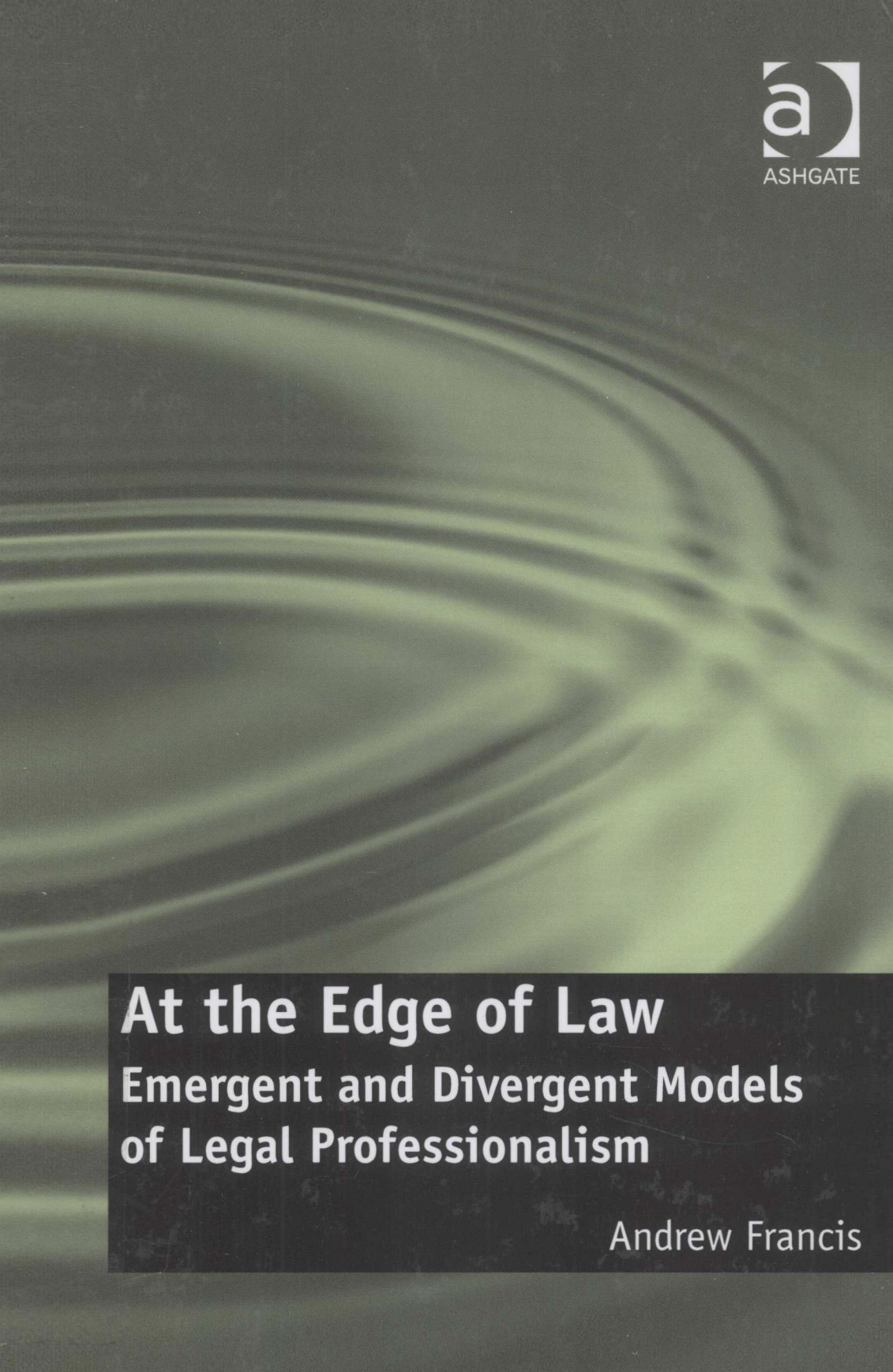
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At the Edge of Law
Emergent and Divergent Models of Legal Professionalism
Andrew Francis

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AT THE EDGE OF LAW

For Oliver and Millie, with love

Preface

By its nature, this book has developed out of collaboration and conversation with a number of colleagues and friends.

First and foremost, I would to like to thank Iain McDonald, Hilary Sommerlad and Matthew Weait. I have learnt a great deal through our collaborations on, respectively, Part-time Law Students, Access to Legal Work Experience and Activist Lawyers, and have enjoyed the process. I should, of course, make clear that the arguments and ideas developed in the book on the basis of data which emerged from our various joint endeavours are, nevertheless, my responsibility alone. Any errors and misjudgements are mine, and should not be taken as having been endorsed by Iain, Hilary or Matthew. Nevertheless, I am grateful to them all for their support in conducting the research, and for their agreement to allow me to draw on the data collected to advance my own arguments.

The development of this book has also benefitted enormously from being written in the supportive atmosphere of Keele Law School. I have been enormously lucky in being able to develop my ideas within such an environment. So thank you, to all Keele colleagues past and present, for your support and encouragement and in creating a vibrant intellectual and collegial place in which to work.

I would also like to thank my students, who are a testament to the mutually supportive relationship between research and teaching. A number of ideas which were first articulated in the classroom in response to student questions or comments have found their way into this book. I hope some of my ideas and findings have helped them along the way too.

A book of this nature would not exist were it not for the lawyers, academics, students and other professionals who generously gave up their time to participate in the research discussed here. I am indebted to them all. Particular thanks to Diane Burleigh at ILEX, Fiona Woolf and Bill Cox from the Law Society, David Harvey and Geoffrey Shindler from STEP and David Eby from the British Columbia Civil Liberties Association for help in securing access to various research sites.

The ideas in this book have been presented at various 'work in progress' seminars, including at Birmingham, Bristol and Keele universities, and at the annual conferences of the Law and Society Association, the Society of Legal Scholars and the Socio-Legal Studies Association and the UK Centre for Legal Education (UKCLE), and I would like to thank the participants in these sessions for their valuable comments. I would also like to thank all those who have participated in discussions about my work over the years including Rick Abel, John Baldwin, Dave Cowan, Rob East, John Flood, Martin Laffin, Bob Lee, Richard Moorhead, Donald Nicolson, Margaret Thornton, Julian Webb, Richard Young and many others. I owe a particular debt to John Flood, Marie Fox, Rosie Harding, Sajida

Ismail, Marie-Andrée Jacob, Iain McDonald, Hilary Sommerlad and Mathew Weait for reading, and then making characteristically insightful comments, on a number of the chapters.

I would also like to thank the Nuffield Foundation and UKCLE for research funding, and Keele University for a period of funded research leave which enabled me to conduct the empirical research for this book.

Thank you also to Alison Kirk and Sarah Horsley at Ashgate for encouraging the book and responding to my queries with promptness and clarity.

Earlier versions of some of the arguments presented in Chapter 4 have previously appeared in the following published form: Francis, A., 2002, Legal Executives and the Phantom of Legal Professionalism: The Rise and Rise of the Third Branch of the Legal Profession?, *International Journal of the Legal Profession*, 9(1), 5–25; and Francis, A., 2006, 'I'm not one of those women's libber type people but…': Gender, Class and Professional Power within the Third Branch of the English Legal Profession, *Social and Legal Studies*, 15(4), 475–93. I am grateful to the publishers for these permissions.

Last, but by no means least, I would like to thank my family and friends for their encouragement and distraction. My mum and dad, Sylvia and David, and my sister, Jenny, have been there from the outset, and latterly have assisted with the childcare. Oliver and Millie constantly remind me what is really important, and without Natasha's love, support and eye for detail, this book would not have been completed. Thank you.

Andrew Francis,
Keele
7 January 2011

Abbreviations

BIHR	British Institute of Human Rights
BIS	Department for Business Invention and Skills
BLD	Black Lawyers Directory
BSB	Bar Standards Board
CBA	Canadian Bar Association
CLLS	City of London Law Society
DCA	Department for Constitutional Affairs
HMCS	Her Majesty's Court Service
ILEX	Institute of Legal Executives
JASB	Joint Academic Stage Board of the Law Society and Bar Council
LCF	Law Centres Foundation
LSB	Legal Services Board
LSC	Legal Services Commission
RAB	Regulatory Affairs Board
SLS	Society of Legal Scholars
SLSA	Socio-Legal Studies Association
SMCA	Solicitors' Managing Clerks' Association
SRA	Solicitors Regulation Authority
STEP	Society of Trusts and Estates Practitioners

Contents

Chapter 1
Introduction: Lawyering at the Edge

Law is now practised by groups, individuals, and in settings, far removed from the core of legal professionalism. Despite widespread recognition of the changing ways in which the legal profession is organized and delivers its services, most studies still focus on readily recognizable sectors of the legal profession; for example legal aid (Moorhead 2004, Sommerlad 2001), family law (Eekelaar, Maclean and Bienhart 2000, Mather, McEwen and Maiman 2001) or corporate law firms (Empson 2007, Hanlon 1999, Heinz et al. 2005, Flood 2007). *At the Edge of Law* is an analysis of a range of actors not readily accommodated within the traditional conception of the collective legal profession. Nevertheless, these actors are an important dimension of the ways in which legal professionalism is developing, given its fragmented, heterogeneous and fluid nature. In studying the professional strategies of those at the profession's margins, this book contributes an additional perspective to the analysis of the changing nature of contemporary legal professionalism within England and Wales. Moreover, it develops the analysis of a core tension facing contemporary legal professionalism: the accommodation of *some* of these divergent visions of legal practice, while other patterns of occupational closure are reinforced.

The legal profession in England and Wales has faced significant changes since the mid-1980s (fragmentation, increasing fluidity of disciplinary boundaries, fractured relationship with the state, shifts in the regulatory environment and so on). In England and Wales the pace of such change has accelerated following the Legal Services Act 2007. While the study of Anglo-American legal professions has achieved a degree of consensus about the nature of these developments, there is greater uncertainty as to whether we are entering a period of post-professionalism (Kritzer 1999) or perhaps a new negotiated contract for legal professionalism (Paterson 1996). At the heart of these debates is the question of what survives. Is there a core of contemporary legal professionalism that transcends the emergent models of legal practice and those practitioners who operate in diverse sectors? Social homogeneity has long since faded in importance although, as Chapters 3 and 4 will highlight, some aspects of social closure demonstrate remarkable tenacity. There are also questions as to the degree to which consumers and government are receptive to claims of shared ethical values. Furthermore, is it possible to identify core legal knowledge, forming the foundation of a collective project of legal professionalism, in an age of multi-disciplinary and cross-jurisdictional practice?

This book deals with unfamiliar and under-researched terrain in addressing these questions. Its methodological approach brings together a series of case-studies, built upon original empirical research, which focus upon those operating

at the margins of core legal professionalism, both in practice and those seeking to enter the profession. Some of these groups, such as legal executives, have a long history and a growing contemporary presence. Others, like the multi-disciplinary professionals represented and accredited by the Society of Trusts and Estates Practitioners (STEP) and the lawyer-activists of the Pivot Legal Society, have emerged more recently. 'Outsider' law students have, on the other hand, always struggled to secure access to the legal profession and continue to experience difficulties today. My analysis of these case-studies is informed by a theoretical framework which develops from a market-control understanding of legal professionalism (Larson 1977, Abel 1988), tempered by the important contribution that writers such as Royston Greenwood, Michael Lounsbury, Roy Suddaby and others have made to our understanding of organizational change and institutional entrepreneurship. Given the identification of patterns of closure running alongside these emergent models of legal professionalism I argue, in Chapters 2 and 3, that Pierre Bourdieu's work on cultural reproduction (1977) informs the analysis of the continuing existence of social closure, without the supports (or perhaps imperatives) ascribed by the market control theorists.

In presenting a close analysis of individuals, groups and sectors on the margins of legal professionalism, I argue that it is possible to identify a range of individual *and* collective models of legal professionalism in operation. Through looking at those at the edge, we can learn much about the core values of a field (Abbott 1995: 861–2, Nelson and Trubek 1992a: 214). I argue that the stories of those operating at the margins of traditional legal professionalism highlight the embeddedness of exclusionary practices at the same time as other emergent models of legal professionalism orbit at the edge of the traditional core. Thus, the challenge becomes one of attempting to identify which strategies of professional advancement may be deployed by which actors and in what context.

Current Issues: A Profile of the English Legal Profession

The following section establishes some of the core issues facing the English legal profession in order to provide a framework for the discussion which follows in later chapters. Although this book does refer to the barristers' profession, its primary focus is on the largest legal profession in England and Wales, solicitors. Notwithstanding the importance of the changes which confront barristers (Flood and Whyte 2009, Zimdars 2010), and related issues facing practitioners within Northern Ireland and Scotland (The Lawyer 2010), the focus on English and Welsh solicitors attempts to capture the centrality and influence of key professional actors within the UK (Abel 1988, Galanter and Roberts 2008).

Fragmentation

There are approximately 115,000 solicitors in England and Wales with practising certificates (Cole 2009: 5). These lawyers work in a variety of private practice firms and in-house organizations. These range from the 4,500 sole practitioners to the largest corporate law firms – the Magic Circle, comprising Allen & Overy, Clifford Chance, Freshfields Bruckhaus Deringer, Linklaters and Slaughter and May (Galanter and Roberts 2008). The smallest High Street firms typically deliver a wide range of generalist legal services, predominantly, but not exclusively, in the private client field (Franklin and Lee 2007), and historically have been heavily involved in publicly funded work (Moorhead 2004). The largest law firms deliver a broad range of legal and professional services, often to FTSE 100 corporations, including work in Mergers and Acquisitions, Banking and Finance (Flood 2010).

While there are approximately 10,000 private practice law firms, just 0.57 per cent of these firms have over 81 partners (Cole 2009: 24). 70 per cent of these firms are located in the City of London (Cole 2009: 24). While nationally small in number, they employ 25 per cent of all solicitors in private practice (Cole 2009: 25). Their turnover is huge, with the largest firms reporting turnover in excess of £1 billion per annum, dwarfing the income of their professional association, let alone their fellow professionals in the High Street. The financial disparity is particularly acute within the legal aid sector, where falling salaries are given as a key reason why people are leaving the sector (Sommerlad 2001, Moorhead 2004). Whereas small firms, in particular those in rural areas (Franklin and Lee 2007), stress their connection to the locality, the largest corporate firms operate in a global marketplace. Thus, they have offices in the main financial and legal centres of the world (Galanter and Roberts 2008), and in the future may outsource legal work to jurisdictions like India, alongside their North American rivals (Timmons 2010).

Globalization, of course, means that we are increasingly interconnected (Flood 1996: 173), and this is particularly pronounced within the professional services field (Dezalay 1995, Dezalay and Trubek 1994). Thus, many of the developments explored in this book may have an impact in other jurisdictions (Davis 2010), notwithstanding contextual differences (for example, in legal education or in partnership structure), given the interconnectedness of global professional service markets (Flood 2008) and the commonalities of Anglo-American professions (Freidson 1994: 16).

Access to the Profession

The main route into the solicitors' profession is an undergraduate degree in Law (or non-law degree followed by the one year, Graduate Diploma in Law), followed by the 9-month Legal Practice Course (LPC) – or Bar Professional Training Course (BPTC) for those wishing to join the Bar. Aspiring solicitors are required to secure and complete a two-year training contract with a law firm, or in-house provider. Notwithstanding the importance that Larson accorded to universities in

their role as a site for professional socialization (1977: 45), as with North America (Manderson and Turner 2006: 666), the relationship between legal education and the profession within the UK has veered between good, bad and indifferent over the last 100 years (Cownie and Cocks 2009). The debate will be revisited from February 2011, following the announcement of a wide-ranging review of legal education by the legal professional regulators (BSB 2010), which is likely to see further calls for greater professional oversight of the academic stage.

Although it is commonly accepted that approximately 50 per cent of law undergraduates do not enter the legal profession (Hunt 2009: 88), it is less clear whether this is through choice, or through a failure to realize what are, at the outset at least, largely vocational aspirations (Pitcher and Purcell 1998: 185). Thus, while in 2008 there were 13,803 Graduates in Law (Cole 2009: 32),[1] and 9,337 students enrolled on the LPC in 2009 (Cole 2009: 39), the training contract remains the key hurdle for those wishing to enter the profession. In 2008/2009 5,809 new traineeships were registered with the Society. This represents a decrease (7.8 per cent) on the level recorded in the previous year, when trainee registrations stood at 6,303. In response to growing concern within the profession about unrealistic and uninformed student aspirations about the ease with which training contracts can be secured, the Law Society campaigned in 2009 to bring these issues to greater prominence (Chellel 2009).

The largest firms dominate recruitment to the profession. Thus, 28.7 per cent of all traineeships are in the City, with a further 21.9 per cent in the rest of London.[2] Although 61.7 per cent of all traineeships registered are women, men are more likely to hold a traineeship in the City; 34.8 per cent of male trainees had City traineeships in contrast to 25 per cent of women. Similarly, 34.9 per cent of all traineeships are in firms with 81 plus partners (again an increase on the previous year), and again men are more likely than women to have traineeships within these firms: 39.6 per cent of men were in such a position in contrast to 31.9 per cent of women (Cole 2009: 39–40). Notwithstanding the significance of these numbers, I argue, in Chapter 3, that the influence of these firms on the broader sector is greater than the numbers they directly employ (Boltanski and Chiapello 2006: 162). Thus, the attributes of early work experience, excellent academic record and a well-rounded personality, valorized by this sector (Lee 1999: 32–6), increasingly become the expectation in other sectors as well.

Diversity within the Legal Profession

The problems of diversity in relation to 'Access to the Profession', particularly around gender, ethnicity and socio-economic background (Halpern 1994: 77–81),

1 This does not include all graduates with Qualifying Law Degrees – for example, combined honours, part-time and so on.

2 The North West was the next most significant region with 11.4 per cent of all traineeships.

continue to be experienced more widely within the profession. Perhaps oddly for a book concerned about those operating at the edge of law, there is no specific case-study of the experiences of women and lawyers from black and minority ethnic (BME) backgrounds (or indeed issues around age, sexuality, religion[3] and disability). I do not want to deny the pernicious disadvantage experienced by these groups. I simply wish to draw attention to actors at the edge of law whose experiences have received relatively less scrutiny to date. Class is a key stratifying factor (Milburn 2009) that often intersects with these other issues, and it is a theme which runs throughout Chapters 3 and 4.

Nevertheless, major problems remain for women and BME lawyers. Women now account for 45.2 per cent of solicitors with practising certificates. Whereas the total number of solicitors holding practising certificates has grown by 51.3 per cent since 1999, the number of women holding practising certificates has increased by 86.9 per cent (Cole 2009: 5). However, beyond the positive story at the point of access, as careers progress, men continue to secure greater access to senior posts and higher remuneration (Sommerlad and Sanderson 1998: 115); 77.8 per cent of men are partners or sole practitioners compared with only 49.2 per cent of women with 10–19 years of experience (Cole 2009: 16). Sommerlad and Sanderson argue, in the context of women within the solicitors' profession, that

> employees [are seen] as autonomous subjects, equal before the law, and requiring minimal legal intervention;... the legal workplace is represented as an arena in which equal subjects will be treated with impartiality, and where such individuals can make certain choices, whilst in reality it is soaked in the prejudices which underpin gendered difference. (1998: 103)

Similarly, in the context of BME lawyers, Nicolson, in reviewing a series of research studies, notes the ongoing problems that lawyers from these groups have faced in securing City trainee contracts, and subsequently partnerships (Nicolson 2005: 207). Vignaendra, Williams and Garvey highlight the particular difficulties that black men face (2000: 127). Major diversity initiatives have been in place since the mid-1990s (Braithwaite 2010). Nevertheless, the most recent major research study in this area (funded by the Legal Services Board) summarized its findings as follows:

> despite important advances towards greater openness and diversity, the profession is nevertheless perceived as inherently masculine in character in the sense of its working patterns and general culture, and, further, characterised by (possibly unwitting) biases against non-white professionals and those drawn from lower socio-economic groups. (Sommerlad et al. 2010: 6)

3 The sectarian dimension is a key issue which should be considered in the context of Northern Ireland, and, perhaps to a lesser extent, Scotland (Tsang 1999).

The Legal Services Board subsequently published plans to require firms and chambers to publish diversity data about its workforce, and it will be interesting to see how the profession responds to this latest initiative (LSB 2010d).

The Legal Services Act 2007

The Legal Services Act 2007 (LSA) will be discussed in more detail throughout the book, and particularly in Chapter 7, but it is important to establish some of its central features at the outset. Key factors leading to the legislation were recurrent consumer criticism about self-regulation in the legal profession (M. Davies 1999) and Office of Fair Trading concern about restrictive practices in professions (OFT 2001). The main features of the legislation are the establishment of the oversight regulator of legal services, the Legal Services Board (LSB) (s.2), and the clear articulation of regulatory objectives and professional principles (s.1). The continued role for Front-line Regulators such as the Law Society and the Bar Council is on condition that they separate their representative and regulatory functions to the satisfaction of the LSB (s.30). Thus, the Law Society established its regulatory arm, the Solicitors Regulation Authority (SRA) to comply with the legislation. The Act also establishes a single independent Office for Legal Complaints (s.114) and, perhaps most significantly for the legal marketplace as a whole, lays down the framework which will eventually lead to non-lawyer owners and managers of organizations providing legal services through Alternative Business Structures (ABSs) (ss.71–111). As a precursor to the ABSs, Legal Disciplinary Practices (LDPs) have been permitted since March 2009, which allow partnerships of lawyers (for example barristers, solicitors and legal executives) to be formed, with up to 25 per cent of non-lawyers (s.9A(2)(a) Administration of Justice 1985). As such, the legislation not only provides new challenges for the way in which professional bodies organize their regulation, but also for the market in which their members deliver their services.

Publicly Funded Legal Work within England and Wales

Following the publication of the Rushcliffe Report on Legal Aid in 1944 and the subsequent Legal Aid and Advice Act 1949, the legal profession co-opted the legal aid scheme (Goriely 1996) and it formed a significant body of work for the profession as a whole (Abel 1988). Since the late 1980s, successive Conservative, Labour and now Coalition governments, have attempted to restrict the profession's control over the scheme, improve the co-ordination of services and above all control costs (Abel 2003). Legal aid lawyers have come under increasing pressure, with many leaving the sector (or the profession entirely) in a response to falling income, a reduction in professional autonomy and diminished prestige in the eyes of both colleagues and the wider public (Moorhead 2004, Sommerlad 2001). The Access to Justice Act 1999 removed large areas of work from the scope of the legal aid scheme, and the Ministry of Justice has continued this direction of travel in its

response to the austerity measures in the Coalition Government's October 2010 Comprehensive Spending Review (MoJ 2010). Other recent developments such as the Community Legal Service established following the Access to Justice Act 1999 to administer civil legal aid (which attempts to bring not-for-profit and for-profit agencies into closer collaboration) were welcomed with a level of optimism (Francis 2000). these developments have had an impact upon other, more radical, approaches to the delivery of legal services to the poor (Robins 2008).

Given the scale of these changes, the core of mainstream legal professionalism has been presented with a challenging set of circumstances, any of which may prompt shifts in the jurisdictional settlements within the system of the professions. My approach in this book, however, is to consider the experiences of those at the edge of mainstream legal professionalism in order to develop our analysis of how, when and by whom professional strategies may be deployed in the future.

Why the Edge?

This book's focus is upon a range of actors who are either positioned, or who choose to position themselves at, what I term, 'the Edge of Law'. As I explain more fully in Chapter 2, the notion of 'the edge' is used as a metaphor and analytical device in a number of ways. Many of the actors considered in this book are 'cutting edge' in the work that they do, challenging accepted practices and patterns of behaviour in the field – the 'institutional logics' (Lounsbury 2002: 255). Others are 'edgy', displaying status anxiety or identity dissonance about their place in the professional field (Costello 2005: 127). Fundamentally, however, I use 'the edge' to refer both to the internal stratification of the legal profession, and the horizontal orbit occupied by those moving away from the core of mainstream legal professionalism and potentially closer to actors in environing professions.

Although there is a wide range of literature considering changes within the legal profession, and indeed work that addresses the outsider experience (see, for example, Thornton 1996), most of this literature focuses on relatively familiar sectors of the profession. The case-studies explored here, which draw on original empirical research, analyse the structures and strategies of those at the edge to reveal the ways in which legal professionalism within England and Wales is responding to the challenges it faces in the early twenty-first century. This is particularly relevant in the context of an increasingly fluid, fragmented and heterogeneous legal profession.

Greenwood, Suddaby and Hinings (2002: 59) and Gieryn (1983) argue that neither behaviours nor boundaries within professional fields are fixed. Thus, as Abbott suggests, jurisdictional moves made by one profession can impact upon the position of another profession (1988: 86). Bucher and Strauss argue that 'most leadership is associated less with the entire profession than with restricted portions of it. ... Leadership, strategies and the fates of segments deserve full focus in our studies of professionalization' (1961: 334). Thus, rather than looking at the

centre of professions, where we might find the embedded core of mainstream legal professionalism and its institutional leadership (the Law Society), Gieryn (1983) and Abbott's later work (1995: 863–5) directs us towards the boundaries, and the segments located there. It is in looking at the processes of change, how differences emerge between groups and how points of difference are shared between other groups, that we can more fully understand the emergence of new social entities, like professions (Abbott 1995: 869).

Of course, professions have always been concerned about boundaries, for example between themselves and other occupations (Sugarman 1995a). However, there is relatively little work that analyses the experiences of actors, who operate on these boundaries (whether by choice, or marginalization), and yet remain within the orbit of a weakened collective mobility project (Abel, 2003, Francis 2004, Kritzer 1999). As Abel suggests, we should be interested in the fringes of professionalism because that is where, just as in Arts Festivals, innovation, change and experimentation can emerge (1985: 6). Thus, new organizational forms developed at the edge, such as multi-disciplinary practices in accountancy, may become more widely accepted (Greenwood and Suddaby 2006), in much the same way as parts of the Edinburgh Fringe Festival are now mainstream (Sturges 2002). More broadly, Sharpe, drawing on Bauman, suggests that a society defines itself against 'outsiders' (2007: 209). Thus, in analysing the experiences of professional actors at the edge of law, we may add to an understanding of the core values of, and enduring ties binding actors to, mainstream legal professionalism.

I have previously argued that future conceptions of legal professionalism require detailed accounts of individual and collective models of professional advancement (Francis 2004: 347–8). The selected case-studies are an attempt to highlight just some of the many examples of professional advancement within the fragmented contemporary system of the legal professions. Inevitably this selection ignores a great deal. This book's core focus is not, for example, on the 12,000 barristers within England and Wales. There are obviously also other case-studies which could have been selected which would provide further insights about the current and future directions of legal professionalism; for example, claims management firms, unregulated will-writers and immigration advice providers. Nevertheless, the case-studies selected here all represent different examples of the way in which 'the edge' operates as a feature of contemporary legal professionalism.

Outsider students, discussed in Chapter 3, highlight the ways in which the patterns of social closure within the profession demonstrate remarkable tenacity, notwithstanding the apparent loss of the profession's capacity to exert collective control over entry. The in-depth analysis of legal executives, a largely ignored branch of the legal profession, demonstrates the attempt of an aspirant occupational group to deploy many of the traditional strategies of professional advancement and yet remain locked at the edge. The Pivot Cause Lawyers' relationship to the core of Canadian legal professionalism provides us with fresh perspectives on the disciplinary ties of Law (Chapter 5). Moreover, the limited potential for the direct applicability of their model to English progressive lawyers is important in