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LEGAL PROFESSIONAL IDENTITY FORMATION AND THE REPRESENTATION OF LEGAL PROFESSIONALS IN CLASSROOM TALK

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A thesis submitted to the Wits School of Education, Faculty of Humanities, University of the Witwatersrand in fulfillment of the requirements for the degree of Doctor of Philosophy.

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ABSTRACT

The focus of this study is the formation of legal professional identity and the manner and extent to which representations of legal professionals in classroom talk could feature in and be studied as part of this process. Eclipsed for many years by the need to teach students to 'think like lawyers', professional identify formation is increasingly acknowledged as a legitimate concern of legal educationalists. This entails expanding the sphere of legal education beyond the cognitive aspects of the discipline of law to encompass inculcation of the purposes and values of the profession but also, more broadly, an appreciation of the forms of power legal professionals exercise, the forms of work they undertake, the relationships they establish and maintain, and the social profile of the profession they advocate for or accept. The study assumes an understanding of legal professional identity formation as a pervasive and implicit process of socialization that occurs irrespective of whether professional identity has been posited as a particular pedagogical object or not. It puts forward the thesis that representations of legal professionals in classroom talk constitute part of the socialization process. It presents a theoretical model for understanding the significance of such representations in processes of identity formation, linking them to an understanding of 'identity regulation' that revolves around the concepts 'role' and 'discourse'. It further invokes the resources of critical discourse analysis and, in particular, the work of Van Leeuwen, to develop a set of appropriate analytical codes modeled on key elements of social practice for analyzing representational meanings relating to legal professionals in classroom talk. The development of the codes is undertaken through an iterative process that engages with a complete, verbatim transcription of classroom talk in an introductory six-month course on law at a tertiary institution. The study concludes that a discursive, analytical approach to studying representational meanings relating to legal professionals in classroom talk and, in particular, a micro-discursive point of entry modeled on key elements of social practice, is useful and appropriate for apprehending the richness of the representational meanings. Such an approach allows for a grounded identification of themes that can then be compared to claims made in the literature on legal professionalism and the teaching of legal ethics. It also concludes that because the representation of legal professionals in classroom talk overlaps with the power relations of the classroom, they should be regarded as a significant source of identity regulation and thus used in a manner that is both reflective and constructive.

KEYWORDS: identity formation, professional identity, legal professionalism, critical discourse analysis, representation.

DECLARATION

I declare that this thesis is my own unaided work. It is being submitted for the degree of Doctor of Philosophy at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination at any other university.

_____

Tracy-Lynn Humby

_____ day of _____ in the year 2012.

For Evan, Charlotte and Tristan

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GLOSSARY OF ABBREVIATIONS

AC	Articled clerk
Att	Attorney
Adv	Advocate
CSA	Circumstances of social action
DPP	Director of Public Prosecutions
J	Judge
L	Lawyer
LA	Legal academic
M	Magistrate
P	Public prosecutor
SA	Social action
SAct	Social actors
SAdv	State advocate
V	Values

CHAPTER ONE

INTRODUCTION TO THE STUDY

1. THE ORIGIN OF THE RESEARCH JOURNEY

This study is about the relationship between the formation of legal professional identity and the representation of legal professionals and their social practices in classroom talk. When I first started teaching law at a tertiary institution in South Africa nine years ago I was passionately energized by the thought of equipping young people with the tools they would require to secure justice, to right the wrongs of society, to defend the downtrodden. The simple imperatives from the text of my faith captured the spirit of the lawyer-ideal[1] that gripped my imagination: 'Seek justice, encourage the oppressed. Defend the cause of the fatherless, plead the case of the widow'[2] so that justice might 'roll on like a river, righteousness like a never-failing stream'.[3] In the classroom, however, though this was the ethos I wanted to impart, I felt curiously constrained to do so by what I had to teach – the kinds of questions deemed appropriate for lawyers to ask and the way lawyers reason about them – as well as strongly-embedded cultural assumptions about the type of people lawyers are and the opportunities that existed for them to make a living. As someone who had never practiced as a lawyer in the conventional sense,[4] I began to worry that the lawyer-ideal which inspired me as a teacher was both naïve and academic. It was a discouragement for me to think that my teaching was in some way contributing to students becoming kinds of people quite different to my ideal: People who seek not so much justice as the best technical, winning argument; who are not concerned

[1] In this chapter I use the term 'lawyer' (a generic term in South Africa that encompasses different types of legal professional) and 'legal professional' interchangeably. In my study of talk about legal professionals in the classroom, however, I distinguish between the various types of legal professional in addition to studying the use of 'lawyer' as a generic term.

[2] Isaiah 1:17 *Life Application Study Bible* NIV (1988) Tyndale House Publishers.

[3] Ibid, Amos 5:24.

[4] As outlined in greater detail in Chapter Three, I have not completed articles to become an attorney nor pupilage to become an advocate, I have not served as a public prosecutor or state attorney, I have never formally counseled a client or represented their interests in court.

with questions of right and wrong but with the correct legal authority; and who would only be prepared to take up the cause of the 'fatherless' and the 'widow' insofar as they were able to pay for the service. But it did set me off to wondering about the professional identities of lawyers and how they are formed: Whether they were in some way given by the nature of the discipline or whether they were socially constituted and, if the latter, what I could do as a teacher to shift or at least diversify the stereotypes that always seemed to be lurking in the wings of my classroom performance.

Also, from a personal perspective, from a young age I have been aware of the potential for language to shape identity. As a young girl and then woman, I would tend to adopt the manner of speaking, the naming and allocation, the forms of interaction and the turns of phrase of the individuals and groups with whom I entered into relationship. For instance, when I accepted the Christian faith at the age of twenty-six, I very quickly learned how to be a 'good' Christian according to the group with whom I worshiped. I learned how things and people were appropriately named and how qualities were allocated among them. I learned how to pepper my expressions of hope with the tag 'God willing' or to preface my sharing of a good event with a 'Praise the Lord!'. I learnt the intricacies of the ritual of group prayer: When it was appropriate to pray, what to say, how to say it, and the linguistic modalities of many other interactions. In all these linguistic performances I was not only demonstrating a desire to belong, but also bidding to be recognized and affirmed by key insiders. And this was all premised on those who had modeled, who had represented to me, the kind of language used by a 'good' Christian in that group and the manner in which the world was discursively constructed in terms of a Christian frame of reference. Many years ago George Herbert Mead wrote: 'We divide ourselves up in all sorts of different selves with reference to our acquaintances. We discuss politics with one and religion with another. There are all sorts of different selves answering to all sorts of different social reactions' (1934: 142). Suffice to say that I have probably felt this division of self, and the change in the patterning of language it entailed, more acutely than most. This not only led to an enhanced sensitivity to how language is used to mark identity, but also contributed to my interest in exploring and understanding the

rich and complex ways in which language functions to constitute identity and, in particular, the ways in which classroom talk constitutes legal professional identity.

2. OUTLINING THE PROBLEM SPACE

2.1 Legal professional identity as a research focus

Until very recently, the literature on legal education in leading Anglophone countries (the United States of America, the United Kingdom, Canada and Australia) bears no mention of **professional identity** as a concept. There has been much written about the so-called 'identity crisis' (Rule, 1987: 249) of law schools,[5] but this invokes the (still debated) issue of how legal academic training at tertiary institutions relates to and is integrated with the subsequent practical training provided by the legal profession: Whether legal education is a 'liberal education' akin to a degree in the humanities, or a specialized technical education specifically geared to preparing students for practice.[6] The poles in this debate were famously defined by Twining (1967) who introduced the enduring metaphors of 'Pericles' and 'the Plumber'. The image of the lawyer as 'plumber' was essentially of 'someone who is master of certain specialized knowledge, 'the law', and certain technical skills. What she needs is a no-nonsense specialized training to make her a competent technician. A 'liberal' education in law for such a person is at best wasteful, at worst 'dangerous' (ibid: 397). Contrasted with this, is the image of the lawyer as Pericles – 'the law-giver, the enlightened policy-maker, the wise judge' (ibid: 398)

[5] For research outlining the so-called 'identity crisis' of legal education, see Arthurs (1997); Bates (1981), (1984); Blake (1987); Bridge (1975); Cownie (2004), 75; Duncan (1991); Fitzgerald (1993); Lawton (1980); Leighton & Sheinman (1986); MacFarlane, Jeeves & Boon (1987); and Rule (1987) in addition to all the articles in Birks (1996). Articles on the South African perspective include Maharaj (1994); Motala (1996); and Woolman, Watson & Smith (1997).

[6] In many of these countries, as in South Africa, the education of a legal professional is a responsibility shared between tertiary educational institutions and the legal profession. In South Africa, In order to become an advocate or an attorney it is necessary to obtain a Bachelor of Laws (LL.B) degree – most commonly at a university law school – before undertaking one of the various forms of practical legal training prescribed by the General Council of the Bar or the Law Society of South Africa. An LL.B degree is also the minimum entry requirement for various positions in the public service, such as the position of public prosecutor. Today, a compulsory period of academic study is an essential step toward becoming a lawyer in most countries of the world. The LL.B degree is the principal academic degree in law in most common-law countries (i.e. England, Australia, Scotland and Turkey) (Sonsteng, 2008: 14 n 63) and is an undergraduate degree. In contrast, the Juris Doctorate (J.D.) in the United States of America is a 3-year postgraduate degree. Some countries are similar to South Africa in requiring a subsequent period of vocational training under the organized profession after completion of the LL.B (for instance, the United Kingdom – see Fitzgerald, 1993: 5 – 6). In others, most notably the United States of America students are not required to undergo any further vocational training in order to qualify as lawyers.

– an image associated with the attributes of intellectual discipline, detachment, breadth of perspective, an interest in human nature and a capacity for independent and critical thought (ibid: 398, 425).[7] The most frequent response to this debate – and one which still leaves the positioning between Pericles and the Plumber open – is that law schools exist 'to teach students to think like lawyers' (see Boon, 2002: 34; Mertz, 2007: 97 – 8; Willging & Dunn, 1981–2: 307). A great deal of thought has thus been channeled into understanding the cognitive, intellectual dimensions of being a lawyer; i.e. the skills of classification, analysis, and reasoning that constitute legal epistemology.[8] This has largely been conceptualized in terms of a project of developing legal reasoning, not of developing professional identity.

A year after I commenced this research the Carnegie Foundation for the Advancement of Teaching and Learning published a report on legal education in the United States of America[9] (henceforth the 'Carnegie Study') in which the concept of professional identity emerged as a prominent focus. To my knowledge, it was the first time in which the concept as such had played such a central role in a high-level report on the legal profession and legal education in an Anglophone jurisdiction. Essentially, the Carnegie Study calls for a reconceptualization of the nature and scope of learning that takes place in professional schools in the United States of America, including law schools. The common problem of professional education, the Study maintains, is 'to teach the complex ensemble of analytic thinking, skillful practice, and wise judgment on which each profession rests' and not to focus exclusively on the cognitive dimension (Sullivan *et al.*, 2007: 27). In order to tease out the implications of this changed

[7] These tensions are also evident in a South African context. As noted by Pickett in the recent *LLB Curriculum Research Report* (2010), law graduates may subsequently pursue a career as a legal practitioner, whether as attorney, advocate, legal advisers in the public or private sectors, legal financial advisers, and so on. But they may often move into fields in which they do not practice law at all, becoming politicians, or diplomats or working in completely unrelated fields. For these students, the Report notes, the study of law serves as a 'good liberal arts education' (Pickett, 2010: 10). The LL.B degree thus has a 'dual nature', serving both as an academic discipline in itself, as well as the 'academic component' for entry into a variety of specialized legal professions (ibid).

[8] Mertz (2007) provides the most extensive recent account of the distinctive features of a legal epistemology, though her research is limited to the context of legal training in the United States of America. We may therefore admit of the possibility of 'legal epistemologies' rather than the singular form.

[9] The Carnegie Foundation's study on the legal profession (Sullivan, *et al Educating Lawyers: Preparation for the Profession of Law*, 2007) was part of a broader comparative study of education in five professional fields (law, engineering, the clergy, nursing and medicine). The series commenced with an essay on the nature and value of the professions in American life (Sullivan, W.M. *Work and Integrity: The Crisis and Promise of Professionalism in America*, 2005).

perspective for professional education, the authors re-appropriate the metaphor of apprenticeship,[10] but extend it to the whole range of 'imperatives' (ibid) confronting professional education. To this end they identify three forms of apprenticeship which they propose as a framework to structure legal education: The cognitive, the practical and the apprenticeship of identity and purpose (which they also dub the ethical-social) (ibid: 13 – 14, 27 – 28, 147).

The focus of the cognitive apprenticeship is on both the forms of analytical thinking characteristic of lawyers and the formal knowledge base of the law (the particular legal doctrines, principles and rules applicable within a particular country), on knowing how lawyers 'think' (ibid: 27). The content of this apprenticeship thus entails learning about legal doctrines, principles and rules in order to grasp particular matters in terms of general principles. It involves developing a legal lens to recontextualize the social world (ibid: 13). In the United States of America the cognitive apprenticeship most frequently occurs in a classroom setting involving a large number of students and the use of the 'case method'[11] and 'Socratic dialogue'[12] (ibid: 28). This is dubbed the 'case-dialogue approach' and is elevated by the Carnegie Study to the status of legal education's 'signature pedagogy' (ibid: 50 – 84).

[10] The Carnegie Study defines 'apprenticeship' as learning that happens when an expert is able to model performance in such as way that the learner can imitate the performance, while the expert provides feedback to guide the learner in making the activity his or her own (Sullivan *et al*, 2007: 26). The Carnegie Study's use of the concept 'apprenticeship' of course, signifies a alignment with particular theories of teaching and learning, more specifically, the situative or socio-cultural approach advocated by Jean Lave, Etienne Wenger and others.

[11] According to traditional accounts, the 'case method' of instruction at American law schools was introduced by Harvard professor Christopher Columbus Langdell during the 1870s. The method entails extracting core legal principles from a reading of cases issued by appellate courts. It was intended as a method to establish law as a science (Sonsteng, 2008: 16). Sonsteng goes on to note that the case method is the predominant method of teaching most courses at nearly all law schools in the United States of America (ibid: 16 n 84). While a comprehensive study of the use of the case method in South African law schools has not been conducted, in the experience of the researcher the case method is also used pervasively in South Africa.

[12] The introduction of 'Socratic dialogue' into the law school classroom in the United States of America is attributed to Theodore Dwight who worked at the Columbia School of Law (Sonsteng, 2008: 12). Sonsteng describes Socratic dialogue as follows: 'The Socratic method of instruction engaged students in continual conversation and required them to distill the applicable rule of law from the superfluous facts of a case. The method motivated students to reason rather than recite.' (ibid: 16). Mertz identifies the following features as being distinctive of Socratic dialogue (2007: 44): (i) Extended questioning of a single student about a case assigned for that day (question/answer or 'dialogic' form); (ii) Frequent interruption; (iii) Few (if any) answers provided; (iv) An insistence on close attention to the language of cases; and (v) A challenging (if not hostile) tone. She further maintains that the dialogic form is key to legal discourse (106). The 'tacit epistemological lesson' that emerges from the dialogic form is that legal truth emerges through argumentative dialogue (108). The extent to which this method is employed in South African law schools has not been investigated. However, anecdotal evidence suggests that it is not used frequently.

The focus of the practical apprenticeship, in turn, is on practical skill or how lawyers 'perform' (ibid: 27), knowing the forms of 'expert practice shared by competent practitioners' (ibid: 28). This would include, for instance, knowing how to work with clients and how to practically function in particular legal contexts. Learning in this second apprenticeship occurs predominantly through simulating practice, which may range from simulated practice situations or case studies in small groups, to standard 'legal writing courses', to 'actual clinical experience with real clients' (ibid: 28, 104 – 124).

The focus of the ethical-social apprenticeship, finally, is 'professional identity' which the Carnegie Report notes is sometimes described as 'professionalism', 'social responsibility' or 'ethics' (ibid: 14); i.e. on how lawyers 'behave' (ibid: 27). This apprenticeship 'introduces students to the purposes and attitudes that are guided by the values for which the professional community is responsible' (ibid: 28). It shares with the goals of a liberal education in law an attempt 'to provide a wide, ethically sensitive perspective on the technical knowledge and skill that the practice of law requires' (ibid). Elsewhere the Carnegie Study describes the content of this apprenticeship as involving the areas of 'professional ethics' (the professional rules of conduct prescribed in particular jurisdictions) and 'wider matters of morality and character' (ibid: 129). It is typically taught by a 'continuum' of pedagogies (ibid:147): From discussion of the ethical aspects of cases in class, to simulations of practice situations which raise ethical issues, to work in legal clinics and internships that incorporate reflection on ethical aspects, to dedicated courses on professional ethics (ibid: 147 – 160). The ethical-social apprenticeship 'joins' the first two apprenticeships and serves as 'the catalyst for an integrated legal education' by elucidating the significance of learning legal analysis and acquiring practical skills (ibid: 14). It both legitimates the work of lawyers and serves as a source of inspiration. The Carnegie Study found, however, that most aspects of the ethical-social apprenticeship were subordinated 'to academic training in case-dialogue method and contested as to their value and appropriateness' (ibid: 132).

My own attempts to use this method over the years have been met with a mass resistance by students who simply refuse to answer the questions posed. Colleagues from the same and different universities report similar experiences. There may be various reasons for this phenomenon: The different levels of academic socialization of South African students as compared to the American counterparts as well as different levels of cultural comfort with direct questioning of individuals in front of a group.

The Carnegie Report's positioning of professional identity within the overall design of a legal education can thus be graphically represented as follows:

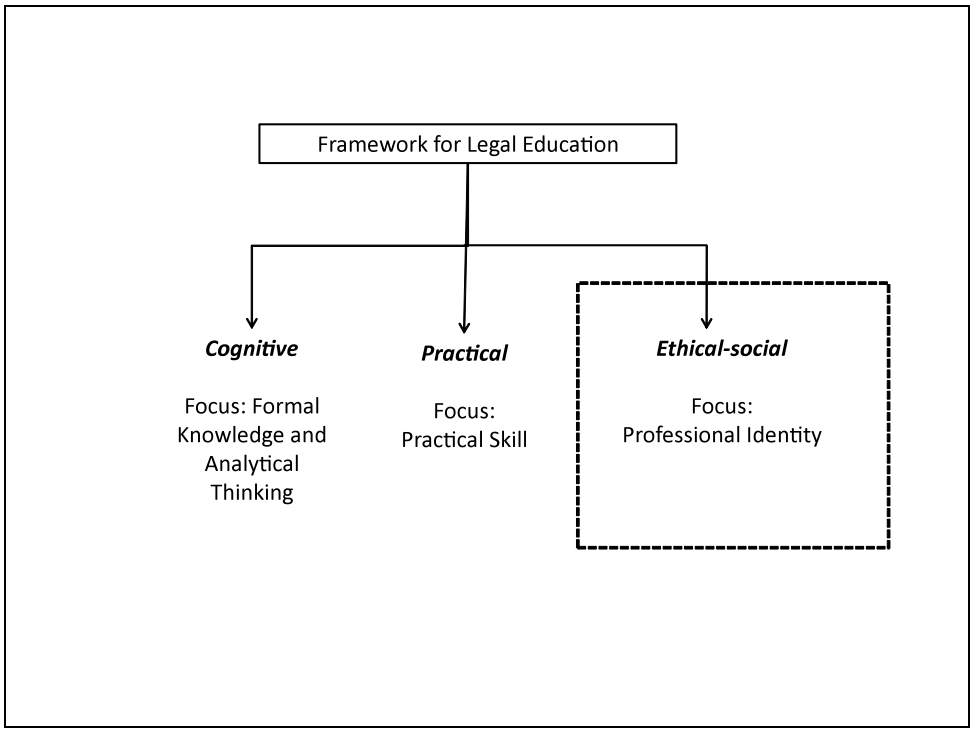

Figure 1: Carnegie Report's positioning of professional identity in legal education.[13]

The Carnegie Study is not alone in highlighting the importance of identity as a constituent element of a framework for thinking about the teaching of practice in the context of the university. Grossman's *et al* (2009) cross-professional study of methods courses aimed at the

[13] In South Africa, although the concept of 'professional identity' has yet to enter the discourse of legal education, there is a similar move towards seeing the LL.B less as a qualification based on knowledge of the law *per se*, and more as one in which there should be a focus on a mix of knowledge, skills and attitudes. The recent *LL.B Curriculum Research Report* found that there was 'a great deal of commonality in the competencies which are highly valued by law faculty and all types of legal practitioners' (Pickett, 2010: 161). The six competencies that were highly valued by all respondents in the surveys were: (i) the ability to understand, analyze, investigate and solve problems; (ii) proficiency in reading, writing and speaking English; (iii) ability to read and interpret statutes and legal documents; (iv) ability to construct and communicate an argument; (v) understanding of the principles of South African law and how they apply in practice; and (vi) research skills, both in general and specific to the profession' (ibid). A second group of competencies – namely, ability to draft legal documents, skills in the practical application of law, and understanding of legal ethics – although not listed in the top ten, were indicated as 'very important' by the overwhelming majority of respondents (ibid). With the emphasis thus falling on 'high-level or generic skills' (ibid: 162) (such as proficiency in reading, writing and speaking English or research skills), legal knowledge, some more specific legal skills, *and* legal ethics (although this aspect was clearly overshadowed by the greater emphasis on generic skills), this Report clearly shows that while there are significant differences arising from the unique features of a South African context, there is widespread support in South Africa for moving away from a 'knowledge-based curriculum' (ibid), to one that also focuses on other dimensions of legal education. There is also evidence for this move in the limited South African literature on legal education (De Klerk, 2006; De Klerk & Mohamed, 2006; Maharaj, 1994; Motala, 1996; Woolfrey, 1995).

preparation of preachers, clinical psychologists and teachers, for instance, is undergirded by a conviction that '[p]art of professional preparation involves the construction of a professional identity' (2009: 2059). This stems from their understanding of practice in complex domains as involving 'the orchestration of understanding, skill, relationship and identity to accomplish particular activities with others in specific environments' (ibid). The three concepts they offer for understanding the pedagogies of practice in professional education - a schemata that might serve to categorize the Carnegie Study's 'continuum of pedagogies' – are representations, decompositions and approximations of practice, respectively (ibid: 2058). Representations comprise different ways of representing the practice in a professional education setting and what these various representations make visible to novices. Decompositions involve breaking a practice down into its constituent parts for teaching and learning purposes. Approximations refer to opportunities for learners to engage in activities that are more or less proximal to the practice being learned (ibid). By implication, pedagogies of representation, decomposition and approximation of practice are potentially *all* useful for instigating the formation of professional identity.

However, whereas both the Carnegie and the Grossman studies focus on identifying and delineating the *pedagogies* by which professional identity is taught as a constituent element of practice, I was more interested in the formation of professional identity as a process of socialization. Instead of positioning professional identity as an 'object' of particular pedagogies, and evaluating these on the basis of their varying degrees of effectiveness, I regarded professional identity formation as a process that is both more pervasive and more implicit, potentially linked to a variety of social phenomena. This is implied in the Carnegie Study when it is claimed that the law school experience entails an 'inevitable apprenticeship' (ibid: 139) into professional identity through, firstly, the tendency in the cognitive apprenticeship to massively over-emphasize the conceptual and procedural or 'formal' aspects of legal reasoning while marginalizing the ethical, moral or social implications of the disputes with which the law deals (ibid: 141), and secondly, by the moral culture or atmosphere of classrooms and the law school campus more broadly (ibid: 140). Students learn from 'their relationships with particular faculty and with fellow students, their perceptions of faculty interests and priorities, their experiences

in clinics, their pro bono work, externships, summer jobs, and other extracurricular activities' (ibid).

Whilst not disputing that professional identity is also formed by such broad experiences and the presences and absences of the cognitive apprenticeship, my initial intuition pointed to another source of learning, a source situated in the legal classroom, but distinct from teaching about law and legal reasoning, namely *representations of legal professionals* made by university law lecturers in the classroom context. In the Grossman study, 'representations' comprise classroom experiences that provide novices with 'opportunities to develop ways of seeing and understanding professional practice' (2009: 2065). These include direct observations of professionals in the field, videos of practice situations or explications of technique, written cases of practice such as the court cases used in law schools, and examples of 'embodied representations' (ibid: 2066), being instances where the teacher speaks of experience as a practitioner. My own idea of representations extended beyond these examples *to include all instances where* the *law lecturer talked about legal professionals and their social practices,* whether such talk was the focus of a particular pedagogy or not. Like the Grossman study, however, I regarded such representations to be of consequence for determining the 'horizon of observation' of the practice (Little, J.W. (2003) 'Inside teacher community: Representations of classroom practice' 105 *Teacher's College Record* 913 at 917, cited in Grossman (2009) 2065); i.e. the aspects of the practice (its activities, resources, actors, and values) which are rendered visible versus those which are obscured from view (Grossman, 2009: 2066). The visibility/invisibility of the practice in different representations impacts on novices' opportunity to engage meaningfully with the practice because such representations can vary in terms of their comprehensiveness and authenticity (ibid: 2065, 2068). A focus on this aspect of classroom talk also offered a way out of the predominant association of professional identity with the teaching of 'legal ethics' and 'moral reasoning' – an association reaffirmed by the Carnegie Study (see, for instance, Sullivan *et al.*, 2007: 133) but also established by the literature reviewed in section 2.2 below.

2.2 Searching for clues about the formation of legal professional identity in literature on legal professionalism and the teaching of legal ethics

In seeking to determine whether classroom representations of legal professionals had been associated with the formation of professional identity, and how the relationship had been conceptualized, I was drawn to two somewhat different bodies of literature: The first constituted by official reports and policy statements on legal professionalism, the second by the extensive (non-South-African[14]) work on the teaching of legal ethics. These bodies of literature were relevant because they accommodated the possibility that legal education is about teaching students 'to be' lawyers, rather than simply to 'think like' lawyers.

2.2.1 Legal Professionalism

Over the past 20 years many reports and policy statements from different jurisdictions have attempted to take stock of legal education as part of the legal profession and to determine the norms that should guide its future development.[15] These reports typically focus on what legal education should achieve in terms of the knowledge and skills in which students should be proficient and the values they should hold by the time they leave law school. In South Africa, the statement on the generic LL.B qualification published by the Standards Generating Body for Legal Education and Training (2002)[16] (henceforth, generic LL.B. statement) and the recent LL.B Curriculum Research Report (2010)[17] serve as reports of this nature.[18]

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[14] The study of legal ethics in South Africa is virtually non-existent. Davis (1978); Dlamini (1992); Mokgoro (1998); and Woolman (1997) refer to values tangentially, but there is otherwise not a single reference to cite.

[15] They include the famous 'MacCrate Report' (R. MacCrate *An Educational Continuum: Report on the Task Force on Law Schools and the Profession – Narrowing the Gap*, 1992) commissioned by the American Bar Association in the United States of America (for other reports commissioned by the ABA during the 20th century see Sonsteng, 2008: 42 – 45); the 'Cotter Report' (W.B. Cotter *Professional responsibility instruction in Canada: A co-ordinated curriculum for legal education* (1992) in Canada (for an account of the teaching of legal ethics in Canadian Law Schools post 1992 see Cotter, 2009); the 'ACLEC Report' (*First Report on Legal Education and Training*, prepared by a statutory body, the Lord Chancellor's Advisory Committee on Legal Education in 1996 (ACLEC)) in the United Kingdom (for the three other major reports on legal education preceding the ACLEC Report see Boon, 2002: 36 – 38); and the Australian Law Reform Commission's final report on *Managing Justice: A Review of the Federal Civil Justice System* (2000) on the situation in Australia.

[16] In terms of the policy-legal framework established since 1996 (the key documents being: *National Commission on Higher Education Report: A Framework for Higher Education* (1996); *White Paper on Education* (1997); Higher Education Act 101 of 1997; *National Plan for Higher Education* (2001); *New Academic Policy for Programmes and Qualifications in Higher Education* (2002) and the Higher Education Qualifications Framework (HEQF)), all

As a general observation, these reports are focused on *what* should be achieved in legal education and not on *how* this should be done. In none of the reports or statements, therefore, is an explicit connection made between the attainment of the recommended knowledge, skills and values, as elements of a professional identity, and the representation of legal professionals in classroom talk. As intimated above these reports do not even recognize professional identity as a coherent object of legal education.

They are, however, relevant to a project investigating professional identity formation in that they set forth the ideal, they define the contours and features of the practitioner role to which novices, and those teaching them, should aspire. This occurs most obviously through statements of the values which lawyers should uphold. The MacCrate Report's four 'fundamental values' for instance, envisage a practitioner who is committed to (1) attaining and maintaining a level of competence in a chosen field of practice and representing clients in a competent manner; (2) promoting justice, fairness and morality in his or her practice, contributing to the profession's fulfillment of its responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them, and enhancing the capacity of law and legal institutions to do justice; (3) participating in activities designed to improve the profession, assisting in the training and preparation of new lawyers, striving to rid the profession of bias based on race, religion, ethnic origin, gender, sexual orientation or disability and rectifying the effects of these biases; and (4) seeking out and taking advantage of

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qualifications in South Africa must be registered on the National Qualifications Framework (NQF). Once a qualification is registered, the institution concerned (e.g. a university) will be accredited as a service provider. In order to obtain registration, the qualification must comply with the general and specific standards established from time to time by so-called 'Standards Generating Bodies' (SGBs). The generic LL.B statement, which was published in *Government Gazette* 23845 of 20 September 2002 was registered on the NQF, obviating the need for universities and technikons to register their individual LLBs. However, this registration was only valid until 2009 and a new generic LLB framework is currently being negotiated.

[17] See notes 7 and 13 above.

[18] A thorough analysis of these reports and policy statements, and the commentary thereon, would constitute a comprehensive study on its own. It would also need to include the work of professional bodies (such as societies of advocates or attorneys) on legal professionalism as well as studies on legal professionalism in different states. As my purpose is merely to provide a sense of some common themes in formal statements on legal professionalism that are associated with educational contexts, and to determine the modalities by which such formal statements envisage the desired aspects of legal professionalism emerging in young professionals, I focus on two very well-known reports in the English-speaking world – the MacCrate and ACLEC reports respectively in addition to the South African reports.

opportunities to increase knowledge and improve skills, and selecting and maintaining employment that would allow for development as a professional and the pursuit of professional and personal goals' (American Bar Association, 1992: Chapter 5). The ACLEC Report envisages lawyers committed to similar ideals.[19] The South African generic LL.B statement, on the other hand, articulates values relevant to a newly-democratized state and a society needing to transform itself away from, in particular, racial and gendered forms of power.[20] Thus lawyers in

[19] The legal values which the ACLEC Report advocates that legal education should achieve are commitment to the rule of law; justice, fairness and high ethical standards; acquiring and improving professional skills; representing clients without fear or favour; promoting equality of opportunity; and ensuring that legal services are provided even to those who cannot pay for them (ACLEC, 1996: 17).

[20] The stubborn persistence of such forms of power in the South African legal profession is illustrated by statistics of: The gender and race profile of university law entrants in 2011; the number of law graduates in 2010; the number of articles registered in 2011; and the 2011 statistics of practicing professionals in the attorneys and advocates' profession and the permanent members of the judiciary. Statistics for race and gender are not available for the roles of the public prosecutor, state advocate or magistrate. Table 1.1 sets out statistics for the afore-mentioned categories per the standard racial categories in South Africa (Black, Coloured, Asian and White), while table 1.2 presents gender representation across the categories. The data in these tables was compiled from two sources: The Law Society of South Africa's 2010/2011 Statistics, which were in turn based on data submitted directly by all tertiary institutions in South Africa and the four provincial law societies; and a summary of the report submitted by the Chair of the General Council of the Bar at its 66th annual general meeting which appeared in *The Advocate* (August 2011), 7. The statistics for the advocates' profession were submitted by the various bar councils in South Africa. The data can thus be considered to be reliable.

Racial Group	Entered Law School (2011)	Graduated (2010)	Articles Registered (2011)	Practicing professionals: Attorneys	Practicing professionals: Advocates	Permanent members of the Judiciary
Black	4570 (64%)	1611 (43%)	570 (32%)	4006 (20%)	327 (14%)	91 (40%)
Coloured	596 (8%)	285 (7%)	56 (3%)	270 (1%)	78 (4%)	21 (10%)
Asian	471 (7%)	666 (18%)	386 (21%)	2424 (12%)	179 (8%)	23 (10%)
White	1545 (21%)	1192 (32%)	781 (44%)	13219 (67%)	1684 (74%)	91 (40%)

Table 1.2: Racial representation in tertiary education, practicing attorneys and advocates and the judiciary.

Racial Group	Entered Law School (2011)	Graduated (2010)	Articles Registered (2011)	Practicing professionals: Attorneys	Practicing professionals: Advocates	Permanent members of the Judiciary
Male	3302 (46%)	1533 (41%)	789 (44%)	13433 (67%)	1754 (77%)	167 (74%)
Female	3944 (54%)	2218 (59%)	1004 (56%)	6644 (33%)	514 (23%)	59 (26%)

Table 1.3: Gender representation in tertiary education, practicing attorneys and advocates and the judiciary.

In the case of both tables, the statistics represent a snapshot and not the progression of a cohort over time. As such the fall-off in the number of graduates compared to the number of students entering law school cannot be calculated with complete accuracy. The only categories that allow for continuity would be the number of students graduating and the number of articles registered, as the registration of articles follow the year of graduation. The data indicates that people of colour (Black, Coloured and Asian) and women comprise the majority of university law entrants. While there is a significant fall-off in the number of students enrolling for law and the number that graduate (only about 50% eventually graduate), they continue to comprise the majority in the number of law graduates. The increase in the number of White and Asian graduates compared to the number enrolling indicates that these two population groups experience greater success in their studies, whilst the greatest fall-off is occurring amongst Black students. The number of articles registered is an indication of the number of

South Africa are expected to sustain the development of a just and democratic society based on the rule of law; promote constitutional principles and values; address past and current injustices; and participate in promoting the administration of justice and the development of legal institutions in South African society.[21] By articulating the values to which legal professionals should be committed, these reports and statements contribute to defining the purposes of law and the legal profession.

They also define the contours and features of the ideal practitioner, however, by specifying the types of tasks they should be able to undertake, the resources they should be able to use, and the relationships they should be able to sustain. Thus many of the reports emphasize the need for lawyers to undertake legal analysis and reasoning, or to be problem-solvers. They point to the need for lawyers to not only know the core principles and rules of the law, but also to understand the law in its social, economic, political, philosophical, moral and cultural contexts. They point to the need for lawyers to sustain a diverse range of relationships both within the legal profession and with members of other professions or disciplines. In all of this they are this contributing to defining, within the context of a particular jurisdiction, the professional identity of the lawyer, albeit in very general, abstract terms. As in this project, they can therefore be used as points of reference for evaluating the comprehensiveness and authenticity of any *particular* representation of legal professionals. Their content in this regard is therefore considered in greater detail in chapter six.

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graduates who are successfully entering the attorney's profession. In the case of race, the data indicate that White and Asian students are more successful in finding articles than their Black and Coloured counterparts. Females, however, continue to constitute the majority of articled clerks. Racial and gender representation becomes more disproportionate in the number of practicing members of the attorneys' and advocates' profession, with the White and to a lesser extent the Asian groups representing a significantly greater percentage of the practicing members than their representation in the total population. White dominance and Black under-representation is particularly marked in the advocates' profession. Male representation increases disproportionately in the number of practicing attorneys and even more so amongst practicing advocates. The effect of transformational policies can be seen in the racial composition of the judiciary but the gender transformation of the bench has been decidedly less marked. Given these statistics, it is interesting that the generic LL.B statement only references the need to transform racial and gendered forms of power tangentially – through its reference to 'constitutional principles' (the South African Bill of Rights includes a clause prohibiting discrimination on a wide-ranging set of grounds, including gender and race).

[21] An analysis of the manner in which these values are enfolded in the generic LL.B statement is provided in **Appendix 1**. While noting that 'legal ethics' is a competency which practitioners and academics agree is important, the LL.B Curriculum Research Report does not articulate the contents thereof.

2.2.2 The teaching of legal ethics

There is an extensive literature on the teaching of 'professional ethics', 'legal ethics', 'professional responsibility' and so on that reports predominantly on teaching and research in the United States of America,[22] England,[23] Australia[24] and Canada.[25] [26] As noted above, the literature on this topic in South Africa is virtually non-existent.

It is interesting, that this literature almost never claims that law schools produce ethical legal professionals who display a commitment to the kinds of values articulated in the previous section. 'The view apparent from the literature,' Chapman writes, 'is of a widespread belief that law school causes moral and ethical insensitivity and induces a regression in personal and social values' (2002: 73).[27]

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[22] The literature on ethics teaching is probably the most extensive in this jurisdiction where a concern for legal ethics has a long history (see Rhode, 1992: 33 – 38). Following the Watergate scandal, which cast highly-placed lawyers in the Nixon government – and by extension the whole legal profession – in an unfavourable light, the American Bar Association (ABA) introduced a requirement that accredited law schools offer training in professional ethics (Morawetz, 1998: 216). The current Standards for Approval of Law Schools (2008 – 9) require, as regards the program of education offered by accredited schools, that each student receive substantial instruction in 'the history, goals, structure, values, rules and responsibilities of the legal profession and its members' (American Bar Association, 2008: Standard 302(a)(5)). The interpretive guidelines on the standards point out that the substantial instruction in this regard includes 'instruction in matters such as the law of lawyering and the Model Rules of Professional Conduct of the American Bar Association' (ibid: Interpretation 302-9). For research on the teaching of legal ethics in the United States of America see Bartlett (1987); Cramton (1977 – 8), (1987); Elkins (1985), (1987), (1988); Erlanger (1996); Erlanger & Klegon (1978 – 9); Halpin & Palmer (1996); Kennedy (1971), (1982); Luban (1983); Meltsner (1983); Menkel-Meadow (1991), (1994), (1999), (2000); Morawetz (1998); Rathjen (1976 – 77); Schechter (1996); and Stone (1971). In 1995 the journal *Law and Contemporary Problems* devoted an entire issue to innovations in teaching the professional responsibility course in American law schools (see Vol. 58 Nos. 3 & 4.

[23] See for instance Boon (2002); Chapman (2002); Economides & Webb (2000); Giddings (2001); Hutchinson (1999); Johnson (2006); Nicolson (2008); O'Dair (1998); Sherr & Webb (1989); and Webb (1996), (1998), (1999).

[24] See for instance Evans (1998), (2002), (2005); Goldsmith & Powles (1998); Noone & Dickson (2001); Powles (1999); Sonsteng (2008); Sonsteng & Camarotto (2000); Willging & Dunn (1981 – 2).

[25] See for instance Arthurs (1998); Cotter (2009) and Jewell (1984).

[26] The literature is part of a recent interest in the ethics of the legal profession more broadly – see, for instance, the sources cited in Nicolson, 2008: 145 n 1. This interest, in turn, is commonly justified by claims that the legal profession is 'in crisis': The levels of depression and addiction amongst legal professionals, it is claimed, are very high, while the public confidence in the legal profession is at an all time low – see Chapman, 2002: 70 n 10 in which she cites a media report indicating that 40% of practicing lawyers in the United Kingdom were keen to leave their jobs and at 70 in which she cites empirical evidence for the public's dissatisfaction with the profession's self-regulation. See also Evans, 1998: 276, 278; Giddings, 2001: 166 (reporting on lawyers misbehaving in Australia); Jewell, 1984: 474 – 5; Mixon & Schuwerk, 1995: 94 n 19 – 21; Schechter, 1996: 367 – 8; Sulllivan *et al*, 2007: 29; Webb, 1998: 134 – 5; Webb, 1999: 284.

[27] Many of these types of claim are supported by a literary genre devoted to recounting the horrors of studying law at such luminous institutions as Yale, Harvard and Cambridge (see Ehrenreich (1994); Goodrich (1996) and Turow (1977)).

The literature details both the nature of such regression and the ostensible causes thereof. For purposes of this study it is significant that the representation of lawyers, including their values and the social practices in which they are engaged featured as one of three broad categories of causes linked to student moral and ethical regression; the other two being the forced separation of legal reasoning from ethical or moral concerns, and the nature of the relationships established between the lecturer and students in the classroom. Although the first category is most important for purposes of this research I provide a brief overview of all three.

As regards the representation of legal professionals in the classroom, it is claimed that law schools, encourage litigiousness on the part of students by focusing on the social practice of litigation rather than, for instance, counseling and mediation (Schechter, 1996: 373). This apparently encourages an adversarial approach to human conflict and produces lawyers who are arrogant, confrontational, controlling, unfeeling and rude (Menkel-Meadow, 1991: 7; Schechter, 1996: 374, 379; Webb: 1996: 274) as well as ruthless and over-competitive (Nicolson, 2008: 149; Schechter, 1996: 389). On the other hand it is said that law schools discourage students from the social practices of providing access to justice for the poor, from providing pro bono legal services and pursuing career options in the public service as opposed to private practice (Erlanger & Klegon, 1978 – 9, 1996; Granfield, 1992; Schechter, 1996: 384). This is linked to an abandonment of activism and idealism on the part of individual students (Chapman, 2002: 68; Nicolson, 2008: 149). Many commentators have also claimed that the law school experience engenders cynicism in students (Chapman, 2002: 68; Menkel-Meadow, 1991: 7 – 8; Parker, 2001: 182, 186; Webb, 1996: 274; Webb, 1999: 286) on the basis of the representation of lawyers as 'mindless form-fillers and grubby money seekers' (Nicolson, 2008: 149).

In addition to the representation of lawyers, there are many claims in this body of literature that the manner in which legal reasoning is separated from moral or ethical reasoning (Cownie, 2003: 159; Elkins, n.d.; Kennedy, 1982: 598; Nicolson, 2008; 148) impacts negatively on students' moral and ethical development. These claims are not directly linked to claims regarding the representation of lawyers; i.e. it is not claimed that lecturers represent lawyers

thinking in this way. Instead the focus is on legal reasoning more generally. The forced separation between legal and moral/ethical issues is said to foster a legalistic approach to moral issues – a 'morality of rule veneration' (Elkins, n.d.: 16; Webb, 1998: 137) in terms of which moral conduct is equated with rule-following and 'creative compliance' through rule manipulation is encouraged (Webb, 1998: 137). It is also said to instill a sense of moral relativism (Cramton, 1977: 253),[28] which is closely identified with the fostering of an instrumentalist approach to law (Chapman, 2002: 68; Cramton, 1977: 257; Nicolson, 2008: 148): What is 'right' is whatever works for a particular client or a particular case (Menkel-Meadow, 1991: 7). Along with this, it is said that law schools teach that legal reasoning requires 'habitual deference to certain formally legitimate kinds of authority' (Webb, 1998: 140) – institutions of juristic speech and writing organized dogmatically and hierarchically as sites of truth (Goodrich, 1996: 60). This, it is claimed, fosters a deferential attitude to authority. The habitual reference to legal authority, as the essence of legal reasoning, encourages passivity (Chapman, 2002: 68; Kennedy, 1982: 594; Nicolson, 2008: 149; Webb, 1998: 137). Law schools also teach that legal reasoning requires the exclusion of an emotional response to legal disputes on the basis that this is irrelevant (Kennedy, 1982: 595). This tends to introduce within students a sense of estrangement from themselves (Goodrich, 1996: 62) in addition to undermining all recourse to contexts that are contingent, partial, fallible or subjective (Cramton, 1977: 260; Goodrich, 1996: 60; Webb, 1998: 140).

Finally, there are claims that the nature of the relationship a lecturer establishes with students in the classroom models tends to be hierarchical (Kennedy, 1982: 593, 604; Nicolson, 2008: 149) and models the subsequent hierarchical relations between senior and junior associates in law firms, and between lawyers and judges in court (Kennedy, 1982: 604). In line with this it is claimed that lecturers frequently humiliate students. The humiliation arises from the 'pseudo-participation' that arises from being called upon, before a large class, to respond to the teacher's questioning in relation to knowledge about which one is not yet sure (Kennedy, 1982:

[28] Cramton describes moral relativism as encompassing beliefs – also widely-held outside the law school context – that value judgments are ultimately indefensible, that one person's values are equal to the values of another, that since values are different all over the world no values are ultimately the 'best' or have any special claim, that values are the result of hard-wired social conditioning and it is thus futile to attempt to change them or that values are right simply because they are held by an individual (1977: 254).

593). Students also learn to defer to their 'betters' through a range of practices on the part of the law teacher: Interrupting students in mid-sentence, mocking them, initiating ad hominem assaults, almost never praising students or only very seldom (Kennedy, 1982: 604) or laughing at students' expressions of common sense of morality (Menkel-Meadow, 1991: 8). As an authority figure in the classroom, the lecturer also exercises a power over how to position students in relation to legal practices. Cramton argues that students are invariably positioned as legal advocates.[29] The underlying, unarticulated assumption is that the advocate must work with goals and values that have already been determined by the party for whom the advocate is acting. Critical reflection upon the goals underlying competing rules is rarely undertaken and students are inculcated in the belief that the proper role of the lawyer is always to assume the goals and values of others (1977: 256).

From the literature, therefore, certain key claims emerge regarding the manner in which legal professionals are represented in the classroom; i.e. there is a focus on litigiousness; discouragement of social practices related to providing access to justice for the poor, providing *pro bono* legal services and pursuing a career in the public services; and a representation of lawyers themselves as 'mindless form fillers and grubby money seekers'. Claims regarding the nature of legal reasoning (its separation from moral, ethical and emotional responses; its deference to forms of legal authority) and the nature of moral thinking (relativistic, instrumentalist) are not specifically linked to the representation of legal professionals. Similarly, the nature of relations in the classroom between lecturer and students (hierarchical relationship; actions aimed at belittling students; the positioning of students) are said to model relations in the legal profession, and are not linked to representations of the legal profession *per se*.

Whilst they are not all linked to the representation of legal professionals, what does unite these claims is a pattern in which either the representation of legal professionals, or legal reasoning, or the nature of relationships in the classroom is claimed to have certain effects in students which defines their professional identity in a negative way: They 'become' confrontational,

[29] The use of the term 'advocate' in the United States of America would not be the same as the term in South Africa. Instead it would probably refer to both advocates and attorneys.

unfeeling, rude, cynical, passive, competitive, and so on. In this way the representations are thus clearly linked – even if anecdotally and intuitively – to the formation of professional identity.

It is important to note that I do not intend to set up claims made in the literature on the teaching of legal ethics as the 'bad straw man', in opposition to the 'good straw man' constituted by the statements on legal professionalism found in official reports and policy statements. In line with the discourse-oriented approach of this study, these two bodies of literature comprise texts that are produced by different social actors, under different social conditions and invoking different agendas and power relations. In themselves they are both also representations that make different aspects of the practice visible and invisible. The scope of the study does not admit for exploring these differences. How reference to these contrasting discourses[30] on legal professionalism serves the present study, however, is that they stand as contrasting points of reference for comparing the representations of legal professionals made by the lecturer in the particular classroom I studied. They thus enable my analysis to move beyond mere description to some sort of evaluation of the *meaning* of my research subject's representations.

2.3 Basis for claims regarding the formation of legal professional identity – A need to focus on the language of the classroom ('classroom talk')

2.3.1 Questioning the basis of the negative effects of law school

Much more than reports and statements on legal professionalism, therefore, the literature on the teaching of legal ethics attempts to account for how professional identity is formed in the classroom. The prevailing argument in this literature – that law school tends to induce a regression in social and personal values and possibly even produces *unethical* practitioners – is based on two separate claims: (1) Teaching in law schools represents legal professionals, the nature of legal reasoning, and the relations in the classroom in a certain (typically negative) light; and (2) this triggers the development of (typically negative) approaches, attitudes/traits of character and values in students. The two claims, however, did not seem to be equally

[30] Chapter Two provides a detailed account of my understanding of discourse.

grounded on rigorous empirical research (i.e. research in which there is significant, comprehensive and systematic empirical data to support the findings).

The first claim seemed to be predominantly grounded upon authors' personal impressions of broad-ranging features of legal education. Schechter's argument regarding the over-emphasis on litigation as a means of conflict resolution, for instance, is based upon his observations regarding the prominence and timing of certain courses in the curriculum (for example, courses such as civil procedure and evidence which are both offered, in the United States of America, in the first and second years of the J.D.); the fact that these courses tend to be taught by prominent, tenured members of the faculty; and the observation that courses dealing with procedures and institutions for diverting disputes from the courts are considerably less common (Schechter, 1996: 373–4). For me, what was significant about Schechter and others' claims was that while broad-ranging features of legal education (curriculum, forms of pedagogy, forms of assessment) *may well* carry tacit messages about being a lawyer, no one had paid systematic attention to how legal professionals were actually being represented in legal classroom talk or proposed a 'way of seeing' or making sense of such representations.

For the second claim, there have been a small group of studies that have utilized more rigorous and systematic methods of empirical research. These include Elkins' series of articles (1985, 1987, 1988) relating to the 'felt experience' of law school of his students at West Virginia University;[31] Willging and Dunn's study of the moral development of law students (which utilized a measuring instrument developed by Rest that tested students' moral development in terms of the Kohlbergian stages) (1981–82: 345–6, 351 – 2);[32] and Sherr and Webb's research

[31] Although Elkins did not explicitly identify the methodology he employed, it appears that he instructed students to keep a journal of their experiences. Their journal entries affirmed that law school, especially the first year, was a time of tremendous psychological, behavioural and affective change. While a few students found the experience exhilarating and stimulating, most described themselves as being tired, exhausted, unable to sleep, depressed, disappointed, feeling inadequate, responding mechanically to tasks, apprehensive, overwhelmed, indifferent and plagued by fears of failure (Elkins, 1985). Many affirmed a developing split between the personal and professional self, a split which entailed compartmentalizing professional and personal values. One student, for instance, wrote; 'Lawyers are not taught to be valueless. However, a lot of my classmates feel they are being told to forget their values. I disagree. We are being taught to separate our private life from our business life. Lawyers must be able to look at a problem from a strictly legal viewpoint. They can't let their analysis be influenced by personal values.' (ibid). Elkins' articles are a rich source of such student accounts.

[32] The aim of Willging & Dunn's empirical research was to determine: (1) Whether the first year of law school had any influence on the moral development of law students; (2) How the level of moral development of law students

on the socialization effects of undergraduate legal education at the University of Warwick;[33] amongst others (Erlanger, 1996; Erlanger & Klegon, 1976; Evans & Palermo 2002, 2005; Rathjen, 1976 – 1977). However, the findings of these research projects relate mostly to very general claims that law school does not seem to promote moral development, or that law school does not tend to encourage an orientation toward 'big firms'. They do not ground claims regarding the acquisition of particular attributes or values on the part of students. Furthermore, all the studies were focused exclusively on students, rather than focused on the law lecturer as the site and source of representations of legal professionals. Cownie's ground-breaking study of legal academics in the United Kingdom notes that academic lawyers 'have hitherto been subject to remarkably little scrutiny' (2004: 2), though even her study – focused as it was on the culture and identity of legal academics in this part of the world – did not examine how academics lawyers represent legal professionals to the students in their classrooms.

I therefore considered that my PhD research project could offer something novel in focusing on what was actually being said about legal professionals in the classroom. I did not wish to examine the causal effect of such representations upon the moral development of students as this would have entailed a far more broad-ranging study of students in different social contexts,

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compared with that of students with equivalent levels of education; (3) How the moral development of law students related to other law student characteristics; and (4) Whether a comprehensive ethics course emphasizing classroom discussion of professional ethical dilemmas had any measurable influence on the moral development of law students. The measuring instrument relied upon was the Defining Issues Test (DIT) – see Rest 'Longitudinal study of the DIT of moral judgment – A strategy for analyzing developmental change' (1975) 11 *Developmental Psychology* 738. The DIT was administered to a limited student population at the University of Toledo during 1976 and 1978 (1981 – 82: 345–6, 351 – 2) together with gathering of information on students' academic results and parental educational backgrounds. Contrary to the anecdotal accounts outlined above and Elkins' work, the researchers found that neither the first year of law school, nor the completion of a professional responsibility course resulted in a statistically significant change in moral reasoning (ibid: 355).

[33] Sherr and Webb sought to determine whether students possess or develop a set of values and expectations that cause them to prioritize 'big city' commercial work over other forms of legal work (1989: 225). The researchers developed a questionnaire eliciting information on the following categories of information: Parental education and occupations; political orientation; reasons for studying law; reasons for choosing Warwick University; student preferences for specified elements of their legal education (e,.g. 'thinking like a lawyer', using legal techniques to achieve policy goals, legal ethics); reasons for selecting course options; and students' career intentions. The questionnaire was administered on a longitudinal basis, starting with students entering in 1981 and then administered at the end of their first to fourth years (ibid: 229). The researchers concluded that the answer to their overarching question – does law school make students 'turn to the city – was equivocal: Students entered university with a practical bias, and evaluated the 'relevance' of course offerings in terms of their relation to practice, but there were few signs that students consistently rated the image of 'city firms' (those prioritizing a highly commercial ethos) higher over others and the students' desired specializations offered no evidence of corporate bias (ibid: 246).

thus considerably diluting my study of the lecturer. The research thus focuses on the first claim outlined above, and on the law lecturer rather than the students. Further, it was necessary to chose and develop an appropriate conceptual framework for theorizing the relationship between representations in classroom talk and the formation of professional identity and working out a methodological approach for systematically analyzing and synthesizing 'talk' about legal professionals in the classroom. In line with my original interest in language and the constitution of identity, I wanted my approach to focus on the fine linguistic details of classroom talk: Not only to present *what* was being said, but to uncover and explain the rich and complex ways in which language was functioning to constitute legal professionals in a particular manner. As explained in chapter two, the use of critical discourse analysis, a textually oriented form of discourse analysis, came to serve this purpose well.

2.3.2 Inspiration: Mertz' study on legal epistemology in classroom talk

After I had already done a substantial amount of work on this project, I was inspired by Elizabeth Mertz' work on *The Language of Law School: Learning to 'Think like a Lawyer'* (2007, Oxford University Press), a study of the constitution of legal epistemology in classroom talk. Mertz sought to determine whether there was a common content to 'learning to think like a lawyer' in law schools in the U.S.A. Her point of departure was that the transformation in thought patterns which students reputedly undergo was accomplished through spoken and written language in classroom exchanges and examinations (Mertz, 2007: vii). This insight prompted Mertz (supported by a number of research assistants) to record, transcribe, code and analyze the law of contracts classes in eight law schools in the United States over a period of a semester. Through her examination of classroom talk, Mertz found that there *was* in fact a common content to the distinctively legal ways of knowing taught in the law schools of her study. This included, for instance, the precepts that justice is served by an adversarial system involving combative verbal dueling, and that social conflicts of any kind can be fitted to this form of conflict resolution. In dealing with human conflict, a lawyer must therefore always recontextualize a dispute in terms of legal categories. This entails fitting a dispute to the form

of adversarial reasoning,[34] identifying and understanding the applicable legal authorities,[35] and using legal language (the language derived from legal authorities) to formulate the dispute. It also entails ignoring details of the context to which people would attach significance on social or moral grounds (Mertz, 2007: 4). Interestingly, although the classrooms in Mertz' study differed in terms of teaching style – in one classroom the professor lectured 95% of the time, in others lecturers spent 45–60% of the time in focused dialogue with individual students, whilst in others focused Socratic-dialogue occupied only 21 – 29% of the time with a higher incidence of shorter and non-focused professor-student exchanges – she found that the epistemological content was similar, that there was a 'shared message' about legal reading 'conveyed across diverse classrooms, professors and teaching methods' (ibid: 94).

In distinguishing the common legal epistemology of U.S. Law Schools however Mertz also provided a lens for others to see how language is patterned to constitute distinctively legal ways of knowing. The patterns were both semantic ('content' categories) and linguistic (involving the 'form' of the language) in nature. She found, for instance, that in discussing case law most of the professors' linguistic turns fell into one of several semantic categories: (1) clarifying facts; (2) applying legal principles to facts; (3) clarifying law, from doctrine to technical terms; (4) resolving the implications of procedural factors and clarifying their impact; and (5) discussing social or policy implications of decisions, including the possible motivation of actors (ibid: 65). She found lecturers (or 'professors' in the United States of America) policed the first four semantic categories strongly through a variety of linguistic patterns. For instance, by relying on the Socratic method the law teacher could maintain tight control over the discourse and prevent the student from giving up on adopting the new style of language (ibid: 51). This

[34] This would also entail positioning the parties to the dispute in terms of their roles in the adversarial process (e.g. plaintiff, defendant, respondent, appellant, witness; etc).

[35] The concept of 'legal authority' is a legal-technical term that might not be easily understood by a person who has not undergone legal training. Essentially, it refers to the sources of law recognized in a particular country. These are textual sources upon which the State confers the status of 'legal authority', i.e. the sources of the principles which the State will use force to ensure their observation. Recognition of these sources would include recognition of the manner in which the sources would be allowed to change over time; i.e. an authoritative process for changing the sources of law (such as procedures for amending legislation or overruling an existing court precedent). In South Africa the binding sources of law are (in order of priority): The Constitution, legislation, court precedent (case-law or the decisions of the courts), the common law and custom. The process of identifying applicable legal authorities would also entail categorizing the dispute in terms of the recognized categories of law (e.g. such as family law, or contracts or company law; etc).

was achieved through the formal device of 'non-uptake': A failure to affirm what the student has just said. This functioned as an effective mechanism to teach the student that certain ways of using language, and thereby certain avenues of thought – for example, a focus on the social and moral overtones of a legal reading *before* it had been correctly parsed in terms of layers of legal authority and procedure – were inappropriate (ibid: 56).

Mertz not only focused on the semantic and linguistic features of classroom talk that constituted a distinctive legal epistemology, she went further to examine the implications of this way of thinking for professional identity. In other words she suggested that the semantic categories associated with learning to think like a lawyer (clarifying facts, applying legal principles to facts, and so on) had subtle implications for becoming a legal person. For example, she argued that the process of learning to read like a lawyer tended to socialize students into the balance of power encoded in the law and the practices of the legal profession. In certain circumstances, the need to strip conflicts of their social and moral context operates to ensure that bias against persons based on their inherent features (such as race or gender) are set aside for purposes of legal judgment. This presents the law as a liberating and leveling force. But the use of layered linguistic frames of reference; i.e. the application of the various layers of legal authority, also *disguises* the prejudice and power that inheres in the laws themselves (ibid: 101). In this way it is easier 'for the cultural assumptions of the dominant group to make their way into a legal calculus than it will be for other viewpoints' (ibid). This positions the student as a subject of ideology rather than merely a rational being who is being taught to separate a legal from a personal view of the case.

She also argued that certain linguistic features associated with inculcating the appropriate manner of legal reading and writing had subtle implications for becoming a legal person. She pointed, for instance, to the pervasive use of direct quotation in the legal classrooms of her study (ibid: 102), particularly in so-called stretches of 'Socratic dialogue'. The use of direct speech creates a more vivid, dramatic and immediate rendition of a conflict, imaginatively bringing the hearer into the very heart of the reported context. It also creates the impression that the reported speech is being produced precisely as it was spoken (ibid: 103), which in the case of law school discourse is false, because the lecturer's account of what the various parties

said or thought would almost always be an imagined reconstruction of what actually took place. This, Mertz argued, has two profound implications for identity. Firstly, it defines a person's central identity in terms of his or her role as a source of legal argument or strategy (ibid: 101). When students, as part of the process of socialization into this way of thinking, are invited to role-play the various parties to a dispute, it is this identity – the strategist – that they assume. The allegiances or values that may otherwise motivate a party to a legal dispute are subsumed by the overarching objective of formulating the better legal argument. Secondly, the use of direct quotation elided the role of 'animator' and 'author' of the text.[36] When a law teacher used direct speech to characterize the position of the people encountered in case-law, he gave the impression of being merely the animator, whereas in fact he was being both animator and author of the text emerging in the classroom. This allowed him to present a case in other people's voices, just as attorneys do in court through the use of witnesses – in this way constructing a version of the 'truth' that is authoritative for being based on what 'actually' took place between the parties, but in reality was not necessarily so (ibid: 105). For the student who takes on this technique, it stresses the essential contestability of any account of events (ibid: 112). The frequent shifting that takes place through the elision of animator and author also elevates fluency in speech participant roles over the anchoring of self in any particular position (ibid). The ability to shift position or 'sides' is presented as of higher value than the steadfast commitment to a position based on a particular set of values or principles.

The subtlety of Mertz' work inspired me to continue my focus on classroom talk that represented legal professionals. Her work also served to point me in the direction of focusing on both the semantic (content) categories in terms of which legal professionals were represented, and their typical linguistic (form) realizations. The representation of legal professionals as an aspect of classroom talk did not, however, feature at all in Mertz' study and so the gap I had identified in the research literature remained open.

[36] These are terms introduced by Erving Goffman to explain his concept of 'footing'. Footing describes the standing or relationship a speaker holds in relation to a text: The 'animator' is the person doing the actual speaking, the 'author' is the person who composed the words, and the 'principal' is the person ultimately responsible for the position expressed by the utterance (Mertz, 2007: 104).

3. STATEMENT OF THE PROBLEM

While the formation of professional identity has been identified as a legitimate focus of legal education, it has tended to be construed as a pedagogical object rather than as a process of socialization. While various processes of socialization – both within and outside the legal classroom – have been linked to professional identity formation, no-one to date seems to have paid extensive attention to the detailed representation of legal professionals in classroom talk. The extensive literature on the teaching of legal ethics affirms that law lecturers inevitably construct images of law, lawyering and lawyers through the stories they tell and the remarks they make in the classroom, yet an extensive detailed analysis of such representations has not been conducted. As such, a method for determining how such representations can be ordered and made meaningful has also not been developed, nor have the conceptual associations between such representations and processes of identity formation been made.

4. AIM OF THE STUDY AND KEY RESEARCH QUESTIONS

The study assumes the form of a detailed case study of a university law lecturer's talk about legal professionals in a six-month, first-year course of study entitled 'Introduction to Law' presented in 2008 at a tertiary educational institution in South Africa. The case study was undertaken with a view to answering the following research questions:

(a) What conceptual resources exist for theorizing the relationship between the representation of legal professionals in classroom talk and the formation of legal professional identity?

(b) Which methodological approach would best elucidate the content and form of representations about legal professionals in classroom talk?

(c) How were legal professionals actually represented in the classroom of the study? How did language function to constitute these representations?

(d) How did the lecturer's representations relate to broader discourses on legal professionalism and the teaching of legal ethics? i.e. what 'horizon of observation' did the lecturer's representations establish?

5. STRUCTURE OF THE REPORT

The remaining chapters of this report are structured as follows:

In chapter two I answer the first of the questions outlined above by providing an overview of social constructivist understandings of professional identity formation. This is linked to the distinctive processes of 'identity regulation' and 'identity work' with the focus in this study falling on the former. I posit 'role' and 'discourse' as the two concepts most central to understanding processes of identity regulation and outline how the resources of critical discourse analysis may be used to elucidate the discourses associated with particular professionals roles in the data. The chapter concludes with the identification of three conceptual claims that frame the study and that relate to the use of the model of social practice to structure representations.

Chapter three situates myself as the researcher in relation to the research topic, outlines and justifies the research paradigm and research design, introduces the research subject (the lecturer whose talk over a course of a semester I dissected), and deals with a number of key methodological issues.

In chapter four I respond to the second of the key questions identified above by explaining how I developed the internal language of description; i.e. the codes used to analyze the data which were drawn primarily from Van Leeuwen's work (2008) on the representational function of language. The codes centre on four critical elements of social practice, namely social action, the circumstances of social action, social actors and values.

Chapters five and six respond to the final two research questions by outlining and then discussing the findings of the analysis. Chapter five provides an overview of the most prominent legal professional roles present in the lecturer's classroom talk according to the key semantic categories and their linguistic realizations outlined in chapter four. Chapter six synthesizes the findings in terms of the three conceptual claims identified in chapter two.

The thesis concludes in chapter seven with an overview of conclusions in response to the four key research questions and an overview of the teaching and learning, policy and research implications of the research.

CHAPTER TWO

DEFINING A CONCEPTUAL FRAMEWORK FOR THE STUDY

Based on the assumption that representations of legal professionals in classroom talk are of consequence for the formation of students' legal professional identity, this study seeks to determine the extent to which legal professionals were actually represented in one particular case of legal classroom talk and the manner in which such representations were constituted by language. This calls for the development of conceptual resources to understand the linkages between representations and identity formation, and a methodological approach for studying them.

In developing a conceptual frame for the study it was therefore necessary to gain a better understanding of 'identity' and the processes implicated in its formation, namely 'identity work' and 'identity regulation'. In further developing the notion of identity regulation, it was necessary to outline the concepts of 'role' and 'discourse' and the choices involved in studying these. For purposes of studying the constitution of various legal professional roles and their associated discourse in classroom talk I focused on the representational meaning of texts. Critical discourse analysis, and the work of Van Leeuwen in particular, was further identified as an appropriate analytical approach for studying these representational meanings.

1. IDENTITY

The literature on 'identity' (and closely-associated terms such as 'self', 'self-identity', 'personal identity', 'social identity') is huge (Sveningsson & Alvesson, 2003: 1166) as the concept is a popular frame of analysis in a wide range of fields. These include philosophy (Hirsch, 1982; Vesey, 1974), social psychology (Burke & Reitzes, 1981; Callero, 1985; Calleo, Howard & Piliavin, 1987; Chang, Piliavin & Callero, 1988; Swann, 1987; Yost *et al*, 1992), different types of sociology (Giddens, 1991; Goffman, 1959, 1961, 1963; Stryker, 1968, 1980, 1992), cultural studies (Du Guy, 2000; Hall, 2000), education (Carrim, 2006; Perumal, 2005) and studies of organization, amongst others. The task of completing the literature review took me into

virtually all of these fields, but the body of literature that I ultimately found to be most relevant and appropriate was the treatment of identity in organization studies, primarily because the concept of 'professional identity' features most directly in this field as one of various types of identity.

Writing from this perspective, Alvesson *et al* point out that the concept of identity has appealed to scholars working from 'strikingly different philosophical frameworks' (2008: 8). Scholars working from a functionalist, interpretivist and critical orientation have all been drawn to the 'theoretical promise' of the concept (ibid). The functionalist approach to identity is technical, aimed at 'developing knowledge of cause-and-effect relations through which control over natural and social conditions can be achieved' (ibid). In organization studies, for instance, it has been maintained that commitment, group cohesion, decision-making and behavior, amongst others, are all affected by patterns of identification (ibid). The focus on identity is accordingly instrumental – as a means to improve these aspects of organizational life. The focus of an interpretivist approach to identity falls more on an understanding (for its own sake) of how humans generate and transform meaning, on 'how people craft their identities through interaction, or how they weave "narratives of self" in concert with others and out of the diverse contextual resources within their reach' (ibid). A critical approach, on the other hand, has an emancipatory interest, with a focus on unmasking the intricacies of power relations and the 'various repressive relations that tend to constrain agency' (ibid: 9). While the approach to identity in this research is more aligned with interpretivist and critical traditions this does not exclude the possibility that insights gained cannot be used to effect improvements in South African legal education and elsewhere.

Definitions of identity are multi-faceted. Most commonly, identity is defined as the self-definitions or self-understandings people attach to themselves (Alvesson *et al*, 2008: 10; Ibarra, 1999: 765; Sveningsson & Alvesson, 2003: 1184). Identity answers to the twin questions that go to the heart of personhood: Who am I? and How should I be? (Cerulo, 1997). Identity may also, however, be used in the context of defining group or collective identity, and thus the 'experience of coherence, consistency over time and distinctiveness of a person or a group' (Alvesson, 1994: 552). Identity is also not confined to reflexive understandings but

encompasses the meanings others attach to self (Beech, 2008: 52; Ibarra, 1999: 766). This insight undergirds Sfard and Prusak's conception of identity as narratives about individuals that may either be told by the identified person to him or herself, that may be told to the identified person by another, or that may be told about an identified person by one third party to another 2005: 16–17). The concept of identity thus invokes a pervasive process of meaning-making in relation to persons that may be focused on self or others.

Definitions of professional identity reflect this understanding. Goodrick and Reay define 'professional role identity' as 'a sense of self that is associated with enactment of a professional role' (2010: 58), while Ibarra associates it with the 'relatively stable and enduring constellation of attributes, beliefs, values, motives and experiences in terms of which people define themselves in a professional role' (1999: 764 – 5).

The self-definitions and categorizations around which identity revolves 'have long been seen as constructed and negotiated in social interaction' (Ibarra, 1999: 766, referencing Mead, 1934 and Goffman, 1959). Already in the 1930s George Herbert Mead concluded that the self can only arise through a process of social experience and activity (Mead, 1934: 135) – it is not something that is naturally given or biologically determined. Mead's insights were taken up by symbolic interactionists[37] such as Blumer who proposed that the self, rather than being a fixed structure, is a process that unfolds through social interaction (Blumer, 1969: 63), while Goffman did much to advance the notion of the self as a social product over the course of his lengthy writing career.[38] This 'constructivist' perspective contrasts with one that associates identity with a fixed and abiding essence. In much of the literature on postmodernism this 'essentialist' view is attributed to pre-modern societies in which identity was 'fixed, solid and stable', 'a function of predefined social roles and a traditional system of myths …' (Kellner, 1992: 141). Identity was not open to being *made* and was thus not subject to reflection or discussion. In

[37] Symbolic interactionism – a term coined by Herbert Blumer in 1937 – was the most significant theoretical product of the Chicago school of sociology, the dominant force in American sociology until the 1930s (Ritzer, 1996: 194).

[38] Goffman's output included eight books, three collections of essays and twenty-eight essays, published between 1951 and 1983 (Branaman, 1997: xlv).

modernity, the problem of identity opened up as individuals became more aware that one's identity could be the subject of innovation and change (ibid: 143).

The trend away from essentialist and fixed views on identity toward constructive approaches has gone hand in glove with a trend away from viewing an individual's identity as 'monolithic' and toward seeing the individual as the point at which multiple identities intersect (Sveningsson & Alvesson, 2003; 1164). The former trend has opened up an extensive area of inquiry into the manner in which discursive, political and cultural influences interface with a person or group's identifications, and the issues of control and contestation (Simpson & Carroll, 2008: 31) that are implicated in the ongoing 'struggle' to define a sense of self (Svenigsson & Alvesson, 2003: 1164). The metaphor of a 'struggle' reflects the multiple, fluid, shifting, intersecting, possibly competing identifications that an individual may hold at any one time (Avelsson *et al*, 2008: 6; Simpson & Caroll, 2008: 31). The self-definitions involved in processes of identification never involve 'simply stepping into pre-packaged selves but always involve negotiating intersections with other simultaneously held identities' (Alvesson *et al*, 2008: 10). More than saying that identity is socially constructed, contemporary narratives of identity are characterized by a 'flux ontology' (Simpson & Carroll, 2008: 31) which associates the meaning-making of identity processes with 'negotiation' at multiple levels.

It is common, particularly in functionalist approaches to identity (cf. Ibarra, 1999: 766), to group meaning-making processes in relation to identity at a 'personal' or 'social' level, indeed Alvesson *et al* suggest that there is an 'inevitable personal-social relation' (2008: 10) in processes of identity formation. They define personal identity as the personal traits and attributes assumed 'as not being shared by other people, or not seen as a mark of group belonging', and social identity as 'an individual's perception of him or herself as a member of a group, particularly in terms of value and emotional attachment' (ibid). Within the literature, however, there are differing conceptions of the nature of personal identity and its intersection with social identities. Some theorists advocate a very 'sparse' understanding of personal identity. In positioning theory, a body of work in the field of social psychology that draws heavily on the work of Goffman, personal identity refers to the 'single self' or 'self1', i.e. the self to which one attributes a single 'point of view' and who acts from that same point (Harré and

Langenhove, 1999a: ibid). In this sense personal identity is merely a structural or organizational feature of an individual's mentality: It can only be presented 'formally' and has no content (ibid: 7). Discursively we display personal identity – the singularity of our selfhood – in the use of first person indexicals ('I', 'me', 'myself', 'mine') and through the continuing narratives we construct of our lives – to index one's discourse in this way *is to have* personal identity (ibid: 8) – the 'I' does not represent some sort of structure or mental state inside the individual. The ability to use the discursive resources of personal identity is a learned behavior that the individual acquires as a child in various social settings and it is this which bestows a unified sense of self. Others however suggest that the unifying and integrating functions which seem to be associated with personal identity involve more than the capacity to have a single, continuing 'point of view in the world of objects in space and time' (Harré & Langenhove, 1999: 7). Sveningsson and Alvesson appropriate the term 'narrative self-identity' to refer to identifications associated with personal history and orientations that function to stabilize and integrate the diversity of role expectations common in modern life (2003: 1185). In their study of a manager experiencing conflicting expectations related to her roles at a research and development company as manager of operations, 'ambassador' to external parties, and self-appointed leader of the organizational culture, they note how she 'grounds' herself by going back to her interests in farming, walking in the woods, caring for her cats and watching sports (ibid: 1185 – 6). In this view personal identity, while still discursively marked by first-person indexicals and personal narratives, refers to a sense of self that permeates or possibly transcends identifications with diverse social identities and that is closely connected to fantasy and personal myth, enduring predilections and traits. Alvesson *et al* thus invite identity theorists to develop a 'sharper eye' for the 'diverse and fine-tuned' ways in which personal and social identities are intertwined: Personal meanings may be invoked in identifications with social groups (as in being a White, female professor), and 'social forces may be at work in the most personalized of identity moves' (2008: 10).

What matters for purposes of this thesis, however, is that both personal and social identifications form part of what has been dubbed 'identity work' – the ongoing activities people engage in to form, repair, maintain, strengthen or revise self-constructions that are

coherent, distinctive and positively valued (Alvesson *et al*, 2008: 15; Beech, 2008: 52; Pratt *et al*, 2006: 237; Sveningsson & Alvesson, 2003: 1165). Although identity work is triggered and lived out in social interaction, it is a process primarily located within the individual, and hence for many scholars the individual subject is the central concern (Alvesson *et al*, 2008: 18). Identity work, however, never takes place in a vacuum but is shaped in relation to a variety of 'extra-individual forces', grouped under the rubric of 'identity regulation' (ibid; Beech, 2008: 52). It is to a more detailed consideration of these two concepts, but particularly the latter, that I must now turn.

2. IDENTITY REGULATION AND IDENTITY WORK

Studies examining processes of identity formation from across the functionalist, interpretivist and critical traditions utilize a wide variety of terms to describe forms of identity regulation. There is mention, for instance, of 'contextual' or 'cultural resources (Alvesson *et al*, 2008: 8, 15), 'cultural templates' or 'scripts' (ibid: 9, 18), 'social discourses or narratives' (ibid: 11), 'identity sets' (Pratt *et al*, 2006: 246); and 'role models' (Ibarra, 1999: 773). The most common meaning attached to all these terms is that they stand as types of resource out of which an individual constructs a repertoire of 'possible selves' (ibid: 785), or 'weaves' a narrative of self (Alvesson *et al*, 2008: 8). They are resources to be 'drawn' upon in a dynamic and reciprocal way (ibid: 11, 15), the 'raw materials' used to 'customize' personal and social identifications (Pratt *et al*, 2006; 246). Within the critical tradition, they are also seen as forces that pressurize or determine how one ought to be (Alvesson *et al*, 2008: 9).

For both form and substance, identity work – the negotiation of personal and social identifications – thus draws upon diverse forms of identity regulation. The manner in which this occurs is the subject of a 'loosely affiliated' body of research that has 'yet to systematically tackle issues of identity construction' (Pratt *et al*, 2006: 238). Within the available literature there is less focus on *when* and *where* identity work occurs than on proposing models for *how* it takes place. Pratt *et al*, in their six-year qualitative study of medical residents, for instance, propose an integrated model of work and identity learning cycles in which learning about the work of a particular profession and learning about one's professional identity are inextricably

linked. Work triggers 'work identity integrity assessments' which occur when what one is doing does not match self-conceptions about who one is or thinks one should be (ibid: 253). Thus in their study, medical residents who were studying to become general practitioners ('primary care residents') experienced the least amount of work-identity integrity assessments: What they found themselves doing in medical residence largely conformed with what they expected to be doing and what they had done during medical school (ibid: 246). The 'identity customization process' which these students undertook – changes in the form and content of identifications with a particular social role that are aimed at making identity fit to work demands – was akin to 'identity enriching'. The main 'identity sets' that students drew upon were the ones they had acquired during medical school, but during the period of medical residence these understandings became deeper and more nuanced (ibid). Medical residents who were studying to become surgeons, however, experienced work-identity integrity assessments that were much more severe. Coming into the programme they saw themselves as highly action-oriented professionals who effected dramatic change in disease, and were surprised to discover that their role included paperwork and 'scut' work such as lowering a patient's toilet seat or deciding which vitamin shake the patient should be given (ibid: 245). These violations of their social identifications with the role of 'surgeon' triggered the identity customization process of 'identity patching' whereby they added their pre-existing (acquired during medical school) understandings of being a general practitioner to their sense of being a surgeon, with a resultant identification in being the 'most complete doctors' (ibid: 247). In defining themselves as the 'most complete doctors', and in addition to the identity sets they had acquired during medical school, the surgical residents tended to draw much more upon the organizational discourses of the institution in which they were studying than other types of residents (ibid: 248). Students who were studying to become radiologists experienced even more severe work-identity integrity assessments because the work they found themselves doing bore little relation to the conceptions of radiologists they had acquired during medical school. While radiologists read films and other images for real patients, during their first year students did little of such work, having instead to read, study and attend daily teaching conferences (ibid: 248). In these circumstances the identity customization process they engaged in was 'identity splinting' – they adopted the prior role of 'student' until they began to

undertake the work of radiologists in later years and their radiologist identifications became stronger (ibid). Ibarra, in her study of the acquisition of professional identity on the part of junior investment bankers, developed a model for the adaptation process which identity work entails that is regulated by both 'situational influences' (job requirements, socialization practices and role models) and 'individual influences' (traits, abilities, motives, self-conceptions and past experiences) (1999: 787). This leads to the conception, within an individual, of an 'adaptation repertoire' comprising of 'possible' or 'provisional selves'. The 'adaptation tasks' involved in developing and refining the repertoire of 'possible selves' involved three basic tasks: (a) observing role models to identify potential identities; (b) experimenting with provisional selves; and (c) evaluating experiments against internal standards and external feedback (ibid: 764, 787).[39] Beech, in turn offers a complex dialogic model for identity work that draws upon the theoretical insights of Bakhtin and Wittgenstein where identity work is typically triggered by the utterances of others or from a 'contextual discourse' (2008: 55)

For purposes of this research it is not necessary for me to elaborate further on these or other models of identity work, or to choose among them, because the focus of my work is not upon law students' identity work as such, but rather on a law lecturer's representation of legal professionals in classroom talk as a form of identity regulation. All that needs to be emphasized is that all of the models are premised on an understanding of identity work being *inextricably intertwined* with identity regulation and of personal and social identifications emerging from the interaction of these two complex processes.

With the spotlight accordingly turned toward identity regulation, in the following section I propose that the notion of contextualized and decontextualized practices enrich an understanding of where and when identity regulation occurs, while the concepts of role and discourse are central to understanding how it operates.

[39] Ibarra's concept of an 'adaptation repertoire' possibly goes too far in suggesting that the choice of identity is necessarily a *conscious* decision, whereas an assumption linked to the study of the discoursal representation of legal professionals in classroom talk is that the individual's engagement with possible identities is a far more insidious process. This is discussed further in section 4.2.1 below dealing with discourse determination versus discourse autonomy.

3. IDENTITY REGULATION IN CONTEXTUALISED AND DECONTEXTUALIZED PRACTICES

In considering where and when identity regulation takes place, Alvesson *et al* distinguish between the study of 'situated practice' and 'cultural formation' (2008: 20). The former involves the study of identity construction processes from a contextualized context; i.e. from within the concrete activity concerned. Thus, a contextualized study of legal professional identity would entail studying legal professionals or various types of legal professional in the carrying out of their work, in the midst of their practice, through such methods as research interviews, focus groups, participant observations and the like.

A focus on identity regulation as 'cultural formation', on the other hand, recognizes that 'available working subjectivities' may be created or produced in sites other than situated, contextualized practices, including the media (popular news and televisions shows, news coverage, advertising, 'best-selling' books on the practice), occupational associations, industry or trade forums, academic writing (see for instance Goodrick and Reay's (2010) study of the legitimation and institutionalization of professional identities for nurses in nursing textbooks) and most importantly for purposes of this study, educational settings (Alvesson, 2008: 21). All these sites involve identity formation in decontextualized social practices. The critical implication of studying identity regulation in such contexts is that it will involve a study of *representations* of the practice, rather than the practice itself (ibid). This legitimates the study of representations of legal professionals in classroom talk as a form of identity regulation taking place within the decontextualized social practice of education.

The extent to which educational settings might influence novice professionals' perception of their future roles is illustrated by Pratt *et al*'s study of the professional identity formation of medical interns discussed above. For all three groups included in the study (interns studying to become general practitioners, surgeons and radiologists respectively), the 'identity beliefs' (Pratt *et al*, 2010: 246) that students had acquired during medical school about being a doctor influenced the customization of their identifications with the target roles, although the manner in which this took place differed from group to group.

4. IDENTITY REGULATION: ROLE AND DISCOURSE

In their paper on the management of managerial identities Sveningsson and Alvesson argue that the identity work which lies at the 'struggle' of identity is both fueled and constrained by (1) roles, (2) discourses and (3) narrative self-identity' (ibid). In this model, narrative identity – identifications associated with personal history and orientations that function to stabilize and integrate the diversity of role expectations common in modern life (ibid: 1185) – can be regarded as the intra-individual force whereas 'roles' and 'discourses' are extra-individual, and thus associated with identity regulation. This suggests that the concepts of 'role' and 'discourse' can be used to understand *how* identity regulation takes place. Rather than assuming the meaning of each of these concepts, the following section explores their dimensions and associations.

4.1 Role

The notion of role has a number of problematic associations. It has been used in both symbolic interactionist and systems approaches with strongly functionalist overtones. Theorists working in these traditions assume a named and classified world, where classification includes symbols designating 'social positions' as the relatively stable, formal components of social structure. 'Roles' are the shared social expectations attached to social positions (Ritzer, 1996: 367). When interacting, people name one another and thus evoke reciprocal expectations of what each is expected to do (ibid). People also apply role designations to themselves and, in so doing, construct a set of self-definitions which function as internalized expectations for their own behaviour (ibid: 368). In terms of this view, roles are socially determined and stable, a 'relatively fixed social construction that prescribes the expected and acceptable behaviours in a given social context' (Simpson & Carroll, 2008: 31, 44). This resonates with naïve understandings of identity as singular, integral, harmonious and unproblematic (ibid: 31). There is a failure in this body of literature to engage with the 'discursive, cultural and political construction of roles [or] with issues of control and contestation' (ibid: 31, 44). The focus falls instead on a functionalist agenda such as how role commitment and salience can be used as

accurate predictors of behavior in different contexts (see Burke, 1977; Burke & Reitzes, 1981; Callero, 1985; Callero, Howard & Piliavin, 1987; Chang, Piliavin & Callero, 1988; Stryker, 1968, 1980). Simpson and Carroll argue however that unless the concept of role can be wrested from the remains of its functionalist bonds, unless it can be re-theorized as a fixed social construction that determines member behavior, 'then its irrelevance and redundancy in the context of contemporary theory is inevitable' (2008: 33).

In their paper Simpson and Carroll argue for a reformulation of 'role' as a 'boundary object' – as something that sits externally to actors and mediates identity work (ibid: 45); as an 'intermediary translation device that sits between the relational processes of identity construction' (ibid: 33). Roles sit in-between constructing selves as a 'relational vehicle' for both the reinforcement of existing meanings and the construction of new ones (ibid: 43). This allows for the concept of role to be reconceived as 'inherently unstable and perpetually "becoming"' (ibid: 44) and subject to power and control (ibid: 44 – 45). It is not only the individual whose personal and social identifications are constantly being re-negotiated through identity work, but in the process, in the interaction that occurs between constructing selves, the meanings of roles as in-between objects are also transient and incomplete, subject to possible disruption and change (ibid: 44). However their meanings are not so unstable as to fail to provide anchors or nodes for identity construction that sustain a sense of continuity over time (ibid: 44).

The reformulated concept of role put forward by Simpson and Carroll has much in common with 'subject position' – a concept used often in the Foucauldian-inspired literature on identity (see, for instance, the manner in which Kuhn (1999) uses the concept). Like role, a subject position is 'something that sits externally to actors and serves to facilitate the identity construction process' (Simpson & Carroll, 2008: 45), and similarly to the reconceived version of role it is situated in a 'flux ontology' (ibid: 31), perpetually becoming rather than fixed, stable or determined. The notion of subject position, however, is frequently associated with a sense of agency that is posited as incoherent, marked by Jameson's 'constitutive features of the postmodern' (1991: 6): A new 'depthlessness' present, in particular in a preoccupation with the postmodern 'culture of the image'; a consequent weakening of historicity both in terms of a relationship to public history and in private forms of temporality (i.e. having a consistent notion

of self that extends back in time); and a new type of 'emotional ground tone' (ibid), characterized by a flux of euphoric but disintegrated, fragmented and disconnected emotional intensities (Kellner, 1992: 144). The abandonment of agency that such a view implies, goes together with a determination-oriented or extremely 'muscular' view of discourse (as outlined below). Subject positions are the externally constituted personifications of the contingent and historically specific discourses that are connected to particular bodies of knowledge at a particular time. The use of the concept as Simpson and Carroll point out, is that it gives greater emphasis to the process of subjectification than it does to the 'substance of identity or self'; one is 'constituted as a subject more than one constitutes a position' (2008: 32). The actor is presented as a 'docile body … in the servitude of far more powerful and pervasive discourses' (ibid).

However, recent research in this paradigm has railed against this 'occlusion' of agency (Kuhn, 2009: 682). The notion of subject position certainly does imply that individuals are 'sites' for the confluence of multiple discourses prescribing thought and action, but it can *also* imply reflection, resourcefulness and resistance (ibid). While early identity studies in this mould 'asserted the deterministic power of discourse, recent studies suggest that creative self-construction (i.e. agency) is possible because the circulation of multiple discourses provides a capacity for ongoing reinvention through variations in identifications' (ibid: 683). Subject positions exhibit a 'discursive surplus' – because each subject position is supported and inscribed by a variety of other discourses – which thus facilitates, rather than erases agency (ibid: 684).

This points to the unique contribution that the concept of 'subject position' and in its reformulated version 'role' can add to the conceptual frame: The concept refers to the 'nub' or the 'site' around which diverse discourses can converge, as the temporary points of 'suture' (Hall, 1996) which not only connect concrete individuals to particular discourses but which function as points of attraction for different discourses as well.[40] As regards the choice between

[40] Kuhn's notion of a 'discursive surplus' (2009: 684) captures the concept well but the insight is not frequently emphasized in the literature. The focus, instead, seems to fall on characterizing the multiple discourses that can shape personal and social identifications at any one level (such as at the level of the organization). Each discourse is treated as personifying *a* role. In their study of managerial identity, for instance Sveningsson and Alvesson

them the distinguishing feature between the two, according to Simpson and Carroll, is that the concept of role invokes a stronger sense of agency (2008: 45). Because the approach to discourse which I will proceed to outline opts for a tight coupling between discourse, meaning and other social elements, and not a relationship that is determined or collapsed, I preferred to work with the reformulated version of role put forward by Simpson and Carroll.

4.2 Discourse

In their article on varieties of discourse, Alvesson and Karreman note that while the term 'discourse' is widely used in social science and organization studies, in many texts there are no definitions or discussions of what discourse means (2000: 1126). It is used as if it had a clear, broadly agreed-upon meaning (ibid: 2006) but the confusingly varied use of the term points to the fact that there is no agreed-upon definition (ibid: 1127). Although use of the term discourse signals an interest in language, quite often it is used to refer to 'conceptions, a line of reasoning, a theoretical position or something similar' (ibid: 1129).

However, in favour of the view that discourse is integrally connected to language, it is important to remember that the first attempts to study language, in the first half of the twentieth century, aimed to disconnect language from its social context – to produce a pure, uniform and stable 'science of language' by dividing it up into various domains and studying these separately (Beaugrande, 1997: 36). While linguists were successful in identifying and classifying the most basic units of language, they found that as they ascended the levels of analysis, it became increasingly difficult to identify underlying patterns and rules explaining how the language worked (Beaugrande, 1997: 39). After decades of research into language as a disconnected system, in the mid-1960s to early 70s a number of new, closely-related disciplines emerged in the humanities and social sciences that were focused on reconnecting language to

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identified four analytically distinct discourses operating at the organizational level (specifically, discourses on 'the global company', 'facilitating creativity', 'exploiting networks', and ensuring proper 'management control' of technical operations) (2003: 1172 – 1176) each of which is associated with a particular role. The subject of their study, for instance, identified with the role of 'generator of institutional culture', which had its roots in the 'facilitating creativity' discourse that emerged at an organizational level but eschewed the role she associated with the 'management control' discourse – one which she pejoratively described as being the 'janitor' (ibid: 1177 – 1178). However each one of these roles could be studied as layered discursive constructions in themselves. One of the most obvious ways in which this can be seen, for instance, is the way in which particular roles are frequently inscribed with gender, class or racial constructions.

its social contexts (Beaugrande, 1997: 39 – 40, 45 – 58; Van Dijk, 1997a: 25 – 27; Wodak & Meyer, 2009: 2). Theories of discourse – the study of language in use (Jaworski & Coupland, 1999; Taylor, 2001: 5) – emerged out of this reconnection project. Over the years a staggering number of different theoretical orientations to the study of discourse have emerged (Jaworski & Coupland, 1999: 14 – 35; Rogers *et al*, 2005: 369). These include speech act theory (Austin, 1962; Grice, 1975); genre theory (Bakhtin, 1981; Eggins & Martin, 1997; Martin, 1985; Hasan & Fries, 1995); the study of intertextuality (Bakhtin, 1981; Kristeva, 1989); conversation analysis (Collins, 1986; Gumperz, 1982); narrative analysis (Bruner, 1991; Ricoeur, (1988)); discursive psychology (Edwards & Potter, 1992; Edley, 2001: 190); ethnography of communication (Hymes, 1972); and critical discourse analysis (Fairclough, 1992, 2003; Van Leeuwen, 2008, 2009; Wodak & Meyer, 2009).

It was initially difficult to choose amongst this smorgasbord of options for discourse analysis. Alvesson and Karreman, however, point out that the different versions of discourse analysis can be 'fruitfully analyzed along two key dimensions' (2000: 1129): The first concerns the relationship between discourse and meaning and, related to this, the relationship between discourse and other elements of social life – with the poles defining the spectrum of possibilities being 'discourse determination' (a 'muscular' view of discourse whereby discourse and meaning are inseparable) and 'discourse autonomy' (whereby the meanings that arise in discourse are transient and not durable) (ibid: 1133). The second concerns the scope and scale of the study of discourse – whether it is concerned with the study of highly-local, context-dependent phenomena, or the broader and more generalized vocabularies structuring social life (ibid: 1129). The diagram below illustrates the matrix that emerges from these four variables (ibid: 1130)

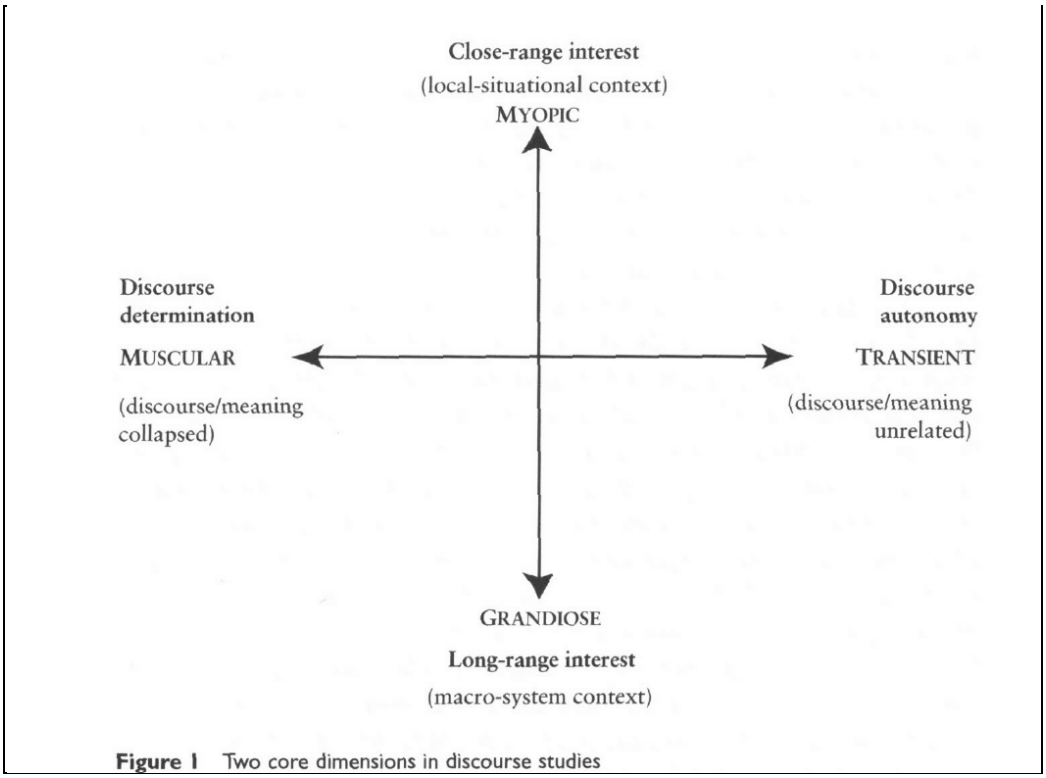

Figure 2: Alevesson and Karreman's four-dimensional representation of discourse studies.

The version of discourse analysis I decided would be best fitted to elucidating the representation of legal professionals in classroom talk as a form of identity regulation, was **critical discourse analysis (CDA)**.[41] This was because (referencing the two dimensions outlined above), it was an approach that allowed me to adopt a moderately strong, but not extreme, position on the determinative effects of discourse and to undertake a sufficiently close-range, textually-oriented analysis of the data that nevertheless allowed me to look toward the longer-range meaning of the text.

[41] The term 'critical discourse analysis has been attributed to the use of the term in Fairclough's *Language and Power* (1989) (Rogers *et al*, 2005: 365). A network of 'CDA scholars' is said to have emerged following a small symposium held in Amsterdam in January 1991. Besides Norman Fairclough and Theo van Leeuwen, Teun van Dijk, Gunther Kress and Ruth Wodak – all well-known and respected CDA scholars – attended the symposium (Wodak & Meyer, 2009: 3). Critical Discourse Analysis has never been and has never attempted to provide one single or specific theory. Studies in CDA are multifarious and derived from quite different theoretical backgrounds (ibid). There is no specific methodology that is characteristic of research in CDA (ibid: 5), nor is there one specific CDA way of gathering data – most of the approaches to CDA do not explicitly recommend sampling procedures and theoretical sampling is often employed (ibid: 27). It is therefore best characterized as a 'school' or a 'programme', implying some shared perspectives on doing discourse analysis.

4.2.1 Discourse determination versus discourse autonomy

Approaches to discourse that lie at the pole of discourse autonomy are interested in studying linguistic patterns for their own sake. Discourse autonomy assumes that the 'language in use' in a particular social context is and should not be connected to any other kind of social phenomenon (Alvesson & Karreman, 2000: 1132). The meanings associated with the language are temporal and specific, not extending beyond the specific linguistic interaction (ibid: 1130). Nunan's introductory text on discourse analysis (1993), for instance, follows this approach. The focus of his book is on discourse as a linguistic performance: Discourse is associated with units of language use greater than the sentence and the linguistic techniques for ensuring coherence between such units.

Discourse determination, on the other hand, assumes that discourse is integrally related to, and in varying degrees determinative and thus encompassing of, other social phenomena. Thinking within the context of identity (or 'subjectivity' as it is also termed in this body of literature), the most extreme proponents of discourse determination would maintain that discourses 'produce' or 'create' identities. This approach – inspired in particular by Foucault's radical historicization of the subject – would hold that 'rather than autonomous subjects using discourse to construct identities, it is discourse that produces power-knowledge relations within which subjects are positioned, identities are constructed and bodies are disciplined' (Ainsworth & Hardy, 2004: 238). An oft-cited example is Foucault's account of the 'hysterical woman', a subjectivity intimately associated with the nineteenth century emergence of psychoanalysis and, similarly, the socially recognizable identity of the homosexual which only came about as a result of the intersection between discourses of sexuality, medicine and law during the nineteenth century (ibid).

The notion of discourse 'producing' or 'creating' identities is at odds with the concepts of identity, identity work and identity regulation which I have thus far been developing in this chapter. Persons, and their personal and social identifications, exist independently of the discourses out of which identity regulation is constituted, albeit that such discourses may

exercise a powerful framing effect on such identifications. If it were otherwise there would be no need to recognize identity work.

I therefore needed to work with an approach to discourse analysis that conceived of discourse as part of social practices in a manner that is tightly-coupled to but nevertheless distinct from other social elements. Critical discourse analysis responded to this need. Fairclough recognizes that discourse exists alongside other social elements when he holds that through social practices discourses are 'articulated' with non-discursive elements of social life such as action and interaction, social relations, the material world and persons (and their identifications). Thus discourse is but one type of social element that is articulated with others in social practices. The relationship between these different elements is dialectical rather than determinative (2003: 25). This captures the 'apparently paradoxical fact that although the discourse element of a social practice is not the same as for example its social relations, each in a sense contains or internalizes the other – social relations *are* partly discursive in nature, discourse *is partly* social relations (ibid, emphasis in original). In his earlier work on language and power he put it as follows: Linguistic phenomena are social phenomena of a special sort and social phenomena are in part linguistic phenomena (1989: 23). This underlines the point that discourse it not merely an *expression* or reflection of social practices, it is *part of* those practices (ibid). This view on the dialectical relationship between discourse and other elements of social life is one of the 'shared perspectives' of critical discourse scholars (Fairclough & Wodak, 1997: 258. See also Rogers *et al*., 2005: 369 – 70). In the context of processes of identity construction, therefore, discourse shapes the personal and social identifications of individuals and groups, but it is also conditioned by the choices of such individuals and groups (as manifest in their identity work) as well as the constitutive possibilities of other discourses.

Scholars of CDA, however, take the conditioning or shaping effects of discourse very seriously, placing a special emphasis on the relationship between discourse and power. Through the ways in which they represent things and position people, discourses may have major ideological effects;[42] i.e. they can help produce and reproduce unequal power relations between (for

[42] Ideologies in this sense should not be understood in terms of the Marxian economic base/superstructure dichotomy, nor even in the standard political science definition as being 'a coherent and relatively stable set of

instance) social classes, women and men, and ethnic/cultural majorities and minorities (Fairclough & Wodak, 1997: 258). A defining feature of CDA is a concern to develop a theory of language that acknowledges the centrality of power in social life and that analyzes the multifarious ways in which language is entwined with power (ibid: 10). Legal professionals have traditionally been regarded as quite powerful social players, and this aspect of CDA allowed me to point out the ways in which classroom talk constituted lawyers as powerful. It also allowed me to explain how unequal relations – not only traditional categories such as the relationship between genders but also lesser-known relationships such as between lawyers and their clients, or the hierarchies that pertain amongst different types of legal professional – were coded in classroom talk. This points to the orientation of CDA analyses as being both interpretive and critical. The critical orientation reflects the influence of the Frankfurt School and Jürgen Habermas on the one hand and the school of Critical Linguistics (associated with the work of Fowler and Kress and Hodge) on the other (Wodak & Meyer, 2009: 6 – 7; Rogers *et al*, 2005: 367–9). The purpose of the analysis is thus to produce and convey critical knowledge that will enable human beings, through self-reflection, to emancipate themselves from forms of domination (Wodak & Meyer, 2009: 6 – 7). A critical approach also implies the ethical duty to make one's own position, research interests and values explicit and one's criteria as transparent as possible, for labeling one's work as 'critical' does not place it outside of the social forms of power which are the object of the critique (ibid).

The approach to discourse in CDA studies therefore fitted well with the understanding of identity regulation within a broader conceptual model of identity formation. This choice of analytical approach, however, then enabled the understanding that as a result of the *multi-functionality of language*, discourse – and thus also identity regulation – intersects with other elements of social life in different ways. The multi-functionality of language refers to the phenomenon of language achieving different things at the same time. Drawing on the

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beliefs or values'. The ideologies which are of interest to critical discourse analysts are the more hidden and latent types of everyday beliefs which often appear disguised as conceptual metaphors and analogies (Wodak & Meyer, 2009: 8) or simply by the way in which people, actions and things are named or circumstances are described. By appearing to be 'neutral' such everyday beliefs remain unchallenged.

pioneering work of Halliday[43] in the field of Systemic Functional Linguistics, Fairclough points out that when people use language they simultaneously represent aspects of the world (physical, mental, relational), enact social relations between themselves, and manifest attitudes, desires and values (2003: 27).[44] On this basis he distinguishes between three major types of meaning in language (ibid):

- The first type of meaning is **representation**. Through language people construe human experience. They name and categorize every aspect of a social practice (sometimes in language which is unique to a particular social practice, sometimes in language which is more general), and establish relationships among things. Language always represents some doing or happening, saying or sensing, being or having – along with its various participants and circumstances (Halliday, 2004: 29). Fairclough refers to this type of meaning (rather confusingly, see below) as 'discourse' (2003: 26).
- The second meaning-type is **action/interaction**. Through language people are always enacting some social function – they are informing or questioning, demanding, offering, promising, threatening, and so on through a potentially very long list. Such action and interaction is in part guided by patterned ways of speaking and writing, as in an interview or in a classroom lecture (Fairclough, 2003: 27). Fairclough refers to this type of meaning as 'genre' (ibid: 26).
- The third type of meaning, according to Fairclough is **identification**, through which individuals identify themselves and are identified by others (ibid: 159). Language features alongside bodily behavior 'in constituting particular ways of being, particular personal and social identities (ibid: 26). Fairclough refers to this type of meaning as 'style' (ibid: 26).

[43] See Halliday, 2004: 29, 58. Halliday refers to 'metafunctions' of language and distinguishes an **ideational** metafunction (which relates to Fairclough's representational meaning), an **interpersonal function** (which Fairclough divides into the meaning types of action/interaction and identification respectively) and a **textual function** (which Fairclough includes in the meaning type of action/interaction).

[44] All three aspects of language use are of course grounded on the assumption that language is constitutive, and not merely reflective of a pre-given reality. In saying that attitudes, values and so on are manifest in language is also to say that it is through language that these phenomena are constituted.

What the identification of three major meaning types in language shows is that discourse is in itself differentiated: It is associated with patterned ways of representing, acting and interacting, and identifying. The one confusing aspect of this model is Fairclough's use of the term 'discourse' to refer to both the phenomenon of the use of language in social practice (as a whole) as well as to refer to ways of representing in a social practice (and thus to only an element of 'discourse' more broadly understood). Fairclough acknowledges this and explains it as follows: 'Notice that "discourse" is being used here in two senses: abstractly, as an abstract noun, meaning language and other types of semiosis as elements of social life; more concretely, as a count noun, meaning particular ways of representing the world. An example of "discourse" in the latter sense would be the political discourse of New Labour as opposed to the political discourse of "old" labour or the political discourse of "Thatcherism"' (ibid: 26).

Fairclough is at pains to emphasize that although the distinction between the three meaning types is a necessary one analytically, it does not prevent the meanings from 'flowing into' each other in various ways (ibid: 29) – they are 'dialectically interrelated' (ibid). Thus 'particular Representations (discourses) may be enacted in particular ways of Acting and Relating (genres), and inculcated in particular ways of Identifying (styles)' (ibid). Conversely – and importantly for purposes of this research – particular ways of identifying, acting and relating may be inculcated in particular ways of representing.

There are two important points to underline regarding the use of Fairclough's meaning types in this research: Firstly, because this is a study of identity regulation in a decontextualized context – which as I noted in section 3 of this chapter involves a study of *representations* of the social practices – the meaning type with which I am most concerned is representational meaning; i.e. the study of 'discourse' as a count noun, as a particular way of representing the world (and unless specifically mentioned, this is the sense in which this term will henceforth be used throughout this thesis). Specifically, this will involve studying how particular roles and associated meanings are constructed in the lecturer's classroom talk. However, one could also study identity regulation through interactional meanings, for instance, through dialogue between legal professionals in particular practice settings.

Secondly, although it would seem that Fairclough's third meaning type (identificational meanings) would be relevant for this research, in my view what Fairclough has in mind here is the manner in which language features in identity work, rather than identity regulation. In *Analyzing Discourse* Fairclough did not intend to provide a detailed theoretical framework for identity construction processes and so his model for this is not as differentiated or detailed as developed in other studies or in this chapter.

In order to clarify the distinction between the different meaning types, and their dialectical interconnectedness, chapter 4 of this thesis commences with an illustration differentiating between the different meanings types with reference to an extract from the data and showing how they constitute different identities, before moving on to the manner in which the codes related to representational meanings were developed.

4.2.2 Textually oriented analysis of the data

In discussing textually oriented analysis, Alvesson and Karreman identify four versions of discourse analysis as follows (2000: 1134):

(a) Micro-discourse approach, involving the detailed study of language use in a specific micro-context;

(b) Meso-discourse approach, involving sensitivity to the use of language in context but with an interest in identifying broader patterns and/or going beyond the details of the text to generalize to similar local contexts;

(c) Grand-discourse approach, involving how discourses are assembled, ordered and presented as an integrated frame. This will involve paying less attention to the specificities of language use in a particular local context and greater generalization as regards the themes evident in such language use; and

(d) Mega-discourse approach, referring to the idea of a more or less universal connection of discourse material, such as a discourse on masculinity, consumerism or globalization.

Using CDA as a method to elucidate representations of legal professionals in classroom talk as a form of identity regulation allowed me to undertake a textually-oriented, micro-discursive analysis of the classroom representations. Critical discourse analysis is textually-oriented as an approach in that it generally pays attention to the linguistic details of the text (Fairclough, 1992: 37), although it is not a common feature of CDA studies that a detailed study of the text is integrated into the research in the same way or with the same intensity (Wodak & Meyer, 2009: 21). The nature of this study called for the use of a fairly comprehensive range of semantic and linguistic categories in order to conduct the micro-discursive analysis and a wealth of such categories were found in two key works: Fairclough's *Analyzing Discourse* (2003) and Van Leeuwen's *Discourse and Practice: New Tools for Critical Discourse Analysis* (2008). A detailed discussion of the categories I derived from these two works for purposes of the study – which are both semantic (content) and linguistic (form) in nature – is provided in chapter 4 of the thesis.

Critical Discourse Analysis, however, also provided models for shifting from a micro- to a meso- or even macro-level analysis, this being one of the particular values of CDA which Ainsworth and Hardy identified in their study of the 'older worker' identity (2004: 225). After examining what the disciplines of economics, labour market research, gerontology, and cultural studies contributed to a study of the older worker, they concluded that a CDA approach is especially suited to understanding the processes of construction whereby the category (or role) of the older worker identity and the meanings associated with it come into being in the first place (ibid: 241). None of the other disciplines dealt adequately with these processes (ibid). CDA, further, provided tools of analysis for studying these processes of construction at both a macro- and a micro-level: The former, by showing how 'an assembly of discourses is ordered and presented as an integrated frame', the latter through the detailed study of language in specific micro-contexts (ibid). In particular, the use of CDA to study processes of construction at the micro-level facilitated identification of the manner in which constructions of identity could function to constrain individuals, as well as offer resources for resistance (ibid: 243).

The movement from micro- to a meso- or larger-scale analysis involves a movement from 'discourse' to 'Discourse' with the capitalization of the latter denoting its prevalence and

generality in capturing the ideas of a particular period (Alvesson and Karreman, 2000: 1126).[45] The problem of climbing the 'discursive ladder' (Alvesson & Karreman, 2000: 1147) – of moving beyond the very specific empirical data which ordinarily takes the form of a text (whether derived from interviews, questionnaires, observed talk or written documents) to address Discourses, as a 'powerful ordering force' (Alvesson & Karreman, 2000: 1127) is a common problem in organizational (and broader social) research. Alvesson and Karreman counsel that there is no final answer to the question of the extent, timing and modalities of moving from discourse to Discourse (ibid: 1146 – 7). They note that this movement involves a shift both of aggregation and perspective, and frequently the decision to ignore local context and variation is made *a priori* (ibid: 1147). There is also pressure, at least in studies of organization, to ascend the discursive ladder very quickly so as to be able to claim that discourse determines important extra-discursive social phenomena (ibid). They therefore express some 'sympathy' for reducing the range in studies of discourse and focusing more on the specificities of language use in local social contexts (2000: 1145). '[T]here are good reasons to sometimes resist the temptation and engage in further contemplation at the level of the text and perhaps make more of it … Grandiosation and muscularization of discourse should be grounded and shown – rather than, as in some Foucauldian and poststructuralist writings, be postulated' (ibid).

Given my interest in the specificities of language use in the lecturer's constitution of legal professionals in classroom talk, a micro-discursive point of entry was mandated. However, because I also wished to theorize the relationship between representations of legal

[45] Gee (1996) uses the distinction between 'discourses' and 'Discourses' in a somewhat different way. He associates 'discourses' with the different 'social languages' that make different social identities visible and recognizable. A study of 'discourse' thus involves paying attention to how people enact different social identities by subtle variations in their use of language (see his example relating to 'Jane' and the manner in which she relates a story first to her parents and then to her boyfriend, 1996: 66 – 8). He views 'Discourses', in turn, as ways of behaving, interacting, valuing, thinking, believing, and often reading and writing that are accepted as instantiations of particular roles (or types of people) by specific *groups of people*, whether families of a certain sort, lawyers of a certain sort …and so on through a very long list' (ibid: viii, emphasis in original). Each Discourse represents one of our social identities (ibid: ix). Through the concept of Discourse Gee thus provides an indication of the range of elements that constitute a particular social identity: Forms of action and interaction; particular beliefs and values; particular ways of thinking; and particular forms of reading and writing, or particular literacies. His concept of 'Discourse' is thus closer to Fairclough's understanding of 'social practice' as patterned ways of being that articulate together action and interaction, social actors, social relations, the material world and discourse (as patterned ways of communicating). What Gee's concept of 'discourse' does not allow for is for a recognition of differing levels of generality and prevalence in the patterning of language, which Alvesson and Karreman's scheme does.

professionals in classroom talk and the process of identity formation, and because I wished to evaluate the extent to which the lecturer's representations contributed to sustaining or transforming existing discourses on legal professionalism and the teaching of legal ethics, it was clear that my analysis could not remain at that level.

Fairclough's three-tiered framework for analyzing discourse is a well-known model for moving from a micro- to a macro-discursive level of analysis. The model is premised on the understanding that language use is determined by social structures through 'orders of discourse' – sets of conventions associated with social institutions which are, in turn, shaped by power relations within social institutions and society as a whole (1989: 17). The use of language in any particular context, however, always has *effects* upon social structures as well as being determined by them, and this contributes to social continuity and change (ibid). The framework itself incorporates a focus on: (1) The text; (2) the 'discursive practice', i.e. the processes by which texts are produced and interpreted; and (3) the socio-historical conditions that govern (but are also potentially affected) by these processes (ibid: 22 – 27).[46] In their review of the use of critical discourse analysis in education, Rogers *et al* observed that while many authors used aspects of this three-tiered framework they frequently failed to specify which linguistic resources accompanied each tier of analysis, or to explain how linguistic resources, discursive practices and wider social formations are connected (2005: 381). They held that there is often

[46] Analysis of the text entails *describing* the language structures produced in a discursive event on the basis of an extensive array of linguistic features which Fairclough groups into ten key questions for textual analysis (ibid: 110 – 111). These analytical prompts enable one to analyze such micro-discursive features as lexicalization (or vocabulary), patterns of transitivity, the use of active and passive voice, the use of nominalization, choices of mood, choices of modality or polarity, the thematic structure of the text, the information focus, and cohesion devices (Janks, 1997: 335 and see Fairclough, 1989: Chapter 5). Analysis of the discursive practice entails *interpreting* participants' processes of text production and interpretation through a variety of resources that explicate the manner in which they make sense of the context, the discourse type, and difference and change (Fairclough, 1989: 140 – 162). Essentially, this involves focusing on the 'members' resources' – the 'prototypes' which individuals hold relating to 'the shapes of words, the grammatical forms of sentences, the typical structure of a narrative, the properties of types of object and person, the expected sequence of events' against which they evaluate a text (ibid: 11). Finally, analysis of the underlying socio-historical conditions entails *explaining* the social constitution and change of members' resources, including their reproduction in social practice (ibid: 163, see 162 – 168). The usefulness of this framework is that it not only provides a disciplined model for ascending the discursive ladder, it also provides multiple points of analytic entry (Janks, 1997: 329). 'It does not matter which kind of analysis one begins with, as long as they are all included and are shown to be mutually explanatory (ibid, and see Janks further for a lucid demonstration of Fairclough's framework at work).

too much social theory in discourse analyses of language in educational contexts at the expense of attention to the specificities of the language use (ibid: 372).

While Fairclough's three-tiered framework for analysis served as a broad model for thinking about this process, I decided against using it as a means to structure the analysis (e.g. to have separate chapters dealing with the linguistic structures of the text, the processes of production and interpretation, and the explanation of the discourse as a socio-cultural practice). The main reason for this was the availability of an alternative model in the work of Theo van Leeuwen, whose notion of ordering representational meanings in terms of the various elements of social practice was aligned with my understanding of discourse being dialectically articulated with other elements of social life *through* social practices. Dissecting the elements of the social practice in the discourse would therefore make these articulations explicit. The emphasis on social practice, coupled with Van Leeuwen's understanding of the recontextualization of social practices (which is another way of looking at practices in decontextualized contexts), enabled me to foreground the 'contextual resources' relating to legal professionalism in the classroom of my study in a more direct, accessible way than was possible using Fairclough's method. It is therefore to a more detailed discussion of Van Leeuwen's method of CDA that I now turn.

4.2.3 Reconstructing discourses on the basis of social practice

In *Discourse and Practice: New Tools for Critical Discourse Analysis* (2008), Van Leeuwen points out that the study of genre in analyses of discourse has taken place at the expense of studies of representation (ibid: 4). His aim in this book is to turn things around by providing analytical tools for reconstructing discourses from texts, even where these differ in terms of genre (ibid). His fundamental point of departure is that representational meanings are ultimately based on social practices on 'what people do' (ibid). He notes that while sociologists sometimes derive concrete actions from abstract concepts (as in Parson's systems theory and Bourdieu's 'habitus'), 'the primacy of practice keeps asserting itself also in the work of these writers, sometimes against the grain of their general methodology' (ibid). The idea at the core of his study of representational meanings is therefore that 'all texts, all representations of the world

and what is going on in it, however abstract, should be interpreted as representations of social practices' (ibid: 5).

Van Leeuwen describes social practices as 'socially regulated ways of doing things', but with the caveat that social practices are regulated to differing degrees and in different ways (ibid: 6 – 7). Although he does not identify the theoretical provenance of his concept of social practice, he assumes that all actually performed social practices include at least ten elements which are (in the order in which he provides them – ibid: 7 – 12): (1) A set of *participants* (social actors) in certain roles, for instance a lecture minimally needs a lecturer and students; (2) a set of *actions* performed in a sequence (these constitute the 'core' of any social practice – ibid: 8); (3) *performance modes* which are prescriptions relating to how an action must be undertaken, for instance, actions may be required to be undertaken at a particular pace; (4) *eligibility conditions* being the qualifications a participant must have in order to play a particular role in a particular social practice; (5) the *presentation styles* involving dress or body grooming requirements of the participants; (6) the *times* (being either specific times or durations) associated with the actions of the social practice; (7) the *locations* in or at which social practices occur; (8) *eligibility conditions* attaching to locations (for example, rooms must fulfill certain conditions if they are to be eligible as courtrooms or classrooms); (9) *resources* being the material or semiotic tools participants employ in the actions of a social practice; and (10) *eligibility conditions* attached to resources.

This is a very sophisticated and detailed model which Van Leeuwen himself reduces in developing analytical tools for studying the representation of social practice in texts. In *Discourse and Practice* he focuses only on the representation of social actors, social actions, time and space (the 'performance modes' and 'eligibility conditions' associated with these elements are therefore folded into the discussion and the tools, rather than being given a separate treatment). In relation to each of these four main categories, he proceeds to identify the key sociosemantic categories by which actors, actions, and so on can be represented, and their typical linguistic realizations, referring to these as 'sociological' and 'linguistic' categories respectively (ibid: 24). For example, in representing social actors there is always a fundamental choice between including or excluding the social actor in the action. 'Inclusion' and 'exclusion'

represent the sociological categories. Exclusion, as the more contentious of the two, is achieved through a variety of linguistic mechanisms, including radical exclusion (there is no trace of the actor in the action), or suppression through the use of passive agent deletion (as in 'concerns are being expressed' – here the people who are expressing the concern are not mentioned) or nonfinite clauses (as in 'to pass law school is hard', in which the agents are similarly not present) (ibid: 28 – 9). Van Leeuwen's emphasis falls more on developing a 'sociosemantic' inventory of the way in which representations can occur than on exhaustively compiling a correlating inventory of linguistic categories – the reason being that language lacks 'bi-uniqueness', in other words, there is no one or exactly corresponding linguistic means for representing a particular sociological category (ibid: 23), or no 'neat fit' between sociological and linguistic categories (ibid: 24). Nevertheless, knowing the typical linguistic realizations of the various sociological categories enables one to identify the latter in the text and determine the patterns that may be evident.

Van Leeuwen highlights a further and critically important aspect of the study of representational meanings in texts, which is that any one social practice may be differently represented in different contexts. What Van Leeuwen recognizes is that 'talking about' a social practice necessarily involves insertion into another social practice. He appropriates the Bernsteinian notion of 'recontextualization'[47] to describe this phenomenon. The 'talked about' practice (recontextualized practice) is recontextualized by the practice in which the 'talking about' occurs (recontextualizing practice). For example, research on the social practice of lawyering *per se* could be inserted into the social practice of research which may involve interviewing, focus groups, participant observation and so on and the meanings and limitations associated with the latter. As the vast literature on research methodology itself recognizes '[r]econtextualization not only makes the recontextualized social practices explicit to a greater or lesser degree, it also makes them pass through the practices in which they are inserted' (ibid: 12). However, 'chains of recontextualization' (ibid: 13) may be involved: Recontextualization

[47] Bernstein developed the concept of 'recontextualization' in 'Codes, modalities and the process of cultural reproduction: A model' (1981) 19 *Language and Society* 327 and 'On pedagogic discouse' In: Richardson (ed.) *Handbook for Theory and Research in the Sociology of Education* (1986)), 205). He held that knowledge is produced in certain social practices and then recontextualized in pedagogic contexts. Van Leeuwen uses the term 'recontextualization' in a broader sense to refer to the recontextualization of any one social practice by another.

may be recursive removing one further and further from the starting point of the chain (ibid). This is applicable to any study of social practices in a decontextualized context as is the case in the present study: The social practice of lawyering has in the first instance been recontextualized by the practice of tertiary education and, as the object of this study, has been further recontextualized by the practices associated with doing PhD research. The rigours of the latter however, would hopefully go some way to ensuring that the filters which might reshape or distort the object of study - the practice of talking about legal professionals in the classroom as a recontextualizing practice in itself – would at least be made explicit.

Various kinds of transformation of the recontextualized practice take place in the process of recontextualization. Elements of the initial social practice may be substituted, deleted or rearranged. Most importantly for purposes of this thesis, the recontextualizing practice – in this instance the 'talk about' legal professionals in the classroom – may add certain elements. These include a host of elements relating to the value framework supporting the practice – constructions of the purpose of the practice and the manner in which it is evaluated, both of which link up to legitimation – *why* the practice must take place or must take place in the way that it does (ibid: 20 – 21). Van Leeuwen also provides analytical tools for studying these aspects in texts and I drew upon these in order to determine how the law lecturer of my study framed the values associated with the social practice of lawyering and, thereby, being a legal professional.

Van Leewen's work served as an important source of inspiration in developing a framework for systematizing representational meanings relating to the social practice of lawyering and, thereby, showing how legal professional roles and their associated meanings are constructed in classroom talk. In two instances, however – the identification of 'internal' and 'external' goods in the practice and the representation of emotion – I found that Van Leeuwen's work was lacking. For the first I drew upon the work of McIntyre (described further in chapter four), while for the second I was fortunate to have been referred[48] to Martin & Rose's *Working with Discourse: Meaning Beyond the Clause* (2004) whose chapter on appraisal (ibid: 22ff) contains

[48] My thanks in this regard are due to Yvonne Reid (PhD), head of the Applied English Language Studies Department at the University of the Witwatersrand.

an account of the representation of emotion in texts. The manner in which this study drew upon and developed the sociological and linguistic categories developed by Van Leeuwen (and to a lesser extent McIntyre and Martin & Rose) is outlined in chapter four.

5. A CONCEPTUAL FRAMEWORK FOR THE STUDY

The literature review presented in this chapter has established that representations about legal professionals in classroom talk are relevant to processes of professional identity formation as a form of identity regulation in which professional roles and their attendant discourse(s) emerge. In this study I investigate how legal professionals were actually represented in the talk of one particular classroom in order to determine what the process entails – how the representations themselves may be studied, and what such study reveals in order to further understanding of the processes of legal professional identity formation. The concepts of identity, identity work, identity regulation, role and discourse have been explored and the resources of CDA have been invoked in order to study representational meanings. From the foregoing, I therefore identify the following three conceptual claims that provide the framework for this research study:

- At a micro-level of discourse analysis, the basic elements of social practice (Van Leeuwen's 'reduced' model) and their associated sociosemantic categories and linguistic realizations, provide a useful schemata for understanding how representations function as a form of identity regulation.
- A micro-discursive study of representations of legal professionals in classroom talk allows one to situate the representations in a particular classroom in relation to broader discourses on the nature of legal professionalism and the teaching of legal ethics.
- The recontextualization of the legal profession within the social context of the classroom overlays representational meanings with the power that derives from that context.

6. SUMMARY

In this chapter I firstly provided a theoretical account of the concept of identity and processes of identity formation. I started off by outlining the various orientations that have motivated a

study of identity and identified the present study as having interpretivist and critical leanings. I then defined identity as the self-definitions attached to an individual by him or herself and others. I distinguished constructivist (which sees the self as negotiated in interaction with others) from essentialist (which sees the self as an abiding essence) approaches to identity, and described how a shift from the latter to the former has been accompanied by recognition of the multiple, fluid, shifting, intersecting, possibly competing identifications that an individual may hold at any one time. I noted that theorists commonly distinguish between 'personal identity' (self-definitions not associated with forms of group belonging) and 'social identity' (self-definitions linked to forms of group belonging), but associated both of these with processes that inhere in the individual, with what is referred to in the literature as 'identity work'. I emphasized that identity work always takes place in relation to 'extra-individual forces' which are variously described as 'cultural resources', 'identity sets', 'discourses' and so on, but commonly grouped under the rubric of 'identity regulation'; and that personal and social identifications emerge from the interaction of these two complex processes. I associated the present research with the study of identity regulation rather than identity work.

I then proceeded to elaborate the concept of identity regulation by noting, firstly, that the literature recognizes the possibility of studying identity formation processes (and thus also identity regulation) in both contextualized and decontextualized practices. I emphasized that the study of identity regulation in the latter involves a study of representations of the practice, rather than the practice *per se*. Following Sveningsson and Alvesson (2003), I identified the concepts of 'role' and 'discourse' as integral to understanding how identity regulation operates. I discussed the problematic functionalist associations attached to the concept of role but noted that in the reformulation of the concept undertaken by Simpson and Carroll (2008) it has much in common with the Foucauldian concept of subject position (but without the 'muscular' discourse-determination associations of the latter), and is in line with the 'flux ontology' characteristic of constructivist understandings of identity. I also explained that it was necessary to invoke the concept of role in the conceptual framework as the 'nub' or 'site' at which discourses could intersect. I noted that the term 'discourse' has been used in a great variety of ways, but that it commonly refers to language in social practice, rather than language as a

disconnected social phenomenon. While acknowledging the wide range of analytical approaches to the study of discourse, I identified CDA as the approach best fitted to the aims of the study in that it allowed for a position on discourse as tightly-coupled to, but not determinative of or collapsed with other social elements, and afforded a micro-discursive point of entry with various models for nevertheless ascending the discursive ladder. What reliance on CDA added to the conceptual frame was an awareness of the nature in which power relations are coded into the finest details of the text, and an understanding of the multi-functionality of language. As regards the latter, Fairclough's identification of representational meanings with particular 'discourses' affirmed the theoretical choice to utilize 'discourse' as one of the major conceptual categories constituting identity regulation. The multi-functionality of language, however, also pointed to the fact that representational meanings (discourses) sit alongside interactional (genres) and identificational (styles) meanings in constituting 'discourse' more broadly and abstractly as the phenomenon of language in social practice.

I concluded this section with an overview of Van Leeuwen's insight that the study of representational meanings should centre around the various elements of social practice. For each of the major elements of social practice an inventory of sociosemantic categories and associated typical forms of linguistic realization can be identified. These categories assist in fleshing out and systematizing representational meanings. The phenomenon of recontextualization chains was recognized as well as the transformations – the most important among them relating to additions of purpose, legitimation and evaluation – that may take place with every recontextualization. The chapter concluded by identifying the conceptual claims for the study.

The following chapter turns to the question of the research paradigm, research design and key methodological issues.

CHAPTER THREE

RESEARCH DESIGN AND METHODOLOGY

1. RESTATEMENT OF PURPOSE AND AIM OF STUDY

This research aims to fill the knowledge gap I identified in chapter one: While the literature suggests that talk about legal professionals impacts upon students' formation of legal professional identity, little systematic conceptual or empirical research has been conducted on what law lecturers say about legal professionals in the classroom. The problem – the possibility that law lecturers are socializing law students into models of legal professional identity that could be positive or negative – is both under-conceptualized and under-examined. My purpose is to propose a way of making sense of this aspect of classroom talk, to propose a possible conceptual and methodological frame for *beginning* to understand the lecturer's potential contribution to professional identity formation processes. My specific interest is to determine which models of legal professional identity are present and, if so, how these are linked to particular semantic and linguistic themes or patterns. My argument is that such a conceptual and methodological frame should be based upon constructivist theories of identity formation and theories of the functioning of language in social practice with particular regard to the representational function of language. These theories, however, needed to be brought into relation with an in-depth empirical case study to produce results that will resonate with legal educationalists.

Some of the primary conceptual and methodological choices I made have already been discussed in chapter two. This includes, for instance, the key methodological choices to use the resources of critical discourse analysis, and Van Leeuwen's work on the representational function of language in particular, and I will not repeat my reasons for these choices here. This chapter discusses the research paradigm; considerations and observations relating to the development of the research design; the choices that were made regarding the selection of the subject; the collection and analysis of the empirical data; and strategies employed to ensure the

credibility of the study. I have not devoted a separate section to the ethics of the research but have integrated discussion of ethical issues into the various sub-sections. In line with ethical norms relating to qualitatively-oriented research, however, I commence this chapter with a statement of my own position as researcher.

2. POSITIONING THE RESEARCHER

In this section I would like to position myself in terms of both the resources I brought to the study and the subjective biases I hold which could have influenced my interpretation of the data.

Prior to undertaking this research, my academic training had been overwhelmingly based in the discipline of law with only a little training in and virtually no experience of methods in the social sciences.[49] I had never conducted an empirical study, nor had I used discourse analytic techniques. In undertaking this research, therefore, I have been stretched and forced to grow in many ways. Chief among them has been a deepened understanding of different forms of knowledge. In terms of the typology presented by Merriam and Simpson – wherein the different paths to knowledge encompass the processes of believing (authoritative knowledge), thinking (rational knowledge), sensing (empirical knowledge) and feeling (intuitive knowledge) (Merriam & Simpson, 1995: 2 – 3) – law is for the most part firmly situated in the realm of authoritative knowledge. The belief or ideology that lies at the essence of legal thinking is that social order is attained and social disputes appropriately addressed through the development and application of principles and rules which derive from various sources of legal authority. The documents that emanate from particular sources – such as Parliament or the courts – are in themselves regarded as authoritative (ibid: 4). It is these sources which constitute the raw materials of the lawyer's path to knowledge as she learns to identify and subtly to parse or synthesize the legal texts. In so doing she develops an ever-increasing understanding of a vast legal semantic field which recontextualizes the social world in terms of legal categories. The overwhelming emphasis in texts on legal research, therefore, is on finding and using the various sources of legal authority: 'All legal research has as its objective the collection of authoritative

[49] I completed a course in Research Design for purposes of completing my Postgraduate Diploma in Tertiary Education which I undertook at the School of Education at the University of the Witwatersrand.

materials relevant to the problem' (Campbell *et al*, 1979: 225. See also Cohen & Berring (1983); Cohen & Olson (1992); and Jacobstein *et al* (1994)). By contrast the conceptual and empirical questions with which I sought to engage for purposes of this research led me down the tangled and knotty avenues of rational and empirical processes of inquiry which entailed engaging with the rigours of developing a research design, managing and analyzing data, thinking about validity, and so forth. Whilst daunting, the process has been immensely enriching, providing me with a new sense of confidence to undertake social research, and, at the same time, solidifying and clarifying my understanding of what makes research in my home discipline of law distinctive.

In legal research it is not customary for researchers to lay their subjective biases open for scrutiny. In the social sciences and research on education, this is one of the most important strategies to enhance the credibility of the research (Maxwell, 1996: 5). Following the lead provided by Peshkin (1988), therefore, I have attained an awareness of at least two 'subjective I's' (ibid: 18) that potentially exerted their influence on the nature of the research and its outcomes. Firstly, as noted in the very first few pages of this thesis, the element of law that excites my imagination, fantasies and emotions is the potential for law to deliver justice. This 'Justice-Seeking I' orientates me to a particular kind of good associated with law and possibly blinds me to others, such as the manner in which law ensures an orderly society.[50] There is within me a 'ranking' of the goods provided by law that affords justice pre-eminence and I therefore needed to take care in both seeing other goods associated with law in my subject's classroom talk and according them appropriate weight. Secondly, there is the nature of my own particular career path in the law, which has led to the formation of a subjectivity I describe as

[50] This is not to suggest, however, that justice and order necessarily stand in an antithetical relationship to each other. However, when the maintenance of order appears to prevail over my intuitive sense of justice, I regard this as a negative outcome. For example, in the field of environmental law, the judge in the case of *Bareki v Gencor* 2006 (1) SA 432 (T) refused to uphold a community's attempt to hold a mining company liable for cleaning the environment from pollution by asbestos caused by the company's operations over many years. The basis for the judge's decision was that the legal authority relied upon by the community could not be applied retrospectively; i.e. to acts completed before the legislation came into operation. The alternative source of legal authority applied by the judge was the common law presumption that the legislature does not intend to legislate retrospectively. This is a broad-ranging principle derived from our legal tradition which is aimed at regulating the power exercised by the institution of State entrusted with making laws. However, there were clear indications in the law relied upon by the community that this *was* in fact the legislature's intention, and the law was in fact changed by Parliament subsequent to this decision to make such retrospective application even clearer.

the ‘Outsider-I’. After obtaining a first degree in music, I proceeded to undertake legal studies through South Africa’s primary distance learning institution, the University of South Africa. Upon finishing my B.Proc and LL.B degrees I moved to another city. I had sent out more than 50 letters of application to various attorneys’ firms from which I secured two interviews and no offers for articles of clerkship notwithstanding an outstanding academic record. As I needed to support myself I could not undertake training to become an advocate, which (at that time) required that one work without remuneration for six months (now it is a year). I was similarly unsuccessful in securing a post as a public prosecutor at the Department of Justice. I eventually found work at a legal consultancy that held various tenders from national and regional institutions to draft legislation. After three years I entered legal academia where I have been based ever since. Notwithstanding that I therefore have other and different forms of experience in the law, there is still a sense that I have not passed through the rites of professional passage that would assure me of insider status. It is this Outsider-I that was so interested in the topic of research as well as the subject whose classroom talk I chose to analyze because, as outlined further below, he has a rich and varied career history that encompassed a variety of mainstream legal professional roles. The influence therefore exerted by this particular subjective I is that it could easily have led to too-great a fascination with my subject’s representations, a starry-eyed awe that could not draw on the benefits of experience to offer alternative models. On the other hand, however, this is same position occupied by the first-year student. The Outsider-I was thus a double-edged subjectivity: It triggered my professional naivety but at the same time potentially positioned me in a manner similar to the students soaking up my research subject’s representations of the legal professional world.

Having outlined my own position, the following sections address the research paradigm, research design and methodological issues.

3. RESEARCH PARADIGM

Schwandt (2000) commences his essay on epistemological stances for qualitative enquiry with the following quotation:

> 'Labels in philosophy and cultural discourse have the character that Derrida ascribes to Plato's pharmakon: they can poison and kill, and they can remedy and cure. We need them to help identify a style, a temperament, a set of common concerns and emphases, or a vision that has determinate shape. But we must also be wary of the ways in which they can blind us or can reify what is fluid and changing' (Richard J. Bernstein 'What is the difference that difference makes?' (1986) quoted in Schwandt, 2000: 189).

This statement is, perhaps somewhat uncomfortably, true of the use of the concept 'paradigm' in literature on research methodologies. Popularized by Thomas Kuhn in his *The Structure of Scientific Revolutions* (1962), a 'paradigm' has been defined as:

> 'An organizing framework that contains the concepts, theories, assumptions, beliefs, values and principles that inform a discipline on how to interpret subject matter of concern. The paradigm also contains the research methods considered best to generate knowledge and suggests that which is open and not open to inquiry at the time (B.A. Powers & T. R. Knapp (1990) *A Dictionary of Nursing Theory and Research*, 103 quoted in Bergman, 2010: 172 – 3).

Babbie, more succinctly, describes a paradigm as '[a] model or framework for observation and understanding, which shapes both what we see and how we understand it' (2004: 33). In the research methods literature different labels for research paradigms abound. Denzin and Lincoln recognize the 'received' and dominating paradigm of 'positivism' (the view toward research that has dominated formal discourse in the physical and social sciences for 400 years) and the 'alternative' inquiry paradigms of 'postpositivism', 'critical theory' and 'constructivism' (1998: 202–3). In a later work, Lincoln and Guba revise this basic framework to incorporate Heron's (1981) notion of a 'participatory' paradigm as an alternative method of inquiry (2000: 168). Cohen and Manion (1994) associate positivism with the 'scientific method' and distinguish it from the 'alternatives' of phenomenology, ethnomethodology and symbolic interactionism. Maykut and Morehouse, in turn, distinguish the 'positivist approach' as the 'dominant paradigm' and the 'phenomenological approach' as an 'alternate paradigm' (1994: 12). Babbie's typology of paradigms is more diverse and incorporates early positivism, social Darwinism, the conflict paradigm, symbolic interactionism, ethnomethodology, structural functionalism and feminist paradigms (2004: 32).

Bergman notes that in the literature (at least on mixed methods research) the term paradigm is used in both a 'strong' sense to designate qualitative from quantitative research paradigms as

competing and incommensurable and in a 'weak' sense where it is roughly synonymous with 'worldview', 'approach' or 'framework' (2010: 173). Bergman critiques the first use on the basis that the claimed differences between qualitative and quantitative methods on ontological, epistemological and axiological grounds cannot be sustained, that qualitative and quantitative analytical techniques do not *necessitate* or *predetermine* a particular view of the nature of reality, a specific research theme or how to research it, the relationship between researcher and research subject or the truth value of the data (ibid). As regards the second use, he argues that if 'paradigm' simply signifies an approach or framework 'there are as many paradigms as there are authors who feel the need to distinguish a meta, grand, and middle-range theoretical approach from alternatives' (ibid).

On the other hand, as Bernstein suggests, the situation of one's work within a particular paradigm can 'remedy and cure', orientating both writer and reader to a common set of concerns and emphases, helping to shape an internally consistent orientation and style. The paradigmatic labels – both in the strong sense of the qualitative/quantitative divide and the weaker sense of more diverse 'worldviews' – would only seem capable of 'poisoning and killing' when they are applied in a manner that necessitates or predetermines, the research project, without the researcher applying her mind to the true fit between her project and the available paradigmatic labels. Further, as Guba and Lincoln emphasize, it is helpful to remember that all paradigms are human constructs. They are not open to proof in the conventional sense and there is no way to elevate one over another on the basis of ultimate, foundational criteria (1998: 201 – 2).

Instead of positioning my research in terms of one of the available paradigmatic labels at the outset, I found that the questions various authors identify in order to frame and distinguish the various paradigms from each other constituted a more generative starting point. These questions can be grouped around the key pillars of ontology, epistemology and methodology (Guba & Lincoln, 1998: 201; Maykut & Morehouse, 1994: 12) as follows:

Ontological Questions:	What is the form and nature of reality? What can be known about reality?
Epistemological Questions:	What is the nature of knowledge? What does research contribute to knowledge or how does knowledge accumulate? What is the role of values in inquiry?
Methodological Questions:	How should the inquirer go about finding out whatever he or she believes can be known?

Figure 3: Questions that constitute the basis for a particular paradigmatic position.

There is no need in this research for me to take a position on the ultimate nature and form of all reality, only that small aspect of reality with which I have been concerned, namely the formation of legal professional identity. To a certain extent I have already nailed my colours to the mast in chapter two for I have made a variety of claims that are consistent with the view that identities, including professional identities, are constructed in social interaction. This basic claim, I in fact regard to be a 'true' state of affairs, as accurately reflecting what happens in the world. This seems akin to what Guba and Lincoln describe as a 'positivist' ontological position: an 'apprehendable reality is assumed to exist, driven by immutable natural laws and mechanisms' (1998: 204), the claim for the social construction of identities being a 'time- and context-free generalization' (ibid). My basis for this position is that this claim has been espoused and found to be workable by a great variety of authors in many different disciplines. It also resonates very deeply with my own subjective experience of the nature of identity formation. The same can possibly be said of the claims that language is both constitutive and reflective of social reality and that it plays a critical role in the socialization process. As the claims in chapter two branch out from these fundamental 'root' claims, however, my ontological position shifts more clearly to that of a constructivist one for I consider that the 'reality' of the process of the outworking of the social construction of identities can be apprehended through a *variety* of intangible mental constructions that are 'socially and experientially based, local and specific in nature [though admitting of shared elements among

many individuals and across cultures] and dependent for their form and content on the individual persons or groups holding the constructions' (ibid: 206). Thus the conceptual choices I have made, for instance, to distinguish 'identity regulation' and 'identity work' as the two most fundamental processes of identity formation, or my choice to then associate identity regulation with the key concepts of 'role' and 'discourse' are not more or less 'true' in an absolute sense, though they may come to be considered as more or less informed, elegant and sophisticated than other propositions. The same is even truer of the manner in which I have applied and developed Van Leeuwen's categories for the representational meanings of language.

The nature of the knowledge I thus present in this thesis is that it is one possible version of the truth that may coexist alongside many others. Later research on this topic might affirm or negate what I have put forward, both as regards the appropriateness of the semantic and linguistic categories by which I have proposed to make the representational meanings relating to legal professional identity more accessible and understandable, and the manner in which I have commented upon the utility of Van Leeuwen's scheme for the project of understanding legal professional identity. Ultimately, 'knowledge' on this topic will consist of the relative consensus among those competent and trusted to interpret the substance of the constructions (Guba and Lincoln, 1998: 212). My stance on the epistemological nature of this work is, furthermore, 'transactional and subjectivist' (ibid) in the sense that I do not claim to have stood apart from my inquiry into this topic in a manner akin to the objectivist, 'one-way mirror' model characteristic of positivist and postpositivist paradigms (ibid: 204–5).

There are a number of methodological implications flowing from the foregoing ontological and epistemological positions. The aim of the inquiry would seem to tend more towards understanding and constructing the positions people hold on the formation of legal professional identity (a constructivist form of inquiry – ibid: 211) – as I intimated in chapter one where I noted that the Carnegie Report tends to present the formation of legal professional identity as an object of pedagogy without at the same time considering the socializing effects of talk about legal professionals in the classroom. At the same time I do not withhold the possibility that, through the understanding of the relationship between classroom talk and the

semantic and linguistic categories which I have held generate particular kinds of meaning, a possible critique and transformation of talk in the classroom about legal professionals could take place (a 'critical' position – ibid). The manner of going about the inquiry would also seem to call for a focus on a natural and localized setting, which is true of this study in that I focused on the talk actually occurring in one particular legal classroom and did not attempt to devise an 'experiment' in which I carefully controlled various confounding variables (ibid: 204). In one sense, however, the research was 'experimental' in that I took the *a priori* (albeit justified) position that Van Leeuwen's representational categories could be applied and tested against the data generated on the representation of legal professionals in the classroom, which categories I then modified and developed as I worked with the data and according to what I perceived and felt to be most generative and appropriate. The research is thus not wholly 'grounded' in the sense that I developed these categories from scratch. The transactional and subjective nature of the knowledge generated by the research also required that I sought to engage in a dialogue with the subject of my research, seeking his emic perspective on the categories and findings I generated (ibid: 207). I have also attempted to enhance the transactional nature of my research by opening up my analytical choices to scrutiny through the use of the analytical tables contained on the accompanying CD-ROM (see section 5.4 below for an explanation of the tables).

My responses to the ontological, epistemological and methodological questions therefore, leads me to conclude that my research is indeed 'qualitative' in the sense of being a 'nonnumerical examination and interpretation of observations, for the purpose of discovering underlying meanings and patterns of relationships' (Babbie, 2004: G8).

4. RESEARCH DESIGN

The literature on research methodology similarly abounds with metaphors that attempt to capture what a research design entails. Babbie and Mouton resort to architectural or engineering contexts, describing the research design as 'a plan or blueprint' of how one intends conducting the research (2001: 74). This is suggestive of a pre-determined, clear-cut, linear process that resonates with Merriam and Simpson's definition of research design as 'organizing structure': 'The process of planning and conducting research can be divided into the tasks of (1)

identifying a concern or problem, (2) establishing a conceptual framework, (3) delineating the research phenomenon, (4) determining research methodology and using appropriate data-gathering procedures and techniques, and (5) analyzing and reporting data' (1995: 9, although in fairness they do note that the process 'is not always' sequential). Maxwell is critical of works that present research design as 'a series of stages or tasks' that are both linear and one-directional drawing inspiration, instead, from the realm of artistic production: A research design is 'an underlying scheme that governs functioning, developing, or unfolding' and 'the arrangement of elements or details in a product or work of art' (1996: 1–2). He emphasizes the mutually constitutive nature of the elements of the design, presenting an 'interactive model' that comprises of purposes, conceptual context, research questions, methods and validity. These elements form an integrated and interacting whole with each element closely tied to several others (ibid: 4 – 5). Janesick turns to the world of dance, comparing the research design process with stages of completion of a choreographic piece (warm-up, exploration and total work-out stage, and illumination and formulation) which involves both set routines (such as those found in the dancing of a minuet) and free-er movements (such as those used in the dance approach known as improvisation) (2000: 383).

While all these definitions and metaphors seem to capture an element of truth about the research design process, based on my experience the various models are better at identifying and describing the constituent elements of the design and the role that such elements play in the project than they are at capturing the nature of the process. With the vantage that hindsight affords, Maxwell and Janesick's models seem intrinsically more authentic in their emphasis upon the mutually constitutive, holistic and open-ended nature of the elements and the process of bringing them together. The metaphor that best captures my own process of consolidating a research design is the somewhat prosaic, domestic art of making white sauce – a process that entails melting a fat, adding flour to make a paste, mixing this together with milk or water and then stirring the mixture over heat until the ingredients gradually thicken into a smooth, creamy sauce. If the ingredients are not in proportion, or if care is not taken in the manner in which they are combined however, the cook is likely to produce a stodgy or lumpy mess. Each ingredient in the metaphor represents an area of focus in the design process I

followed: The fat represents the research idea or interest which I outlined at the very start of this thesis, which melted in the initial passion with which it was infused. The flour represents the literature, and here I was in grave danger of adding too great a quantity. This danger arose from the nature of my topic which necessitated having regard to at least three different bodies of literature: Research on the teaching of legal ethics and models of legal professionalism in the literature on legal education; research on identity and identity formation in a variety of disciplines; and research on discourse analysis, the different meaning potentials of language and the function of representational meanings in particular. It also arose from the fact – already intimated in chapter two above – that the literature, particularly in the case of identity and identity formation was *vast*. Although I followed various strategies to try and delimit the literature, it was only after I started engaging with the final element of the recipe – the milk or water added to the floury paste which represents my empirical data – that the choices I needed to make regarding the literature came more easily into focus. The research design process I followed was not predetermined or executed. While I was never without a sense of the phenomenon I wished to investigate, my purpose, conceptual framework, research questions and methodology emerged and coalesced over time, in relation to each other and most importantly, in relation to the empirical data.

As noted in the restatement of the purpose and aim of the research above, my reasons for deciding to rely on the resources of critical discourse analysis, and the work of Van Leeuwen in particular, will not be restated here. It is important, however, to explain why I decided to link critical discourse analysis to a case study of one particular lecturer in one particular legal classroom. Janks, in describing her research method for critical discourse analysis, says that she usually starts with a particular text and then, depending on the unanswered questions and hypotheses raised by the somewhat arbitrary entry point of that particular text, seeks out other related texts (1997: 331). In this way she is able to move from the text to the discourse(s) (ibid). The choice to rely on a case study, as Stake points out, is not so much a methodological choice but a choice of *what* to study (2000: 435). If I had decided to move from text to text in this way a variety of options were available to me. I could have obtained extracts from the classroom talk of different lecturers, either lecturers teaching the same course I selected for purposes of

the study ('Introduction to Law'), or lecturers teaching different courses in the same law school, or lecturers teaching the same or different courses in different law schools across South Africa. Apart from certain practical considerations,[51] my primary reason for eschewing these options in favour of an approach on a single lecturer was that I wanted to be able to make a clear empirical claim about the *extent* of classroom talk about legal professionals – a claim which would not have been possible if I relied on snippets of the classroom talk of a number of lecturers. A focus on one lecturer, moreover, was in line with the conceptually and methodologically exploratory nature of my research: I did not seek, for instance, to stake a claim on the content of the representations of legal professionals in South African law schools, or even within the particular law school where I work, but rather sought to determine the ways in which such representations are constituted by the language in use. I also considered that an expansion of the scope of the research to include more lecturers would entail a sacrifice in the depth of the semantic and linguistic analysis, and thus one of my chief interests in the research project.

A case may be simple or complex but it is always a bounded system that exhibits patterned behavior (Stake, 2000: 436). The first responsibility of the researcher undertaking a case study is to 'bound' the case, to conceptualize the object of study (ibid: 448). In this study the object is not merely the lecturer, but the lecturer within the context of a specific classroom and then, even more specifically, the classroom talk relating to legal professionals within such classroom. This includes, where relevant, exchanges between the lecturer and students. The purpose of the case study 'is not to represent the world, but to represent the case' (ibid). As opposed to an *intrinsic* case study, however, which is squarely focused on the particularities of a case because of a primary interest *in those particularities* and not because the case represents other cases or illustrates a particular trait or problem, an *instrumental* case study – being the form in which the present study is better classified – facilitates our understanding of something else (ibid: 437). This still entails scrutinizing a case in all its depth (Mason, 1996: 92), but rather

[51] If I had wanted to tape all the lectures of the lecturers in the same course in the same year, for instance, I would have required six research assistants, as the lectures all took place at the same time. If I was going to compare lecturers I felt it was important to compare them teaching the same content. As regards comparing lecturers at different universities, I had no funding for the research so arranging for transport to and time spent on the campus of different universities would have been difficult.

because this helps the researcher pursue a broader, external interest which, in this case, is the development of a conceptual and methodological frame for understanding legal classroom talk relating to legal professionals. Even an instrumental case study, however, will only weakly represent the larger group of interest (ibid: 446). The further responsibilities of the case study researcher include selecting the 'thematic lines' or issues (ibid: 440) around which the case can be organized and selecting patterns of data to develop these issues (ibid: 448). The thematic lines for purposes of this research are contained in the research questions articulated in chapter one, whilst the selection of data is patterned on, firstly, the primary roles constituted by the lecturer's classroom talk, and secondly on the primary elements of the social practice of lawyering as described in chapter four. Methodologically, triangulating key observations and bases for interpretation in a case study is important (ibid; Cohen & Manion, 1994: 241) as is seeking emic meanings held by the subjects of the case (Stake, 2000: 441). It is to such, and other, methodological issues that I now turn.

5. METHODOLOGICAL ISSUES

In this final section of the chapter I consider selection of the case, access to the site of the research and informed consent, collection of the data, steps in data analysis and criteria for evaluating the credibility of the research.

5.1 Selection of the case

Instrumental case studies require the researcher to choose the case; i.e. to undertake purposive sampling (Stake, 2000: 446). This is a type of non-probability sampling in which the researcher selects the objects of observation on the basis of his or her own judgment about which ones will be the most useful or representative (Babbie, 2004: 183). As noted above instrumental case studies are only weakly representative of a broader population. The 'epistemological opportunity' obtained from selecting a case on the basis of representativeness alone would seem to be quite small (Stake, 2000: 446). For this reason, Stake suggests that 'potential for learning' is sometimes a superior criterion to representativeness – to select that case from which we feel we can learn the most (ibid). This was indeed an important consideration in both the key decisions I made regarding selection of the case.

The first decision involved selection of the course 'Introduction to Law' as the unit of study in which to conduct the research. This is a semester-long compulsory course in both the undergraduate and post-graduate LL.B programmes at the tertiary institution where the study was conducted.[52] In both cases it is offered in the students' first year of studying law. From my own experience of teaching the course (three or four times before I started the research), I knew that students come to it with an enthusiasm and interest in all things relating to law which has not yet been dampened by the grind of parsing and assimilating endless legal authorities. The content of this course, more so than any other one, arguably created a space for talk about legal professionals, not least because a section of the curriculum was devoted to 'The Legal Profession' (the lecturer devoted about 2 lectures to this particular topic at the end of the lecture series). Although the students may already have preconceived ideas as to the kinds of people lawyers are (gained, for instance, from the media or through family/friends they know who are lawyers), they are 'fresh' from the perspective of determining the socializing effect of law school. The semester length of the course also enabled me to work with a reasonably (and not impossibly) large set of transcriptions. Three lectures of 45 minutes each (one 'single' lecture on a Tuesday and one 'double' on a Thursday) were presented each week (although the lecturer sometimes shortened the double lecture from an hour and a half to an hour, in which case I worked with the session as a single lecture – see lecture 22 for instance). I considered it necessary, for purposes of making a claim regarding the extent of talk about legal professionals within the classroom, to observe and video-record all 22 lectures constituting the series.

The second decision involved the selection of the lecturer teaching the course. Every year, the 'Introduction to Law' class comprises about 600 students who are then divided into smaller classes. In 2008 there were six undergraduate classes (of approximately 100 students each) and one postgraduate class (of approximately 15 – 20 students). The allocation of lecturers to these courses is an administrative task undertaken by the Timetabling and Workload Committee –

[52] The undergraduate LL.B programme at the institution where the study was conducted is a four-year degree ordinarily taken by students straight out of secondary education. The post-graduate LL.B is a two- or three-year degree (depending if there has been a law major), taken by students who already have a 3-year university degree. There are only about 20 postgraduate LL.B students each year as the undergraduate stream is by far the more popular.

one in which I have no involvement in or power over whatsoever. I was thus required to make my selection from those lecturers who had been allocated to, and were willing to teach the course. My primary criterion in making the selection was that the subject had to have had some practical experience in the legal professional world, to have known that world, as it were, from the inside. This answered to my feelings of incompleteness as a lecturer in having never functioned within the ordinary realms of the legal professional world myself and hence my curiosity to see how a person who had been an insider taught the course differently. It also, I believe, afforded some authenticity to the representations made by the lecturer.[53] Given this criterion there was really only one candidate for the research from the group of allocated lecturers – a middle-aged white male who has taught at the institution for a number of years but who, prior to that, had done his articles of clerkship as an attorney, worked as a public prosecutor and then a magistrate for a number of years, and then on a Justice-College[54] project raising awareness of the new Constitution amongst magistrates and judges (though he noted that there were 'many other little detours and intermezzos and dramas and the other things' inbetween (I1:60:271 – 2)[55]). He is, moreover, married to a very successful currently practicing attorney (identified in the transcripts as 'Isobel'), and regularly socializes with other attorneys, advocates and judges. He therefore not only had a background in legal practice, but a rich and diverse background that spanned both the 'private' and 'public'[56] divides of the profession. It is nevertheless a limitation of the study that his experience was limited to these particular forms of practice (for instance, he has had no experience of legal consulting work or of work in alternative forms of dispute resolution).

Notwithstanding his rich experience in the legal profession, my subject's stance toward it and to legal professionals more generally, as ascertained in the interviews I conducted with him,

[53] The question of authenticity in the sense of my subject having been a practising legal professional at some point in his career seemed to be the most significant factor grounding the validity of my research when I presented to a group of South African legal academics at the South African Law Teachers' Association held in January 2011 in Stellenbosh. The very first question asked was whether my subject had been 'in practice'.

[54] The Justice College is an institution attached to the national Department of Justice, which primarily undertakes the training of public prosecutors and, to a lesser extent magistrates. It is located in Pretoria, South Africa.

[55] The referencing system which I utilized for both the transcribed lectures and for the interviews conducted with the subject is explained in section 3.5.3 below.

[56] The construction of the legal profession in terms of public and private spheres is discussed more extensively in chapter 5 below.

could best be described as ambiguous, if not cynical. In describing his decision to study law, for instance, he stated: 'I started off in law … I wouldn't like to call it an accident because that sounds terrible but because it was the natural continuation of what I had been doing. There was nothing better to do' (I1:61:274-77). Two factors appeared to push him in the direction of legal studies. At school he had some success as an orator, though he had always been overshadowed by a good friend who had won the National Orator's competition and wanted to study law. Because his friend 'had this vision of becoming an orator and a lawyer … that was peer pressure' (I1:64:312–3). His mother was a lawyer and urged him to 'go do law …You're a good orator and you are good with words, do law' (I1:67:329 – 30). He admitted, however, that he would have liked to study architecture in which he had a 'keen interest' (I:66:325).[57] But his businessman father was dead against the idea, telling his son '[p]lease, you know, there is no work for architects. You are not going to make a living. Just forget about it. I am not going to pay for you to waste your money and not be able to make money' (I1:66:320–3). All of these factors therefore, together with a certain lack of career guidance (see I1:62), prompted the lecturer to pursue his career in law. There were no 'lofty ideals' at the beginning, more of an 'absence of something else' that he could study (I1:68:331, 337).

His ambiguity extended to his current role as an academic lawyer. 'I am not a very good academic lawyer … I am not a good true blue lawyer', he declared (I1:69:340–2). This dis-identification with the role seemed to stem both from a sense of ennui in legal matters, as well as his perception of lacking the 'legal killing instinct'. He said, for example: 'You know, I sit in the tearoom and I listen to my colleagues argue a point and if I don't fall asleep which often happens because it's so boring, you know … I don't understand what they are arguing about. I can't see the point and I don't, I haven't got that legal killing instinct' (I1:70:343–6). He maintained, instead, that he should have studied history which was his 'passion' (I1:69:340).[58] His characterization of the key personal characteristic required of being a lawyer as the 'legal killing instinct', together with his characterization of the legal profession more generally as a

[57] This interest came through at various points in the series of lectures when, for instance, the lecturer would describe the architecture and design of various court buildings to the students.
[58] This interest, and particularly the lecturer's interest in Roman legal history, also came to the fore at numerous points in the series of lectures.

'cut-throat business', a 'dog-eats-dog profession' (I1:75:375) pointed to him being an *illustrative* case for purposes of the research (Stake, 2000: 436), i.e. one who was likely to exemplify the kinds of claims made in the literature on the teaching of legal ethics in classroom talk. I regarded this as a positive attribute as it would assist me in identifying the semantic and linguistic patterns that constituted such talk. It is, however, also a limitation of the study in that the discursive basis of a non-cynical attitude towards the lega profession is not investigated through the choice of this particular subject.

Rogers *et al.*, in their description of the CDA tradition, note that scholars working within this fold often distinguish their work from other 'non-critical' forms of discourse analysis by arguing that their analyses move beyond description and interpretation of the role of language in the social world toward explaining *why* and *how* language does the work that it does (2005: 368). This corresponds with Fairclough's third tier of analysis outlined in chapter two.

5.2 Access to the site of research and informed consent

The ethics of social research necessitates obtaining the consent and co-operation of the subjects who are going to assist in the investigations and of significant others in the institutions or organizations providing the research facilities (Cohen & Manion, 1994: 349). As Stake notes, '[q]ualitative researchers are guests in the private spaces of the world' (2000: 447). Although it was not problematic for me to obtain access to the research site as it was conducted at the institution where I am employed (though unwise, as Cohen & Manion caution, to take consent and co-operation for granted, 1994: 355), it was necessary for me to firstly obtain consent clearance from the university ethics committee for non-medical research. To this end I submitted a detailed proposal setting out the substance of the proposed research together with annexures that included a participant information sheet, informed consent form, and procedure for obtaining student consent. The ethics committee considered the proposal and granted clearance on 17 July 2006 (see **Appendix 2A**). The participant information sheet describing the object and nature of the proposed research, the methodology and data collection methods to be employed, and measures to ensure the confidentiality of the subject's inputs was made available to the subject prior to the commencement of the research. The data

collection methods included observing, video-taping and transcribing the subject's lectures in the selected course as well as interviewing the subject and audio-taping and subsequently transcribing the interviews. Measures to ensure the confidentiality of the research and to demonstrate respect for the subject included the opportunity for the research subject to check the interview and lecture transcripts and to review drafts of the subsequent analysis and discussion. I also guaranteed that the subject's identity would not be disclosed in the interview or lecture transcripts or at any place in the draft or final PhD reports, offered to return the audi- and video files generated during the course of the research and provided an assurance that none of the data generated by the research would in any way be used to influence the subject's status at the institution concerned. After discussing the contents of the participant information sheet and possible negative effects on the lecturer's teaching, the selected lecturer signed the informed consent form on 15 January 2008, consenting to all the data collection methods proposed without imposing any conditions (see **Appendix 2B**).[59]

It was not only necessary to obtain the informed consent of the lecturer in the selected course, but also of the students taking the course in the particular year in which I conducted the data collection. Even though the focus of my research was the law lecturer and not the students, I nevertheless considered asking the students to sign written consent forms as well. Students have a right to a learning environment that is not disruptive and that respects their privacy as individuals. The students concerned must therefore permit any unfamiliar intrusion into that environment. Prior to obtaining ethical clearance, I sought the advice of the Head of School at the time as well as a colleague who was a member of the university ethics committee for non-medical research who were both of the opinion that, given the focus of the research, it was not necessary to obtain the students' written consent. The following course of action was therefore approved as part of the ethical clearance and carried out by myself in February 2008 when the lectures commenced: At the first lecture the lecturer introduced me to the class and allowed me time to explain the nature and object of the research, the fact that I would be sitting in the class for the duration of the semester as a non-participant observer, and that I

[59] Appendix 2B contains the signed copy of the informed consent form with the section in which the lecturer printed his name blacked out in order to protect his identity.

would be video-recording the class for transcription and analysis at a later stage.[60] Students were assured that they would in no way be identified in the video transcripts and that nothing that appeared in the video could or would be used against them in any decision taken by the lecturer concerned or any other member of staff of the law school. They were also be assured that the video files would not be made available to outsiders. Students were invited to comment on whether they felt the research process would be intrusive and how this might be minimized. Whilst arrangements could have been made to accommodate students who objected to the research being conducted in their learning space, they made no comments or objections in the first introductory lecture or at any time thereafter.

5.3 Data collection and transcription

In case studies it is appropriate to use triangulation, which Cohen and Manion define as 'the use of two or more methods of data collection in a study of some aspect of human behavior' (1994: 233, 241). Triangulation is commonly assumed to enhance the validity of the study (Maxwell, 1996: 88, though see my reference in section 5.5 below to Janesick's critique of the use of validity, generalizability and reliability to evaluate qualitative research). A researcher contemplating the use of triangulation is confronted with three broad questions: 'Which methods are to be selected?' 'How are they to be combined?' And 'How are the data to be used?' (ibid: 241–2).

In my initial research design I sought to rely on two methods of data collection: Observation and video-recording of the lectures in the selected course over a period of six months, and interviewing of the lecturer. In both cases I envisaged producing detailed textual transcriptions containing *everything* that had been said either in the lecture or the interview. These methods

[60] Unfortunately, as events unfolded this only occurred at the end, and not at the beginning of the first lecture in the course. I had planned to commence observing and recording the lectures in February 2008 but hit a snag when my ten-month old son required major reparative open-heart surgery which took place on 1 February 2008. The lecture times clashed with the limited visiting times in the intensive care unit (ICU). Not wishing to delay my data collection by a year I engaged the assistance of a postgraduate student who recorded the lectures for me during the month of February. On the occasion of the first lecture, which took place on 12 February, very soon after the operation, I rushed from the hospital to be able to present the object and nature of the research to the students and to obtain their consent before the lecture ended. This was not ideal but the best I could achieve in what were extremely trying circumstances. I took over the recording of the lectures in March, when my son was released from the ICU.

were selected because at the beginning of the research process I was also toying with the idea of exploring how lecturers *themselves* – rather than their representations of the professional world – constituted models for the identity formation of students. In addition to studying their representations in the classroom, I had thought to explore the extent of their own professional development in the interview in order to examine, in effect, how their own professional identity formation structured their presentation of learning resources in the classroom. As I proceeded with the study I realized this constituted a distinct research focus that could easily ground another PhD and chose instead to focus only on the representation of legal professionals in the lecturer's classroom talk (which could and in fact did involve him referring to himself in professional roles, but encompassed much more than that).

As a result, the primary form of data collection upon which I relied was the video-recordings and observations of the entire series of lectures in the selected course. Concern relating to the relationship between reliance on this source of data alone and the validity of the data collection may be alleviated by having regard to Ensor and Hoadley's (2004) work on the relationship between classroom observation and trustworthy claims in pedagogy. They distinguish between inductive approaches (often described as classroom ethnography) that call for the fullest possible records of classroom life from which theoretical frameworks can be deductively derived. Such approaches are usually associated with exploratory, small-scale studies and involve the use of open instruments such as field notes, audio- or video-recordings or a combination thereof (ibid: 81–2). Deductive approaches on the other hand, operate deductively from theory to the development of categories and sub-categories that then constitute a lens to develop classroom observation instruments that sample particular aspects of classroom life. The data set produced thus tends to be discrete rather than continuous (ibid: 82–3). The distinction between the two approaches is not watertight. For instance, theory also shapes the collection of continuous data, guiding what the researcher foregrounds and backgrounds – as in this research where the focus of the video-recordings is most often on the lecturer and not on the students. Nevertheless, the point to be underlined is that validity in data collection is more of an issue in the deductive approach and the use of closed schedules because these involve *a priori* decisions relating to sampling. In the case of an inductive approach using open

instruments, sampling and the validity thereof arises in what one decides to focus upon but emerges as more of an issue in the process of analysis where the trustworthiness of the researcher's claims are linked to how exhaustively she treats the collected data sets (ibid: 83). As such, reliance on the transcribed video-recordings and related classroom observations as the main source of data is not a fatal validity threat to the study, provided that I account for my process of analysis of such texts in as rigorous a manner as possible.

Because I wished to reproduce an as accurate-as-possible textual account of the lectures and the interviews it was necessary to select a particular method of recording. For the lectures I decided to obtain audio-visual material by taping each lecture with a small camcorder. In this way I hoped to capture as much detail of the lecture as possible – the lecturer's positioning in relation to the class, his body language, the students with whom he was interacting (but not the reactions of the students when he was not interacting with them), and so on. I discussed the use of this method with the research subject prior to commencing the research and he was of the opinion that whilst he could be conscious of the fact of being video-taped at first, after a while he would forget about it. My presence in the lectures was of the non-participant variety (ibid: 293) and I tried to position myself in the physical space of the classroom in the least conspicuous manner possible. At times it was apparent that the lecturer remembered the presence of the camcorder in the lecture. For example, in advising the students to take time in reading their instructions from clients he states '[w]e are not working with the lives of other people, you are not a paediatrician or a cardiac surgeon, nobody's going to die, I've never seen anybody die in a law office' L16:5:24–5. His references to 'paediatrician' and 'cardiac surgeon' may have been included to index an awareness of my own engagement with these professionals a few months prior (see note 59 above) and thus point to his awareness of my presence in the class. Such instances, however, were very rare. For the interviews, I considered it sufficient to use a digital dictaphone as this adequately captured the lecturer's talk as well as the tone and inflection with which he said particular things.

The data collection period for the lectures extended from 12 February till 17 April 2008 and resulted in 22 transcripts totaling 10 618 lines of text. The complete lecture transcripts are saved on the CD-ROM accompanying this thesis, while the date and main topic of each lecture

is outlined in **Appendix 3**. Miles and Huberman note that any transcription process is 'fraught with slippage' depending on the knowledgeability, skill and care of the transcribing person (1994: 51). Because I wanted the lecture transcripts to reflect as much detail as possible (including all the 'uhs', 'ers', mispronounciations and so on, but also certain non-textual data such as tone, emphasis, body language, positioning) I undertook to transcribe the lecture material myself. I was concerned that a professional transcriber would not take sufficient care in recording these other aspects and, additionally, all of the service providers I contacted worked only with audio and not audiovisual files. Initially my supervisors and I experimented with transcribing extracts from the lectures. My *modus operandi* thus consisted in viewing the audiovisual file of the lecturer as soon as possible after it had occurred, using a table to chunk the video into themes which I was able to identify by their time and duration, and then evaluating whether each chunk was worthy of transcribing as an extract. After proceeding in this way for a few of the lectures I became concerned that this methodology would cause me to lose some of the subtlety of talk about legal professionals in the classroom, which was often interspersed among discussion on other topics. I therefore decided to transcribe the lectures in their entirety, which thus also enabled me to gain a sense of the proportion of classroom talk devoted to legal professionals. The transcription process took me a very long time, but I was able to proceed with this task during the year in which I put the degree in abeyance (2009). The great advantage derived from this labour was an intimate familiarity with the content of the lecture data.

The interview took place over six sessions of an hour to an hour and a half each during June 2008 and resulted in six transcripts totaling 4 110 lines of text. The complete interview transcripts are saved on the CD-ROM accompanying this thesis. The interview that I conducted with the subject was in-depth and loosely-structured in line with what Mason identifies as features of 'qualitative interviewing'; i.e. a relatively informal style; the assumption that data are generated by the interaction; and a thematic, topic-centered and narrative approach (1996: 38). For purposes of preparing for the interview, I drew up a semi-structured interview schedule (contained with the interviews on the accompanying CD-ROM) that I provided to the lecturer before the time. The schedule divided the interview into the three broad thematic

areas, namely the lecturer's own conception of legal professional identity, his identification with that model and the manner in which his own sense of professional identity had formed, and the manner in which he sought to impart legal professional identity in the classroom. While the schedule to a certain extent guided us as to the breadth, scope and sequence of the questions, as with interviewing of this nature it was necessary to think on the spot (ibid: 44) when the subject's answer to a question suggested a different line of inquiry, when he seemed to be digressing on a particular point or when the sequence of questions needed to change. For the interviews, I was satisfied in using the services of a professional transcriber whose work I checked against the content of the audio files and corrected, where necessary. The complete transcripts of the lectures and interviews are saved in the relevant folders on the CD-ROM accompanying this thesis.

5.4 Data analysis

For purposes of conducting the data analysis, I used the code-based theory building software package ATLAS.ti. The use of qualitative data analysis (QDA) software in research is dogged by a variety of false hopes and fears. Chief among them is the notion that the software somehow does the analysis – that one would be able to 'dump' one's text into a programme and see what comes out (Weitzman, 2000: 806). This is a major misconception. As Weitzman notes, 'using software cannot be a substitute for learning data analysis methods. The researcher must know what needs to be done and do it. The software provides tools to do it with' (ibid: 805). The software I employed served as an analytical tool in the following ways: Providing a place to store the lecture transcripts and to search quickly, easily and effectively across the 22 documents; in the coding of the data, by storing and keeping track of the codes I had used and the modifications made to codes as the analysis proceeded; by enabling me to retrieve the data segments attached to particular codes and produce code reports; and by helping me to produce and keep track of memos attached to particular codes. For me, ATLAS.ti vastly reduced the technical or administrative difficulties associated with analyzing a large amount of textual data consistently and relatively quickly, thus opening up space to think coherently about the meanings in the data.

My first step in the data analysis process was to devise a system for accurately referencing the texts. I numbered the lecture transcripts sequentially and then read through each transcript in order to distinguish and number each paragraph. Every change of speaker was accommodated in a paragraph break, but the texts were also marked by very long stretches of the lecturer speaking alone and I divided these sections into paragraphs as well. As a last step, I used the 'line numbers' function in Microsoft Word to insert line numbers. I then adopted a citation system that captured the largest to the smallest unit, thus L4:10 refers the reader to Lecture 4, paragraph 10; whilst L16:55:237–9 refers the reader to Lecture 16, paragraph 55, lines 237 to 9. Where relevant in my overview of findings and discussion of findings I was therefore able to refer to either a particular paragraph in a particular lecture, or to particular lines or a line in a particular lecture. I followed a similar method for referencing the interviews (thus I3:40:357 refers to the third interview, paragraph 40, line 357).

As noted above, I transcribed each lecture verbatim and in its entirety. This included the interaction between the lecturer and students. I identified the students numerically, allocating a number to each one as they spoke in the course of the lecture series. Thus 'Student 1' was the first to speak in the lectures and was identified in this way throughout the series. I kept track of descriptors of each student (principally their gender and race in addition to other signifying features) in a separate excel sheet. This enabled me, for instance, to know that when the lecturer was interacting with Student 1, he was interacting with a white female. As my findings will show, this was important at times, particularly as regards the representation of legal professionals as social actors.

Having thus devised a referencing method, I proceeded with the coding of the data. As Miles and Huberman so accurately note, 'coding is analysis', a process that entails dissecting a text into parts while keeping the relations between those parts intact (1994: 56). Codes are tags or labels for separating texts into units of meaning and they can be descriptive or inferential in nature (ibid). Descriptive codes, which assign a chunk of text to a particular phenomenon, are typically created before inferential codes, which capture more complex, latent meanings (ibid: 58). There are different methods for generating codes: The researcher could create a provisional 'start list' of codes prior to fieldwork or, following a more inductive, grounded

approach, generate codes as they appear to emerge from the texts, moving toward increasingly abstract codes through iterative reviews (ibid). The former approach has been criticized for being 'a priori' and for moulding the data into pre-existing conceptual schemes, the latter is said to encourage a more open-minded and context-sensitive approach (ibid). However, as Miles and Huberman observe, even with grounded theory approaches the ultimate objective is to match the observations to a theory or set of constructs (ibid) – it is therefore not as unstructured or inductive as some would maintain.

Since part of the conceptual frame adopted for this research entailed examining the utility of the model of social practice and the choices associated with representing the different aspects of practice (as developed, principally, in the work of Van Leeuwen) for purposes of better understanding identity regulation of legal professional identity, I had an extensive 'start list' of codes with which to work. As described in chapter four, however, Van Leeuwen's work provided too-extensive a list. After struggling and experimenting with some of Van Leeuwen's categories in relation to my data, I opted for a relatively streamlined set of codes that nevertheless allowed for complex layers of descriptive and inferential analysis. A detailed account of this process is provided in chapter four.

I first developed my set of codes in relation to what I considered to be the richest portion of the data, namely the last half of lecture 21 and lecture 22 in which the focus of the lectures was the legal profession as such. When I was satisfied that the set of codes I was using would allow me to construct a coherent narrative, I used them in relation to the rest of the data. The first layering of descriptive codes entailed distinguishing representational meanings in the text relating to particular legal professional roles. The terms designating legal professional roles were known, but not predetermined by me. My background in law enabled me to *recognize* and distinguish between these roles. I was thus able to determine that a chunk of text, for instance, related to the role of the attorney, another related to that of the judge, another to the role of the Director of Public Prosecutions, and so on. I named the chunks of data relating to each professional role **'quotations'**. Using ATLAS.ti, I was easily able to produce a report of all the quotations for a particular legal professional role. I numbered these sequentially and inserted the exact location of the quotation using the referencing system outlined above. The

lists of quotations attached to each of the primary roles I analyzed for purposes of my findings are attached as **Appendices 4A – J**. Most of the quotations I identified were distinct and a few were partially overlapping (as when the lecturer would start off talking about advocates and then shift to talk about judges). In a few instances, however, his talk of the different legal professionals was so interwoven that it was difficult to assign the quotation to one professional role rather than another. The following quotation (from L22:66) serves as an example:

> **LECTURER:** OK. Those are the two, um, parts of the profession that I think most of you are going to go into. Um, there .. those are the two private, uh, private parts of the profession. Um, and in both these, um, uh, professions, you will make, you'll make a living. Definitely. You'll make a good living. And the higher up you go in these professions the better your living is.

In this passage the lecturer is referring to both the role of the attorney and the role of the advocate because these are the two professional roles associated (both in terms of my own knowledge and with the lecturer's subsequent exposition) with the 'private parts of the profession'. Separating this passage into separate 'bits' relating to each role would have been impossible and I therefore coded the quotation for both roles. In the list of quotations for each role I have indicated where a quotation was coded twice in this manner by listing the legal professional roles in square brackets (e.g. [Attorney] [Advocate]) above the particular quotation, and in my findings I use the sign of equivalence (e.g. Att-Q29=Adv-Q49) to show where the same quotation was used in different sets. The latter example also shows that I developed a system of abbreviations to refer to particular quotations. Thus the letter 'Q' indicates that the reader should have regard to the quotations relevant to a particular role, while 'Att' refers the reader to the set of quotations relating to the 'Attorney'. The number '29' indexes the 29th quotation in the attorney set. The list of abbreviations used to refer to the different legal professionals is as follows (a consolidated list of all the abbreviations used for quotations and extracts is contained at the beginning of chapter five):

AC	Articled clerk
Att	Attorney
Adv	Advocate
DPP	Director of Public Prosecutions

J	Judge
L	Lawyer
LA	Legal Academic
M	Magistrate
P	Public Prosecutor
SAdv	State Advocate

Figure 4: Abbreviations used to designate legal professionals.

My first layer of descriptive coding thus enabled me to produce sets of quotations from across the 22 lecture transcripts grouped according to particular legal professional roles. The next (and more onerous) step, entailed analyzing each *set of quotations* according to the codes I had derived/developed from Van Leeuwen's scheme. As outlined in **Diagram 4.1** in chapter four, the model I developed was categorized along four broad dimensions – social action, circumstances of social action, social actors and values – with each dimension further subdivided into a number of categories. The analysis thus entailed analyzing **each set of quotations four times**, reading and coding *the same data* first for the representation of social action (and its relevant sub-categories), then for the representation of circumstances of social action (and its relevant sub-categories), and so on. It thus involved seeing the same quotation from different vantage points, invoking different portions of the text. For example, the text below (Att-Q2, or the second quotation in the attorney set) represents the attorney in social action (e.g. 'looking' for a piece of legislation; 'going' to a client's library; and 'falling around') but also represents the circumstances of that social action (locating the attorney, for instance, in the 'client's library'; or implying a stressful state in that the attorney is 'in a hurry'):

> **LECTURER:** ... Ladies and gentlemen it might seem like a very stupid trivial detail um but if you are looking for a piece of legislation and you're in a hurry and its not the law library uh where you now know, hopefully all of you now know where the Butterworths and the Jutas um uh statutes are. Go to a um uh uh client's library or you go into another attorney's library you must immediately be able to go to the Butterworths. Um you know, it's no use you falling around there saying 'um we oh we oh where will I find the ….' You must know. What's going on. (L6:47)

The second layer of analysis thus involved dissecting each quotation into different 'bits' of text. To avoid the clumsiness and confusion that would have resulted from referring to 'sub-

quotations' I have preferred the generic term of **extracts** to refer to these bits. An 'extract' thus refers to text within a quotation that relates to one of the categories I developed to describe the representation of legal professionals in social practice. As with the quotations, I developed a system of referencing for each set of extracts, as follows:

SA	Social Action
CSA	Circumstances of Social Action
SAct	Social Actors
V	Values

Figure 5: Abbreviations used to designate main analytical categories.

Using the *quotation* number as a point of reference, I then ordered each set of extracts alphabetically. Thus 'Att-SA1**a**' refers the reader to the first extract representing social action in the first quotation of the attorney set; J-CSA4**b** to the second extract representing circumstances of social action in the fourth quotation in the judge set, and so on.

In order to demonstrate the depth and complexity of my analytical process in as transparent a manner as possible, I developed analytical tables for each of the major legal professional roles I analyzed – these being the ones that were associated with the greatest number of quotations in the data set. There are four analytical tables for each professional role, one each for the extracts pertaining to social action, circumstances of social action, social actors and values respectively. The format of the tables for these four categories are not exactly the same, for they capture the different sub-categories pertaining to each category (as in the reference to 'Active', 'Transactive', 'Semiotic' social actions below, for instance). The sub-categories are outlined in detail in chapter four.

JUDGE: ANALYTICAL TABLES

1: SOCIAL ACTION (A= Active; T= Transactive; S=Semiotic; P=Passive; NT=Non-transactive; M=Material)

JUDGE QUOTATION NO.	EXTRACTS: SOCIAL ACTION (SA)	A	T	S	P	NT	M	Object (not calculated – for guidance only)

1	that's where you have the different judges uh who *gives* on the same set of facts uh four or five different judgments	X	X	X				PEOPLE – BACK

2: CIRCUMSTANCES OF SOCIAL ACTION (CSA)

JUDGE QUOTATION NO.	EXTRACTS: CIRCUMSTANCES OF SOCIAL ACTION (CSA)	CIRCUMSTANCE TYPE
1	NONE	
2	you can believe on a spiritual level, you can believe 'this is how law works, law is just a reflection of a higher law' and still be a judge and sit in judgment of others objectively.	EMOTION

3: SOCIAL ACTORS (SAct)

JUDGE QUOTATION NO.	EXTRACTS: SOCIAL ACTORS (SAct)	CLASSIFICATION/CATEGORIZATION NOMINATION/PARTIES
1	NONE	
2	sit in judgment of others objectively	PARTIES – Included

4: VALUES

JUDGE – QUOTES	EXTRACTS: VALUES (V)	CONTENT	FORM
1	NONE	-	-
2	you can believe on a spiritual level, you can believe 'this is how law works, law is just a reflection of a higher law' and still be a judge and sit in judgment of others objectively.	INTERNAL GOODS – Objectivity	MORAL EVALUATION

Figure 6: Extracts from analytical tables for the role of the judge.

The analytical tables accordingly detail every single choice I made relating to the analysis of the data. They are saved in the relevant folder and sub-folders on the CD-ROM accompanying this thesis. The write-up of my findings in chapter five references the extracts in the analytical tables extensively and inclusion of the tables thus enables the reader to check these references him or herself.

As described in chapter four, after experimenting with various frames for the write-up of the findings, I decided upon a narrative that was in the first instance structured around the main legal professional roles I found in the data. In undertaking the write-up I was able to see that

the roles were linked and, as described in greater detail in chapter five, was able to group some of the roles into a 'preferred' career path, and others into a 'shadow' career path. Within each role I then built the narrative around the analytical categories of social action, circumstances of social action, social actors and values respectively. As Janesick notes, the ultimate decisions about the narrative reside with the researcher. 'Like the choreographer, the researcher must find the most effective way to tell the story and to convince the audience of the meaning of the study (2000: 389). My narrative was supported by the use of 'quasi-statistics' (a term coined to refer to the use of simple numerical results that can be readily derived from the data) (Maxwell, 1996: 95). As Maxwell observes, many of the conclusions of quantitative studies have an implicit quantitative component (ibid). For purposes of my research, for instance, I was able to count the number of times forms of social action were coded as active or passive, transactive or non-transactive, and so on and express these as percentages of the total number of extracts relating to the phenomenon in question.

The final step in the analysis entailed comparing the lecturer's representations across the main legal professional roles in order to determine the primary themes relating to legal professional identity that could be said to emerge from the lecturer's talk. In undertaking this task I also had regard to the themes suggested by 'official' discourses on legal professionalism and the discourse that emerges from the literature on the teaching of legal ethics outlined in chapter one. I relied in the first instance on cognitive mind-mapping to determine the relationships amongst the themes evident in my findings. This enabled me to see nodes and clusters in the data. The second technique entailed drafting a comparative table for each of the main conceptual claims of the thesis in order to determine how the findings relative to each professional role related to the claim. The comparative table, in particular, facilitated my discussion of the findings in chapter six. The quasi-statistics relevant to each role were also valuable in assessing the amount of evidence related to each theme.

5.5 Strategies for ensuring the credibility of the research

It is customary for researchers to respond to the issue of the validity, reliability and generalizability of their research, irrespective of whether they are working in a quantitative or

qualitative paradigm. Janesick, however, is critical of this 'trinity' – which she argues is derived from a psychometric perspective – to research of a qualitative nature (2000: 393). The criteria of reliability (in the sense of replicability) and generalizability are, in her view, 'pointless' in case studies in particular, where the value of the study is at least in part its uniqueness (ibid: 394; see also Maxwell, 1996: 91). Wodak and Meyer similarly argue that classical concepts of reliability and objectivity employed in the domain of quantitative research cannot be applied to assess the quality of qualitatively-oriented methods such as CDA in an unmodified fashion (2009: 31). Rigorous 'objectivity' cannot be reached by means of discourse analysis. Each analysis 'must itself be examined as potentially embedding the beliefs and ideologies of the analyst and therefore guiding the analysis towards the analysts' preconceptions' (ibid: 32).

I nevertheless consider it important to respond to the question of validity, in the sense of how credible or believable the research is. Maxwell proposes that the key concept for validity is the validity threat, or 'how you might be wrong' (1996: 88), and highlights the specific validity threats that arise in the case of description, interpretation and theory (ibid: 89).

The main threat to valid description is inaccuracy or incompleteness of the data (ibid). This is largely solved by the audio-visual recordings of the lectures and verbatim transcription of the recordings (ibid). As noted above, I recorded all 22 of my research subject's lectures on video and undertook the detailed transcription of this material myself. This produced what Maxwell refers to as 'rich data'; i.e. data that are rich and complete enough to provide and full and revealing picture of what is going on (ibid: 95).

The validity threats to interpretation are more complex. They include the possibility of researcher bias – the imposition of the researcher's own framework or meaning which can lead, for example, to the selection of data that fit the researcher's existing theory or preconceptions (ibid: 90); and reactivity, being the manner in which the researcher influenced the setting or individuals studied (ibid: 91). I have already covered the issue of reactivity in discussing how I managed the issue of data collection, and the effects that my video-taping of the subject's lectures could have had, in section 5.3 above.

My response to the problem of researcher bias has been five-fold: Firstly, as outlined in section 2 above, I have attempted to bracket and articulate my own subjectivities or possible biases. Secondly, I have solicited feedback from a variety of people, primarily through my participation in a group of PhD students working under my supervisor Professor Yael Shalem. Maxwell notes that soliciting feedback from others is an extremely useful strategy for identifying validity threats and exposing biases, assumptions and flaws in one's own logic or methods (ibid: 94). The PhD group, which came into existence at the time I registered for the PhD and is still running, generally meets on a three-week to monthly basis for two hours allowing students who are at various stages of their research to present their work in order to obtain critical and constructive feedback. Over the years, I have had an opportunity to present to this group four or five times, and each occasion was valuable in causing me to question my approach, methods or interpretation more deeply. In January 2011 I also had the opportunity to present my research at the annual meeting of the Law Teacher's Association of South Africa in Stellenbosch, South Africa. Furthermore, at all times the research was conducted under the supervision of both an education professor and a legal professor. This was done in an attempt to ensure the credibility of the research for both an education and a legal audience. Fourthly, as noted in the section on data analysis above, my development of the analytical tables, and their inclusion in this thesis, was done with the intent of opening up my analytical choices to scrutiny and this fact alone caused me to seriously question and consider each choice as if from an outside perspective. The final strategy I employed – that of the 'member checks' or 'respondent validation (Babbie & Mouton, 2001: 275–6) – is one of the main ways of guarding against researcher bias. The purpose of a member check is to allow those who are the subject of research to affirm that the research, including description, interpretation and theory-building, is accurate and authentic. My research subject expressed a wish to be involved only at the end of the research process and did not therefore exercise the opportunity to check the transcripts or be involved in the data analysis process. I provided him with a near-final draft of the thesis together with the analytical tables and we met about two weeks later on 10 August 2011 to discuss the findings and claims I had put forward. The lecturer affirmed that the findings and my discussion thereof resonated with him. He remarked that the conceptual framework and methodology had produced a piece of work that was 'extremely clear' and lucid, noting that it

could so easily have drifted into 'hogwash' or 'anecdotal rubbish'. He was not really surprised at the extent to which representations of legal professionals featured in his classroom talk, admitting that one of his objects had always been to instill in the 'children' that they are one day going to be professionals. The value of being part of this particular research for him was that while he had formerly talked about legal professionals 'intuitively' he had now resolved to make his representations of legal professionals a formal part of his teaching methodology. At this meeting I expressly asked him whether there was any aspect of the report which he desired should be left out on ethical or personal grounds (I was thinking, for instance, of the revelation of his wife's salary at one point in the lectures), but he insisted that he was completely comfortable with the report's content and that nothing should be excluded.

4. SUMMARY

This chapter has outlined the research paradigm, design and methodologies I selected for purposes of engaging with the research questions identified at the end of chapter one, and grounding the conceptual claims identified at the end of chapter two. Whilst avoiding an upfront labeling of my research as falling within a qualitative paradigm, my responses to key ontological, epistemological and methodological questions indicate that the research is clearly of a qualitative orientation. I have emphasized the integrative and iterative manner in which I was able to develop my research design and put forward reasons for situating my use of CDA within a single case study. As regards methodological issues: I have outlined my criteria for the selection of the course in which the study was conducted as well as the research subject; fully articulated the manner in which I gained access to the site of research as well as the ethical, informed consent of my research subject and the students he taught in the year in which the research was conducted; explained and justified my methods of data collection; provided a detailed account of my processes of data analysis; and set forth the strategies I adopted to enhance the credibility of the research. In the next chapter I focus on the manner in which I developed the primary codes for the data.

CHAPTER FOUR

DEVELOPING THE ANALYTICAL CODES

1. INTRODUCTION

The purpose of this chapter is to provide an account of how I went about developing a workable set of codes for analyzing the lecture material. One of the key claims framing this research is that the elements of social practice – as constituted by a range of sociosemantic categories and their linguistic realizations – provide a useful schema for understanding *how* representations function as the raw materials out of which a professional identity is fashioned. In exploring this claim, my initial aspiration was to make use of Van Leeuwen's richly detailed identification and analysis of such categories and their realizations in *Discourse and Practice* (2008). As intimated in chapter three, however, I found that taking too much from the smorgasbord of options he presents actually inhibited my construction of a narrative about the patterns of representation relating to legal professionals in classroom talk. It was therefore necessary to be selective.

As indicated in chapter two, I commence this chapter with an explanation of what I understand by representational meanings as distinguished from interactional and identificational meanings. I then provide a birds-eye view of the sociosemantic inventory of representational meanings Van Leeuwen develops in *Discourse and Practice*. The third part of the chapter tracks my two analytical phases – the first phase of struggle arising out of my attempt to work with too many codes, and the second phase of selection, supplementation and refinement. The chapter concludes with an explanation and demonstration of the package of codes I subsequently used to parse the data.

2. DISTINGUISHING REPRESENTATIONAL, INTERACTIONAL AND IDENTIFICATIONAL MEANINGS

In section 4.2.1 of chapter two I outlined my understanding of the multi-functionality of language with reference to Fairclough's three major types of meaning in language. These relate

to patterns in representation, structuring action and interaction, and identification respectively. One of the most illuminating moments in my research journey was realizing that representational, interactional and identificational meanings combine in different ways to construct different roles (identity regulation, the main focus of this thesis) as well as speakers' identifications with these (identity work) *within a single text*. A text captures a social event (such as a classroom lecture) in all its complexity, but the event may be guided by more than one social practice and hence constitute multiple roles. This is particularly true where one social practice is recontextualized within another (as when the social practices of lawyering are spoken about in the context of a legal classroom – see section 3 of chapter two above). It was thus important for me not only to be able to distinguish representational from interactional and identificational meanings, but also to identify *which* representational meanings were significant for my research. In this section I wish to illustrate my understanding of the different meaning types (as well as the representational meanings in which I was most interested) with recourse to a longer extract[61] drawn from the second lecture in the data series (L2:09 – 65). The extract contains an interaction between the lecturer and students on *Rex v Brown*, a court case decided in the United Kingdom that dealt with the crime of sodomy. For reasons of space I have not reproduced the relevant section of the transcript in its entirety here (for this the reader may now turn to **Appendix 5A**).

2.1 Interactional meanings

I commence with interactional meanings because these are foregrounded by the nature of the extract as a classroom lecture; i.e. the roles that are constituted by the interactions in the piece are those of the teacher and learners. This can be seen most clearly through the 'eliciting exchange'.[62] A number of such eliciting exchanges are present in this extract.[63] It commences, for instance, with the following turns between the lecturer and a particular student:

[61] I am using the term 'extract' here to refer simply to a lengthy section of text, and not in the sense in which I have developed the term in section 3.5.4 of chapter three.

[62] In their groundbreaking study of classroom discourse, Sinclair and Coulthard (1975) attempted to identify the features that distinguished discourse as pedagogical. They found that a lesson could be divided into a number of 'transactions' which comprised of different types of 'exchanges' between teachers and pupils. The 'eliciting exchange' typically consists of three moves: (a) an initiating move by the teacher, aimed at eliciting knowledge and

EXAMPLE 1 (L = LECTURER; S4 = STUDENT FOUR)

L: Now is there anybody who can start with Rex v Brown, is there anybody who can give us the um facts in Rex v Brown? [Two students a male and a female raise their hands, L addresses the male] …

…

S4: Um there was a group of sadomasochistic homosexuals …

L: OK now you must explain what all those words mean to us, we don't know what that means.

S4: All right ….

L: What is a homosexual?

S4: Um, homosexual is a man who has sexual interest in another man (said with slightly mirthful expression).

L: Can you have female homosexuals?

S4: Course you can … oh well

L: (Laughs together with whole class) A ha course you can ... it's not so of course. No, we call people who are interested in the same gender we call them, well the popular name is gay but that also seems to be a bit problematic. But gay people, I've heard people of this persuasion call them 'queer', the word 'queer' is no longer considered to be um offensive. Um queer legal theory is an acceptable word. But there is this distinction. Homosexual is the word referring to men preferring to have sexual intercourse with their uh own gender, men and men, and lesbian is where you have female, um, variety.

The patterning of questions and responses in this extract is what I understand by interactional meanings. This is no ordinary conversation about the definition of homosexuals, it is one in which one party (the lecturer) stands in a position to not only question another (the student) but to evaluate that response. Between the lecturer's initial question and evaluation in this extract there are a number of further questions – the lecturer, as it were 'holds out' (the phenomenon of 'non-uptake' that Mertz found to be so pervasive in the classrooms of her research) on the student's response, attempting to steer his thinking in a particular direction.

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often in the speech function of a question; (b) a response by the learner; and (c) feedback from the teacher that evaluates the learner's response (outlined in Fairclough, 1992: 14).

[63] Apart from the extract below see also L2:21:54–5 – L2:23; L2:25–9; and L2:29:68–9 – L2:31.

The manner in which the lecturer controls the interaction – initiating questions and determining the topic – and the manner in which students respond to his questioning, thus constitutes the roles of teacher and learner on the basis of interactional meanings.

2.2 Representational meanings

From the lecture material reproduced immediately above, it may already be evident that while the patterning of the interaction between lecturer and students gives effect to the roles of teacher/learner, at least two other forms of identity, and the social practices in which they are embedded, are being *represented*: Homosexuality and sadomasochism. The actors in these practices are introduced by Student 4 through an existential process clause ('T]here was a group of sadomasochistic homosexuals' – L2: 14) which simply assumes that a group of people identified primarily on the basis of their sexual preference, exists. A form of identity regulation then takes place as the lecturer proceeds to question and problematize the student's understanding of the identity tag 'sadomasochistic homosexuals'. This culminates in his opinion on the word that best *represents* persons with a homosexual preference ('queer'), and the restriction of the word 'homosexual' to refer only to men having sexual intercourse with other men. While the lecturer's aim may have been only to elicit the facts of the case of *Rex v Brown*, at the same time he was therefore shaping and engaging with students' existing conceptions of homosexuality (and later in the extract on sadomasochism) on the basis of representational meanings.

Tracking the ways in which various kinds of social practice and their constituent roles in legal classroom talk could be a fascinating venture (law being, in itself, an inherently recontextualizing social practice). For my purposes, however, the representations that were of most interest were those relating to legal professionals, the social practices in which they were represented as engaging and the values associated therewith. This occurs at L2:63 and 64 in the extract where the lecturer speaks explicitly about being a judge. The term judge signals a particular legal professional role and in these two paragraphs the lecturer constructs meanings and storylines around this role. Although he acknowledges that he cannot get the quotation right, the lecturer uses the conventions of direct speech, heightening the immediacy and drama

of the judge's words. In the extract judges are represented as not only engaged in the social action of 'sitting in judgment' of others, but also in the actions of 'recreation' with their families and 'socializing' with their friends. This represents judges as ordinarily, or normatively, having family and friends. Secondly, the judges are represented as having certain beliefs: As not agreeing that males should have intercourse with one another, as considering this 'abhorrent'; as people who regard sadomasochism as 'completely abhorrent' on the basis of a Christian or a decency point of view. It seems clear that the judges in this instance were *not* homosexual or a sadomasochist. From this flows the subtle message that judges shouldn't be homosexual or sadomasochist – they should rather be family-oriented, bastions of respect in their communities, inscribed with the religious identity of a Christian. Thirdly, through the explicit injunctions against leaving aside 'personal baggage' judges are represented as having to set aside their emotions, even though they are signaled as being people of strong emotion – it is not simply that they dislike homosexuality or find it distasteful, the emotion is extreme, the practice of homosexuality is 'abhorrent'. What I am pointing to here, is that while the lecturer's primary focus in this extract may have been an epistemological one focused on the nature of legal reasoning, he also says a lot about judges as particular kinds of people, engaged in doing particular things in relation to others and guided by particular values. **It is such representational meanings that constitute the core of my analysis.**

2.3 Identificational meanings

Although they do not feature significantly in my analysis, for the sake of completeness I will briefly outline my understanding of identificational meanings. It should be clear that a variety of social roles – teacher, learner, homosexual, sadomasochist, judge – are constituted in the extract under consideration through both interactional and representational meanings. Identificational meanings relate to the manner in which speakers use language to position themselves in relation to these roles. For the most part, for instance, the manner in which the lecturer takes his turns in the extract under consideration is unproblematic, indexing a secure identification with the role of the teacher. A less-experienced teacher, less assured of his identification with a teacher role may have commenced the extract by saying: 'Well, I think what I would like to do today is to discuss the case of *Rex v Brown* … is that OK with

everybody?' This lecturer, however, is assured of his position: He takes, rather than waits for a turn, determines the topic, interrupts students and so on.[64]

Both lecturer and students also position themselves in relation to the social roles constructed on the basis of representational meanings. Student 4's positioning in relation to the role of 'homosexual' at L2:18:43–4 is revealed not so much by what he says – which appears to be an attempt to provide a neutral, unbiased definition of a homosexual person – but by his facial expression at the time, which I could probably most accurately describe as an attempt to suppress laughter.[65] The lecturer's relationship to 'homosexuality' is developed more explicitly (at L2:21). He identifies with his representation of homosexuality in a rather careful way, perhaps aware that the topic could be a sensitive one. His commitment to saying that homosexuals are 'gay' or 'queer' is carefully hedged: He consistently uses the pronoun 'we' rather than 'I, thus deflecting attention away from his own views; he associates the term 'gay' with a 'popular view' but then goes on to qualify that this may be problematic. He legitimates his use of the word 'queer' on the basis that the people to whom this designation is directed use it themselves, and so on. But then at L2:29:65–7 his use of a stereotypical designation – the 'leather fairies' – suggests a subtle, covert alignment with Student 4's position.

When the lecturer speaks in the voice of one of the judges in the case of *Rex v Brown*, however, he exhibits a different form of positioning – positioning not so much himself but the students in relationship to the judge. His first use of the pronoun 'we' ('when we sit in judgment on a matter like this') positions the students as part of the judicial community, as insiders who have ascended the legal hierarchy and now occupy the exalted position of being able to sit in judgment of others. This is in itself interesting because only a tiny percentage of law students will ever go on to become judges. But in this paragraph the lecturer consistently positions them

[64] The only time his confidence seems to falter is at L2:62 where he seems a bit out his depth in responding to the student's commonsense reasoning around the legal and non-legal construction of the notion of 'guilty'. He points out that the rules are different in England and concedes that he is 'not quite sure how it works' (L2:62:137). There are a few false beginnings ('Um so … but don't … L2:62:143) and a concession that he forgot to tell students not to read the whole case.

[65] There are many different ways in which this could be interpreted – one could argue that the student is not a homosexual and that his suppressed laughter arises from his tendency to mock and deride homosexuals in contexts that do not require 'political correctness'. It is impossible to know what the student meant at that point without perhaps knowing more about him or interviewing him. The point is, however, that the very subtle shift in the student's expression at that point served to position him in relation to homosexuality.

in this role through the repeated use of the term 'you'. In so doing he also aligns them with the normative associations discussed previously: It is the students whom he is addressing, and not only his representation of judges, who are positioned as people who believe homosexuality or sadomasochism is 'abhorrent'. Whilst everything I have discussed in this sub-section constitutes my understanding of identificational meanings, I have only really expanded on this last type – the manner in which the lecturer positions students in relation to legal professional roles – in my analysis. This was done mainly in order to investigate the claim made in the literature that students are invariably positioned in the role of the legal advocate (Cramton, 1977: 256).

3. VAN LEEUWEN'S FRAMEWORK FOR THE ANALYSIS OF REPRESENTATIONAL MEANINGS

Having established that my core focus was constituted by representational meanings relating to various types of legal professional, I turn now to Van Leeuwen's inventory of socio-semantic categories for representational meanings and their most common linguistic realizations. As explained in chapter two, although Van Leeuwen starts off with a very complex model of social practice comprising at least ten constituent elements (2008: 6 – 10, see my discussion in section 4.2.3 of chapter two), he subsequently develops his scheme for representational meanings in terms of the representation of social actors, social action, time and space respectively. In line with his strong emphasis on recontextualization and the elements that are added to a social practice in the recontextualizing process, he also devotes separate chapters of this work to the discursive construction of legitimation and purpose.

I wish to emphasize the *richness* of the options identified in Van Leeuwen's work and have therefore outlined the full range of options he presents for the three chapters upon which I relied the most,[66] namely those dealing with the representation of social actors, social actions and legitimation respectively in **Appendix 5B**. The three tables in this Appendix identify the fundamental socio-semantic choices in each category, the manner in which these are typically

[66] Van Leeuwen's chapter on the representation of space emphasizes *visual* representations of space in the classroom, whereas my focus was more on the text of the classroom that related to the representation of professional practice. I also chose not to focus on the representation of time as I found, during my first attempt at analysis, that times – both in terms of durations and specific points in time – did not feature significantly in the lecturer's classroom talk.

realized linguistically, and the possible implications of each socio-semantic choice for processes of meaning-making.

As a study of the tables in Appendix 5B will show, the codes potentially available on the basis of Van Leeuwen's work constituted, for the *sociosemantic categories* relating to social action, social actors and legitimation alone, at least 36 different major codes and 37 sub-codes. When I first presented the range of codes I intended to try out to my supervisors (and this was already a selection from the full range of codes Van Leeuwen presents) the wise advice I received was that it would be 'jolly difficult to operationalize all of them' and that it was necessary to 'arrange them relationally and trim them so that the work is manageable'.[67] This need lay at the centre of my subsequent coding journey.

4. MY CODING JOURNEY

4.1 First attempt

As noted in chapter three, my first attempt to develop the codes was based on what I considered to be the richest relevant part of my data, namely the lectures that specifically focused on the legal profession (the second half of lecture 21 and lecture 22 in the series). These alone comprised over 1200 lines of text. My chief difficulty at this point was deciding upon the primary axes of analysis and their sequence. Initially I had thought to use the model of social practice advocated by Van Leeuwen as the primary axis of analysis; i.e. I would firstly identify all the social actions, social actors, times, spaces and forms of legitimation in the text; subject each of these broad categories to more detailed analysis using a selection of the socio-semantic categories outlined in Appendix 5B; and then write up the findings in a similarly-structured manner. I thus envisaged having a findings chapter that focused firstly on social action and perhaps social actors, one devoted to legitimation and possibly a third devoted to the representation of time and space. Each of the findings chapters would address the representation of these categories across the full series of 22 lectures.

[67] Commentary received from Professor Shalem on the first draft of this chapter.

An **extract** (the first two lines) of the first analytical table I developed in accordance with this grand strategy, one which divided the text of lectures 21 and 22 into the broad categories of social action, social actors, time and space respectively, is contained in **Appendix 5C**. In this table I also addressed what I considered to be representation of the resources of the legal professional, albeit that Van Leeuwen didn't cover this category. This first level of analysis I termed the **'social practice analysis'**. I then sought to develop my analysis of social action and social actors using more detailed categories, and an **extract** (the first two lines) of the results of this effort are set out in **Appendix 5D.** As this particular table shows, the socio-semantic categories I was able to accommodate seemed quite sparse: I attempted to distinguish between more and less generic forms of social action and used this distinction to structure the table. I also attempted a full-scale transitivity analysis (explained more fully in section 5.1 below) of all the clauses relating to each social action. As far as social actors were concerned, I simply identified whether the social actor in each actor was included or excluded in the action, whether they were active or passive in relation to the action and whether their gender was indexed. At this stage, the primacy of role – which I at that stage referred to as the 'identity category' – had already begun to assert itself, for I sought to identify which 'identity category' was being constituted by the representation of each social action and its associated social actors.

Instead of attempting to write up my analysis of these analytical findings (a move which, in hindsight would have saved a lot of time by revealing at an earlier stage that the path I was following was leading to a dead end), I then launched into an analysis of the forms of legitimation in the same body of text. An **extract** (the first two lines) of the results of this table are contained in **Appendix 5E**. The first column on the left borrows from Van Leeuwen's categories ('R(G)' for instance, refers to the form of legitimation being predominantly a goal-oriented rationalization) and the remaining categories ('object', 'object type', 'knock-on effect', 'constitutive outside', 'basis' and 'source – voice') were elaborations of my own. Before attempting a similar analysis of 'time' and 'space' in the data, I wisely attempted to write up the findings of the legitimation analysis.

The first major problem I experienced with the analytical strategy outlined above was that it was *massively* time-consuming, given the amount of text I was attempting to analyze. The process ate up a substantial part of my 2010 sabbatical year and I realized, as my supervisor had advised, that I would only be able to operationalize a few of Van Leeuwen's sociosemantic categories. The critical problem, however, was revealed in my attempt to construct a narrative based on my legitimation analysis (Appendix 5E). My narrative was structured according to the analytical categories in the table (e.g. I wrote firstly about the objects of legitimation in the data, then the object types, and so on). Disappointingly, the result was unacceptably fragmented – meaning had slipped away down the smooth sides of my analytical matrix. The codes I was using, in addition to what I was choosing as my primary axis of analysis (the elements of social practice), were not enabling me to tell the story of the stories that emerged around legal professionals in the lecturer's classroom talk. It was therefore necessary to start over.

4.2 Second attempt

I therefore returned to the data, reading and re-reading the text of lectures 21 and 22 and I realized that the elements of social practice, rather than being the primary axis of analysis, *needed to be attached to a legal professional role*. Distinguishing representational meanings relating to the particular professional roles in the text thus constituted my first act of coding. Once I had a set of quotations relating to each professional role, I asked myself which of the sociosemantic categories developed by Van Leeuwen would best enable me to construct a narrative around each of the legal professional roles that peopled the lecturer's classroom talk. Specifically, I asked myself which codes would be conducive to constructing a narrative around what the various types of legal professional **do**, **how** they do it, **who** they are (and with **whom** they interact) and **why**. I also took into account which codes would enable me to respond to the discourses on legal professionalism outlined in chapter one.

This interrogation led me to the four broad analytical categories that structure my discussion of each of the main legal professional roles in chapter five:

- WHAT legal professionals DO invoked the sociosemantic category of **social action**. Because I wished to make a claim about the representation of legal professionals as powerful or powerless actors, I sought firstly to determine whether lawyers were ACTIVE or PASSIVE in relation to the social actions in which they were represented as engaging, and whether their actions were TRANSACTIVE or NON-TRANSACTIVE; i.e. extending to people, things or phenomena as the objects of action or not. I also wished to make claims regarding the nature of the power exercised by legal professionals and found that distinguishing between the nature of the action as MATERIAL or SEMIOTIC assisted me in this purpose.
- HOW legal professionals do what they do invoked what I termed **circumstances of social action**. Here I considered it important to examine what the lecturer constituted as the RESOURCES of the legal professional, what they were representing as 'having' or 'needing'. Because of the frequency of claims regarding the negative emotional tone of the legal professional world I also had regard to the representation of EMOTION relating to each legal professional role. This aspect of social life is not dealt with in Van Leeuwen's book but, as noted in chapter two, the work of Martin and Rose (2004) on appraisal had already been brought to my attention. They distinguish the negotiation of affect (how people express their feelings in discourse) as one of three major attitude-types in text (ibid: 25) and I was therefore able to draw upon this work to better understand representation of the emotions of legal professionals in my data. Rather than a full-blown analysis of the spatial world of the various legal professionals, I sought simply to determine where they located. The code of LOCATION enabled me to respond to claims in the legal education literature that legal professionals are located predominantly in the physical space of the court.
- WHO legal professionals are invoked the category of **social actors**. Following Van Leeuwen's understanding of classification (reference to social actors by means of the major categories a given society differentiates between classes of people – 2008: 42), I firstly sought to determine to what extent the lecturer had CLASSIFIED legal professionals on the basis of GENDER, RACE and CLASS. I also took notice of whether legal professionals were NOMINATED or not (and who was being nominated) and on

what other bases they were CATEGORIZED (i.e. identified in terms of the identities or functions they share with others – see Van Leeuwen, 2008: 40). I also wished to pay attention to the range of social actors in the legal professional world, and here I concentrated only on whether such actors were INCLUDED or EXCLUDED.

- WHY lawyers do what they do invoked Van Leeuwen's category of **legitimation**, but which I have instead chosen to call the representation of **value**. This term better captures my attempt to relay both the form and the content of the key legitimations and their bases in the lecturer's classroom talk. I concentrated firstly on legitimations (and delegitimations) of LEGAL PROFESSIONALS THEMSELVES – whether the lecturer evaluated lawyers in a positive or negative light and the basis for him doing so – and then on his legitimations (and delegitimations) of LEGAL PROFESSIONAL WORK. For the latter category I invoked the MacIntyrian distinction between the INTERNAL and EXTERNAL GOODS of the practice (outlined in greater detail in section 5.4 below). For every legitimation identified in the text I considered whether it took the form of a reference to AUTHORITY, MORAL EVALUATION, a PURPOSIVE CONSTRUCTION or MYTHOPOESIS.

In addition to these codes, I also paid attention to the manner in which meanings were associated with each other. The two constructions that interested me most were RELATIONAL PROCESS CLAUSES and what I term 'IF-THEN' clauses. Relational process clauses are a process-type in the Hallidayean transitivity system, which is described more fully in section 5.1 below. 'If-then' clauses are those that are semantically related to each other through conditionality or through causality; i.e. they either express the condition upon which the other takes place or will take place, or they specify the (inevitable) consequence of a certain course of action or state of affairs. As I read through the data, both relational process clauses and if-then constructions stood out as playing a particular role in solidifying or concretizing the shape of the legal professional world the lecturer was creating in the classroom: The former by defining one experience in terms of another such that they become inextricably linked, the latter by positing one particular type of experience as a condition precedent for the occurrence of another.

Figure 7 below sets out these codes in a graphical format:

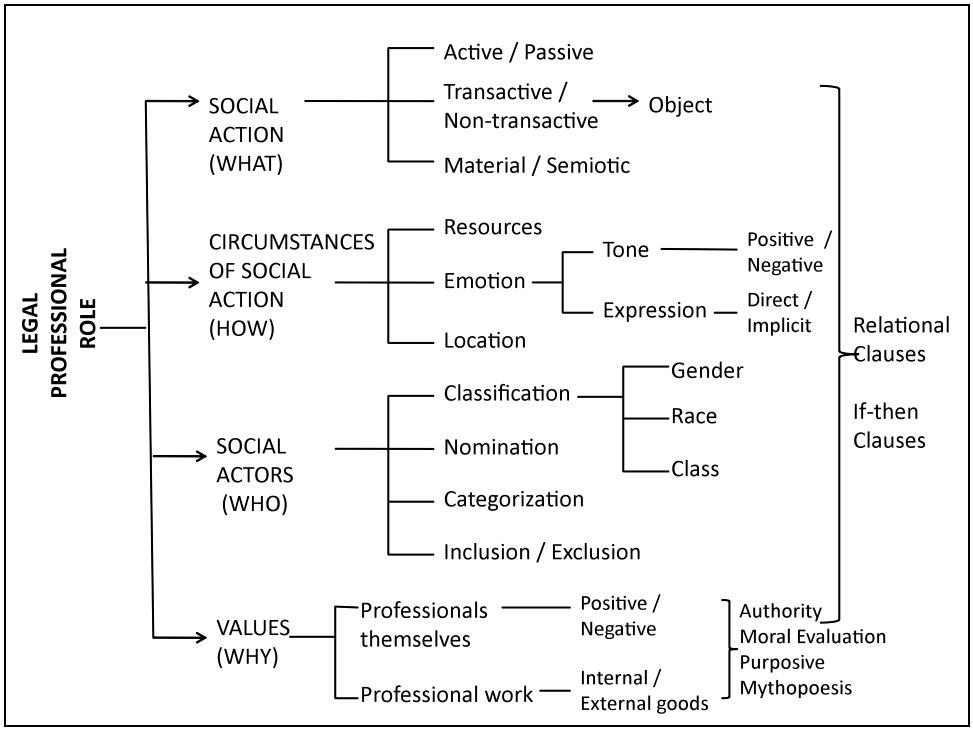


Figure 7: Overview of analytical codes.

Across all the roles these analytical codes allowed me to examine the same extracts of text from different vantage points in a manner that seemed to *exhaust* the meaning potential of the text with minimal degrees of overlap. This suggested to me that they were functioning appropriately to provide analytically distinct and meaningful lenses to flesh out representational meanings.

5. DESCRIPTION OF THE CODES

The description of the codes in this section seeks primarily to set forth the basis upon which I recognized the codes in the legal material, and the manner in which I distinguished them from each other. In my discussion I rely on extracts taken from the lecture material. The identification of specific linguistic realizations for each sociosemantic category served mainly to assist in the identification of each category (as noted in chapter two, language lacks bi-uniqueness, so the realization of a sociosemantic category could take place via a variety of

linguistic mechanisms – Van Leeuwen, 2008: 23). The linguistic forms of realization did not serve as codes in themselves.

5.1 Social Action

In order to explain the codes chosen for my analysis of social action, it is necessary to outline briefly the 'transitivity' system developed by Halliday – a grammatical system for construing the world of experience in terms of a number of process types (Halliday, 2004: 170) (this is merely important background information – unlike my first attempt at analysis, the process types do not feature in the final analysis as codes *per se*). At the root of the transitivity system is an observation that our most powerful impression of experience is of a flow of events or actions. Language, through the grammar of the clause, imposes order on the endless flow of actions. It not only separates out actions from one another, but also enables us to distinguish between different types. There are six such types in the Hallidayan transitivity system. The most basic is the distinction between processes that occur 'out there' in the world around us (outer experience, as in example 4.1 below) and those that we experience going on inside ourselves in the world of consciousness (including cognition, perception, emotion and imagination, as in example 4.2) (ibid). The material process clause represents outer experience, while the mental process clause represents inner experience.

4.1 The litigation department *does* all the backroom work.

4.2 Judges *interpret* uh rules.

The third type of process in Halliday's system is the relational process clause that encompasses actions of identifying and classifying the world by relating one experience to another, as in 'The advocate is the person who appears in court'. In this case one type of classification ('advocate') is related to another ('person who appears in court').[68] By linking such classifications, in my view relational process clauses play a particularly important role in 'cementing' meanings.

[68] Halliday distinguishes three kinds of relational process: Identifying (as when x is identified with an adjective or a noun); circumstantial (as when x is located 'at' a place); and possessive (as when x 'has' or 'gets' something) (Halliday, 2004: 216).

In addition to material, mental and relational clauses, which are the main types of process in the English language, Halliday distinguishes three further categories which lie at the border of these three main types (ibid: 171). Lying at the border between material and mental process clauses are behavioural process clauses, which represent the outer manifestations of inner workings, the acting out of processes of consciousness and physiological states, as in '[s]o you have three four hours every night that you can sleep'. Verbal process clauses - as in 'There's not somebody who will come and knock on your door at five o clock and say: "Why are you still here"' – lie at the border between mental and relational clauses because, while emanating from the mental capacity for speech, they also capture the processes of symbolization, the manner in which we encode, identify and classify the world in speech sounds. Lastly, on the borderline between relational and material process clauses are those concerned with existence or possession, which Halliday designates as existential process clauses (ibid), as in '[n]owadays there is the School of Legal Practice …' or '[y]ou've got your own law reports. You've got your own work, you've got your own telephone' etc. With this background in mind, I turn now to the codes I actually used to unpack the representation of social action.

The primary codes I used to code social action were Van Leeuwen's distinctions between active/passive, transactive/non-transactive and semiotic/material forms of action. All these sub-categories are implicated in constituting power: Powerful actors are more likely to be positioned as active in social action, as extending their power over objects (transactive action) and as carrying out actions that are more closely situated to processes in the mind rather than carried out in the physical world.

5.1.1 Active/passive positioning in relation to the social action

Strictly speaking, determining whether legal professionals were active or passive in relation to the social actions in which they were represented as engaging, belongs to Van Leeuwen's category of role allocation (2008: 32), a socio-semantic category pertaining to social actors rather than social action. From my point of view, coding the social action as passive or active in relation to a particular set of actors such as legal professionals conveys information both about those actors *and* about the characteristic ways in which such actors are represented as acting

(i.e. both 'who' and 'what'). I was therefore comfortable with utilizing this code pair under the rubric of social action. In accordance with the system of transitivity outlined immediately above, activation/passivation can be studied by paying attention to the grammatical participant roles assigned to social actors. Thus activated social actors are coded as the actors in material clauses, behavers in behavioural clauses, sensors in mental clauses, sayers in verbal clauses, and so on; passivated actors are coded as the recipients or clients in material clauses, receivers in verbal clauses or assignees in relational clauses (Halliday, 2004: 260). In example 4.3 the addressee of the lecturer's talk – being 'you' as advocate – is coded as the actor in a series of material clauses:

4.3 You work on your *own*. You work on your own. You have your own office, you have your own secretary which you appoint and you pay for. You've got your own law reports.

In contrast 'secretary' is passivated through the use of a possessive pronoun (Van Leeuwen, 2008: 33); e.g. 'your own secretary' both activates the representation of 'you' as an advocate, and passivates the people who are secretaries. At the same time, it represents the action associated with advocates as 'appointing' and with secretaries as 'being appointed'. In general, I did not encounter any real problems in coding actions as active or passive in terms of their relationship to the particular legal professional.

5.1.2 Transactive/non-transactive social action

Van Leeuwen clearly regards the next pair of codes – whether the action was represented as transactive or non-transactive – as a sociosemantic choice pertaining to social action (ibid: 60). Transactive actions always involve two participants: the 'actor' and the 'goal' – being the person, phenomenon or thing to or over which the process extends (example 4.4). Non-transactive actions involve only one participant (ibid, example 4.5). As noted in Appendix 5B, non-transactive action tends to be associated with less powerful social groups (ibid)

4.4 [I]f you're a natural lawyer, you must have a system - somewhere - against which you can *test* your positive law.

4.5 He retired.

One of the more vexing questions I encountered when undertaking the coding was whether actions in which legal professionals were coded as passive were necessarily non-transactive. Example 4.6, for instance, is taken from the set of quotations dealing with the generic category of the lawyer. In this extract, the lawyer is being addressed by the judge and in the moment that he is being addressed he is passive (notwithstanding that he may in turn be addressing the judge in the next moment). As the goal of the judge's verbal process, it seemed strained to say that 'being addressed' is a process that extends to the judge in a similar fashion, even though there are clearly two participants in the clause.

4.6 [I]f the judge asks you 'Please address me on the following point …

For this reason my coding of non-transactive action encompasses (a) situations where the legal professional is active in relation to the action, but the action does not extend to any particular goal; and (b) situations where the legal professional is passive in relation to the action.

For all transactive actions I sought also to identify the goal or 'object' of the action. This entailed paying attention to the object following a transactive verb. In this I allowed myself to be led by the data in conjunction with my knowledge of the discipline of law. In example 4.7, for instance, the object of the advocate's action of 'getting' is 'precedents' which is a concept familiar to me as the statements on the law that emerge from the decisions of the courts. This I coded in terms of the more generic category 'law'. In example 4.8 the object of 'impressing' is 'the people' which it is clear from the context are the legal professional's clients. The client is similarly the object in example 4.9, though now backgrounded in the concept of 'court work'.

4.7 So he will get all the precedents that is in favour of your case.
4.8 You must *impress* the people.
4.9 The advocates do the *court work*.

Whilst the distinction between active/passive and transactive/non-transactive social actions (as well as the distinction between material/semiotic action described below) applied to all the social actions identified (thus enabling me to present 'quasi-statistics' on the patterning of these particular codes), the various objects that emerged from the lecture material were more diverse (though as I proceeded it became apparent that law, language, information, other legal

professionals and clients emerged as the dominant categories) and at times an action extended to more than one object. In example 4.10, for instance, the judge's action of judging a case extends, firstly, to the legal parties involved in the case before him or her and, secondly, to what I termed 'ultimate outcomes' – avoidance of the creation of chaos.

> 4.10 [I]f you judge a case, you are not, you must avoid creating chaos.

The objects in my data were thus not capable of quantitative measurement in the same way as the other codes within the category of social action. The various objects that emerged from my lecture material are fully described in chapter five.

5.1.3 Material/semiotic action

Van Leeuwen's distinction between material and semiotic action expresses a choice between representing an action as 'doing' or 'meaning' (2008: 59). The former, related to the material process clause in the Hallidayean transitivity system, represents an action that has, at least potentially, a material purpose or effect on a participant in the clause, which may be any abstract or concrete thing (ibid: 59 – 60). The latter is represented as occurring within the realm of inner experience and is thus associated with mental and verbal process clauses (ibid: 60). One of the difficulties with this distinction, raised at one of the sessions at which I presented to the PhD group of which I formed part, was that 'doing' also involves a mental element. Thus, while I had categorized 'drafting' as a material rather than a semiotic action, members of the group argued that the act of 'drafting', as contemplated in example 4.11, is a mental rather than a material process that requires considerable intellectual skills.

> 4.11 [O]ur laws are not *drafted* with any kind of elegance, ours laws are very poorly *drafted* in this country. … But in South Africa we don't make good laws, they're *drafted* by civil servants … so … your bright lawyers are in private practice. And only the duds go into civil service and they *draft* laws.

Employing Van Leeuwen's definition of material action, however, there is clearly a material effect on a participant ('laws') in this extract. Moreover, from my experience working for a legal consultancy, the connotation of the word 'draft' evoked an effect on a concrete thing; i.e. a series of actions executed in relation to a physical document, such as writing out the document,

deleting and amending certain sections, fixing commas and inserting full stops and so on. The presence or absence of a mental element was therefore not the central distinguishing feature between material and semiotic action, but was rather whether the action had a 'material' effect on any thing. On this basis, however, most of the actions undertaken by the legal professionals in my sample would have been coded as material, rather than semiotic. Van Leeuwen's categories in this instance did not assist in capturing a subtle difference in the data between actions that are more or less tied to a physical, concrete context. This is evident when one contrasts the action of 'drafting' laws, as outlined above, with an action such as 'creating' laws. The latter is more clearly associated with law as a normative system, rather than as document upon which the legal drafter toils. 'Create' is also a more general term than 'draft'. For this reason, my distinction between material and semiotic actions differs somewhat from Van Leeuwen's. In working with the data I coded action as 'material' if a material process clause was present and if the action was more closely linked to a physical, concrete context. Semiotic action encompassed mental and verbal process clauses as well as material process clauses that involved semiotic rather than material participants or where the quality of the action was more semiotic than material in nature. The generality of the action was an important pointer in this regard.

5.2 Circumstances of Social Action

In order to code the circumstances of legal professionals, I relied on three sub-categories: Resources, location and emotion.

5.2.1 Resources

For purposes of describing representation of the resources of legal professionals, I was largely on my own, as this aspect was not covered by any of the authors upon whom I relied. I read and also searched the transcripts for the verbs 'have', 'need' and 'get' as I found that the objects of these verbs generally indexed the resources in the text. I included within this category both reference to tangible, physical resources (as in example 4.12) and intangible resources (example 4.13).

4.12 [B]ut if you are in a profession *you must have a car*, *you must have a cellphone* …

4.13 You must have *a very good reputation*.

5.2.2 Emotion

From the work of Martin and Rose on appraisal, I drew only from their exposition on the representation of affect (2004: 24–27). Halliday's mental and behavioural process clauses also assisted in identifying sections of the text that dealt with emotion. The two main sub-categorizations I found to be useful were whether the affect was positive or negative in nature, and whether the representation of emotion was direct or implicit. It was not particularly difficult to identify an emotion as positive (example 4.14) or negative in nature (example 4.15) (although as I proceeded with the analysis it struck me how much this depends on general cultural understandings). Emotions represented directly (both examples 4.14 and 4.15) were also fairly easy to spot.

The indirect representation of emotions was more challenging and involved a wider range of mechanisms. More than representation of the behavioural manifestations of emotion which Martin and Rose put forward as clear examples of the indirect expression of emotion (ibid: 26), I found that in many cases the lecturer's description of the conditions surrounding a particular action (as in example 4.16, where one can imagine the emotional toll of working 18 hours a day), or the expression of a reaction to those conditions (as in example 4.17 where the lecturer's insertion of a 'thank heavens' indexes an emotional relationship of aversion to working in the matrimonial courts), served to index a particular emotion.

4.14 I send him off to jail and *I feel wonderful* you know I say 'rot in hell I hope you never come out.'

4.15 And of course, you know, I was *tired*, I was *irritated* um uh I was *cross* with this man, I was *cross* with my colleagues, *cross* with the world

4.16 I didn't know that I was just *working 18 hours a day* trying to get these *mountains* of files out of my office.

4.17 [W]hen I was a magistrate I had to serve for a uh limited period of time *thank heavens* in the um matrimonial court.

5.2.3 Location

In order to determine representation of the location of legal professionals I paid attention to any description of the physical space in which legal professionals were located (example 4.18); to the object of the preposition 'in' (or, less commonly, 'into' or 'from) (example 4.19); and the lecturer's use of the word 'go' or 'go to' (example 4.20).

4.18 And there I got *a corner office, a beautiful large office with an inter-leading door to my secretary's office*

4.19 [Y]ou are admitted *in court* as an attorney.

4.20 So please, if you *go to*, if you *go* to *a firm of attorneys …*

5.3 Social Actors

For purposes of the representation of legal professionals as social actors I drew upon Van Leeuwen's distinctions between classification, categorization and nomination (though not in the hierarchy in which he develops them – see 2008: 40 – 45) in addition to whether the social actors with whom legal professionals were represented as interacting were included or excluded in the action.

5.3.1 Classification and categorization

The distinction between nomination and categorization rests upon whether social actors are represented in terms of a unique identity or whether they are represented in terms of the identities and functions they share with others (ibid). Classification in turn is presented by Van Leeuwen as a sub-category of categorization whereby social actors are identified on the basis of the major categories by which a particular society differentiates among classes of people (ibid: 43). For purposes of this research I regarded the classifications of gender, race and class as being most significant. Linguistically, classifications (like categorizations more broadly) usually appear as classifiers in nominal groups, such as 'the white judge', or 'the middle-aged magistrate' (ibid). For gender classification, however, I found that the most prominent marker was pronoun usage, whilst for class classifications contextual understandings played a more significant role. In example 4.21, for instance, the lecturer's reference to the earning capacity of a senior advocate clearly situates the particular legal professional type as within the class of high earners, but this depends on one's contextual understanding that an annual salary of four to eight million rand in South Africa is very high indeed. In example 4.22 the judge's status as a

member of the higher classes is in turn suggested by the description of his speaking voice as 'very civilized'.

4.21 And a very civilized English voice on the other side:' Excuse me, but um may I please talk with magistrate Serfontein?'

4.22 And a senior advocate, well as I said, gets from four to five up to eight million in a year.

Racial classifications involved classifiers in nominal groups as well as contextual understandings. In addition to these three sub-categories, I also paid attention to the classifiers in nominal groups more generally, in order to determine whether there were any patterns evident in the identification of legal professionals in terms of group features. Apart from racial, gender and class classifications I paid attention to other classifiers in the nominal group and these I discussed under the rubric of 'categorization'.

5.3.2 Nominations

For each legal professional role I identified nominations. These usually imply a special sort of status. Van Leeuwen points out that in stories nameless characters fulfill only passing, functional roles and do not become points of identification for readers or listeners (ibid: 41). Nomination is typically realized by proper nouns (example 4.23).

4.23 But sometimes you get a very good attorney. Like Dr Dale now …

My identification of nominations fed into my study of gender and race classification as I was able to use my knowledge of the South African legal profession to know whether the lecturer was speaking about a male or female, or a black or white person.

5.3.3 Inclusion/exclusion of social actors[69]

The reasons for including or excluding social actors may be varied: Their inclusion may be tangential and thus trivial to the main themes of the utterance or it may be assumed that readers already know who the social actors are so that inclusion would be over-communicative

[69] The reader can here note that in the legal profession there are specific terms to designate the social actors with whom legal professionals engage. The attorney or advocate would engage with 'clients' but the same people would be 'parties' before judges or magistrates. The same person might be an 'accused' in relation to a public prosecutor or magistrate in the event of a criminal trial. I have utilized this nomenclature in the analytical tables and discussion of the findings.

(ibid: 30). Alternately, the exclusion of certain social actors may be motivated in order to block access to more detailed knowledge of a practice, or it may signify the play of power in discourse – the automatic exclusion of certain social actors as a manner of knowing and speaking, which disguises the underlying power relations between those actors (ibid: 30). Inclusion is relatively easy to spot – the use of proper or common nouns to designate particular people or groups of people. Exclusion occurs as a result of a wider variety of linguistic mechanisms.[70] The excluded actor may not be mentioned in relation to a specific action, but they could be present elsewhere in the text. The 'classic' mechanism of passive agent deletion (as in example 4.24, where the firm of attorneys is present through their action of 'frowning upon' the cession) also serves to exclude social actors.

4.24 The contract may be ceded, but it is frowned upon, it is not something you must try and do.

Nominalizations and process nouns similarly allow for the exclusion of social actors. Nominalization involves the conversion of a verb ('to create') into a noun-like word ('creation'), and thus semantically, the conversion of a process into an entity (Fairclough, 2003: 143). In the process social actors may be excluded, as in example 4.25 where the clients who are applying for mineral rights are excluded through the nominalization 'application'.

4.25 If there's an application for the prospecting of new mineral rights, then obviously you can appoint uh Dr Dale uh to appear in the High Court.

Process nouns are part of the nominal (noun) vocabulary of English but belong to a particular sub-category with a special connection with verbs (and thus processes) (ibid). Examples include 'activities', 'progress' and 'support'. In example 4.26 the word 'support' is used twice, each time concealing a different set of agents:

4.26 Um (clears throat), three things that you must have tech … formally. LLB, six month's pupilage without payment, nobody pays you, you must have financial support to live for six months, uh, without support uh to live for six months without a salary.

[70] For purposes of the analysis I did not consider it necessary to rely on Van Leeuwen's further distinctions between suppression, backgrounding and radical exclusion (see 2008: 29 – 31).

In the first instance, 'support' could refer to a spouse or family members who would support the would-be advocate or 'pupil' during her six-month period of pupilage. In the second instance, 'support' is referring to the advocate to whom a pupil is assigned, who does not support the pupil with a salary.

5.4 Values

My coding of legitimations of legal professionals themselves and legal professional work respectively, both proceeded along two dimensions. For legal professionals themselves, I simply sought to determine the presence of a legitimation (positive assessment) or a delegitimation (negative assessment). For legal professional work I distinguished whether the legitimation indexed an internal or an external good. For both legal professionals themselves and legal professional work I examined whether the legitimation/delegitimation took the form of a reference to authority, moral evaluation, purposive construction or the use of mythopoesis.

5.4.1 Internal/external goods

As noted above, my distinction between internal and external goods was drawn on that established by MacIntyre in *After Virtue* (1981). MacIntyre situates his understanding of internal and external goods within the concept of 'practice' which he defines as 'any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of that form of activity …' (ibid: 175). Accurately capturing the internal goods of a practice is not easily achieved: Firstly because they can only be specified in terms of some particular practice and by means of examples from such practice; secondly, because 'they can only be identified and recognized by the experience of participating in the practice in question. Those who lack the relevant experience are incompetent thereby as judges of internal goods' (ibid: 176). Given what I have already noted about the 'Outsider-I' at the beginning of chapter three, I was aware of my own possible deficiencies in this regard. MacIntyre, however, provides some guidelines in the recognition of internal goods: They are integrally linked to the standards of excellence of the practice and emerge as one systematically subordinates one's self to the best standards so far achieved

(ibid: 178). This also entails 'subordinating ourselves within the practice in our relationship to other practitioners' (ibid). They are, furthermore, those goods that are transmuted with the history of the activity (ibid: 181) and they are always more than a set of technical skills (ibid: 180). External goods are more easily recognized, being those that are 'externally and contingently' attached to the practice 'by the accidents of social circumstance' (ibid: 176). They typically take the form of prestige, status and money (ibid). When achieved they are always some individual's property and possession (ibid: 178). It is a characteristic feature of external goods that the more someone has of them, the less there is for other people and they are thus typically objects of competition (ibid). The achievement of internal goods, on the other hand, is a good for the whole community who participates in the practice (ibid). MacIntyre emphasizes, however, that external goods *genuinely are goods* that 'no one can despise …altogether without a certain hypocrisy' (ibid: 183). It is internal goods, however, which are central to maintaining the integrity and meaningfulness of the practice.

MacIntyre's characterization of external goods assisted me in identifying them reasonably easily in the text. In example 4.27, for instance, status and power are indexed by the adjectival phrase 'hugely influential', while in example 4.28 material rewards and status are present through the references to 'a better salary' and 'more senior work'.

4.27 So the chief magistrate is a *hugely influential* political person.
4.28 Stay on a little while as a professional assistant or associate, uh, it's at a *better salary* and there you get *more senior work*.

Identifying the internal goods associated with legal professional work was much more tricky. Here an ability to identify legitimations on the basis of their form (explained below) was of real assistance because they pointed to the presence of an internal good. In example 4.29, for instance, the purpose of bringing accused persons to court 13 is signaled as not letting them 'rot' in jail. The internal goods lying behind this statement constitute a rich and well-developed set of principles relating to fairness in the administration of justice and upholding the rights of accused persons.

4.29 *In order not to let the people rot in jail*, you bring them to the magistrates' court to what we call a directional court, Court 13 in Johannesburg.

In general, however, I found the identification of internal goods fairly challenging and seemed to rely very heavily on contextual understandings derived from my experience of participation in the discipline of law (and that only from an academic perspective).

5.4.2 Authority, moral evaluation, rationalization and mythopoesis

For the form in which values were expressed I relied on Van Leeuwen's four categories of legitimation: Authority, moral evaluation, rationalization and mythopoesis (2008: 105 – 106).

Authorization is legitimation by fiat, where the answer to the spoken or unspoken 'why' of legitimation is 'because I say so' or 'because so-and-so says so' (ibid: 106). In the case of authorization, there may have been a time when the purpose and underlying moral values of the social action being legitimized were made explicit, but over time – as a practice becomes a tradition or institution – their articulation is seen as unnecessary. Van Leeuwen distinguishes among a variety of forms of authorization which differ according to the agent or 'force' from which the authorization proceeds and their corresponding typical linguistic realizations (ibid: 106 – 107). Although linguistic patterns signaling legitimation on the basis of authority include verbal process clauses in which the projected clause contains some form of obligation modality (ibid: 106) and verbal or mental process clauses that situate an 'expert' as the subject (ibid: 107). In example 4.30, which involves a verbal process clause (and which I have held indexes the internal good of rationality – because the judge must provide *reasons* for his decision), accepting the reasons put forward by the judge must flow simply from the fact that he speaks as a judge.

> 4.30 The judge will, when he starts giving his order, just before that, towards the end, he will say these are the reasons why I decided like I decided.

Example 4.31 also relates to the work of judges and signals the internal good of legal certainty. Legitimation of this good is linked to the judge's decision and thus the judge's authority. The process type involved, however, is mental rather than verbal. Example 4.32, in turn, involves the legitimation of the deputy chief justice (a positive evaluation) – in this case linked both to his occupation of the office of the deputy chief justice, but also to the high institutional status of chancellor of the university.

4.31 But in general the judge will always decide on the minimum change in society.

4.32 Who's the deputy chief justice, he's on sabbatical at Wits now … he's sitting here in Wits, he's doing sabbatical work, he's also the chancellor of this university.

In the case of moral evaluation, the legitimation is based on values other than the value that lies in the recognition of various forms of authority (ibid: 109). According to Van Leeuwen, in some cases moral value is simply asserted by 'troublesome' words (such as 'good' or 'bad'), but in most cases moral evaluations index particular discourses of moral value. For example, a discourse of moral value relating to law might be indexed by such words as 'human rights', 'equality', 'just', 'non-arbitrariness' and so on. Such words, however, only hint at the underlying discourses – they do not make the explicit and debatable. As Van Leeuwen puts it, '[t]hey trigger a moral concept, but are detached from the system of interpretation from which they derive …' (ibid: 110). There is as a result no explicit, linguistically motivated method for identifying moral evaluations – they can only be 'recognized' on the basis of 'our commonsense cultural knowledge' (ibid). Nevertheless, it was helpful to know that a few linguistic forms point to the presence of moral evaluation in texts (ibid: 110). These include evaluative adjectives (as in example 4.33), abstractions (as in example 4.34 where the quality that is distilled from the social practice of being a public prosecutor is boredom) and analogies (as in example 4.35 where the role of legal academics in producing research for publication in legal journals is delegitimated through comparison with a mouse running around and around, senselessly, in its wheel).

4.33 When I was a when I was a specialist prosecutor one of my *glorious* cases that I prosecuted was sommer a very quick case that was sent to my court.

4.34 Um it's not *boring* like being a public prosecutor.

4.35 [T]he only people reading journal articles, learned journal articles, are the thirty percent of academics who are involved in the publishing of those articles … [the] … other … seventy percent of the other academics never read it. So you know it's a you know it's a its like a little mouse in one of these little wheels.

Rationalization involves 'reference to the goals and uses of institutionalized social action and to the knowledges that society has constructed to endow them with cognitive validity (ibid: 106). This form of legitimation relies on purposive constructions though, as Van Leeuwen explains, not all purposive constructions are legitimations (see ibid: 124ff). A purposive construction only

qualifies as a legitimation if it contains a level of 'moralization' (ibid: 113–114); i.e. it should index discourses of moral value. A purpose construction requires three elements: (a) the object whose purpose is being constructed; (b) the purpose, which can be a process, an action or a state; and (c) a purpose link (such as a nonfinite clause beginning with 'to') (ibid: 126). Even though the undergirding rationality appears to be made more explicit, reference to the relevant discourse of moral value is still oblique (ibid: 113). In example 4.36, from the lawyer's perspective the purpose of receiving people who seek advice is that they will be paying a thousand to three thousand rand an hour (thus indexing an external good). In example 4.37 the purpose of the magistrate hearing the case is constructed as avoiding a situation where the accused will stay in jail for the rest of the weekend (thus referring obliquely to the rights of the accused, considerations of fairness and so on).

4.36 People come to you … and they pay you a thousand to three thousand rand an hour, to get advice from you because you know.

4.37 I am reluctantly hearing this case because I'm the only sitting court that can hear this case otherwise this man will stay in jail for the rest … of the weekend.

Mythopoesis is legitimation achieved through storytelling (ibid: 117). These can take a moral or a cautionary slant. In cautionary tales (ibid: 118), the narrator elaborates the outcomes of failing to comply with the norms of social practices. The use of mythopoesis, however, may contain all the other forms of legitimation. A few cautionary tales were present in the data, including the lengthy tale of the secretary in the attorney's office and the law teacher's experience of sentencing an offender to prison for a first offence.

5.5 Relational and 'if then' clauses

In addition to the codes described above, I took note of the presence of relational and 'if then' clauses. These constructions are not explicitly included in the analytical tables – rather I simply noted them as I proceeded with the write-up of the findings. At noted above, 'if-then' constructions can specify a condition precedent (as in example 4.38 where a condition precedent to being invited as an acting judge in the highest courts is being 'deemed fit') or indicate an (inevitable) consequence (as in example 4.39 where the only career option left open

to the failed lawyer is to become a politician). My argument is that both such uses function to solidify or 'cement' meanings.

4.38 if you are deemed to be fit, they are invited as an acting judge to the Supreme Court of Appeal or to the Constitutional Court

4.39 You know if a lawyer is a failure, a dismal failure, the only thing that that remains open to him is to become a politician.

This is arguably even truer of relational clauses, which link two phenomenon in a very tight relationship, as in example 4.40 where appearing in court and being intimidated are linked in a manner that seemingly allows for few exceptions.

4.40 [A]ppearing in a court is very very intimidating.

6. SUMMARY

In this chapter I have outlined the processes I undertook to develop a set of codes to analyze the lecture material. I started off explaining and illustrating the differences between representational, interactional and identificational forms of meaning and indicated that my focus fell squarely on representational meanings. I briefly outlined Van Leeuwen's approach to systematizing representational meanings and illustrated in Appendix 5B the richness of the categories he develops for the three chapters of his work on which I relied the most. I then describe my two attempts to work with Van Leeuwen's data – the first ending in disappointment, the second involving selecting and developing codes that I considered would be useful in constructing narratives around the key legal professional roles in the text. I finally described each code used in the analysis, with references to the lecture material for illustration purposes.

The following chapter presents the findings that emerged from the application of this analytical scheme to the data.

CHAPTER FIVE

REPRESENTATIONS OF LEGAL PROFESSIONALS AND THEIR SOCIAL PRACTICES

1. INTRODUCTION

In this chapter I piece together the scattered representations of legal professionals and their social practices that occurred over the course of the 22 classroom lectures I observed and transcribed. By organizing these representations in terms of the various elements of social practice which my language of description fleshes out, I am able to show how the lecturer's classroom talk constituted different legal professional roles. The picture that emerges is richly detailed, providing an extensive array of discursive resources to name and describe legal professionals and their social practices. According to the conceptual frame outlined in chapter two, such discursive resources lie at the heart of identity regulation in the classroom, for they not only (re)present legal professionals and their social practices in particular culturally-bounded ways, they establish a foundation for the next generation of incumbents to fashion their professional identities as they appropriate and begin to use these discursive resources in their own talk. The nature of language and meaning is such however, that there is always space for a new generation to shift, challenge or reject the discursive resources that are presented to them. However, in doing this they work against the assumption that what is represented is the norm. This was true of the representations of legal professionals and their social practices in the classroom of my study for they tended to be presented as the ways things work, or the way things simply are.

Using the various content words that designate legal professionals in a South African context, I identified the quotations in my data set which represented different legal professional roles and/or some aspect of their social practices. I then classified each according to the dominant legal professional role represented. The number of quotations attached to each role is set out in Table 1.

Legal Professional Roles	No. of Quotations: Lectures 1 – 21 (1st half)	No. of Quotations: Lectures 21(2nd half) – 22	No. of Quotations: Total
GENERIC CATEGORY			
Lawyer	38	3	41
PREFERRED CAREER PATH			
Articled clerk/candidate attorney	2	9	11
Attorney	11	22	33
Attorney specialization: Conveyancer	0	1	1
Attorney specialization: Notary	0	3	3
Advocate	26	29	54
Judge	70	9	79
SHADOW CAREER PATH			
Public prosecutor	2	4	6
State advocate	0	3	3
Magistrate	20	6	26
NICHE CAREERS			
In-house legal counsel	0	2	2
Law commissioner	0	1	1
Legal academic	11	9	20
State attorney	1	2	3
State legal adviser	0	1	1
ADMINISTRATIVE POSITIONS			
Clerk of the maj court	0	1	1
Master of the High Court	0	1	1
Registrar of deeds	0	1	1
Registrar of patents, trademarks and copyright	0	1	1
Registrar of the High Court	0	1	1
POLITICAL APPOINTMENTS			
Director of Public Prosecutions	4	1	5
Family advocate	0	1	1
Human Rights Commissioner	0	3	3
Public Defender	0	1	1
Public Protector	0	1	1

Table 1: Number of quotations attached to particular legal professional roles.

The words used to name legal professionals were both generic and specific. The generic term used was the word 'lawyer'.[71] The bulk of the quotations, were however associated with 24 specific naming words for legal professionals. It is these particular 'naming words' that identified and thus distinguished particular professional roles. A variety of positions in the public service were mentioned in the lecture dealing specifically with the legal profession, but in most instances this was the first time they received a mention. It is clear that the roles of the judge, the advocate, the attorney and the magistrate emerged as dominant.

The table also indicates that reference to 'lawyers' and specific types of legal professional in the lectures *not* focussed on the legal profession (i.e. lectures 1 to the first half of lecture 21) were significant, in some cases far exceeding the quotations in the legal profession lectures (as for the roles of the lawyer, the judge and the magistrate) in other instances almost equivalent to the quotations in the latter (e.g. the role of the advocate). I thought that this finding, in itself, lent support to my hunch that the communication of messages about lawyers and the legal profession is pervasive in classroom talk, even where this is not the primary focus of the curriculum.

The representation of legal professional roles in the lecturer's classroom talk were linked into two major career paths. The first, represented as the overwhelmingly preferred career path, linked the roles of the articled clerk, attorney and the advocate, with the role of the judge, reserved for the very best advocates, at the pinnacle. The second, represented as the more menial, disparaged or shadow career path linked the roles of the public prosecutor, state advocate and magistrate. In contrast to the preferred career path, where the progression through the roles was linear, the progression of roles in the shadow career path was alternative (either public prosecutor-state advocate or public prosecutor-magistrate). The roles of the legal academic, in-house legal counsel, law commissioner and state legal adviser were represented as alternative, niche careers in relation to these two career paths. As representative of the niche careers, I discuss the role of the legal academic because it had the most quotations and was also linked to becoming an advocate and a judge in very exceptional circumstances. In

[71] The term 'legal practitioner', one of the key concepts in the Draft Legal Practices Bill (2010), was never used, and merely indicates that this particular term had not been appropriated by the lecturer I studied as a discursive resource.

addition to these roles, the lecturer made cursory mention of various administrative roles, as well as roles which are dependent upon some form of political appointment. I will not deal with administrative roles save to say that these were generally represented as being menial in nature (indexed by the lecturer's use of the generic term 'factotums' to refer to such roles at L22:110:726). As regards political appointments, I will deal only with the Director of Public Prosecutions as the others, with only one quotation apiece, do not really accommodate an extended discussion. The relationship between the roles and the different career paths is illustrated in Figure 8 below.

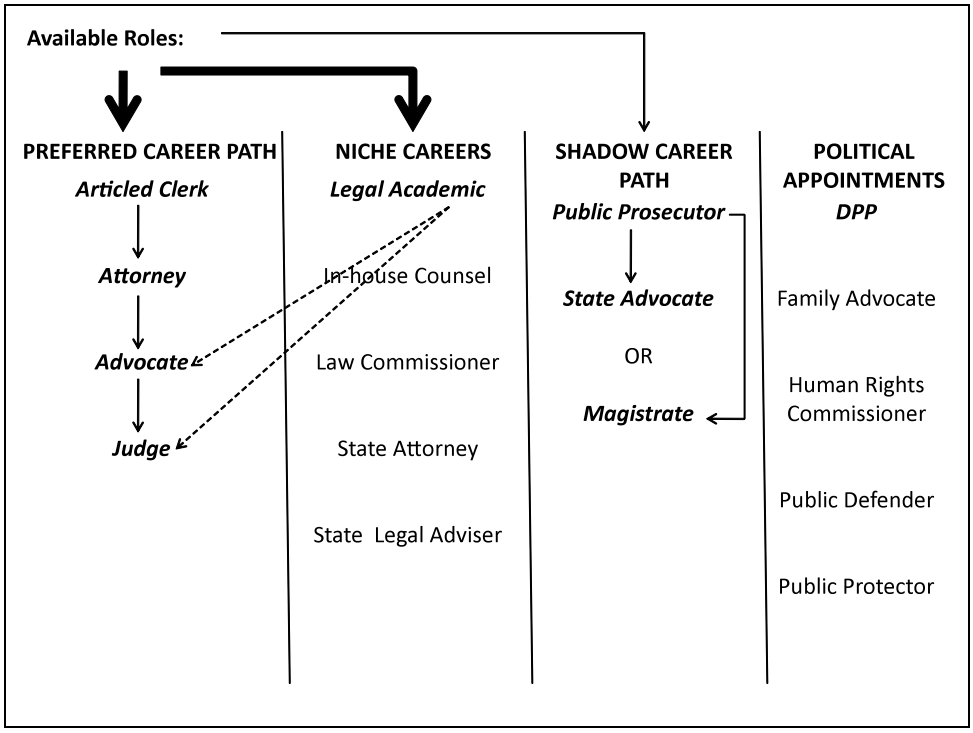
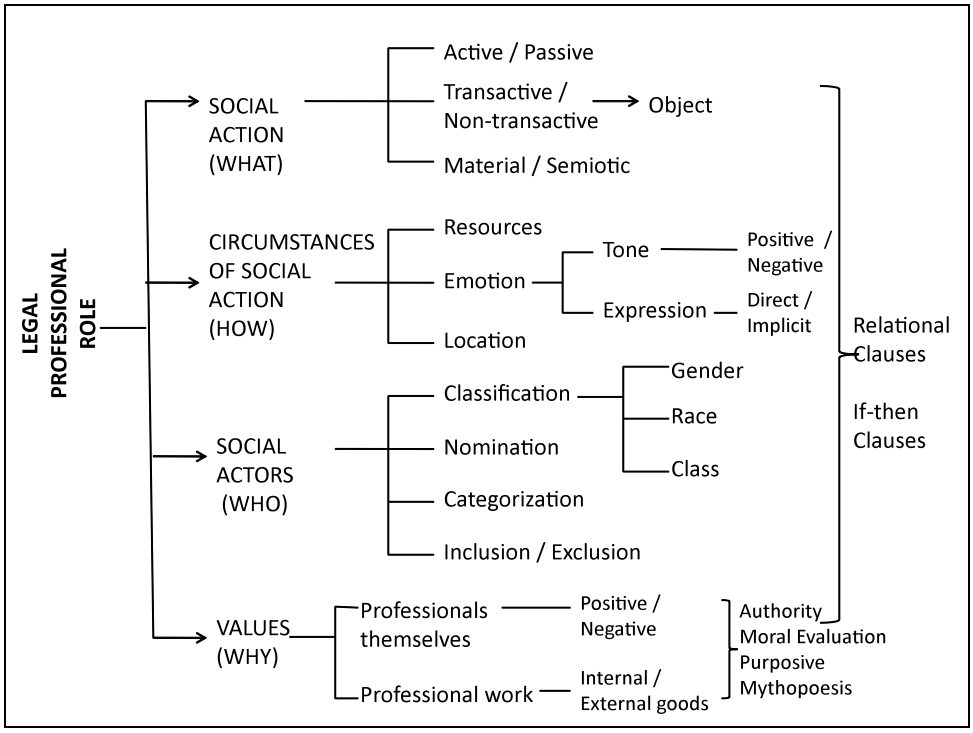


Figure 8: Overview of Career Paths and Roles. Arrow weight indicates preference, arrows show linkages and progression. Roles in bold and italics are discussed further in this chapter.

In section 2 of this chapter, I commence with a reconstruction of the lecturer's representations around the generic role 'lawyer'. Thereafter I reconstruct each of the roles linked into the preferred and shadow career paths respectively. Section 3 deals with the preferred career path and covers the roles of the articled clerk, attorney, advocate and judge. Although the role of the judge is linked into this preferred career path, I treat it separately from the others because the judge – occupying a position of state authority – is differently positioned from the other roles, both in relation to other lawyers and in relation to the people who seek legal services.

Section 4 outlines the shadow career path, encompassing the roles of the public prosecutor, state advocate and magistrate, with the role of the magistrate similarly treated separately. Section 5 moves on to the role of the legal academic, while Section concludes with the Director of Public Prosecutions as representative of legal professional roles linked to political appointments.

In each case, I use the model of the legal professional in social practice outlined in chapter four to structure my discussion. In this regard, the outline and discussion of the analytical codes in sections 4.2 and 5 of chapter four refer. Figure 7, which presented the codes in a graphical format is reproduced here for ease of reference:



2. THE LAWYER AS GENERIC CATEGORY

2.1 Social action

An analysis of the 41 quotations associated with the generic term 'lawyer' yielded 46 extracts which positioned lawyers in relation to forms of 'doing' or action in the text. The overall representation that arose from these 46 extracts is that lawyers are active and powerful agents, whose mastery over the semiotic domains of laws, language and information places them in a position of authority over other people. The instances in which social action was coded as passive, non-transactive or material highlighted areas of potential vulnerability – waiting for clients, being paid by clients and being 'gossiped' about – over which lawyers seemingly exercise less control.

The lecturer constituted lawyers in social action in a manner that represented them as overwhelmingly active (87%), substantially transactive (73%) and primarily exercising semiotic power (73%). The most significant semiotic form over which lawyers were represented as actively exercising power is law itself (associated with 41% of the transactive quotations). Lawyers 'work with laws' (L-SA10) but the source of their power over laws does not lie in knowledge of the law *per se*: The law is a 'very difficult mistress', a '*vast* field' (L-SA5b) and nobody can therefore claim 'to know everything that there is to know about the law' (L-SA5b). Instead, the lawyer's power over law lies in the capacity to 'find' the law (L-SA29); to 'read' court cases and other legal texts with understanding (L-SA26); and to 'interpret' legislation (L-SA16; L-SA20). These capacities are so important as to be definitive of lawyers. The lecturer, for instance, implores his students to read their court cases: 'Students, I don't know why, but students are lazy to read the case', he says. Shrugging his shoulders in despair he continues 'I don't understand it. You know that is … what makes you a lawyer. If you don't read court cases you're not a lawyer' (L-SA26). A relational clause ('that *is* what makes you a lawyer') and an if-then clause ('If you don't read court cases [then] you're not a lawyer) signal the solidity and importance of this relationship in the lecturer's semantic universe.

But lawyers' power over laws is much greater than simply being able to find, read and interpret the law. They also 'draft' (L-SA7), 'develop' (L-SA14) and indeed 'create' laws (L-SA13). They are

able to 'test' laws against a higher system of moral authority (L-SA1) and are thus capable of assuming the authority to do this. 'Finding' and 'drafting' the law are relatively closely situated to material processes, but 'reading', 'interpreting', 'developing' and 'creating' laws situate the lawyer in a realm of more generalized action and abstract concepts.

An initial clue to the hierarchy of the semiotic over the material – a theme which will be explored in relation to all the roles represented in the data – is given by the context in which the lecturer uses the term 'draft'. Elsewhere, the lecturer refers to lawyers engaging in the more semiotic actions of 'developing' and 'creating' laws, but when he refers to 'drafting' laws, he speaks of how poorly laws are drafted in South Africa. And they are 'not drafted with any kind of elegance' because they are 'drafted by civil servants' (L-SA7). What can you expect, the lecturer asks, because the 'bright lawyers are in private practice. And only the duds go into civil service and they draft laws.' (L-SA7). In this utterance the lecturer collocates the term 'draft' – a word closer to the material, painstaking process of writing and rewriting the text of legislation according to the design of higher-placed policy-makers – with both 'civil service' and 'duds', while he collocates the term ' private practice' with 'bright lawyers'. In this way the lecturer paints drafting, as well as the public sphere of legal work, in an inferior light.

The secret to lawyer's power over laws, however, lies in their power over another, more general, semiotic form – language. 'For a lawyer, languages is like the secret' (L-Q40), the lecturer says at one point. 'If you are not good with languages, if you are not good with words, understanding words, writing words, speaking words, then the legal profession is going to be very hostile. A very hostile environment for you' (L-SA18). Once again, an 'if-then' clause establishes the importance of this relationship. This secret in relation to language lies at the very heart of the origin of the legal profession and is the basis for its exclusivity:

> **LECTURER:** So the legal profession ladies and gentlemen, this profession that you so eagerly want to enter, the legal profession started with a monopoly. It started with a mystery. It started in a temple. …[Y]ou would bring your case to the temple to the priests to find out whether you had an action and whether there was a good day on which you could bring your action. …[L]aw is an elitist or an exclusive profession. And it is exclusive because we almost have our own language, in the old days people used Latin, but we almost have our own language. And we have all these specialized tools. We know how to read a court case. We know how to read a contract.

> We know the mysteries behind the legal texts. And that is that is that is the origin um of the of the legal profession. (L-Q28)

The secret has to do with understanding that it is language that lies at the heart of social conflict (L-SA19a), and that lawyers grapple with this conflict 'by understanding words in their very very difficult and multifaceted way in which they operate' (L-SA18; see also L-SA23; L-SA27c). The lecturer models and indexes this capacity at various points. For example, in relation to the meaning of the term 'common law', at the end of a lengthy exposition he highlights for students that 'this is exactly the kind of thing that will be expected of you as a lawyer. This is *one* word. Common law. And I have now in fifteen minutes, I don't know how long, given you at least five or six distinct different meanings of that one word. And it would be expected of you as a lawyer one day to read a sentence and from that sentence to deduct what does the 'common law' mean … in that sentence' (L-SA15).

However, the 'secret' also has to do with understanding the power that flows from recontextualizating the world in legal language. 'If you're a lawyer then things have a legal meaning' (L-SA39a). Thus, the lecturer corrects a student when she refers to the 'full title' (everyday language) rather than the 'long title' (legal language) of a statute because 'if you don't use the right word it doesn't work' (L-SA12). And he shows how the everyday meaning of the words 'without prejudice' carry important and different connotations in a legal context: That they refer not only to the idea of 'not harming' but also to the idea of 'not being bound', or reserving one's rights in the process of litigation (L-SA39d).

In addition to mastery over laws, language and legal language, the lecturer advocates that mastery over information – a kind of general knowledge of society – is definitive of being a lawyer (L-SA6; L-SA9; L-SA24). He reacts with deep shock, for instance, when he discovers that students are unaware of the identity of the chancellor of their university (L-Q9) and admonishes them: 'You must know these things ladies and gentlemen, if you are going to become a lawyer you must be informed in our society, in your community and if he's the chancellor of your university … you are going to run into trouble, you must know this, ladies and gentleman, I'm making a joke about this now because it's hot and it's a long lecture but *please* don't underestimate what I'm saying: A lawyer in society *is somebody who's informed*' (L-SA9, my

emphasis, note the relational clause). This requires that lawyers must 'read' and 'know' a variety of things: They must read the law reports every month, the newspaper 'every day', and the professional journal every two weeks. They must know what's going on in the university, the bar and the side-bar, they must know which cases are before the courts, and who are the most important 'movers and shakers' in the country (L-SA9e).

Their mastery of laws, language and information is the source of lawyers' potency in relation to, and over, a range of others. It is firstly a power that is exercised in relation to clients. A lawyer not only 'advises' clients on the basis of his knowledge of laws, language and information (L-SA9d), he needs to 'impress' them with this knowledge so that they will reward him handsomely (L-SA38).

Assuming a client's interests and point of view, it is secondly a power exercised in relation to 'the other side' (L-SA39a), the legal team representing the person with whom the client has a misunderstanding. This was most vividly illustrated in L-Q39 where the lecturer stated:

> **LECTURER:** Ladies and gentlemen if you are opening litigation… If you are just feeling the water, if you exchange your first documents, before you start exchanging pleadings, you are writing to the other side and you say: 'Look', according to my client, this is what happened. My client says this is what happened. Um … if this is true, we are going to sue you. Um … if you want to, if you want to negotiate, if you want to talk, you know, lets do so.' (L-Q39)

In this short extract the lecturer represented the lawyer engaging in a number of material processes – 'exchanging documents', 'exchanging pleadings', and 'writing to the other side' but these are encompassed within the broader semiotic action of 'opening litigation'. The lawyer is represented as the confident initiator of this process who has no reservations about employing that most powerful of legal phrases: 'We are going to sue you' in relation to other people. But in this representation the lawyer also assumes power over managing the litigation process by inviting 'the other side' to negotiation and discussion.

The lawyer's potency ascends a notch in the actions of 'arguing', 'convincing' and 'persuading' (L-SA27d; L-SA33): 'That is what lawyers do. They argue to convince you' (L-SA33 – note, again, the presence of a relational clause defines what lawyers 'do' in terms of verbal dueling). For this reason it is 'very important' that lawyers are able to 'project' themselves. Knowledge, in itself is

not very valuable. 'If you can't share that knowledge, if you can't convince somebody else, of your point of view … it's useless. Its dead gold in the safe' (L-SA11). By defining the criterion for success in these terms, lawyers are represented as extremely potent players in the semiotic domain because they effectively possess the power to change how somebody else thinks or feels.

However, their highest form of power resides in their capacity to pronounce or have a 'say' over things and people. They are represented as having the *capacity* to speak in an influential moral voice (even if they do not always exercise this capacity), as when the lecturer's 'natural lawyer' 'says' to a government that passes a law prohibiting a black man from falling in love with a white woman: 'Sorry, is not in accordance to the higher law. It is an unjust law and therefore the citizens that is (*sic*) oppressed by this law have the right to disobey that law' (L-SA3). It is easy to underestimate the extent of this power, which is truly far-reaching: It is an authority that can face up to other forms of authority (governments, for instance) and define what is just and unjust and who does or does not have a right to do something. However, it is also a power that can entrench existing forms of inequality as when the lecturer refers to Hugo de Groot, the 'great Dutch lawyer' of the 16 century, who said in one of his books: 'You can't trust with money a woman that is not a … 'umbaarkoopvrou', if a female is not a public merchant you cannot trust her with money' (L-SA17). Although the lecturer discredits this view – it is 'a little bit chauvinistic' but more importantly, contradicts the right to gender equality in the South African Constitution – the point I wish to underline here is simply that lawyers are represented as having this far-reaching capacity – to pronounce on what *should* be and thereby contribute to defining the semiotic placement and material circumstances of whole categories of people, as Hugo de Groot's writings on law did for the position of women in relation to money for many centuries.

Representations of lawyers as passive (13% of social actions) or non-transactive (27%) in relation to social action, or as engaged in material action (27%) were far less frequent. Where they did occur they pointed toward the soft underbelly of the lawyer's otherwise seemingly invulnerable façade: Lawyers' relationship to clients, and their relationship to other lawyers.

The relationship between lawyers and their clients is complex. On the one hand, a lawyer's position is very powerful: They are privy to clients' sensitive information; they are capable of recontextualizing their client's problems in legal language; and they steer the course of engagement with the persons with whom a client has a dispute. However, the relationship is ambiguous because lawyers are also dependent on clients for work – they are the lawyer's 'bread-and-butter' (L-Q23). The quotations in which the lawyer's relation to action was passive, non-transactive and material related to this feature of the lawyer-client relationship, with the lecturer depicting 'lawyers' as 'sitting' and 'waiting' for clients to come to them (L-SA9b; L-SA21). The use of the term 'lawyer' in this particular context, however, needs to be qualified, for the need to 'sit and wait' for clients applies only to the roles of the attorney and the advocate.[72] Further, because South Africa has a divided bar, it is only really attorneys who 'sit and wait' for people to come 'off-the-street' with their problems: Advocates, as litigation specialists, are reliant on the attorneys for work who thus constitute the 'clients' of the advocates. In the case of the advocate, therefore, their relationship to clients is bound up with their relationship to other lawyers. It is in this regard that the significance of the lecturer's comment about lawyers' irresistible desire to 'gossip' emerges. Lawyers, and particularly advocates, cannot avoid the possibility that their performance in court will be talked about (a passive, semiotic action), and thus impact on their ability to attract future work.

2.2 Circumstances of social action

The 41 quotations associated with the term lawyer not only pointed to the key social actions in which lawyers are engaged but also provided information on the circumstances associated with those actions. Within this set, a total of 16 extracts contained further information on the resources lawyers employ in their social practices; 6 provided some detail on the emotional 'ground-tone' of being a lawyer; and 4 provided insight into the locations in which lawyers function.

The resources which lawyers were represented as needing to have – the 'tools of the trade' (L-CSA10; L-CSA18) – confirmed the semiotic nature of their work. Lawyers work with language

[72] For an overview of the attorney-advocate relationship in South Africa see Van Dijkhorst (2007) para 112, at 107.

and 'words' (L-CSA4; L-CSA18; L-CSA28; L-CSA38; L-CSA40); books (L-CSA18; L-CSA25); dictionaries (L-CSA18; L-CSA39); court cases (L-CSA27b), including such specialized tools as 'headnotes'[73] (L-CSA27a) and 'noter-uppers' and 'indexes' (L-CSA29).[74]

The one resource which lawyers were represented as specifically *not* having – the resource of time (L-CSA27b; L-CSA27d; L-CSA41) – introduces a new theme in the lawyer narrative. 'People in practice, for instance, *don't have time* to write journal articles'. They write 'short little superficial things' for the *De Rebus* and *Without Prejudice* because 'they *haven't got time* to go and do thorough research …' (L-CSA41, my emphases). These representations about not having time serve as an indirect expression of a negative emotional state: Stress. This emotional state accounted for 4 of the 6 extracts coded for emotional content. In the lecturer's representations lawyers are people who work in stressful and pressurized environments. Although 'preparation is everything', lawyers must be capable of thinking 'on their feet', of responding intelligently and wittily to a challenge where they have not prepared (L-CSA30b). Thus, in court, if the judge says 'Please address me on the following point', the lawyer must be able to look 'very very hastily for some authority' and then argue the point before the judge, even though he or she may not have been able to read the whole case but only the headnote (L-CSA27b). A lawyer who is unable to meet the challenges of the profession should not expect care and nurturing, only hostility (L-CSA18).

Despite operating in stressful and hostile environments, lawyers must be able to maintain a façade of emotional calm. 'If you're a lawyer, you must never do anything if you are in a bad mood or if you are emotionally unstable' (L-CSA37). An 'if-then' clause in this quotation represents needing to be emotionally stable as the inevitable and normative consequence of being a lawyer. Lawyers are thus presented with a double challenge: They must not only be able to cope with working in stressful environments, they must also be effective at separating themselves from the stress and presenting a cool and calm façade.

[73] The main publishers of court cases in South Africa conventionally publish a short summary that precedes the publication of the judgment given by a judge in a particular case. This summary is called the 'headnote'.
[74] An 'index' and 'noter upper' relates to the indexes of court cases published by the two main legal publishing houses in South Africa, Juta and LexisNexis: Butterworths. By using this tool practitioners can ascertain which cases have been decided on particular issues and the relationship among cases.

It was interesting to see how the lecturer at one point engaged with this emotional characterization of the lawyer's working environment, attempting to offer students an alternative model. Lawyers, he cautioned, frequently don't read their instructions from clients carefully. They tend to be 'quick, clever, and wrong' (L-Q23). He urges his students: 'Go and sit down, read the instruction. Take it in, read it again, make sure you know what the client wants. Um you know, there's no rush whatsoever. We are not working with the lives of other people, you are not a paediatrician or a cardiac surgeon, nobody's going to die, I've never seen anybody die in a law office. Um so there's no urgency, *although I might be saying something to the contrary* - sit, relax see that you know what is going on' (L-Q23, my emphasis).

With the exception of the location of the 'court' and the 'office', the lecturer seldom linked the 'lawyer' to *specific* working environments. Lawyers were by and large represented as operating in a world of semiotic forms (laws, language and information) and thus in a curiously physically dis-located fashion. In the few instances where a specific location was mentioned, however, the location that emerged as preeminent was the court (L-CSA25b; L-CSA27c; L-CSA30a; L-CSA31), the 'theatre' (L-CSA30a) of the lawyer's 'performance' (L-CSA31).

2.3 Social actors

This section considers how the lecturer represented both lawyers and their clients as social actors.

2.3.1 Lawyers

While I was not able to find any specific classification on the basis of class in the 41 lawyer quotations, gender, and to a much lesser extent, racial classification was evident in the text.

Gender proved to be the most straightforward and explicit classification of lawyers. In the majority of instances the lecturer's references to lawyers were gender-neutral but in 5 (12%) of the 41 quotations there was a specific gender classification. In 4 of these extracts the gender classification was indeed male (L-SAct3b; L-SAct5b; L-SAct7b; L- SAct17a), and in the remaining one it was gender-inclusive (the lecturer's reference in L-SAct1b to 'man-made, woman-made, person-made law'). There were two instances of nomination – reference to the 'church fathers'

St Augustine and St Thomas Aquinas (L-SAct3a) and the 'great Dutch lawyer' Hugo de Groot (L-SAct17b) – which also involved reference to males. None of the quotations therefore referred exclusively to female lawyers.

The racial classification of lawyers was even subtler. Apart from the fact that the two instances of nomination in the text mentioned above referred to *white* males, in the 41 lawyer quotations the lecturer only used the classifiers 'black' and 'white' once – in regard to the 'unjust' apartheid laws which prohibited a 'black man' from falling in love with a 'white woman' (L-Q3). However, the black man and white woman in this example were clearly not represented as lawyers. Instead of classifiers, racial classification arose from very subtle contextual references to the use of language. The first occurred in the following exchange (L-SAct8) between the lecturer and Student 15 (a black, male student):

> **STUDENT 15:** Government Gaz / Government Gazette what what …
> **LECTURER:** The what what what government what is the government what is this thing Government Gazette. You can't talk like that like a lawyer you can't use 'what what', it's not legal phraseology ….
> **STUDENT 15:** It's a document keeps the [gestures with hands] Act and ..
> **LECTURER:** OK I don't understand what you're saying …

In this extract Student 15 uses the phrase 'what what' to signify his lack of certainty about the term 'Government Gazette'. In my own classes and the classroom I observed for my research I observed that black students use the phrase 'what what' in the sense of 'or whatever' or 'kind of'. The lecturer took great exception to this phrase, specifically categorized it as lying outside the domain of 'legal phraseology' and warned the student that he can't 'talk like that like a lawyer'. Because it is primarily black students who use the phrase 'what what' the association that could arise from this exchange is that black ways of speaking are antagonistic, and possibly inferior to, the ways of speaking like a lawyer. The broader point which the lecturer may have wanted to make through this exchange was possibly that 'slang' is not appropriate in a legal context, but because he did not highlight any uses of slang in relation to white students, or link white students' language use to the language used by lawyers, the classification that arises from the exchange seems racial.

The second instance of race classification arising from the intersection of lawyers and language

occurred when Student 3 (a white female) asked the lecturer whether it was beneficial for lawyers to know a 'European' language. The lecturer affirmed this and continued: 'And that's why, in the apartheid days unfortunately they prescribed that you must have English, Afrikaans and Latin. And I would say English, Afrikaans, Latin plus a European language. And an African language. Yes say Afrikaans and or any other African language. English at a first-year level, Latin at a first-year level and a European language at a first year level. Otherwise you can't become a lawyer' (L-SAct40). The subtle discrimination against African languages arises here through the manner in which English, Afrikaans, Latin and a European language are mentioned first, while the reference to an African language seems to be tagged on as an afterthought. Then follows a sentence in which the lecturer affects some repair by placing Afrikaans and an African language on the same level, posing them as alternatives for the essential language requirements of the lawyer.

Lawyers were also categorized on bases other than the social classifications of gender, race and class. The lecturer referred to 'natural' lawyers (L-SAct1a), 'constitutional' lawyers (L-SAct16); 'successful' lawyers (L-SAct9b) and lawyers who are 'failures' (L-SAct7a); 'good' lawyers (L-SAct27; L-SAct30a) and 'exceptional' lawyers' (L-SAct30b). A distinction between lawyers who are in private practice and those who are in public or civil service, emerged only once in this particular set in relation to the action of 'drafting' laws and was clearly associated with a delegitimation of civil service employment in relation to private practice (L-SAct7c).

2.3.2 Clients

Clients were present or included in the social action more times (5 extracts) than they were backgrounded (3 extracts) and in 3 extracts the lecturer mixed terms that both included and suppressed clients as social actors. The latter set is especially interesting for tracing how clients are progressively backgrounded as the lawyer proceeds to deal with the client's problems through, in particular, the courts.

Clients are initially present as the 'people' or the people 'off the street' who come to the lawyer seeking legal advice (L-SAct5a; L-SAct9a; L-SAct21) for which they will pay handsomely (L-SAct9a). They are *people*, integrated 'subjects' who require the lawyer's expertise to solve

miscommunication (L-SAct19). Shifts in their status occur as 'people' become identified on the basis of the 'problems' they bring to the lawyer: 'Because what lawyers do is they sit in their office and they wait for people … to come off the street to bring their problems to them. And it can be anything. It can be from the theft of an artwork to a divorce to a rape to a … disputed … testament, a will' (L-SAct21). The characterization of the client's problem in terms of the categories provided by laws and legal doctrine – theft of an artwork, divorce, rape; etc – is one of the initial and most important steps in recontextualizing an everyday problem as a legal problem. The problem then becomes a 'case' (L-SAct14; L-SAct28). Sometimes the name of the client involved in the case is retained as an identifier (as in 'the Harris case') but this is not a given. The words 'problems' and 'cases' therefore are discursive resources that progressively facilitate the backgrounding of clients as social actors. The impacts of this semantic shift are likely complex and multifaceted but from one perspective they allow lawyers to distance themselves from the messy conflicts with which lawyers frequently have to grapple, much like the medical 'case' may allow doctors to distance themselves from the body and issues of life and death.

The other shift present in the lecturer's representations was the movement from 'people' to 'client'. This involves complex shifts in the nature of the power exercised by lawyers and clients vis-à-vis each other. As people become clients, it becomes important for the lawyer to, for instance, 'impress' the client (L-SAct38) and to make very sure that he or she knows 'what the client wants' (L-SAct23). This places the client in a position of power over the lawyer. On the other hand, as the lawyer assumes control over managing the dispute that lies at the core of the client's troubles, the use of the possessive pronoun constructs clients as owned by lawyers; i.e. he or she becomes '*my* client' (L-Q39) and his or her voice in defining the dispute is taken over by the voice of the lawyer (L-SAct39). The client is also instrumentalized in being characterized as the lawyer's 'bread-and-butter' (L-SAct23).

2.4 Values

There were 25 extracts associated with valuing or devaluing lawyers or their work within the lawyer quotation set. Ten related to whether lawyers themselves were either valued or

devalued. Of the fifteen relating to evaluation of lawyers' work, 9 (60%) related to the internal goods of the practice and 6 (40%) to external goods. In all 25 extracts valuation and devaluation were predominantly constituted through the strategy of moral evaluation (76% of the extracts), rather than through rationalizations (20%) or through references to authority (5%). Unlike legal reasoning, therefore, which is predominantly guided by reference to legal authority, the values associated with *being* a lawyer enter professional discourse through the somewhat problematic, subtler route of moral evaluation.

Not surprisingly (given the lecturer's somewhat cynical outlook on the profession alluded to in chapter 3), in 9 of the 10 instances where the lecturer provided an evaluation of lawyers it was negative. Lawyers in general were represented as people who are somewhat lacking in intellectual capacity (the classification system invented by Linaeus is so 'absolutely basic and simple' that '[e]ven lawyers can understand it' – L-V32), who are sometimes slapdash about reading the instructions of their clients (L-V23), and who cannot resist the urge to 'gossip' about their colleagues, although this is both gossip in a 'negative' and a 'positive' sense (L-V31). Specific groups of lawyers tended to be devalued on the basis of their lack of capacity, particularly intellectual capacity: 'Constitutional lawyers' are devalued on the basis of their failure to understand the proper relationship between the Constitution and Roman-Dutch law (L-V16); lawyers who enter civil service are devalued on the basis that they are 'duds' (LV7c); and lawyers who become politicians are devalued on the basis that they are the 'worst people … who can succeed at nothing else but sitting there and making noises' (L-V7a – though this representation was couched in the form of a 'joke'). 'Natural lawyers' however, those who believe that laws should be tested against a higher source of moral authority, were devalued on the basis of their lack of 'moral courage' (L-V3a). The lecturer suggested that during apartheid the 'right' thing for a natural lawyer to do would have been to advocate civil disobedience – to recommend that force or revolution could be used to overthrow the government that made the law. But the 'natural lawyers' in his representation – specifically St Augustine and St Thomas Aquinas – lacked the moral courage to do so, and gave preference to the value of order over justice (L-V3b, c). This seems to represent justice as antithetical to order, and lawyers who work within the status quo as inevitably 'cop-outs' of some sort. The lecturer's dichotomization of

order and justice appears to rule out the possibility of acting with moral courage within the status quo.

Notwithstanding the fact that lawyers as such were devalued, the lecturer suggested two internal goods of the practice. The first centred around a vision of law as the bastion of order (L-V3c); objectivity, rationality and thoroughness (L-V2; L-V23; L-V41; L-V37); and certainty (L-V10b). The second is somewhat more problematically and tenuously categorized as an internal good: The importance of an elegant or impressive presentation, which appeared in 3 of the 9 extracts associated with internal goods. The lecturer advised students to put things 'elegantly' in both their spoken and written forms of expression. At L-V35, for instance, he equates the 'more lawyerly' way of saying something with 'the more elegant' way of putting it, and at L-V7b he evaluates the drafting of legislation in South Africa on the basis of its 'elegance'. He also opined that having knowledge is not as important as being able to 'project yourself', for without this knowledge is 'dead gold in the safe' (L-V11). The quality of elegance can be regarded as an internal good, but it is a somewhat 'shallow' one, for it hints at the potential for form to overshadow content; i.e. what lawyers are standing *for* when they prosecute or defend someone comes to be seen as less important than the veneer of the prosecution or defence.

In a South African context, the extent to which the lecturer linked the practice of lawyers to the values of the Constitution would constitute an important internal good. Thus the practice would be 'good' to the extent that it promoted constitutional values. There was only one instance of such a linkage in the lawyer role: Having outlined Hugo de Groot's somewhat 'chauvinistic' notions around women's capacity to handle money, the lecturer continued as follows: 'Can we use that as part of our common law? No! Of course not. What will stop us? Section 49(2) will stop use because it says yes, look at the Roman-Dutch law, but if you get an absurdity such as this then ignore it. Obviously that is not the way we think anymore …'(L-V17a). The value affirmed here is gender equality and the lecturer, through his devaluation of Hugo de Groot's ideas (they constitute an 'absurdity' and are 'obviously' not the way we think anymore) implies that lawyers need to think in a manner that promotes gender equality.

Three of the six quotations elaborating upon the external goods of being a lawyer pointed to

the material rewards lawyers can enjoy (L-V9a; L-V10a; L-V38a). Interestingly, all of these quotations were in the form of purposive constructions (involving the use of 'to' or 'so that'); i.e. constructions that make the rationality of particular forms of action explicit. Thus lawyers must learn how to use legislation and cases 'to earn money' (L-V10a) and clients must be impressed 'so that' they will pay R20 000 an hour for legal advice (L-V38a). This suggests that the ultimate value orientating lawyers in their work is material reward. However, the lecturer also pointed to other external goods: Being 'successful' (L-V9b); and belonging to a profession that was 'elitist', 'distinguished' and 'specialized (L-V28).

2.5 Summary

Reconstruction of the lecturer's representations of the generic category of the lawyer provides valuable insight into the nature of power exercised by lawyers, the purposes and values of law and the legal profession, the nature of legal work, legal relationships, and the social profile of the profession. The forms of power lawyers wield are semiotic, not material, as confirmed not only by the way their social actions are framed but also by the semiotic nature of the 'tools' of their trade and the tendency *not* to locate them in any particular physical space. The lecturer explicitly states that their power lies not so much in *knowing* the law as being able to manipulate it: To find, read, understand, develop and create laws. The ability to manipulate lies in a power over language – 'Language is the secret' – and, to a lesser extent, information in the sense of a general knowledge of society. The exercise of such powers to their greatest potential impacts both at a personal and societal level: Through argumentation and persuasion, a lawyer can change the way somebody else thinks or feels; at a societal level, lawyers are cloaked with the capacity to shape but also authoritatively determine the moral framework that guides ordered relationships. This feeds into the purposes and values of law and the profession. The internal goods of the profession – of which there were a greater number represented than external goods – include order, objectivity, rationality and thoroughness as well as the upholding of constitutional values. While the lecturer evaluated lawyers themselves in an overwhelmingly negative way his criticism affirms, albeit in an inverted fashion, a set of traits related to these values, for it implies that lawyers should be thorough, with both a superior intellect and strong moral fibre. The rationale for the exercise of their powers, however, is also

framed (and sometimes explicitly so) in terms of the pursuit of money, success and exclusivity. The nature of legal work tended to be framed in terms of adversarial models of justice; i.e. it is oriented toward 'the other side', and to verbal duelling ('arguing', 'convincing', 'persuading') in court, and tended to be coloured by a negative emotional tone. This was constituted by the lecturer's implicit suggestion that the working conditions of the lawyer are highly stressful: Time is a resource that eludes them and they are frequently placed in situations where they must 'perform' and 'impress' in the absence of sufficient preparation. In terms of the range of relationships present in the text, it emerges that the need to perform and impress applies not only to clients but also to other legal professionals as lawyers cannot resist the urge to gossip about each other. The lawyer's relationship with clients is complex and multi-layered: Included in the social action more times than backgrounded, the client is both elevated – in being the person whom the lawyer must impress – and diminished in status through a variety of discursive strategies that reframe the client, as a concrete human being, in terms of legal problems, categories, and types of legal work. In the process the client is both constructed as an object of ownership and instrumentalized. The social profile of the profession that emerges from reconstructing the lecturer's narrative on the lawyer is surprisingly inclusive: Most references to lawyers are gender-neutral or inclusive and there were few explicit markers of race or class. However, there were also subtle features of the classroom talk – the failure, for instance, to explicitly categorize lawyers as exclusively female or to include female nominations, and the disassociation of 'black' ways of talking from talking like a lawyer – that suggest a profile biased toward male and white dominance.

3. THE PREFERRED CAREER PATH

The preferred career path was constructed on the basis of more than 30 quotations occurring predominantly in the lectures dealing with the legal profession. The roles comprising the preferred career path centred around the symbols of the 'side-bar' (referring to attorneys), the 'bar' (referring to advocates) and the 'bench' (referring to judges). Although these roles were marked as preferable to those comprising the shadow career path, the progression from being an attorney, to being an advocate, to being a judge involved a movement from a lower, to a higher, to the very highest role possible in the legal profession. Thus while both the roles of the attorney and the advocate were indexed as preferable, they were still less preferable in proportion to their distance from being a judge. They were in a sense represented almost instrumentally, as necessary (and possibly trying) steps to be taken by the very few who ascend to the very top of the legal professional hierarchy.

The lecturer's representation of the roles of the attorney and advocate as the most probable and desirable *points of entry* into the legal profession for most law students was constituted by two key utterances. The first framed the very beginning of the lecture devoted to the legal profession as follows:

> **LECTURER:** Let us talk about the legal profession now shortly ladies and gentlemen. It's something that fascinates you, um, and, uh, let us start, uh, not at the top but, um at the part of the profession *which would probably be, uh, the part where you're going to enter the profession*. South Africa's got a divided bar, we've got a bar, um, where we have, um advocates, and I will come to the advocates just now. And then we've got what we call a side-bar. Uh, and in the side-bar we have the attorneys.' (Att-Q12, my emphasis)

Notable here is that the lecturer constitutes preference by actively positioning the group of students in relation to these two particular roles by way of the collective pronoun 'you' (at this point the key differences between the role of the attorney and the advocate had not been developed so the connotations of being positioned in relation to both the bar and the side-bar are not clear). This positioning is reaffirmed in a statement that frames the end of his discussion of the roles of the attorney and advocate:

> **LECTURER:** 'OK. Those are the two, um, parts of the profession *that I think most of you are going to go into*. Um, there .. those are the two private, uh, private parts of the profession. Um,

> and in both these, um, uh, professions, you will make, you'll make a living. Definitely. You'll make a good living. And the higher up you go in these professions the better your living is.' (Att-Q29=Adv-Q49)

What the second statement adds, however, is a *categorization* of these two roles, through a relational process clause, as the 'private parts' of the profession. This adds to a carving up of the legal profession into 'private' and 'public' spheres. However, it also *legitimizes* entry into and progression through the private sphere by way of two purposive constructions - 'you'll make a good living' and 'the *higher up* you go *the better* your living is'.

In his depiction of the progression through the preferred career path, the lecturer spends more time describing the steps required to become an attorney (which entails first becoming an 'articled clerk' for a period of two years) (AC-Q3=Att-Q15;[75] AC-Q6; Att-Q14, 16), than he does for becoming an advocate (which entails being a 'pupil' for a period of a year under the guidance of an advocate) (Adv-Q17). The processes are similar in some respects in that both the aspirant attorney/advocate are depicted as being fairly active and in control of initially pursuing their career option. To become an attorney the process commences with studying for and obtaining the four or five-year LL.B, though the lecturer points out that the profession regards the five-year degree as 'preferable' (Att-Q14) – thus indicating a position on the extensive debate[76] on the appropriateness of the four-year LL.B (introduced in the late 1990s) over the former postgraduate model (entailing five years of study, and which is still opted for by some students). The next stage generally involves actively finding a 'principal' ('somebody that you know and that you trust and that will be willing to train you in the legal profession'), making an appointment with the prospective principal, requesting him or her to consider you for articles of clerkship and entering into a contract for that purpose (Att-Q15). During the two years of articled clerkship, the clerk 'is salaried' and does legal work in order to pass the Law Society's admission examination (Att-Q15). Having passed the admissions examination, the attorney is admitted in court as an attorney and may then practice for his or her own account (Att-Q16). To

[75] The use of an '=' sign points to those quotations that are exactly included in more than one identity. As explained in the chapter on methodology this is justified because different aspects of the quotation would be relevant to the different identities. A small number of quotations were included in more than one identity when carving up the quotation to apply to separate identities would have detracted from the overall meaning of the quotation.

[76] See Pickett, 2010: 11 for an outline of the transition from a five- to a four-year LL.B.

become an advocate the process similarly involves 'getting' a 'master' – being a senior advocate or advocate in whom one has confidence, entering into a contract with him and going with him so that he can 'show you the ropes'. Thereafter the candidate writes the bar examination and is admitted in court as an advocate (Adv-Q17). Unlike the articled clerk, the pupil (trainee advocate) receives no salary during the period of his or her pupilage.

Practically, it is possible to choose to become an advocate without first becoming an attorney. In South Africa it is also not possible to be both an advocate and an attorney at the same time.[77] What was interesting, however, was the amount of time the lecturer expended (in part driven by student interest on this issue) explaining and justifying why becoming an attorney *before* becoming an advocate was critical to success. The logic of this move was laid bare in the following statement (made by the lecturer in Lecture 16 in response to comments made by Student 3):

> **LECTURER:** Well, uh you know, it's a difficult question. It's like, you know, it really is a difficult question. Because if you are at the bar uh uh and when I say at the bar it means if you're an advocate, you rely one hundred percent on the um side-bar, and those are the attorneys to send you briefs, to send you um to send you work. So if you go directly from university to the bar you're going to sit in an office somewhere here in Johannesburg and wait for your telephone to ring and it's never going to ring. Because nobody knows about you. So in that sense it is much much better to go, do your articles, build up your contacts as they say, during your articles … see that you know the attorneys in your firm uh very very well so that at least they will brief you when you're an advocate … (Att-Q7; see also Adv-Q16).

The reliance of advocates on attorneys for work – and hence the need to be known amongst attorneys – was emphasized again later on in the series of lectures. But this time the lecturer provided a far stronger evaluation of anyone who considers going to the bar before they have been to the side-bar. In response to a question on this issue from Student 1, he answers:

> **LECTURER:** ... *you're a fool* because as I've just shown you by the the the magazine, it all depends on your reputation. And what kind of reputation have you got? Um, you know, you're a beautiful girl from Scotland and that's not going to help. It helps with other things but it's not going to help with the law. But, if you do your articles first then at least you're getting to know the attorneys. And you're getting to know the partners at that firm and other firms because every case that you do in your two years' articles you have to work with other attorneys. And if

[77] See in general Van Dijkhorst (2007).

> you impress them, even in the magistrates' court, you appear there and you make a name for yourself, far far better … Um, you know. I would agree with that. Um. I would say nobody can go to the Bar before they've been to the side-bar. But there's no such rule. It's a split bar so you can do what you want. (Att-Q28 = Adv-Q45)

The lecturer's evaluation of Student 1 as a 'fool' for going to the bar straight after studying, is saved from impertinence only by the fact that this is an imagined position. It is interesting that neither Student 1 herself, nor any other student in the class challenged his opinion, or attempted to open up the issue for debate. Further, in the second quote the emphasis is not so much on knowing but also *impressing* the other attorneys – this corresponds with the importance, highlighted in the role of the lawyer – of impressing clients.

This theme was reinforced by the lecturer's positive reference to people who were successfully following this route, the clearest example relating to a former student. After explaining how she had published a short note on prescription whilst employed as a candidate attorney (articled clerk) at a certain Johannesburg law firm, he goes on to say:

> **LECTURER:** If she's going to the bar, she's now a candidate attorney, she's working to qualify, she qualifies at the end of this year. If she then stays on another year or so at [name of firm], big firm, lots of contacts, she then goes to the bar, everybody knows that she's an authority on prescription. And that - that's how you get people to phone you. That's how you get people to phone you. That's how the legal profession works, ladies and gentlemen, that is unfortunately how it works. (AC-Q9; see also Adv-Q28)

The lecturer's use of the evaluative term 'unfortunately' signals that whilst a young legal professional has a choice to become an advocate straight out of studies, a failure to succeed would almost certainly flow from this move because this 'is' (a relational process clause) how the legal profession works. The spectre of failure was in turn powerfully constituted by the lecturer's representation of failed advocates. 'I can assure you', he starts:

> **LECTURER:** … there are people sitting here, um, in town or at um, Sandton, *praying* for the telephone to ring. Uh, and they're sitting there week after week, hopefully only week after week and not month after month. Um, because, you know, I've heard of people sitting on the library steps of the, of the chambers in Sandton, uh, trying to conduct a practice from the library steps. I mean, can't go into the library because the library is, is preserved (sic) for the members of the Bar. Sit on the steps and trying to get your practice going. I mean that's not [clears throat] that's not, you know, nobody's going to employ an advocate on the library steps. (Adv-Q46)

This representation construes the need to progress from being an attorney to being an advocate not so much as a matter of making a success, but as a matter of professional survival.

At two points the lecturer affirmed the *validity* of the divided bar through relational clauses that linked this division of work between attorneys and advocates to a 'better' arrangement ('It *is better* that the advocates do the court work and the attorney does … the off-the-street work, the preparation' – Att-Q22; Adv-Q39) – as contrasted with linking 'mixing' the work of an advocate to being 'stupid' (Att-Q22).

The lecturer not only linked the roles of the attorney and advocate, but also the roles of the advocate and judge. The emphasis in this progression – which includes the progression from being 'junior counsel' or 'counsel' to 'senior counsel' (Adv-Q21 – 4) – falls on the elite qualities of the few individuals who succeed in climbing the professional ladder. Although admitting that not everyone would agree with him, and providing a few counter-cultural examples (Att-Q23=J-Q77; J-Q78), the lecturer remarks that 'the idea is the very *best* senior advocates. The very best of the practicing advocates are appointed as judges' (Adv-Q25; see also Adv-Q35; Adv-Q50; J-Q75). However, in contrast to the move from being an attorney to an advocate – which remains to a certain extent under an individual's control – the move from advocate to judge is characterized by a lack of control, where the decision to appoint a senior advocate as a judge rests primarily with agents within the judicial hierarchy themselves, or with agents in government (Adv-Q3=J-Q20; Adv-Q6=Adv-Q30).

The lecturer's two counter-cultural examples relating to the progression from advocate to judge included a reference to the judge Kathy Sackswell (*sic*),[78] who was appointed to a post in the Witwatersrand Local Division from practicing as an attorney (Att-Q23=J-Q77), and judge Carole Lewis, formerly a legal academic, who was appointed to a post in the Supreme Court of Appeal (J-Q78).

Having outlined the salient linkages between the roles that constitute the preferred career path, I turn now to a more detailed description of, firstly, the roles of the articled clerk, attorney and advocate and, secondly, the role of the judge.

[78] Judge Kathy Satchwell serves in the South Gauteng High Court.

3.1 The Articled Clerk, Attorney and Advocate

3.1.1 Social action

The number of extracts pertaining to social action increased through the roles of the articled clerk, attorney and advocate respectively; i.e. there were 35 extracts pertaining to social action in the 11 quotations relating to the articled clerk; 71 extracts in the 33 quotations relating to the attorney; and 110 social action extracts in the 53 quotations relating to the advocate. These extracts followed the trend mentioned above in regard to the lawyer role in that in the majority of instances the action was coded as active (65% for the articled clerk; 81.5% for the attorney; and 66% for the advocate) and transactive (63% for the articled clerk; 68.5% for the attorney; and 52% for the advocate). In the case of both the attorney and advocate semiotic actions predominated over material ones (60% for the attorney; 54% for the advocate) but in the case of the articled clerk semiotic and material actions were present on an almost equal basis (48.5% semiotic; 51.5% material). Whilst still in the majority these percentages were generally lower than those evident in the representation of lawyer's social actions reflecting the lecturer's more nuanced representation of the social action of these particular roles.

In general, in contrast to the pattern evident in the lawyer role – the almost cerebral flow of power over law, language and information which then enabled power to be extended over people – the objects over which the powers of articled clerks, attorneys and advocates extended were more diverse. Prominent in all three cases was the extension of active and transactive social actions over other lawyers as well as the personnel of a legal office. The lecturer thus represented these roles as part of a social network, detailing their forms of interaction. Various abstract entities such as the 'firm', roleplayers in court proceedings such as witnesses and opponents, and various features of the physical context in which lawyers operate also featured as the objects of the social actions of the articled clerk, attorney and advocate.

Like the lawyer role, there was a fair amount of emphasis on articled clerks, attorneys and advocates acting in relation to laws. Semiotic forms of action over this object reflected these roles' differing power relationships towards law. Thus, while an articled clerk needs to 'learn' the law (AC-SA5c), advocates have achieved mastery: They 'get' precedents (Adv-SA5c), 'see'

the law (Adv-SA43a) and 'argue' for or against cases (Adv-SA5e; Adv-SA12). Interestingly, the only instance in which attorneys were represented in a semiotic form of action toward the law was the action of 'contravening' the Trust Monies Act (Att-SA19f). Otherwise, attorneys' forms of action toward law were mainly represented as material – the processes of physically searching for laws in a library (Att-SA2a – c) and buying law reports and statutes (Att-SA3b – d). While the lecturer also represented the advocate acting materially toward the law, the actions themselves were qualitatively more rarified for they focused on the early twentieth-century practice of 'collecting' judgments in order to assemble these into a law report, as well as the practice of collecting rare copies of the Roman-Dutch old authorities (Adv-SA9; Adv-SA11a; Adv-SA14). Thus while the attorney searches for laws within a collection assembled by someone else, the advocate is the assembler: Either of a law report or of a private library. In the case of the former, the advocate essentially determined which judgments were reported and which thus became law (Adv-SA11b).

In contrast to the lawyer role, however, there was much less emphasis on information and language. None of the attorney's social actions could be regarded as extending over information, and only two extended over language. Interestingly these both related to an attorney, Denys Reitz, writing creatively (Att-SA10b; Att-SA11a) with the capacity of writing creatively linked to being an 'intellectual' (Att-SA10b). For the advocate, none of the social actions could be regarded as extending over language and only one extended over information (Adv-SA2 – using the debates of Hansard).

The most interesting representation pertaining to information as the object of social action occurred in the quotations relating to the articled clerk. The lecturer's anecdote of his first few weeks as an articled clerk in a firm of attorneys (AC-Q5) is a cautionary tale of a young man who, drowning under a mountain of work and knowing that he needs to learn the law, mistakenly thinks that his principal is the primary source of information: 'if I wanted to learn something I went to the partner and I said how do you, how do you redeem a trademark in Papua New Guinea?' (AC-SA5c). Unaware of the socio-cultural dynamic within this particular law firm he blindly transgresses the unspoken rule that his first port of call should have been the legal secretary: 'And I didn't know that I should have asked her first and if she says I don't

know or I haven't got the book here then go to the manager or the partner to find out' (AC-SA5d). The unfortunate result was that

> **LECTURER:** 'I irritated the living daylights out of her because I didn't ask her anything' (AC-SA5f) and 'instead of getting off on the right foot she then decided she would boycott me. And everything I did, uh, she sabotaged. You know. She would take a file, every file that I did and she would listen to my dictation. If I made an error she would take my dictation to the senior partner and say "You're going to lose money here this man doesn't know what he's doing"' (AC-SA5g).

What is interesting about this representation is that it highlights the importance for the young lawyer of not only being informed about current affairs or the technical aspects of laws, but also about the dynamics of human relationships in particular legal professional contexts.

In the case of the role of the lawyer, the lawyer's power over clients was represented as primarily semiotic ('advising' clients and attempting to 'impress' them) and based on their mastery of laws, language and information. For the roles of the articled clerk, attorney and advocate the lecturer provided a more detailed picture of the material actions that lie behind or precede the more abstract actions of 'advising' or 'impressing'. This was most well-developed in the case of the attorney. These material actions, whilst not only providing an indication of the types of work in which articled clerks, attorneys and advocates engage, also hinted at the reality that they all have to work very hard in order to stand in assume the position of an expert (Att-SA30b; Adv-SA37 c and d; Adv-SA44a). Thus the young articled clerk was represented as 'doing' all kinds of legal work (AC-SA3d) and 'doing' trademarks (AC-SA5b) in particular, but needing to work '18 hours a day' in order to remove the 'mountains of files' off his desk (AC-SA5e). Attorneys were represented as doing the 'off-the-street work' (Att-SA22c): 'Doing' the administration of a legal case (Att-SA13c; Att-SA28a), the divorce of a god-daughter (Att-SA22b), or trademark and commercial work (Att-SA27b) or 'attending' to the formalities for the purchase of a building (Att-SA19b). In the best example of the lecturer representing the material actions an attorney must undertake in order to do an aspect of 'off-the-street' work (the 'backroom work' required for litigation), the lecturer said:

> **LECTURER:** The litigation department - well they do maj court, maj court litigation obviously, that's what they do and when it goes to the High Court you do, um, all the backroom work, you

> get all the expert witnesses together, you get all the statements together, you get the file together… You drive around, um and get the statements from witnesses, you drive around and um uh do inspections in loco, and things like that. You do all the prep [becomes tongue-tied] preparatory work so that you can give the, uh, advocate a decent file that he can work from. (Att-SA27a)

What is interesting about this representation is the implication of a step-down in glamour: Driving around, getting statements together, organizing files and so on are diffused, tiring and tedious tasks. The advocate's actions in relation to clients, by contrast, were far more focused and abstract (such as 'taking' a brief to court (Adv-SA30a; Adv-SA31a), and 'promoting' a case (Adv-SA5b)). This served as another instance where the materiality (but also specificity of social action) was used to mark a lower status.

There were two other prominent themes in the lecturer's representation of the social actions of articled clerks, attorneys and advocates insofar as these related to clients. They both hinted at additional bases for the power of these roles over clients, namely, the capacity to charge fees (AC-SA5b) – even as high as R20 000 an hour (Adv-SA21d; Adv-SA32d), and, in the case of the attorney, the custody of trust monies. The latter serves to illustrate how the position of trust which attorneys occupy can be used to their own advantage, with the client having little, if any, control over their conduct. In two different lectures, the lecturer noted that attorneys act as custodians for huge transactions (Att-SA19a), such as the deposit required for the purchase of fixed property (Att-SA19b and c). Such monies are paid into the attorney's trust account (Att-SA4a). However, at the same time attorneys cannot keep their hands off, cannot resist accessing trust monies (Att-SA19g and i). They may attempt to draw on trust monies (Att-SA19d), use trust monies to make personal loans to members of their family (Att-SA4b) and, in the worst instance, steal from the trust account (Att-SA6). Over all these actions the client has little control or redress – even where the attorney has paid the monies back immediately (Att-SA4c). 'Beware students', the lecturer warns 'make it extremely difficult for anyone within the firm to access trust monies' (Att-SA19h).

Turning then to what was relatively new in the roles of the articled clerk, attorney and advocate – the prominence given to the extension of social action to other lawyers and to legal office personnel – the lecturer's representations in this regard constituted eight different types of

relationship: (i) between articled clerk as trainee and attorney as trainer (as 'principal'); (ii) between pupil (novice advocate) and advocate (as the trainer or 'pupil master');[79] (iii) among attorneys or advocates as colleagues;[80] (iv) between articled clerks and attorneys and office personnel; (v) between attorneys and advocates as regards the provision of legal work through the referral system; (vi) between advocates and witnesses in the context of litigation; (vii) between advocates and judges as regards the manner in which they relate to each other in the context of a courtroom; and (viii) between individual practitioners and their professional bodies.[81]

In these relationships the coding of social action as active or passive was used to mark the power differentials between the constituent roles as well as the complexities of the relationship. Roles were not represented as being thoroughly powerful or powerless; i.e. consistently powerful/powerless in all relationships. The most ambiguous in this regard were the roles of the advocate and the articled clerk.

In the relationship between advocate and witness the advocate was always active in – for example – asking piercing and tenacious questions (Adv-SA18a; Adv-SA42e); attacking (Adv-SA42f) and chipping away at the witness (Adv-SA42c). In fact the witness was never even present as a social actor. In the relationship between attorneys and advocates regarding the provision of work through the referral system, attorneys were almost always represented as active (they send advocates work (Att-SA7a); instruct advocates (Att-SA32); and know, when they get a case, which advocates to brief (Att-SA9)) while advocates were almost always represented as passive: They rely on attorneys to send briefs (Adv-SA16a and d); need to be appointed or briefed (Adv-SA5a; Adv-SA21c; Adv-SA23; Adv-SA27; Adv-SA29a and b; Adv-SA31b); need to be known and spoken about (Adv-SA16c; Adv-SA18d; Adv-SA19a; Adv-SA42b), and face the spectre of not being contacted (Adv-SA16b; Adv-SA19e; Adv-SA46a); and not being

[79] See Adv-SA17a – f and Adv-SA18c. This particular relationship is not discussed further in the text below as being less significant compared to the other relationships.
[80] See Att-SA1a – c; Att-SA13a; Att-SA16c; Att-SA21a; Adv-SA18b; Adv-SA20a; Adv-SA22; Adv-SA28a; Adv-SA42a; Adv-SA45; Adv-SA19b; Adv-SA32a; Adv-SA32c. This particular relationship is similarly not discussed further in the text below.
[81] See Att-SA18a; Att-SA19e; Adv-SA8; Adv-SA19d. This particular relationship is similarly not discussed further in the text below.

employed (Adv-SA46e; Adv-SA47d). Two 'if-then' constructions emphasize the inevitability of the advocate's reliance on the attorneys: '*if* you are at the bar … you rely one hundred percent on the side-bar' and from the same quotation, '*if* you go directly from university to the bar you're going to sit in an office somewhere here in Johannesburg and wait for your telephone to ring and it's never going to ring …' (Att-Q7; Adv-Q16). The advocate was represented as a powerful actor in the courtroom through his mode of relating to the judge; i.e. in appearing before the judge (Adv-SA33a); addressing the judge (Adv-SA35d and e); laying, putting or presenting authorities before the judge (Adv-SA1b; Adv-SA4b; Adv-SA4c; Adv-SA5d); informing the judge of every single possible authority (Adv-SA4b); confronting the judge with his side of the argument (Adv-SA4a); and trying to convince the judge (Adv-SA5d). However, the *inferiority* of his power in relation to the judge was marked by the active social action of apologizing to the judge (Adv-SA34b; Adv-SA35g) as well as the passive actions of having authorities rejected by the judge (Adv-SA7); being questioned by the judge (Adv-SA34a); having his case thrown out by judge (Adv-SA34d; Adv-SA35c); and being 'stuffed' by the judge (Adv-SA35f). All of the latter extracts from quotations 34 and 35 were characterized by the use of if-then constructions, entrenching a sense of the magnitude of an error and the stakes that rest on the perfection of one's presentation of a case.

The situation of the articled clerk at the bottom rung of the professional ladder was aptly constituted through the lecturer's anecdote of his first encounter with a legal secretary and how she sabotaged his work (AC-SA5g) and ruined his reputation in the firm (AC-SA5i). Based on this experience, the lecturer advises students to 'beware of the typists' (Att-SA33) and to 'get on' with the office manager and the office personnel (AC-SA5h; Att-SA21); just to 'count on them and just say yes sir no sir or whatever you say' (AC-SA5h). However, this situation is only temporary and is based on the perception that articled clerks are 'threatening' (underscored by the use of an if-then clause), and thus powerful:

> **LECTURER:** 'If you enter into a law firm as an articled clerk you are a threat to everybody. You are a threat to everybody and you don't know that. And the people who are most threatened by you are of course the office personnel that's been there for years and years and who, uh, has got a vested interest in the firm and all they see is this young upstart's coming from university and within two or three or four or five years they become partners and then, you know, they

start earning more than they do and they start shunting them around' (AC-Q4).

If the articled clerk follows the trajectory of the preferred career path they will ascend to the role of the advocate and then practically 'own' a secretary (Adv-SA32b; Adv-SA44b).

Apart from the coding of social action as active or passive in these relationships, it is also interesting that the verbs chosen to capture action constitute the nature of the relationships as harsh and aggressive: Advocates 'attack' witnesses and 'confront' the judge; judges 'throw' the advocates' case out of court; legal secretaries 'sabotage' and 'ruin' but are at the same time 'shunted around' by articled clerks become partners. All of these words conjure up a divisive and aggressive professional environment.

3.1.2 Circumstances of social action

The lecturer's representation of the circumstances in which articled clerks, attorneys and advocates carry out their social action was not proportional to the number of quotations associated with each. That is to say, that whereas the total number of quotations for these roles stood roughly in the ratio of 1:3:5 (i.e. with 11 quotations for the articled clerk, 33 for the attorney and 54 for the advocate), the ratios for the extracts relating to resources, emotional content and location respectively were very different. In the case of the advocate there were 39 extracts associated with resources, in contrast to 3 extracts for the articled clerk and 14 extracts for the attorney (giving a ratio of roughly 1:5:13). In contrast, with 16 extracts relating to emotional content for the articled clerk, and 14 and 13 extracts on emotional content for the attorney and advocate respectively, the ratio was almost 1:1:1. As regards location, there were 15 extracts for the articled clerk, 18 extracts for the attorney and 24 extracts for the advocate (a ratio of roughly 3:6:8). This shows that the lecturer portrayed the advocate as having resources that were far richer and more diverse than those at the disposal of the articled clerk or the attorney, while highlighting the emotional content of the articled clerk's work and, to a lesser extent, the attorney's work, to a greater extent. Both representational patterns index social power: Access to a greater range of resources is associated with greater social power, whilst susceptibility to difficult emotions arguably signals the lack of it.

As outlined in Part A, the resources which lawyers were primarily represented as employing

tended to be semiotic in nature. For the roles of the articled clerk, attorney and advocate, it was only really the advocate who was represented as using resources such as 'language', 'words', 'books', and 'court cases' (see Adv-CSA2; Adv-CSA4; Adv-CSA5a; Adv-CSA5b). While attorneys were also represented as using cases, this tended more toward reference to law reports as physical resources: 'In the old days', the lecturer stated, 'if you had to set up shop as a one-man uh attorney, you had to buy a whole set of Law Reports from eighteen voetsek till today. And that would cost you something like fifty to eighty thousand bucks, depending on whether they're bound or not' (Att-CSA3b). Nowadays, with the availability of excellent electronic resources (Att-CSA3a), '[y]ou can really start practicing with a pile of CDs … Not taking up more than five square inches on your desk (Att-CSA3c).

A semiotic resource that featured in all three roles, however, was that of reputation. This resource played a critical role in constituting the preferred career path because it is the need for a good reputation that drives an aspiring advocate to first become an attorney. Unsurprisingly, while the lecturer mentioned the need for reputation in regard to both the articled clerk and the attorney (AC-CSA9c; Att-CSA28), it featured most prominently in relation to the advocate (Adv-CSA16b; Adv-CSA20b; Adv-CSA28b; Adv-CSA29; Adv-CSA42a; Adv-CSA45b). A resource closely related to that of 'having reputation' was the need to 'have extreme expertise' which was mentioned in the context of attorneys wishing to appear in the higher courts (Att-CSA25b).

The lecturer also emphasized the importance of qualifications (Att-CSA14; Att-CSA20). For the advocate, emphasis was laid on not only obtaining the required qualifications (Adv-CSA47a; Adv-CSA48a), but obtaining these with *distinction*: 'Now if you're straight through your LLB by you know getting 60 or 68% you know that's not good enough. You must get your LLB cum laude' (Adv-CSA16c, see also Adv-CSA16d).

Interestingly, the need to know 'your ethics' (probably a reference to the rules of professional conduct upheld by the Law Society and the General Council of the Bar), was represented instrumentally, as an integral requirement (together with the 'Rules of Court' or 'etiquette) for obtaining the resource of a pass in the bar examination:

> **LECTURER:** 'Bar exam - lots of work - but you must know your Rules of Court. And your ethics. Ethics, remember that, if you prepare for the bar exam those are the things that they're going to ask. Your Rules of Court. You must know your etiquette, your Rules of Court and your ethics. What may and may you … can't you do (Adv-CSA48b).

Apart from these semiotic resources, the lecturer also mentioned a number of material resources which an articled clerk, attorney or advocate would need, such as a desk, office, or study (AC-CSA5c; Att-CSA3c; Adv-CSA15; Adv-CSA32b); files, file numbers and numbers to charge fees (AC-CSA1a; AC-CSA5c); a telephone, cellphone or dictaphone (Adv-CSA32b; Adv-CSA47b); and office personnel such as a secretary, office manager and librarian (AC-CSA5c; Att-CSA3b; Att-CSA13b); and a car (Att-CSA27; Adv-CSA47b). The necessity of having such resources – and the broader resource of having money to buy such resources – was most marked in the case of the advocate through the use of if-then constructions: '[I]f you are in a profession you must have a car, you must have a cellphone, you must have money to entertain people, you must have money to go out, you must have money to buy books, you must have money to buy, money to buy make-up, you want to buy nice clothes' (Adv-Q47).

The lecturer made extended reference to the resources employed by advocates in the process of litigation, such as affidavits (Adv-CSA5b; Adv-CSA34a), expert witnesses (Adv-CSA34a); and the litigation department in a firm of attorneys (Adv-CSA40a). The chief focus, however, fell on the resource of the 'brief' as both a semiotic and material resource. A brief, the lecturer explains, is the instruction the advocate receives from the attorney (Adv-CSA31b); i.e. it constitutes the advocate's mandate to represent a side on a particular case. Apart from providing an extended description of the brief as a physical document (that it is blue, folded in a particular way, tied with a pink ribbon, and carried by the advocate to court) the lecturer also remarks in passing that 'it comes from the formula of the praetor' (Adv-CSA30a). The praetor in this reference establishes a symbolic linkage to the republican and classical eras of Roman law, while the references to the very specific physical form of the brief suggests an age-old tradition, the reasons for which are mostly unknown or forgotten by most. These references seem to romanticize the role of the advocate: There is something exciting about bearing under one's arm the blue document, tied with its pink ribbon as one strides into court. It would serve as a marker of status – much as the stethoscope marks the medical doctor. In this manner the

lecturer invests a material object with complex symbolic meanings.

The lecturer, however, invests the brief with an additional meaning: It is also the advocate's 'bread-and-butter' (Adv-CSA31b) (but one instance of the 'bread-and-butter' metaphor in the data). It is an interesting metaphor because, at least in the context of successful advocates, it is misleading – if an advocate is making between four and eight million rand a year, his or her lifestyle is considerably higher than the bread-and-butter level. The lecturer, however, may have used the metaphor to highlight the dependence of advocates upon attorneys. The lecturer also points out that 'if you have friends becoming legal advisors to large firms, they are very good to know. Uh, these are people who will brief you if you are going to become an advocate. They will brief you and they will give you *fat* briefs' (Adv-CSA29). This posits the befriending of in-house counsel as a purely instrumental action.

Similarly to the lecturer's representations around the brief, his representations regarding the manner of dress of the advocate skillfully invested material objects with symbolic meaning. This occurred by way of reference to the formal apparel of the advocate – the advocate's robe – as well as ordinary forms of dress. As regards the former, the lecturer explains to students that the chief implication of acquiring the title of 'senior counsel' or 'SC' (Adv-CSA21a, in itself a resource) is that 'you get to wear now not only a cotton robe, but you can wear silk robe' (Adv-CSA21b). As regards the latter, the lecturer emphasized that as an advocate 'you must be able to present yourself' (Adv-CSA43b). For this reason it is essential for the advocate to have 'nice clothes':

> **LECTURER:** '[Y]ou can't, you know, not be well-dressed, you're an advocate, you must dress very very well you must impress the people. You can't sit there with uh a denim and slacks … it just doesn't work. If you … if you've got a multi-million contract that is a bit shaky and you want to take it to court and you get to this guy and he looks like you look now today … Not that, not that you don't look beautiful but, um, you know, this is not, you know, he's going to say 'uuuh, you know, please, this guy doesn't know what he's doing or this girl doesn't know what she's doing. She's in a pink Oxford tracksuit [gestures towards one of the students] please, you know'. You must power dress: black, red, white; high heels, silk stockings, pencil-striped skirt, jacket, neat hair, and, you know, power, power, power.'

In this extract a pink Oxford track suit, denim and slacks are correlated with not knowing what you are doing, while wearing black, red and white, high heels and the rest signify power, the

capacity to defend a multi-million rand contract in court. The lecturer's notion of 'power dress' however, is decidedly gender-biased. One could infer, from this statement, that it is only women who must compensate for their power deficit before the court by donning the sexually suggestive (high heels, silk stockings) uniform of the prototypical female corporate officer. What is also interesting about this quotation, similarly to Adv-Q45,[82] is a kind of indirect impertinence, once more directed at a female student.

The final resource-type that featured prominently, but only in relation to the role of the advocate, were the naming of character traits deemed essential for the advocate to possess. These included wisdom (Adv-CSA13); an eye for detail (Adv-CSA36); being a good public speaker (Adv-CSA37b); not being shy, but liking 'intellectual violence' (Adv-CSA37c); being perceptive, brilliant and tenacious (Adv-CSA42e); and having a razor-sharp intelligence (Adv-CSA43a), an extremely well-developed 'legal feeling' (Adv-CSA43a) and an encyclopaedic knowledge of the law (Adv-CSA43a). In many cases, these qualities were linked via an if-then construction to the lecturer's counsel to 'stay away' from the legal profession: 'If you don't have an eye for detail if you're a, if you're a more of a forest type person and you can't see the detail, you can't see the leaves for the forest (gestures 'no'). Stay away. Don't even try to become an advocate' (Adv-CSA36). In an interesting anecdote about his former colleague Andrew, the lecturer illustrated the embodiment of these resources in practice:

> **LECTURER:** Um, he's a, he's a small unopposing little man. He's not a, you know, fiery lion or something. But, he chips at you until you crack. And he doesn't … I remember I gave a paper on unjustified enrichment (coughs) and I gave the paper first thing in the morning, it was a day session, um and he was fascinated at the, at my view, that I had on this, uh specific issue ... it's complicated and I can't even remember it. But it was a novel view on extending unjustified enrichment. And he, as soon as the session was over he came to me and, you know, he .. it was teatime I can remember and he was standing here and he said: 'Um you said this and this .. what exactly did you mean?' And he went on and on and on .. throughout teatime, throughout uh the second session the the mid-morning session, throughout lunch time. And I said 'Andrew, please, dear God, can I eat I mean, I don't want to be rude but, you know, can I just have a break?' And he said 'Yes but uh um what exactly did you mean, you can eat you can talk to me while you eat.

[82] In Adv-Q45, quoted in the section outlining the preferred career path above, the lecturer tells a young female student that she would be a 'fool' to go immediately from university to the Bar, and counsels that while she may be beautiful, and while this might help with 'other things' it would not assist her in carving out a career as an advocate.

> And he stayed with me until that afternoon that we, that the conference was over, he did not give up until he understood exactly what was going on. And he didn't uh, he didn't accept uh my version of it at all. First of all I had to explain it to him and then, you know, he started attacking me on why, why it couldn't be. So, um, that is the kind of person that you want, uh, as an advocate. (Adv-CSA42f)

In this extract, a relational clause ('that is the kind of person that you want … as an advocate) links all these qualities to the role of the advocate. At another point the lecturer refers more broadly to being one of the 'bright stars' which he links, via an if-then construction, to 'making it' at the bar (Adv-CSA19b).

The theme of having too much work for the time available in which to complete it (i.e. not having enough time) also featured strongly in all three roles. Articled clerks must 'run around' (AC-CSA1a). On their very first day of taking up articles of clerkship, young articled clerks are given their own secretary, desk, office, number to charge fees, and so on – not because these resources are essential to their learning – but because 'they [attorneys] haven't got time *not* to give it to you' (AC-CSA5d). The pressure is immediately on to start earning fees for the firm: 'You must start earning now. You must start doing trademarks' (AC-CSA5d). Not having enough time also manifests in having to work abnormally long hours. Thus the articled clerk is working '18 hours a day' (AC-CSA5f); the lecturer's wife Isobel, an attorney, needs to work 'extremely hard' (Att-CSA30a); and the advocate typically only manages to get 'three to four hours sleep a night' (Adv-CSA37d). In one of the earlier lectures, the lecturer also made it clear that the situation in other countries is the same, if not worse, than in South Africa. Speaking of the possibility of 'transferring' to another jurisdiction, he remarks of the situation in England: 'If you want to go to England and you want to live with those hideous people then you can go there. They'll make you … they'll not make you a partner, they'll make you an associate, they'll pay you nothing, and *you'll work like a dog*. *For the rest of your life*' (Att-CSA1e, my emphasis), and of the situation in the United States of America: 'perhaps you can go there. I don't know why you want to go there you'll probably also work, you know, 24 hours a day' (Att-CSA1f).

As noted in the overview of the lawyer role above, the phenomenon of being overworked is associated with a negative, stressful emotional state. In these roles the lecturer provides clues to the social dynamics that drive lawyers to push themselves this hard. One has to do with the

nature of the work, specifically, keeping track of the never-ending stream of documents which are involved in bringing a dispute to court:

> **LECTURER:** You know what pagination is? You have a file of *ten thousand pages* and *every day a new document arrives to be put into that file*. Sometimes, *the order changes* … you paginate it in pen because it changes. And *it's paginated from page one to page ten thousand*. Correctly. *If it is not correct then the judge can throw out your case* (Adv-CSA34c, my emphases).

The last sentence of this extract hints, however, at the main variable driving the work of advocates and attorneys involved in litigation: The judge expects a file that is substantively and technically perfect. If there is even the slightest technical error, the judge can decline to adjudicate the matter and require the attorneys and advocates to go through the lengthy, tedious and time-consuming process of placing the case on the court roll again (Adv-CSA34d; Adv-CSA35b; Adv-CSA35c). One of the most important implications of a case being thrown out of court is that costs would then have been wasted (Adv-CSA35d) and both the advocate and attorney would then need to face a very angry client.

However, the lecturer also presented legal professionals as kinds of people who thrive on 'nervous tension'. Responding to Student 3's tale of her experience of a day in court, and how she could feel the nervous tension in the room which was 'just too awful for words' (Adv-CSA54), he remarks of his partner Isobel: 'No well some people thrive on that, some people live like … [Isobel], I mean if she doesn't have an adrenalin rush every five minutes you know she gets bored. So some people really like that, they thrive on that nervous tension and they are their best and sharpest when they have [that]' (Att-CSA31). The caveat is that 'its impossible to sustain it for weeks and weeks and months and months and then you must take a break um you must look after yourself … it's a high-tension job' (Att-CSA31).

Most of the explicitly-mentioned emotions in the data pertaining to articled clerks, attorneys and advocates were what would commonly be regarded as 'negative' emotional states: irritation (AC-CSA5g; Adv-CSA42b); fear (AC-CSA5h; Adv-CSA33a); hatred (Adv-CSA42c); terror (AC-CSA4d). This often seems to be the inevitable state of affairs (marked by an if-then construction), as when the lecturer states:

> **LECTURER:** [I]f you stand up in court, and you will feel that (shakes head) I hope every one of you will at least once in your life have that feeling of appearing in a court. You are, and I don't care *who* you are, if, you can be Sydney Kentridge, if you appear in court you are *scared*. And if you are not scared then you are not prepared. (Adv-CSA33a)[83]

What is interesting in this statement is how being afraid is linked to *being* prepared. The best explanation of this is seemingly that preparation fully exposes you to the complexity and difficulty of the issues at stake and the burden of persuasion that rests upon your shoulders.

The lecturer characterizes the legal profession in general in a negative emotional light when he remembers working for his mother's firm as a young boy during the vacation: 'I was a sweet little boy and very nice personality and everybody loved me' (AC-CSA8b). 'I thought well this is what legal practice is going to be like,' he continues, 'but, um, I discovered that it's *not*' (AC-CSA8c). He proceeds to caution on the seemingly inevitable (using an 'if-then' construction), stating: '[A]nd if you enter into a law firm you will discover this within a year or so' (ibid).

Compared to the lawyer role, the specific working environments of articled clerks, attorneys and advocates were represented to a greater extent and in a greater variety. The predominant site in the case of each role was not surprising: Articled clerks, who do not yet have the right of appearance in court, were almost always located in a law firm (AC-CSA4a; AC-CSA5a; AC-CSA5j; AC-CSA8a; AC-CSA8d; AC-CSA9a; AC-CSA9d; AC-CSA10; AC-CSA11b) or in the more detailed sites within the firm (such as the 'trade mark department' (AC-CSA5b) or the 'beautiful large office with an inter-leading door to my secretary's office' (AC-CSA5e)). Attorneys, on the other hand, were almost evenly located in the firm or office (Att-CSA1a; Att-CSA2c; Att-CSA7b; Att-CSA21; Att-CSA30b); and in the court (Att-CSA16; Att-CSA22; Att-CSA24; Att-CSA25a; Att-CSA23). The lecturer uses location to suggest a potential division between more and less successful attorneys when he casually remarks that attorneys sit in 'big large buildings' or in 'derelict old renovated houses' (Att-CSA13a). The advocate was predominantly represented in court (Adv-CSA1; Adv-CSA16e; Adv-CSA23; Adv-CSA30b; Adv-CSA31a; Adv-CSA32c; Adv-CSA33b; Adv-CSA34b; Adv-CSA35a; Adv-CSA39) – in a number of instances the role of the advocate was even

[83] It was interesting to observe how this theme emerged in a presentation given by a female advocate to my first year Introduction to Law class of 2011. She stated that every advocate, before they appear in court for the first time, has to throw up in the toilet first because they are so nervous.

defined, by way of a relational clauses, on the basis that they are the legal professionals who appear in court (Adv-CSA37a) or whose work involves the preparation of everything for court (Adv-SA32c). Advocates were otherwise represented as being 'at the bar' (Adv-CSA18; Adv-CSA19; Adv-CSA28a; Adv-CSA45a) or in their 'offices' or 'chambers' at the bar (Adv-CSA19a; Adv-CSA44). In contrast to the lecturer's advice to students that they should *not* proceed to the bar straight out of university, he represents a select group of academics as moving directly from the university to the bar (Adv-CSA16f; Adv-CSA20a; Adv-CSA20c; Adv-CSA42d). This is justified on the basis that such academics had already established good reputations. Geographically, there was a slight preference given to identifying Johannesburg as the site of social action (Att-CSA10a; Att-CSA19b; Att-CSA23; Adv-CSA16a).

3.1.3 Social actors

Articled clerks, attorneys and advocates as social actors

Gender classification of these three roles was pervasive, tending toward bias in favour of the male as one ascended the legal hierarchy. There were surprisingly no instances of racial classification in any of the roles although in contrast to the lawyer role I was able to discern classification on the basis of class, especially in the case of the advocate.

For the articled clerk and the attorney – the two roles occupying the lowest slots on the preferred career path – classification on the basis of gender was equivalent; i.e. in the case of the articled clerk, 2 extracts involved male classification (AC-SAct8; AC-SAct11c), and 2 involved female classification (AC-SAct9b; AC-SAct9d); for the attorney, 4 extracts involved male classification (Att-SAct4a; Att-SAct10e; Att-SAct18; Att-SAct25b), 4 involved female classification (Att-SAct8; Att-SAct30a; Att-SAct31a); and one was gender inclusive (Att-SAct15). In both cases, however, the female classifications arose from the lecturer talking about a specific individual: In the case of the articled clerk, his former student and in the case of the attorney, his partner, Isobel. Thus when the lecturer spoke about articled clerks or attorneys more generally the classification was always male. The lecturer's nominations exhibited a not dissimilar pattern: There was one female nomination for the articled clerk (AC-SAct9a), and 4 male (Att-SAct10a; Att-SAct10b; Att-SAct10c; Att-SAct25a) and 2 female (Att-SAct23; Att-

SAct31b) nominations for the attorney respectively.

The gender classification of the advocate, on the other hand, evinced a clear gender bias. Twelve extracts involved male classification (Adv-SAct1; Adv-SAct5b; Adv-SAct7; Adv-SAct14; Adv-SAct17; Adv-SAct18a; Adv-SAct20a; Adv-SAct24; Adv-SAct30b; Adv-SAct34b; Adv-SAct35b; Adv-SAct42) and only three were female. There were two nominations in the text and both were male (Adv-SAct33a; Adv-SAct51). Of the female classifications of advocates, one again referred to his former student who he postulated as 'going to the bar' (Adv-SAct28). The remaining two extracts are fascinating for elucidating the lecturer's complex stereotyping of the female advocate in contrast to one put forward by Student 3 (a female). Relating how she had shadowed an attorney for a school project, she relates the following incident:

> **STUDENT 3:** I met up with, well I met some of his colleagues, there was a lovely tall blond lady - I don't recall her name - lovely tall blond woman and she was an advocate and she was wearing her robes and walking, you know we all walked across the road and it was very romantic and everything we sat in the Brazilian [class and lecturer laugh], we had lunch and she asked me all questions about school and then she said 'Oh you studied French at school!', she started rattling off in French for like half an hour and I just sat there with a mouth full of teeth.

The student's female advocate is a woman of the world. She wears her robes with confidence, lunches in a restaurant opposite the court, speaks a foreign language with ease and demonstrates an interest in things academic. She is physically arresting – lovely, tall and blond. The lecturer juxtaposed this with the following image of the female advocate by responding:

> **LECTURER:** Ja that's the stereotypical, that's the stereotypical idea that I have of a of a female advocate but I'm uh I shouldn't talk to you about that but um tall, long, blond, um you know multi-faceted, multi-functioning, multi-tasking uh super elastowoman, you know three children on the hip and uh you know five hundred thousand briefs on this side, that's what you must be.

The lecturer's stereotypical idea of the female advocate parts significantly from that of the student. While the student's representation suggests that the female advocate she encountered was talented in many ways, the lecturer now takes this to an extreme – she is 'multi-faceted, multi-functioning, multitasking'. His reference to 'three children on the hip' removes the female advocate from the site of professional work and places her in the (admittedly wonderful but also) messy, noisy, distracting and demanding context of child-care.

Further, his reference to the female advocate as being a 'super elastowoman' who has *both* three children on the hip *and* 'five hundred thousand briefs on the side' suggests that the female advocate must overcompensate if she does choose to have children; i.e. she must accept an extraordinary number of briefs. As a result she must be a 'superwoman' balancing an impossible set of responsibilities.

There were 11 extracts relating to class classification in the case of the advocate, and 1 extract of this nature relating to the attorney. The class classifications were of three kinds: There were representations indicating that advocates (and to a much lesser extent attorneys) are situated in the upper classes; one representation hinting at class divisions within the advocates' profession; and two representations implying that succeeding as an advocate requires access to financial resources that only members of the upper or at least the higher middle classes would have. The first of these kinds of classification revolved around representations of the resources which advocates acquire or can demand: The advocate's study is 'huge' (Adv-SAct15a), his children are well-educated and have 'of course' emigrated (Adv-SAct15b), while another advocate has done 'exceptionally well' at the bar (Adv-SAct20b). The advocate's profession is 'very lucrative' and 'well-paid' (Adv-SAct44a), their fees are unapologetically 'exorbitant' (Adv-SAct23c), running into 'millions of rand' (Adv-SAct23b). More specifically the advocate can charge not R3000 an hour but 'R20 000 an hour' (Adv-SAct21a) and can earn anything 'from four to five up to eight million [rand] in a year' (Adv-SAct53b) (in comparison the lecturer makes it known that his wife, an attorney, earns between 3 and 3.5 million rand a year – Att-SAct30b). Interestingly, in both instances where the lecturer mentions specific figures for the annual income of an advocate and attorney he refers to numbers only ('four to five up to eight', 'three, three-point five'), and leaves off the word 'million', yet it is obvious he is referring to figures of this quantum in the comparison he makes between the salary of a judge and an advocate (at Adv-SAct53b). Not all advocates are successful however, and in conjuring up the advocate trying to conduct his practice from the library steps, he hints at the serious class divisions that exist within the profession (Adv-SAct46). The last category of class classification is interesting for it addresses the issue of access to the profession – whilst advocates are clearly capable of *becoming* members of the upper class do you have to be a member of that class in the first

place in order to break into the profession? The lecturer did not deal with this question directly, but two of his representations at least suggest that the conditions of the professional world of advocates are such that you are more likely to succeed if you have access to financial resources. In talking about the compulsory training advocates undergo ('pupillage'), he goes on to remark:

> **LECTURER:** 'six month's pupilage without payment, nobody pays you, you must have financial support to live for six months, uh, without support uh to live for six months without a salary. Perhaps you might, you might think it's easy to do that as a student it is, you know, because you've got lots of support structures.' (Adv-SAct47a)

The lecturer's assumption in the last sentence of this extract configures the student in a particular way, whereas in fact many students *do not* have the financial resources or support structures to survive for six months without any income. This particular requirement, therefore, functions as a barrier to the profession for the lower classes (though the lecturer does not appear to regard it as such). In similar vein he reels off a host of other resources (cellphone, car, entertainment, books, make-up, nice clothes) that money can buy and which are, apparently, essential for success as an advocate (Adv-SAct47b).

There were a variety of other bases upon which the lecturer classified articled clerks, advocates and attorneys. These included physical appearance and ethnicity (his reference to 'attractive Jewish lady at AC-SAct9c); age (AC-SAct11b); language preference (Att-SAct10h); and other occupations (politician, farmer – see Att-SAct10d). The two most frequent bases for categorization were, however, seniority in the sense of status (Att-SAct22b; Adv-SAct52; Adv-SAct53) and intellectual capacity (AC-SAct11a; Att-SAct10f; Adv-SAct18b; Adv-SAct19b; Adv-SAct44b; Adv-SAct50).

Clients and other role-players

To a fairly significant extent, clients were backgrounded rather than included in the social actions of articled clerks, attorneys and advocates: For the articled clerk, there were no extracts in which clients were included in the social action, and three extracts in which they were backgrounded, for the attorney, clients were included in four and backgrounded in ten extracts; and included in two and backgrounded in 12 extracts for the advocate.

I did not discern any interesting themes in the social actors who were included in the social action of the attorney (Att-SAct2; Att-SAct4b; Att-SAct13 and Att-SAct22a) and the advocate (Adv-SAct5a; Adv-SAct23a). Similarly to the lawyer role, clients were recontextualized and backgrounded by way of reference to specific legal problems such as 'mergers and acquisitions' or 'trademarks' and so on (AC-SAct5b; Att-SAct17b; Att-SAct27d) as well as a range of other depersonalizing nouns, such as 'legal work' (AC-SAct3; Att-SAct17a); 'off-the-street work' (Att-SAct22c); 'backroom work' (Att-SAct27a); 'labour relations' (Att-SAct10g); 'maj court litigation' (Att-SAct27b); 'case' (Att-SAct5; Att-SAct9; Adv-SAct4; Adv-SAct11; Adv-SAct19a; Adv-SAct22; Adv-SAct34a); 'matter' (Adv-SAct21b); 'papers' (Adv-SAct34a); and 'file' (AC-SAct5e; Att-SAct27c; Adv-SAct34a; Adv-SAct34c; Adv-SAct35a). The terms 'case' and 'file' were thus used most frequently across the three roles for purposes of backgrounding clients. An interesting instance of backgrounding occurred in the role of the advocate when the lecturer stated that the advocate appears 'on behalf of *an attorney*' (Adv-SAct32). This highlights professional relations between advocate and attorney, rather than the relationship between the advocate and client. Backgrounding in this particular instance was therefore achieved by substitution (of another social actor) rather than through the use of depersonalizing nouns.

The only other social actor which featured prominently – and this only in relation to the articled clerk – was the legal secretary AC-SAct4; AC-SAct5a, c, d, f). The personal trials and tribulations the lecturer experienced at the hands of a legal secretary at the firm where he completed his articles have already been outlined in the section on social action above. It is also interesting to observe, however, the discursive strategies the lecturer employed to configure the legal secretary as a 'larger-than-life', negatively-stereotyped character. The first strategy involved intertextuality – referring to what his mother had 'always said' and a series of relational clauses that positioned the legal secretary in the category of 'the worst things' and things that cause terror):

> **LECTURER:** My mother always said, there's nothing, nothing worse, and I hope I'm not offending somebody here but it is *true*, I mean as my personal experience there's nothing worse than a professional typist, uh, in a law firm, a secretary. There is nothing, nothing worse. They always have personal problems, they never have enough money, they always want to borrow money and they are absolute terrors.

The relational clauses in this extract ('there's nothing worse than a professional typist … There is nothing, nothing worse' and 'they are absolute terrors') therefore do two types of work: They position legal secretaries in a particular way and generalize the lecturer's evaluations to all legal secretaries.

The other discursive strategy the lecturer employed to negatively-stereotype the legal secretary involved a description of her physical appearance:

> **LECTURER:** And there I got a corner office, a beautiful large office with an inter-leading door to my secretary's office and there was my secretary sitting in the corner. And she was enormous. She was really, you know, she was an enormous person and she had, uh, make-up, you know, false eyelashes and dark dark makeup.

The lecturer prefers the adjective 'enormous' to 'very fat'. In Western society being fat is associated with a certain level of ego-weakness: Lack of mastery over one's drives, unhappiness driving the need to eat and so on, and so tends to confirm his earlier statement that legal secretaries always 'have personal problems'. His choice of the term 'enormous', however, also allows him to capture the power she jealously guards in her small domain of the legal firm.

3.1.4 Values

There were relatively few extracts dealing with the valuation or devaluation of articled clerks, attorneys and advocates *per se*. In the case of the articled clerk there were no extracts of this nature at all, for the advocate there was one positive, one negative and one ambiguous evaluation; and for the attorney three negative and three positive evaluations. All these extracts involved the use of moral evaluation as the basis for encoding value.

The lecturer's negative evaluations of attorneys were all based on his perception of a central character flaw which he generalized to all attorneys: The incapacity to resist the temptation to steal trust monies (Att-V4; Att-V6; Att-V19). The lecturer's positive evaluations of attorneys all related to specific attorneys, and thus tended to confirm the perception that attorneys, as a rule, are morally suspect. 'But *sometimes* you get a very good attorney' (Att-V25, my emphasis), the lecturer began, in speaking about a contemporary example of a very good attorney, Dr Dale. The bases upon which Dr Dale is valued – the extent of his knowledge, his linkages to an

academic institution – are thus goods which are apparently very difficult to come by in the attorneys' profession. The lecturer's other positive evaluation of a specific attorney – his representations around Denys Reitz, an attorney active in the mid-twentieth century, centred on him being a 'very impressive' man (Att-V10a, b), an evaluation based on his creative abilities, contribution to labour relations in South Africa, and founding of one of the 'great' law firms in Johannesburg.

For the advocate, the positive evaluation was cemented in a relational clause, through a clear association between the advocate's profession and 'the very best lawyers' for whom this profession is 'reserved' (Adv-V44d). The lecturer's negative evaluation of advocates related to the thoroughness or rigour with which the advocate argued before the judge. Such rigour seemingly entails an element of honesty, with a corresponding ethical obligation resting upon advocates to acknowledge when there is a good argument against them. Referring to the orator Cicero, he remarks: '[H]e just he talks, like an advocate in a trial you know he's not going to say "Oh excuse me judge here's a very good point against me if you don't mind looking at this" - it's what they should do but they don't' (Adv-V1). The lecturer's more ambiguous evaluation of advocates also related to thoroughness, which he uses as a basis for differentiating between advocates when he says: 'Of course not all advocate are the same. And some advocates are more *thorough* than others' (Adv-V4, my emphasis).

Surprisingly, there was not a single extract elucidating the internal goods of the work of an attorney, and only one and four extracts of this nature relating to the articled clerk and advocate respectively. As there were so few extracts, and because all involved the use of moral evaluation, it is difficult to discern any normative pattern. In two instances, the lecturer hints that legal professionals should be individuals who are ethically upstanding: The articled clerk is interviewed to determine whether she is a 'fit and proper' person (AC-V7); the advocate is promoted to the position of 'senior counsel' if he is a 'person of substance' (Adv-V22a). While being a 'fit and proper person' and a 'person of substance' may be the discursive tip of a submerged iceberg of values that partly constitute the internal goods of the profession, the values themselves remain just that – submerged. The values implicit in the lecturer's remark that in order to be promoted to a judge, the advocate's judgments as acting judge must be

'sound' (Adv-V6b), remain similarly opaque. Values are more explicit in the lecturer's insistence that in order to convince the judge to accept his authorities, the advocate must use logic and rationality (Adv-V5), and this resonates with the invocation of these internal goods in the lawyer role. There was only one extract in which a duty of care on the part of the advocate towards his client was even marginally apparent. Rounding up his emotionally-charged description of an advocate appearing before a judge in circumstances where the advocate's papers are not completely correct he concludes:

> **LECTURER:** And then you've *wasted costs*. You've *wasted thousands of rand* by appearing and preparing to appear for that day for trial in court and *it's just thrown out because you've made something wrong*. You've referred to section 2(1) instead of section 1(2). (Adv-V35, my emphasis)

The lecturer's reference to 'wasted costs' in this extract invokes the client as a backgrounded social actor, for it is ultimately the client who pays such costs. Use of the word 'waste' and moreover wasting 'thousands of rand' suggests a gross dereliction of duty based on such values as efficiency, frugality and trust in the manner in which the advocate applies his highly-paid services. However such client-centred values are also overshadowed in this extract by the reference to formal, procedural correctness (referring to section 2(1) rather than to section 1(2)).

External goods were far more frequently represented in the data: Across the three roles 48 extracts were associated with a variety of external goods, but a breakdown of this figure reveals that more than two-thirds of these were made in relation to the advocate (33 extracts for the advocate; 9 for the attorney, and 6 for the articled clerk). A significantly *higher* proportion of the extracts encoding external goods achieved this through the use of purposive constructions (29 extracts), than through moral evaluation (19 extracts). This means that the linkages between certain actions and external goods were *explicitly* rationalized.

By far the greatest number of extracts constituting external goods related to material rewards (evident in 19 of the extracts: AC-V2; AC-V3; AC-V4; AC-V5; Att-V15; Att-V17b; Att-V27; Att-V30; Adv-V20; Adv-V21; Adv-V22b; Adv-V23; Adv-V29; Adv-V31; Adv-V32c; Adv-V44b; Adv-V45b; Adv-V49; Adv-V53). This frequently involved reference to, or a focus on the salary one would

obtain or the fees one could charge as a legal professional, linked to an evaluation of the extent of such income, or a statement of such income in explicit terms. It also involved financial evaluations of specific types of work. The work undertaken by the litigation department in a firm of attorneys, for instance, is:

> **LECTURER:** '[n]ot lucrative, not lucrative' … even in commercial litigation or insurance litigation where you're talking about *millions* of rand, not lucrative. Rather do something more lucrative like trademarks or patents or the.. uh, commercial work straight-forward commercial work, um uh mergers and acquisitions, management buy-outs, things like that. Very, very lucrative. (Att-V27, emphasis by lecturer)

The other two external goods that featured prominently were reputation and status (both evident in 8 extracts). I have already spoken in part about both as kinds of resources, under the section on the circumstances of social action above. That I was able to do so reflects their position in a hierarchy of values constructed by the lecturer, they are instrumental. The lecturer's former student writes a short note in the *De Rebus* so that she can build up her reputation (AC-V9), you should aspire to obtain your LL.B *cum laude* so that you will be distinguished and people will talk about you (Adv-V16). However, both reputation and status are in turn frequently constituted as means towards the more ultimate ends of, for instance, getting in with the 'big firms, obtaining work and/or reaping material rewards (in relation to reputation see: AC-V10; Adv-V28; Adv-45a; Adv-V45b; and in relation to status see: AC-V4; Adv-V21; Adv-V22b). At times however, the lecturer's representations around these two goods constituted them as ultimate goods, as ends in themselves. Thus being talked about by other people – the pride and pleasure that would flow from being 'well-known' – is presented as the desirable and legitimate purpose of actions such as undertaking the LL.B, writing the admissions examination, and going to the bar (Adv-V18; Adv-V42; Adv-V51). Attaining particular statuses – being promoted in accordance with the legal hierarchy: from an articled clerk to a professional assistant, to a director or partner (Att-V16), from an advocate to a senior counsel (Adv-V23), and from a senior counsel to a judge (Adv-V3; Adv-V6a; Adv-V52) were all presented as goods desirable in themselves.

Other external goods that featured more than once included the attainment of power, either as a good in itself (Adv-V47b), or as a means to 'shunt' other people around (AC-V4) and the

opportunity to specialize (Att-V23; Adv-V41; Adv-V45b). In a number of instances, the lecturer represented the goals of particular actions in terms of the need to pass examinations. Thus the articled clerk undertakes all kinds of legal work – not so that he or she will be offering a service to clients – but 'so that you can pass the …Law Society's admission exam' (AC-V3, see also Att-V15 and Adv-V48). The value of being intellectually stimulated by one's work – which I regarded as an external good because it is one enjoyed only by the practitioner him or herself – was constituted as such in both an inverted (expressed negatively) and direct (expressed positively) guise. The negative constructions all related to the work of the attorney, while the positive constructions related to the work of the advocate. Thus the work of an attorney is:

> **LECTURER:** hard, boring, slogging work. It is administration for 95 per cent. You are not going to find in the ordinary work of the attorney great intellectual challenges or great innovative, uh, law changing challenges (Att-V17a) …. Ordinary work for the attorney however, uh, divorces, estates, trusts, transfer of property, uh, general attorney's work is not, uh very challenging. It's not intellectually very challenging. It is routine rather than intellectual effort (Att-V17b).

By contrast, the work of an advocate 'is more intellectually stimulating' (Adv-V32a). It is interesting that relational clauses were most frequently used in relation to this external good, rather than others. Thus the attorney *is* somebody who does the administration of a legal case (Att-Q13) which is then associated with statements about an attorney's work *being* 'hard, boring slogging work', 'administration for 95 per cent', not very challenging' and 'routine rather than intellectual effort'. The concentrated use of relational clauses in this particular extract points, possibly, to the primacy of the value of intellectual stimulation in the lecturer's framework of understanding of the legal profession but it also functions to cement these meanings, for the relationship between the work of attorneys and these qualities is presented as clear and unequivocal.

3.1.5 Summary

Articled clerks, attorneys and advocates were all represented as powerful social actors, though to a lesser extent than the lawyer role. The higher percentage of passive actions can be ascribed to a more nuanced representation of the complex relationships that pertain amongst these legal professionals themselves and with other players. None of these roles embodied a

thoroughgoing powerful or powerless position, all were represented as more or less powerful in different contexts. The nature of power as semiotic or material appeared to play a role in situating these roles in a hierarchy in that articled clerks – the novices in the profession – were represented as equally likely to engage in semiotic as material action, whereas semiotic forms of action predominated in the case of the attorney and advocate. Advocates were most frequently represented as working with semiotic resources. Where a resource could be framed in either a semiotic or material form attorneys were more likely to be represented using the resource in its material form, while the opposite was true of the advocate. The sources of power exercised by these roles included a relationship to laws, but the role of language – which had featured so prominently in the lawyer role – was not foregrounded. In the case of information, the lecturer introduced a new form of power-as-knowledge in the personal anecdote of himself as a bumbling young articled clerk, unable to discern the underlying social dynamics of the firm in which he was serving. New sources of power – such as reputation and qualifications – were introduced. Modes of dress (the silk robe, high heels, silk stockings) also emerged as ways in which to signify or express power. The objects of the power exercised by these roles tended to be more diverse. The goods to which the powers of the articled clerk, attorney and advocate were directed were much more likely to be external than internal with material rewards, status and reputation (both as an instrumental good and as a good in itself) predominating. The need to know one's ethics was represented instrumentally, as a means toward obtaining a pass in the professional examinations. As regards the nature of professional work, there were not many instances in which these roles were represented making moral judgments in relation to others, but a few instances in which they were represented as taking action that was wrong on moral grounds. This was particularly true of the role of the attorney in relation to trust monies. The nature of legal work as predominantly adversarial emerged at various points in for instance, reference to the kinds of traits an ideal advocate should possess and the tendency to locate the attorney at least half of the time in the location of the court and the advocate almost always so. The negative emotional tenor of the work of these roles was strongly affirmed, once again through lack of time and stressful environments. However, the lecturer tended to name the negative emotional content of the work more explicitly. He also hinted at some of the drivers of negative emotion, such as the magnitude of the work and the

expectations of technical and substantive perfection. In representing these roles, the lecturer outlined a complex web of relationships holding between the legal professional and clients, but also amongst legal professionals themselves. The activation or passivation of action played a significant role in constituting the varying power differentials in such relationships. In contrast to the role of the lawyer, clients were backgrounded to a far greater extent, but using the same kinds of discursive resources (i.e. reference to clients by using depersonalized nouns such as 'case' and 'file'). The legal secretary featured as an unexpected inclusion in the range of social actors with who articled clerks and attorneys interact. There was a much clearer gender profiling of the profession, though this became more marked as one ascended the professional hierarchy: While articled clerks and attorneys were equally likely to be represented as male or female, advocates were represented as predominantly male. The class profile of the profession emerged in suggestions that advocates are members of the upper classes, or even have to be such members in order to succeed. Interestingly, race did not feature as a form of social categorization in these roles at all.

3.2 The Judge

3.2.1 Social action

Within the 79 quotations relating to the role of the 'judge', there were 156 extracts dealing with different forms of social action. Similarly to the role of the lawyer, and more so than the roles of the articled clerk, attorney and advocate, these were predominantly active (72%), transactive (67%) and semiotic (80%) in form. There was an emphasis on judges' power over language and information in addition to laws, which is also similar to the lawyer role. However, unlike the flow of power in the lawyer role (over people *through* the mastery of laws, language and information) the power wielded by judges functions in an inverted fashion: It is through their decisions over people in individual cases that they wield power over law and language. Obscured in this stream of power is the power they exercise, through their judgments, over both their colleagues and articled clerks, attorneys and advocates.

It is helpful to commence the reconstruction of the role of the judge with the representations that revolve around the verb 'sit'. In one instance, the lecturer uses this in a transactive form –

a judge 'sits' in judgment of 'others' (J–SA2), and in another, the sense in which the verb is used is material – a judges 'sits in his chambers' (J–SA52b), but in all other instances the verb 'sit' is used in a manner that implies semiotic action in a non-transactive form. Judges simply 'sit' (J-SA16a; J-SA17a; J–SA19b; J-SA21a–c; J–SA56a; J–SA60). Sitting implies assuming a deliberate position, not being on the move but being settled or installed in a particular place. There is a solidity in 'sitting', an implied sureness of self, and even, perhaps, superiority, which is reinforced when the sitting is done 'in judgment'. Contrary to Van Leeuwen's observation that the coding of social action in a non-transactive form frequently indexes powerlessness (2008; 60) in the case of judges who 'sit' the non-transactive form of their action actually reinforces the sense of their power.

The role played by judges in the legal process initially seems quite passive. They must wait for cases to be brought to them, or appeals to be made to them from lower courts (J-SA28a; J-SA28c; J-SA28f). Materially, they wait for documentation and files to be brought to them (J-SA71a; J-SA71c). Unlike the emphasis placed on lawyers, attorneys and advocates being able to find, read and interpret cases and legislation, judges have everything laid out before them. In court, they are 'confronted by both sides represented by an advocate' (J-SA21a) who 'make sure that the judge is informed of every single possible authority … that will support their side of the case' (J-SA21b). These legal authorities are paramount for while each advocate also presents the judge with their version of the facts of the case through, for instance, affidavits, their arguments turn on persuading the judge to decide the case in terms of one body of authority rather than another (J-SA23a). Frequently there will be authority for both sides (J-SA23a), but what the judge gains is 'the advantage of the entire scope of authorities, presented by the two advocates' (J-SA21c).

During this initially apparently passive stage, however, the judge's power may be suddenly unleashed if the laying out of laws and information before him is not executed with absolute correctness. This was most clearly and dramatically illustrated in the following representation (L22:49:254–269):

> **LECTURER:** If there's a spelling error in your pleadings, oh please. If there's a grammatical error. If there's a technical error, a legal error, if you've made an aversion on a statement that is wrong

> technically, legally, your case is thrown out. The judge will give you an opportunity. He'll say, uh, please Mr [state's student's surname], address me on this novel interpretation that you have in clause 3. And then you will be able to address him but I mean if you, uh uh, if he talks like that you know you're stuffed. You can just as well, you know, pack up and say 'I'm sorry my lord, um uh, I'm relatively inexperienced in these matters and uh, it slipped in, I beg your lordship's indulgence to amend it'. And your lordship will not give you an indulgence. He will say, well the indulgence I will give you is that I will take the case off the roll for you completely and then you can put it back again when it's correct.

What is perhaps most noteworthy about this particular representation is the massive emphasis on formal correctness. What matters most is not whether the presentation of the case, correctly captures the substantive issues experienced by the people who have brought the case to court, but whether the documents before the court are technically perfect in terms of law and language. The seriousness of such an apparently trivial and easily remediable error as referring to section 2(1) as opposed to section 1(2) is expressed, in part, by the verb used to capture the judge's reaction: The case is 'thrown out' (J-SA71d; J-SA72a; J-SA72d), in effect discarding the hundreds of hours of work that may have gone into preparation for the day in court on the part of both the advocate, the referring attorney and the articled clerks in training (see J-SA71c). The judge's power is underlined by the representation of the advocate 'begging' his 'indulgence' as 'lord', which indulgence is unmercifully withheld. The judge's power to throw a case out of court is not initiated with sound and fury, but with a chilling mildness, affording the advocate an opportunity to address him on the 'novel interpretation … in clause 3' (J-SA72b). Like a cat with a mouse the judge allows his prey an apparent opportunity to escape the consequences of his power, but then unleashes the full force of it nevertheless (J-SA72c).

After hearing both sides of the case, the judge's agency comes to the fore: 'he investigates the advocate's sources, he does his own research, he comes to a conclusion based on everything that was laid before him' (J-SA21d) – the 'judge is the one evaluating the evidence' (J-SA40) (note the presence of a relational clause here). A conclusion is mandatory for legal dispute resolution is predicated on the need to bring to social disputes to finality through non-violent means. The judge's conclusion and the manner in which he reaches that conclusion, however, involve a complex mix of powers and constraints.

To begin with, the judge's conclusion most obviously extends to the people who are in dispute:

The people who, if they had the resources to do so, initially approached an attorney and/or advocate to present their case in court, or who otherwise represented their own interests. Over such individuals and groups, judges exercise far-reaching powers. They decide whether a group of sadomasochistic homosexuals are criminals or not (J-SA4); whether the marriage of two people who were married in a garden (and not a house) is valid or not (J-SA5); whether a woman has been raped or not (J-SA41); whether a man who refused to pay maintenance should remain in prison or not (J-SA53); whether two people can get divorced, or not (J-SA69). In the instances where the lecturer foregrounded the people who are impacted by the judge's decision, the decision is far-reaching because it contributes to defining their status and hence their roles; i.e. whether they are criminals; married, unmarried or divorced; convict or free man; a rape survivor or merely a woman who sleeps around. Judges' decisions will not always involve status: In commercial disputes the decision will impact on who owes whom a sum of money; in contractual disputes who owes whom an obligation, and so on. Whilst also far-reaching the impact of these decisions is arguably less critical for the definition of self than decisions involving status. It is interesting, therefore, that the lecturer's representations relating to the impact of judges' decisions at the level of individuals, coalesced around this extreme form of power. This would seem to create a more dramatic and vivid picture of judges' power over individuals, than more mundane stories about sums of money owed or contractual obligations.

In the lecturer's representations, however, the extension of the judge's power to actual, concrete individuals was an almost tangential focus. Instead, the focus fell on the relationship between the conclusion of the judge and existing law, either in the form of legislation or older cases. The judge's conclusion or decision, therefore, was represented as being more about the shifting web of legal authority: How judges are constrained by existing forms of legal authority, but empowered to transform or even discard such authority.

Early on in the series of lectures, for instance, the lecturer made it clear to the students that when a judge sits in judgment on a matter he must 'look for the law' (J-SA4e). The judge's 'personal baggage' (J-SA4a), his 'personal subjective view' (J-SA4b) is not relevant to the act of judging. Thus his personal predilections regarding homosexuality or sadomasochism which he

might find from a 'Christian point of view or from a decency point of view completely abhorrent' (J-SA4c) must be set aside. Instead he must look to the apparent objectivity of existing legal 'authority', which could be legislation or the decisions of judges in previous cases ('precedent'). These forms of legal authority serve to rein in or discipline the judge, preventing the apparently arbitrary and potentially biased decision-making that would result if the judge reached his conclusion on purely moral grounds. Thus a judge cannot reach a conclusion that he is unable to base on some form of legal authority and he cannot manufacture his own authority (J-SA22b). The basis of his power, however, lies in being able to maneuver within and make choices within this semantic field. It is true that in certain instances the judge is 'bound' to reach the conclusion a previous court reached in regard to a similar set of facts (J-SA28e).[84] And, the lecturer emphasizes, it is particularly important that judges consider and make decisions that are in accordance with the South African Constitution (J-SA11). But in regard to legislation, the judge holds the far-reaching power to 'interpret' the legislation (J-SA7a; J-SA9a; J-SA10a; J-SA17a, b), which is to decide upon the meaning of that legislation in a particular context, and in regard to precedent, the power to decide whether he will 'follow' previous decisions or not (J-SA22a; J-SA25; J-SA27b, c; J-SA41b; J-SA43a, b).

The complexities of a judge's power are most evident in regard to the following of precedent, which the lecturer attempted to spell out in J-SA26: Assuming a case with similar facts, a judge of such a case in the Durban High Court can reach a conclusion different to a judge in the Transvaal (now Pretoria) High Court 'and say for these reasons, very good reasons must they be, "I'm not following my brother in the Transvaal"' (J-SA26a). At a later stage, a similar case might again arise in the Durban High Court. The judge may then say '"My brother in the Transvaal made this decision in 1962, it was wrongly not followed by my brother in 1968 but now in 1992 I am overruling him and I am following the Transvaal judgment"' (J-SA26b).

[84] The extent to which judges are bound by previous decisions is governed by the rules relating to 'precedent'. In South Africa, magistrates' courts, which are the courts lower on the legal hierarchy, are always bound by the decisions of the higher courts. The High Courts, which are geographically based, may take decisions on the same set of facts that differ – thus the Cape High Court may reach a different decision on a similar set of facts than the Johannesburg High Court. However, within these geographical divisions if a case is decided by three judges, the three-judge decision always binds the decision of a single judge. The Supreme Court of Appeal and the Constitutional Court, which are the highest courts in South Africa, bind all other courts – which means that their approach to deciding a particular issue must always be followed.

However, if there is such a dispute between High Courts, and that dispute is really damaging to legal certainty, the case may then go up to the Supreme Court of Appeal who will make a decision 'and everybody is bound by that' (J-SA26c; J-SA28g). In deciding to follow, or not to follow a previous decision, therefore, every judge exercises the significant power, through that particular decision, of making a new precedent (J-SA26a; J-SA27a; J-SA28c). It is in this way that judges 'develop', 'make' or 'create' law (J-SA15; J-SA16b; J-SA28g). However, they are also capable of 'striking out' laws (J-SA13) and, as regards the older system of Roman-Dutch law on which South African law is based, they are represented as 'demolishing' huge pieces of such law (J-SA44).

Whilst all of this is illustrative of how judges' powers are represented as extending over a shifting web of 'legal authority', in effect they are also exercising power over each other and over other legal professionals. This power is most concentrated at the upper end of the court hierarchy, but remains evident throughout it. Thus, the highest courts, the Supreme Court of Appeal or the Constitutional Court have the power to enhance or diminish the reputation of their colleagues in the High Courts by either upholding or overruling their decisions. In similar fashion, within the High Court judges extend their powers over the decisions of their 'brothers' in the same or different divisions (see the paragraph above in addition to J-SA43b); High Court judges also hold sway over the decisions of magistrates who officiate within the jurisdiction of their courts, particularly through the institution of 'automatic review'[85] (J-SA28a, g; J-SA51a–c; J-SA52a–b; J-SA53a–b; J-SA66). In all these courts, the judge's conclusion, his decision to decide the matter on the basis of one set of authorities rather than another, has an impact on the advocates and attorneys who prepared the case, for the judge's conclusion determines absolutely whether they win or lose, succeed or fail. At one point the lecturer hints at the judge's sense of power over advocates (and by implication the attorneys who referred the case to them) when he says: '[D]uring his judgment he will *play*. He will say "the advocate for the defence" or "the advocate for the respondent said the following. I'm not accepting his version.

[85] A rule whereby the decisions of magistrates with less than seven years of experience are subject to automatic review by a High Court judge in certain instances. I cover the lecturer's anecdote that best illustrates some of the dynamics of the judge-magistrate relationship in the section dealing with the magistrate below.

I'm rejecting his authority. Advocate for the other side forwarded these arguments and I find them acceptable. And for these reasons I'm going to follow that"' (J-SA36b, emphasis). The telling word in this representation is the verb 'play' – a word that invokes the metaphor of a cat playing with a mouse and affirms the significant power judges wield in the legal hierarchy.

Judges not only wield power over the parties before them, their colleagues and other legal professionals, and the law itself, they also hold dominion over language. This was most dramatically represented during the second half of the second lecture of the series (L2:69ff), where the lecturer presented the facts of the case *Ex Parte Doe* 1987 (3) SA 829 (D) to the class. The lecturer had aimed to illustrate to the class how 'ordinary language' can be very confusing, and cause 'enormous uncertainty'. In this case the language causing the confusion was the preposition 'in': The statute governing marriages stated that a marriage must be concluded 'in' a house. A man, whose marriage had not taken place 'in' a house, but rather in a garden applied to have his marriage declared null and void on the basis of non-compliance with the marriage statute. Because of the gravity and solemnity of the contract of marriage, and because strictly confining the meaning of 'in' to 'inside the house' would cause tremendous uncertainty – people whose marriage had not taken place in a house would then be uncertain whether their marriage was valid or not – the judge chose not to follow the 'letter of the law' (J-SA6a–b), nor the meaning of 'in' in the Oxford English Dictionary (J-SA6c). Instead, he 'looked beyond' the dictionary meaning of the word (J-SA6d) and chose to 'extend' and 'widen' (J-SA6d; J-SA7b) the meaning of 'in' a house to effectively include 'not in' the house, to an 'open space outside the closed space' (J-SA6d).[86]

In this particular example, the lecturer also brought to the fore judges' power over what might be called 'ultimate outcomes': That through their decisions judges are capable of 'creating

[86] That the students found this difficult to swallow is indicated by the extended questioning and discussion that ensued after the lecturer's initial presentation of this case (see L2:74–119). This particular episode is representative of the new perspective (or 'ideology', Mertz, 2007) on language which students are required to take on as part of a distinct legal epistemology; i.e. a perspective whereby language is connected to a dynamic system that produces and sustains 'legal authority', such that language is no longer merely 'referential' to objects in the world. This episode is deserving of a study in its own right for the moves on the part of the students to suggest alternative wordings for the statute so as to avoid the problem that arose in *Ex Parte Doe*. All their suggestions are, however, aimed at preserving a referentialist perspective on language and resisting the new perspective the lecturer is attempting to introduce to them.

certainty' (J-SA10c, see also J-SA6a; J-SA7b; J-SA10b) or 'creating chaos' (J-SA10d). They are also capable of either aligning and reinforcing or distancing themselves from other sources of power as in Oliver Schreiner who, through his judgments, 'stood up' against the apartheid regime (J-SA54), whilst other judges were seen as 'co-operating' with (J-SA55b) or 'standing quietly by while the apartheid government ravished human rights' (J-SA57).

In addition to all these powers, judges were also represented as having authority over their conditions of work – the capacity, for instance, to undertake 'sabbatical work' (J-SA14) or 'research' (J-SA56b), to 'retire' from a case and undertake his own investigation (J-SA21c) and, operationally, to rule that the proceedings in court will take place 'in camera'; i.e. that such proceedings will not be open to the public (J-SA68a–b).

The forms of social action pertaining to judges that were passive, non-transactive and/or material in form tended to cluster around four themes: The procedure of appeals (J-SA28a, d, f); the process of being appointed as judge (J-SA12; J-SA20; J-SA30; J-SA62b; J-SA63b; J-SA64; J-SA75; J-SA76; J-SA77); judges' vulnerability to changes in the political system (J-SA46; J-SA47; J-SA48; J-SA50; J-SA55c, e; J-SA70b–c); and the resources judges receive for doing their jobs (J-SA74; J-SA79). As the first of these themes is an already well-known feature of the judicial system (judges are passive in the sense that cases are brought to them, whether as a court of first instance or on appeal, rather than them being able to go and find cases that will reform the law), I will discuss only the second and third of these themes, while dealing with the fourth in the section on values.

In outlining the formal process of judicial appointments, the lecturer pointed to the central role of the Judicial Services Commission:[87] The JSC receives the names of judicial candidates (J-

[87] The lecturer's representations around the appointment of judges outline the formal contours of the process, but also hint at the machinations of power that lie behind it. Because judges exercise such far-reaching powers, which, in South Africa, extend to the possibility of 'striking out' laws on the basis of their unconstitutionality, the judicial appointment process is potentially a very controversial political issue. Furthermore, in South Africa the racial transformation of the judiciary looms large, as the bench was overwhelmingly white during the apartheid years. Since judges enjoy security of tenure as an important feature of their appointment, these judges continued to serve after the 1994 elections. The political solution regarding the appointment of judges was thrashed out during the negotiations that preceded the 1994 elections and a unique solution – whereby judges would be appointed by a multi-stakeholder panel dubbed the 'Judicial Services Commission' (JSC) – was agreed to and subsequently entrenched in section 178 of the Constitution (see further Devenish, 2004).

SA75a); 'interviews' (J-SA12a, c) or rather 'scrutinizes' the candidates 'behind closed doors' (J-SA75c); and sends a shortlist of names to the President who then finally decides which individuals will be appointed (J-SA12d). But this seemingly neutral and objective process is susceptible to a variety of power struggles at various points.

The first power struggle, and possibly most contentious, relates to which names are forwarded to the JSC in the first place. This in turn depends on being asked to serve as an 'acting judge' and 'proving one's self' in that position. At J-SA75a, the lecturer outlines the processes and actors in this regard, as follows:

> **LECTURER:** Judges ladies and gentlemen should be, they were always in the past, the best senior advocates. Uh, are asked to act as judges and then they if they are good then they prove themselves then they are asked by the Minister of Justice to consider becoming a judge. Their names are then sent to the Judicial Services Commission. That is how a judge is appointed. (J-SA75a)

Whether it is only senior advocates who can become judges is a moot point in South Africa, although since the 1996 Constitution it seems to be generally accepted that judicial appointments are open to a wider pool of candidates. The lecturer, however, seems to affirm the traditional norm (see the extract above as well as J-SA63b). He also links judges with senior advocates in relational clauses on more than one occasion as in 'the judge is a senior advocate of twenty-five years standing' (J-Q72)), he acknowledges that 'nowadays of course it's no longer compulsory that you must be a senior advocate' and affirms that attorneys and even academics have been appointed as judges (J-SA77). Interestingly, the actors who ask senior advocates (or any other type of professional) to serve as acting judges and to whom the acting judges need to prove themselves are, in one instance, completely backgrounded (J-SA75a), in another they are simply referred to as 'they' (J-SA20) and in another the lecturer allocates this power to an incorrectly wide range of actors – 'the council the bar the minister and the judicial services council' (J-SA30). In fact, this would probably be a decision made by the Judge President in each division (or Chief Justice in the Constitutional Court) and the actors before whom an acting judge would have to prove himself would be his or her peers in the division. The lecturer's backgrounded and ambiguous representations here, however, seem to correctly reflect the

very subtle manner in which this form of power operates.

In general the lecturer strongly negates the possibility of magistrates being promoted to the High Court bench, even though their work is perhaps most closely akin to that of the judge. (The manner in which the lecturer constitutes this negation is outlined in greater detail in the section on the magistrate in Part D below.)

The second type of power struggle occurs between judges and the JSC itself.[88] The lecturer hints at this power struggle when he uses the verb 'scrutinizes' to capture the JSC's work in relation to judicial candidates (J-SA75c), and then reinforces this by adding 'And they ask you everything. They ask you about your personal life, they ask you about your political views, they ask you about your sexual orientation, they ask you about your health, they ask you everything' (J-SA75d). Interestingly, he immediately follows this communication up with a representation of a white male standing up to the JSC – the example of Judge Edwin Cameron, who in his interview before the JSC, actively volunteered the information that he was both homosexual and HIV-positive (J-SA76a–c).

With regard to the third theme – judges' vulnerability to changes in the political system, to 'a transfer of power' (J-SA55c) – the lecturer represented judges as passive and non-transactive in relation to the social action but with an interesting play upon the possible material versus semiotic effects of such vulnerability. When there is a radical change in the political dispensation, as occurred in South Africa during the early 1990s, the power lies with the new government to decide what should be done with sitting judges who, one might assume, are strongly imbued with the ideology of the previous regime. The extent of a new dispensation's power in relation to sitting judges is cleverly captured in the lecturer's play on the notion of 'chopping off' the old judges' heads (J-SA46b; J-SA70b). The action has chilling physical connotations, conjuring up images of the guillotine and perhaps its use in contexts such as the French Revolution. But it also has a semiotic connotation in the sense of completely removing a judge's mind from the scene by, for instance, dismissing or retiring all the old judges (J-SA55c),

[88] In recent years this has been a hugely controversial topic in the South African legal profession. At issue has been the invasiveness and appropriateness of the questions put to judicial candidates by members of the JSC, and their hostility toward particular types of candidates, particularly white males.

thereby making a 'clean sweep' (J-SA55e). In his representations on this theme, the lecturer seemed to adopt a harmonizing, pragmatic tone, rather than opting for representations that highlighted racial tensions. For instance, he observed that despite the fact that sitting judges 'were not a hundred percent completely trusted by the new government', there was a provision in the South African interim Constitution providing that sitting judges would be respected and retrained to understand the Constitution (J-SA48). Notwithstanding the difficulties of 'changing the frame of reference of a sixty-five year middle-aged man' (J-SA46), the sitting judges were retrained (J-SA48; J-SA50). He also referred twice to the fact that the Chief Justice under the apartheid regime, Justice Corbett, was the person who swore Nelson Mandela into office (J-SA12g; J-SA55d) – an act that symbolized the 'evolutionary' nature of the change from the old system to the new. In alluding to new judges, he refrained from any form of critique that linked race, new judges and case backlogs and instead mildly observed that it takes a 'long time' to train a judge (J-SA47) and that case backlogs were the price the South African system of administration of justice had to pay 'to slowly but surely appoint new judges' and for the old judges to train the new judges (J-SA70c). In referring to the one 'clean sweep' that did occur – the appointment of 11 new justices to the Constitutional Court (J-SA55e) who were tasked with 'looking after' the Constitution (J-SA55a) – he makes no mention of the rationale of race in their appointment but instead states that they were all appointed 'for very specific human rights reasons' (J-SA 62b).

3.2.2 Circumstances of social action

The 79 quotations related to the role of the judge yielded 85 extracts dealing with the circumstances of social action. Of these, 25 related to the resources used by judges, 33 to the emotional context of judges' work, and 27 to the locations in which judges are found. This set of extracts generally confirmed the stereotypical image of the judge as the cool, calm and collected 'king' of the courtroom, who wields power through a range of abstract resources.

Like lawyers, judges were represented as working exclusively with semiotic tools, such as dictionaries (J-CSA6), different forms of legal authority (J-CSA16; J-CSA22; J-CSA23b; J-CSA25a); the rules of statutory interpretation (J-CSA17b; J-CSA19) and the rules of precedent (J-CSA26a;

J-CSA26b). The lecturer also made mention of the specialized set of semiotic instruments through which judges act when deciding a case, such as the use of 'discretion' (J-CSA7; J-CSA10); the 'ratio decidendi', being the reasons the judge provides for his decision (J-CSA36; J-CSA39); the 'obiter dictum', being observations that the judge makes in passing which are not, strictly speaking, necessary for deciding a case and are therefore not binding upon the parties (J-CSA39; J-CSA41b; J-CSA43); the 'order of the court', which is the judge's binding instruction to the parties (J-CSA69b); the 'mandamus', being an order made by a judge compelling someone to do something (J-CSA53a); the 'sentence', being an order relating to the punishment of a criminal offender (J-CSA67b); and the power of 'review' over the decisions of magistrates (as well as government officials) (J-CSA66). It is interesting that in at least three instances – the references to 'ratio decidendi', 'obiter dictum' and 'mandamus' – the lecturer prefers to retain the Latin terms, rather than to simply use the more mundane English descriptors. The Latin terms arguably better convey the ancient links between the contemporary South African system of law and the classical era and thereby contribute to the mystique of judges.

The notion of time as a resource also featured in the role of the judge, but whereas lawyers' chronic lack of time was represented as a seemingly unchangeable feature of legal professional life, judges were represented as needing – and obtaining – the time required to do their jobs properly. 'Justice is not something that you can rush … justice is not something that uh you can use a sausage machine for. … [Y]ou must consider the cases. It takes time' (J-CSA70a, note also the relational clauses in this extract). To the students' apparent surprise, the lecturer confirms that courts are only in session for certain times of the year and in recess for other times and this is 'to give the justices times to do research. And write the judgments. And um to come up to date with the most current law. To … be a justice in South Africa, to be a judge in South Africa is not easy. Um it's a very dynamic environment. So uh besides holiday they need time off from court work, so that they can catch up with their research' (J-CSA56, see also J-CSA14b). This generous allotment of time carries through to the expectations surrounding the development of judges as professionals: 'A judge is not made overnight … it takes time, it really takes time' (J-CSA70b). The representations around time therefore serve as a further index of judges' power at the top of the legal professional hierarchy.

In the case of the extracts that describe the emotional context of judges' work, a distinction can be made between those that carry messages about the emotional life of judges themselves, and the emotions judges elicit in others.

In the case of emotions which judges might feel themselves, the representation was contextual rather than direct. The lecturer advocates that one must be 'very comfortable' and 'have whatever you want' before becoming a judge (J-CSA79). This together with his representations around judges having time for sabbaticals and vacation and so forth implies that judges should be at ease, satisfied perhaps. However, being a judge is not without its stressful dimension. This relates primarily to being the object of scrutiny, most notably by the Judicial Services Commission before appointment as a judge (J-CSA75b, c, d) but also in relation to 'proving' one's self for purposes of promotion (J-CSA20a; J-CSA30; J-CSA75a). Stressful emotions could also be implied from the threats posed to judges by a change in the political order (J-CSA46); and, simply, the day-to-day work (J-CSA47; J-CSA63; J-CSA69a) of which there is an 'enormous amount' (J-CSA70d).

Apart from this, the two predominant themes relating to the emotional disposition of judges themselves were, firstly, representations of judges as objective and rational and, secondly, representations of judges as courageous.

There were both more and less explicit representations around the objectivity of judges but both involved emotion. In the more explicit representations, which occurred early on in the series of lectures, the judge's capacity to 'sit in judgment of others objectively' (J-CSA2), appears to involve a capacity to separate out, or hold in suspension, things that one might 'believe on a spiritual level' (J-CSA2) or feel very strongly about (J-CSA4a). In the less explicit representations, the objectivity and rationality of judges was placed in sharper relief by representing the people with whom the judge comes into contact as highly emotional: The female rape survivor (J-CSA41a); the abused child (J-CSA68b) and even the remorseful criminal who admits 'Look, mea culpa, I'm guilty, I'm here, I'm *throwing myself* on your mercy' (J-CSA67c, my emphasis) bring complex and difficult emotions into the court room. The judge responds with cool rationality, 'evaluating' the rape survivor's evidence (J-CSA41a) or taking the

criminal's plea for mercy into 'consideration' (J-CSA67c). In Halliday's transitivity system, verbs such as 'consider' and 'evaluate' would fall into the category of 'cognitive' mental process clauses (Halliday, 2004: 208 – 210). These verbs represent a very different form of sensing to that captured by 'emotive' words such as 'love', 'like', 'abhor', 'fear' and so on. However, as the lecturer's anecdote about his own sentencing of a first-time offender as a magistrate indicates (this anecdote is covered in greater detail in the section on the magistrate below), those who sit in judgment of others frequently experience very strong emotions. These aspects of a judge's work however, were never foregrounded by the lecturer. As opposed to emotional and 'over-enthusiastic' magistrates (J-CSA51), judges were always represented as cool and calm (J-CSA53b).

The other theme of judges' emotional world – that of judges acting courageously – emerged in comments around the justices of the Constitutional Court not shrinking away from declaring gay marriages valid, albeit that this created some uncertainty (J-CSA11), in the representation of Judge Schreiner standing up to the apartheid regime (J-CSA54) and, probably most explicitly, in the anecdote of Justice Cameron's admission of his HIV-positive status in his interview before the Judicial Services Commission (J-CSA76a, b).

The emotions judges were represented as exciting in others tended to be predominantly 'negative' emotions. Apart from the emotion of fear, which comes out most clearly in representations relating to the advocate (see the section on the articled clerk, attorney and advocate above), the lecturer represented judges as causing boredom for 'they talk in a language of their own they have arguments of their own and it is extremely long-winded (J-CSA29) and some of their judgments 'become very tedious (J-CSA33). They other dominant negative emotion was that of distrust in the context of the democratic government's distrust of the judges of the apartheid era (J-CSA55a) because the latter were seen as 'standing quietly by while the apartheid government ravished human rights' (J-CSA57).

Judges' were almost exclusively located in the physical space of the court – this accounted for 21 of the 27 extracts relating to location (77%). In 11 of these the lecturer simply used the word 'court' (J-CSA9; J-CSA10b; J-CSA13a; J-CSA23a; J-CSA24; J-CSA25b; J-CSA67a; J-CSA68a; J-

CSA72b; J-CSA73), whilst in two instances he located the judge more specifically, by referring to the judge sitting on the 'bench' (J-CSA10c) or being in his 'chambers' (J-CSA52a). In addition to using other terms for naming courts (see 'provincial division' and 'local division in J-CSA20b; J-CSA21; J-CSA60 or the 'appellate division' in J-CSA35) he referred to courts in only two specific geographic areas, being the 4 instances he spoke about the 'Cape Provincial Division' (J-CSA27a, b; J-CSA31; J-CSA32) and the one time he referred to someone being a judge 'in the Witwatersrand' (J-CSA78). This follows the trend of the curiously dislocated fashion of representing legal professionals, on the one hand, but it also points to how certain areas of activity – the legal centres in Cape Town and Johannesburg, in this instance – could attain a certain pre-eminence. The remaining 6 extracts specifying the location of judges placed judges in 5 different types of space: A space of socializing and recreation (J-CSA4b); of 'sabbatical work' at a university (J-CSA14a); of 'workshops' with other stakeholders (J-CSA50); at the 'swearing in ceremony' of President Mandela (J-CSA55b); and in the interviewee's chair before the JSC (J-CSA75d; J-CSA76c).

3.2.3 Social actors

Judges

Judges were represented as overwhelmingly, in fact almost exclusively, male. The sources of these representations were two-fold: Extracts in which pronoun usage determined whether the lecturer was talking about a male or female person, and nominations. There were 26 extracts in which the judge was classified on the basis of gender. In 25 of these (96%) judges were classified as male (J-SAct6, 7, 9b, 10a, 14b, 21a, 22a, 23a, 26a, 27a, 32, 33, 34c, 35a, 36a, 38a, 39a, 41, 43a, 46, 52a, 53c, 62b, 65, and 72), and in the only other extract, the classification was gender inclusive (J-SAct17). Even here, the inclusion of the female appears to be an afterthought for the lecturer states: 'when the judge sits in the court he does he does he or she doesn't decide …'. The fact that the lecturer first mentions 'he' and the manner in which he then seems to stumble over the pronoun justifies this interpretation. Within this group of 26 extracts, the overwhelming male classification of judges arose from a very limited range of discursive resources. Specifically, it was achieved by the use of the pronouns 'he' (90 instances),

'his' (27 instances), 'him' (9 instances) and the nouns 'brother' (4 instances) and 'guy' (1 instance).

As with the roles of the lawyer, articled clerk, attorney and the advocate (to a lesser extent, at least as far as class is concerned), classification on the basis of race and class was far subtler. There were only three extracts within the 79 judge quotations pertaining to racial classification (J-SAct12a; J-SAct14e and J-SAct57a) and 2 pertaining to class (J-SAct53a and J-SAct79). In his racial classification of judges, the lecturer hints at, but does not explore the racial tensions involved in the shift from the old, white (male) judicial guard to a bench that is more demographically representative. The unquestioned point of departure is that judges of the apartheid regime were 'of course white' (J-SAct57a). The seemingly unquestionable meaning that flows from this is the need for transformation, which underlies the lecturer's anecdote on the 'slight' controversy that arose when President Mandela made it known to the JSC that his preference for the post of chief justice was not the 'white old judge from the old dispensation', Judge Hefer, but rather Justice Mohamed (J-SAct12a). This move on the part of the President was controversial because it violated the doctrine of the separation of powers whereby members of the executive should not be overly involved in the appointment of judicial officers as such officers play a key role in checking the executive's powers and keeping it within the bounds of a human rights framework. The lecturer's interesting qualification of this controversy as 'slight' however, represents (but also re-constitutes) a consensus that the appointment of a 'white old judge from the old dispensation' as the first chief justice of the newly elected democratic regime would have been untenable. The unquestioned need for transformation is also mirrored in the lecturer's discussion around 'old' and 'new' judges at J-SAct70b and c. However, further than this, the considerable racial tensions involved in the transformation of the judiciary, which incorporate debates around the appropriate skilling and experience of judicial candidates and the efficiency of the courts amongst others, did not feature at all.[89]

[89] Despite the need for, and carrying through of transformational objectives in relation to the judiciary I found it interesting that when the lecturer asked the class to name the then (and still current) deputy chief justice of the Constitutional Court, Justice Dikgang Moseneke, the class – who comprised an even mix of white students and students of colour – could only recall the names of white, male judges (J-SAct14e), as is evident when one considers quotation 14 of the 'judge' set of quotations: 'Pius Langa, you should all know this ne? Who's the deputy chief justice (sshhh sshhh) Who's the deputy chief justice, he's on sabbatical at Wits now … he's sitting here in

The two extracts pertaining to class, implied that judges are of the upper crust. This included specific reference to monetary wealth as well as reference to the more implicit indicia of the effects of wealth, such as having a good education and speaking in 'very civilized' tones (J-SAct53a). More explicitly, judges' positioning in the upper classes can be inferred from the fact that they are generally appointed from the ranks of the best senior advocates (J-SAct79). Because of the great disparity between the advocate's income and the salary of a judge, which is paid by the State, judges must be 'very comfortable' and become a judge as a 'kind of retirement' (J-SAct79).

There were many instances in which judges were specifically nominated, 30 in all, comprising reference to 24 judges in both the current and previous regimes (see table 2).

Judge/Justice's Surname	Extract	Gender (M, F)	Race (W, NW)
Cameron	J-SAct14c; 76	M	W
Chaskalson	J-SAct14d; 50	M	W
Corbett	J-SAct12c; 55b	M	W
Buchanan	J-SAct37b	M	W
De Villiers	J-SAct37c	M	W
Eloff	J-SAct66	M	W
Foxcroft	J-SAct31b; 34b; 53b	M	W
Hefer	J-SAct12d	M	W
Hoexter	J-SAct59	M	W
Jones	J-SAct38b	M	W
Kentridge	J-SAct12d	M	W
King	J-SAct31a; 34a	M	W
Langa	J-SAct14a	M	NW
Lewis	J-SAct78b	F	W

Wits, he's doing sabbatical work, he's also the chancellor of this university …. [Student: Edwin Cameron I think it is - other students murmur their disagreement or assent] Ooohh Edwin is the chairman of the council, who is the chancellor [Student 6: Chaskalson] No no Chaskalson is long retired, we long forget about Chaskalson. Who is the chancellor of the university of the Witwatersrand? [Another student attempts an answer but L already starts whistling incredulously] Ladies and gentlemen, I am going to kill myself [class laughs] I give you a hundred bucks if you can tell me. [Student: Is it a contract?] [Class laughs] It's a verbal contract, ja [more students laugh] [One other student attempts to answer] Justice? What? ….Does anybody know? [slight pause] Have you ever heard of Justice Dikgang Moseneke? [cries of 'oh' from class and chatter] Oh yes of course Dikgang ja ja ja ja [imitates class]' There is not enough evidence to draw an inference that such students had already clothed the identity of the judge with meanings of white-ness and male-ness, perhaps through their socialization pre-law school. But that they only knew the names of white, male judges raises the question whether their expectations around the identity of a judge; i.e. that the judge will be white and male, mould their way of perceiving the world, such that the names of white judges are easier to remember than black ones.

Mohammed	J-SAct12b	M	NW
Moseneke	J-SAct14f	M	NW
Murrans	J-SAct38c	M	W
Ogilvie Thompson	J-SAct35c	M	W
Reitz	J-SAct37a	M	W
Roelf	J-SAct35b	M	W
Sachs	J-SAct61a	M	W
Sackswell (*sic*)	J-SAct77a	F	W
Schreiner	J-SAct54a; 58a	M	W
Solomon	J-SAct45c	M	W

Table 2: Judges nominated in extracts pertaining to the 'judge' (M=Male; F=Female; W=White; NW=Non-White).

The nomination of judges, as can be seen from the table above, underscored the predominantly male and white face of the judiciary in the lecturer's representations: A total of 22 of the 24 nominated judges were male (92%); whilst 23 were white (88%). It is also interesting that in the case of one of the only two nominated female judges – the reference to Kathy 'Sackswell' – the lecturer was unable to remember her correct surname, which is 'Satchwell'. It could be argued, however, that students who simply hear the names of these judges do not have the contextual knowledge to associate them with gender and racial categories. This is true, but in numerous instances contextual references in the text would have alerted students to such classification (particularly through pronoun usage). Furthermore, race (and even ethnicity) can be inferred from a person's surname. Thus 'Mohammed' and 'Moseneke' are both immediately evident as Indian and African surnames.

Apart from gender, racial and class classifications, judges were categorized in at least four other ways. In addition to categorizations on the basis of employment ('acting' as opposed to 'full judges – see J-SAct30a, b) ethnicity and ideology ('English liberal' as opposed to 'Afrikaner professional' judges – see J-SAct57b) which were associated with only one extract each, judges were characterized on the basis of their brilliance, intelligence and even eccentricity, characteristics which went together in making judges 'wonderful' (J-SAct45a; J-SAct54b; J-SAct58b). The other more prominent form of categorization related to age: Judges are 'old' (J-SAct19; J-SAct55a; J-SAct70b, c) or at least, middle-aged (J-SAct78a).

Parties

In the judge set of quotations, the parties who appear before the judge were backgrounded (21 extracts, or 52,5%) slightly more than they were included (19 extracts, or 47,5%). Backgrounded social actors were excluded from the social action by the same order of discursive resources that functioned to background 'clients' in relation to the other roles thus far considered. Thus a judge must decide and solve the 'problem' (J-SAct18); he must make a decision on a set of 'facts' (J-SAct27a) which tend to refer to legally-recognized institutions such as 'marriage' (J-SAct8; J-SAct11a) or 'human rights' (J-SAct57c) rather than the parties themselves; he sits in judgment on or considers the 'matter' (J-SAct4a; J-SAct4d; J-SAct62b) and hears the two 'sides' (J-SAct36b); and he decides, judges, considers or even throws out the 'case' (J-SAct21b; J-SAct22b; J-SAct23b; J-SAct25; J-SAct26b; J-SAct27b; J-SAct35d; J-SAct39b; J-SAct43a; J-SAct43b; J-SAct49; J-SAct54c; J-SAct70a; J-SAct71; J-SAct72). One of the interesting shifts that the use of such discursive resources facilitates is that the judge can appear as the author or creator of a case. Instructing his students to read a particular case, for instance, the lecturer adds '[i]t is a case *by* the wonderful and very eccentric and very learned … judge of appeal Solomon' (J-SAct45b, my emphasis). The emphasis in this particular representation falls fully on the creative power of the judge who has artfully woven the dispute before him into recognized legal categories.

Where the parties were included in the social action, in a couple of instances reference to them was generic (see the reference to 'others' at J-SAct2; 'these people's' marriage at J-SAct10b; and 'parties' at J-SAct69), and in one instance it was personal; i.e. the lecturer located students in the position of being a party before a judge (see the use of the pronoun 'you' at J-SAct3). In the remainder of instances, however, the lecturer included specific groups of people in the social action. What is interesting is that at least three-quarters of these specific references pointed towards groups that are (or were in the recent past), commonly regarded as marginalized in society: Sadomasochistic homosexuals (J-SAct4b, c) or homosexuals more generally (J-SAct11b); prisoners (J-SAct13b; J-SAct53d); female rape victims (J-SAct40; J-SAct41b); women with many children whose husbands fail to pay maintenance (J-SAct52b); and children who have been molested (J-SAct68a). In the remaining instances the parties were

presented as being somewhat irrational and/or lacking in ethical motivation – people who get married in submarines (J-SAct5a, b) and then later say '"Ja, but we also got married in strange places and we are now also tired of our spouses and … we also want it null and void' (J-SAct10a, b). It is interesting that the included parties come from such marginalized groups and that there is not a single inclusion of, for instance, powerful commercial entities or the State as parties before the judge. Such actors could account for a significant proportion of the civil work before a judge. Reference to rape victims, molested children, prisoners and so on, however, places the power of the judge in sharper relief.

3.2.4 Values

There were almost an equivalent number of extracts within the judge set of quotations relating to evaluations of judges themselves (34 extracts) and of their work (33 extracts). In the case of the latter, 27 extracts related to the internal goods (82%) and six to the external goods (18%) of the practice respectively. Similarly to the roles of the lawyer, articled clerk, attorney and advocate, the form in which valuations occurred was mainly through moral evaluation (55 extracts – 77,5%). Another 16 extracts were equally divided between references to authority and purposive constructions and there was one instance of mythopoesis.

Unlike the other legal professional roles considered thus far, a little more than half of the valuations (19 extracts, or 55%) relating to judges themselves were positive, rather than negative. The most prominent theme emerging from these extracts was that the judiciary is an elite meritocracy. Judges are appointed from the select class of the 'best senior advocates' (J-V75), they are the 'best of the best' (J-V63), the 'best brains in the business … And usually they are highly intelligent and very very good lawyers' (J-V29a, see also J-V20; J-V30; J-V77). A relational clause explicitly links the courts to a meritocracy: 'A court is um uh a court is a meritocracy, it is something that is based on merit, it's based on on um professionalism' (J-V46). At other points the word 'judge' is collocated with terms such as 'wisdom' (J-V42); 'sterling' (J-V57a); 'luminary' (J-V66); 'expert' and 'knows everything' (J-V72b). At a few points the lecturer's esteem for the judge elite bubbles over in glowing praise for specific judges: There is 'the wonderful and very eccentric and very learned judge of appeal Solomon' who was 'one of

the of the bright lights of the 1920 … appellate division. A brilliant, brilliant jurist' (J-V45); the 'brilliant', 'intelligent' and 'wonderful' Oliver Schreiner who was a 'true blue lawyer … one of the greats' (J-V54; J-V58) and the 'brilliant' Carole Lewis' (J-V78b). The last of these extracts provides a clue to the connotations of the lecturer's use of 'brilliant' because in its broader context he makes the point that she was formerly an academic and her judgments are 'better theoretically-founded' than those of her colleagues on the bench. The lecturer's high esteem of things academic, and the intellect more generally, also comes through when he values Justice Dikgang Moseneke on the basis that he is the chancellor of Wits University (J-V14).

The elite status of judges is not only expressly described in these terms, it is also communicated via the language used to describe the courts: Judges occupy the 'higher' and 'highest' courts (J-V24; J-V26a; J-V28; J-V49), while magistrates occupy the 'lower' courts. The higher/lower dichotomy used to describe the courts serves to reinforce the hierarchical impression of the legal profession.

In four instances, the lecturer's evaluation of judges themselves was ambiguous. Three of these four instances related to judges currently serving on either the Supreme Court of Appeal or Constitutional Court bench. In all three cases, the lecturer expressly indicated a basis for esteeming the judge and then subtly suggested a basis for critique. Thus, in the case of Justice Albie Sachs the lecturer stated, '[a]lthough he practiced for a very limited matter, very limited matter in Mozambique, and the neighbouring countries, and he is a qualified lawyer um he is he was appointed because of his role in the struggle, because of the sacrifices that he has made and because of his passion for human rights' (J-V62). This statement, while valuing Justice Sach's commitment to and passion for human rights tends to suggest that he was not appointed to the bench because of the depth of his expertise as a lawyer – since he only practiced for 'a very limited matter in Mozambique. Similarly, while praising Justice Cameron as a 'very courageous person' in the context of his admitting to the Judicial Service Commission that he was HIV-positive, he hints at questioning the meaning ascribed to this act – 'everybody was asking whether it was necessary to do that or was it very courageous to do it. Well I don't know you must maar decide for yourself' (J-V76). And Judge Hefer who 'wasn't a bad judge, he was as a matter of fact a very good judge' is also a ' white old judge from the old ..

dispensation' (J-V12b). In this instance the qualifiers 'white' and 'old' convey a negative valuation. In contrast to the lecturer's veiled critique of sitting judges, his valuation of judges who served in the past is almost always extremely positive, as is evident in the references to judges Solomon, Schreiner and the 'luminary' Judge Eloff.

These veiled criticisms of sitting judges are suggestive of an ambiguity within the lecturer toward their elite status. His enthusiasm for them is neither whole-hearted nor unqualified, as his negative evaluations evince. One of the most interesting of these occurred through the strategic use of wry laughter, in the following extract:

> **LECTURER:** Uh and the Judicial Services Committee consists of a wide spectrum of people involved in the legal world. And it's a huge panel consisting of the Minister of Justice, other law lords [laughs wryly] hmm other law lords, other justices, the chief justice, ummm even a representative from the magistrates' commission.

In addition to judges being devalued because of their over-concern for procedural correctness,[90] and their failure to uphold human rights (J-V55; J-V57b) they were also devalued for being overly verbose (J-V29b; J-V33); they 'cannot keep [their] mouth[s] shut' about things (J-V39b)) and for failing to properly develop Roman-Dutch law. Talking of the student's case assignment, which was in the lecturer's particular area of expertise of unjustified enrichment, he points out that it was a split decision regarding whether a general enrichment action should be introduced into South African law '[a]nd by just missing it with one judge, the South African legal science was put back thirty, forty now going on fifty years' (J-V35). In addition to putting South African legal science 'back', the judges have 'taken out' many pieces of Roman law. The reason, the lecturer suggests, is that 'they've [the pieces of Roman-Dutch law] just become anachronistic', but he then follows this with an immediate *ad hominen* argument 'or not, the judges perhaps are just a little bit stupid' (J-V44).

The lecturer represented a diverse range of goods internal to judges' work. These included the

[90] This is a tricky basis for devaluation because in other contexts it is also presented as an internal good (see paragraph below). This points to a tension in the lecturer's representations regarding 'professional values' such as procedural correctness, and lay perceptions of the values that the administration of justice should deliver, such as appropriate punishment for those who break the law. This is a tension evident in the data that is left unresolved. I discuss this phenomenon in greater detail in the section dealing with the magistrate, and the case of the man who defaulted on his maintenance payments.

upholding of Constitutional values (J-V11; J-V13; J-V41; J-V48a; J-V50), the importance of representing society on the bench (J-V10d; J-V78a), the value of acting objectively, impartially (J-V2; J-V4; J-V61; J-V74) and rationally (J-V26b; J-V36; J-V39); the promotion of legal certainty (J-V6a; J-V6b; J-V7; J-V9; J-V10a; J-V10b; J-V10c; J-V11; J-V26c) and the upholding of procedural correctness (J-V52b; J-V53; J-V71; J-V72). The most prominent of these – the upholding of Constitutional values and the promotion of legal certainty – were represented as existing in a certain degree of tension. On the one hand legal certainty 'is very very important. Your society is based on legal certainty. If you have a society where there's no legal certainty … then you live in chaos' (J-V6a). For this reason a judge should always favour the interpretation that gives the greater legal certainty' (J-V10a), the change that will result in the 'minimum change in society' (J-V10c). This is underscored with an if-then construction: '*If* you judge a case … you must avoid creating chaos' (J-SA10d). On the other hand, in South Africa the Constitution has a specific transformational agenda that requires discarding certain laws if they fail to meet the test of constitutionality. In instances where the constitutionality of a law is at stake, judges are required to lead change and to take decisions that may result in far-reaching change. Thus the lecturer represents judges taking decisions allowing same-sex marriages to take place (J-V11), disallowing forced confessions (J-V13), and discarding the cautionary rule regarding a rape victim's evidence (J-V41). In all these instances, the Constitution legitimates the social change – 'the Constitution is an *overwhelming* authority. So you can't go against the Constitution' (J-V11). It thus tended to be invoked in quite a positivistic sense; i.e. instead of exploring the bases of the values enshrined in the Constitution, the overriding value involved is that of accepting legal authority.

Although the lecturer spoke only twice about judges being the representative of society on the bench in one instance it was invoked, via a relational clause, in a definitional sense; i.e. the judge *is* 'the representative of society on the bench' (J-V10d).

The external rewards of the judge centred around two themes: Material rewards and status. The lecturer's representations around the material rewards judges receive were muted: They get a 'government car', for instance (J-V74b) but the salary they receive – a newly-appointed judge gets about 'seven six hundred thousand a year' for instance (J-V79) – is a 'problem'. This

is a step down from the earning capacity of the best senior advocates, but an annual salary of six to seven hundred thousand a year would still places judges amongst the top earners in South African society. The lecturer's representation of the judge's material rewards thus reinforces the value of pursuing *high* or *significant* material rewards.

All the other extracts relating to external goods were associated with status in the form of the lecturer emphasizing that particular judges were 'chief justices' or 'judge presidents', i.e. those who have been appointed to the highest position, either within a particular division or in South Africa as a whole (J-V31; J-V32; J-V37; J-V38). The lecturer's consistent indexing of this fact constituted rank amongst judges as significant and therefore something to be valued.

3.2.5 Summary

The passive and transactive forms of power which judges initially exercise in hearing a case belie the extensive range of powers they actively exercise over the parties involved in a dispute and, through their adjudication of such dispute, over their colleagues, the legal professionals involved in the case, the law itself and ultimate outcomes. The power they exercise over the parties before them involves much more than a resolution of the dispute, because it simultaneously involves categorization in terms of legal categories that potentially carry significant losses for or at least a change in social status. Their power over the legal professionals involved in the case can be exercised during the trial or at the end of it. The choices they make regarding which legal authorities to follow at the same time pick winners and losers from amongst the precedents already determined by colleagues in courts of the same or lower ranking. They possess both a constructive (creating, making, developing) and destructive (demolishing, striking out) power over law that encompasses extensive powers to determine the meaning of language for legal purposes. Judges are, however, vulnerable to forms of power exercised by others, both from within and outside of the legal system. With regard to the purposes and values of the law and the legal profession, the lecturer laid greater emphasis on internal than external goods. Internal goods included upholding constitutional values; promoting legal certainty and embodying objectivity, impartiality and rationality. Reference to external goods was muted, featuring only material rewards and status. An

adversarial system of justice was inherent in describing the social action of the judge and the role they play in deciding between the 'two sides' that are presented to them in court. Judges were also almost always located within the physical confines of the court. Whilst great emphasis was laid upon judges setting aside both their emotions and their own moral positions, in the legal categorizations they bestow on the parties appearing before them, as well as in their capacity to determine ultimate outcomes such as 'certainty' versus 'chaos' judges make far-reaching moral judgments. Judges were also depicted as exciting a range of negative emotions in others. Although judges have the power to determine the circumstances of their work, and particularly power over the resource of time, they may be stressed by the enormous amount of work they face daily, as well as the need to 'prove themselves', especially when serving as an acting judge. The parties appearing before judges were backgrounded more often than they were included, primarily through use of the depersonalizing nouns 'case' and 'matter'. When social actors were included as parties, they tended to belong to categories that are commonly-regarded as socially marginal, or were represented as irrational or lacking in ethical motivation. The social profile of the judiciary was represented as almost exclusively male. A few classifications on the basis of race were evident (mostly through reference to the 'old, white judges), but in general the lecturer avoided reference to race or the tensions involved in the transformation of the judiciary. There were also a couple of representations suggesting that judges are indeed from the upper crust.

4. THE SHADOW CAREER PATH

The shadow career path was constituted by ten quotations (in contrast to the preferred career path's 30) and was comprised of three roles (public prosecutor, state advocate, magistrate), in contrast to the preferred career's four (articled clerk, attorney, advocate, judge). Unlike the preferred career path, where the progression through each role was both linear and essential, the shadow career path offered an alternative: Progressing as either public prosecutor-state advocate or as public prosecutor-magistrate. Both such progressions constituted careers 'in the civil service' (P-Q3). A slight preference for the former progression over the latter was suggested in the lecturer saying 'if you do become a public prosecutor, you know, that is where you want to end up. To be a state advocate' (P-Q5; SA-Q4). Implicit in this statement is the knowledge that whilst prosecutors work exclusively in the magistrates' courts, state advocates work in the high courts.

The role of the public prosecutor served as an essential point of entry for both progressions (P-Q3). Equally essential was promotion to the rank of 'senior prosecutor'. In the case of the first progression (public prosecutor-state advocate):

> **LECTURER:** [I]if you're a senior public prosecutor, the director of public prosecutions invites you for a interview and if you pass the interview then uh you become a state advocate. … Uh and everybody wants to become a state advocate but you can't do that off the street. You must first become a public prosecutor.' (P-Q4; SA-Q1)

And for the progression public prosecutor-magistrate '[y]ou would start by being a junior prosecutor, senior prosecutor uh being elevated to the bench becoming a magistrate' (M-Q9).

Whilst the lecturer said nothing more about the shift from being a senior prosecutor to being a magistrate, he related to students his personal experience of being interviewed for the position of state advocate (SA-Q3). In this anecdote (which is covered more extensively in Part F below, dealing with the role of the Director of Public Prosecutions), the lecturer advises students that promotion to the position of state advocate depends on being able to 'get on' with the Director of Public Prosecutions (DPP): '[S]o if you don't get on with the character, if you don't get on with the personality, of the director of public prosecutions, then then it's difficult' (SA-Q3). What is more subtly evident is that the lecturer's failure to be promoted to the position of state

advocate (this was during the time of apartheid) was probably due to his taking a stance against a push on the part of the DPP to show his true political colours:

> **LECTURER:** And then he started asking me political questions. At that stage he was prosecuting Winnie Mandela. Um and he started asking me questions what I would do if I had been the attorney-general. And I just refused to answer the questions, I said 'sorry I consider those questions inappropriate and I don't, I can't answer them. And that's a political decision and I can't answer them. Um I don't want to seem unthankful or unpleasant but I really can't answer …' And then he stopped. Immediately. He said 'thank you, yes go back to the magistrates' court.' (SA-Q3)

What functions most powerfully in this representation to convey the impression that the lecturer's political beliefs functioned as the primary ingredient in his failure to 'get on' with the DPP, and the true basis for the failure of his application is the coding of the DPP's response: He stopped 'immediately' and then in a dismissive manner relegates the lecturer to a career in the magistrates' court. This constitutes a complicated representation of the purposes and values of law and the legal profession: On the one hand, the lecturer is presented as a courageous and upstanding young man, upholding the neutrality of law; on the other, it paints a depressing picture of law's corruption – as an instrument used to further the political agenda of the day.

Lastly, the lecturer's representations also constructed the *lack* of a linkage between the roles of the magistrate and judge, and the extremely exceptional circumstances that must prevail if an individual is to successively negotiate this career transition. He notes that it was one of Dullah Omar's (the first Minister of Justice in South Africa's new constitutional democracy) objectives:

> **LECTURER:** [T]hat the curriculum vitae, the cursus honorum, the career path of a magistrate and a judge would eventually in South Africa become one. You would start by being a junior prosecutor, senior prosecutor uh being elevated to the bench becoming a magistrate, senior magistrate, regional court magistrate, senior court magistrate, regional court president and then be invited to become a judge in the High Court. He tried to bridge that gap.' (M-Q9)

His use of the word 'gap' however, is indicative of a significant divide between these two roles, which he then reinforces by counseling students that magistrates are 'far removed' from judges (M-Q10; MQ11). The basis for this discrepancy in the status of magistrates and judges is multi-faceted, but he sums it up in this particular context by way of an exaggerated negative evaluation of the training of magistrates. Whilst judges are only appointed from the ranks of

the best advocates:

> **LECTURER:** [A] magistrate, nja, is just trained here in Pretoria for six months and you know … Here they didn't even have to have an LLB. Now they must have an LLB. But in the old days … just a public service diploma or you know walking past a few law books would have sufficed. Um, nowadays it's more formalized. But magistrates and judges are very very far removed.' (M-Q11)

He does however show that the progression is not impossible by relating the career success of his former colleague in the magistrates' court in Cape Town, Mr Andre Legransie. Mr Legransie was 'very very bright', 'really very very clever' and very fair (M-Q12). He became a regional court magistrate but was then promoted to the High Court because, in the lecturer's opinion '[h]e's got the gravitas and the knowledge and the professionalism to become a High Court judge' (M-Q12). Notwithstanding this example, however, the lecturer concludes by affirming the chasm: 'OK so it is possible … but the run of the mill magistrate is very far from the High Court' (M-Q12).

4.1 The Public Prosecutor and State Advocate

4.1.1 Social action

In the six quotations relating to the public prosecutor there were 14 extracts pertaining to social action, and five in the three quotations relating to the state advocate respectively. Both the public prosecutor and state advocate were coded in action that was predominantly active (78% for the public prosecutor and 80% for the state advocate respectively). The public prosecutor's actions were also predominantly transactive (71% or 10 of the 14 extracts) and semiotic (85% or 12 of the 14 extracts). The social actions of the state advocate, by contrast, were predominantly non-transactive (80%) and material (80%). While the representation of the social action of the state advocate thus departs significantly from the trend evident in all the other legal professional roles, not much turns on this, as it is simply a reflection of lack of data relating to this particular role.

Prosecutors were most commonly represented as engaged in the generic action of 'prosecuting' (P-SA2a; P-SA3; P-SA4a). This is a somewhat 'thin' representation of their social

actions, in the sense that the terms used to describe social action were not elaborated, the discursive resources were not rich and varied. In one quotation however, (P-Q2 – the lecturer's extended anecdote regarding his prosecution of a man accused of credit card fraud) the lecturer broke the action of 'prosecuting' down into more specific actions: 'Proving' a case (P-SA2c); entering into plea bargains (P-SA2e); addressing the accused (P-SA2f, g); 'putting' the charge to the accused (P-SA2h); and asking the magistrate for a particular kind of sentence (P-SA2i). In all these representations the prosecutor exercises power almost exclusively over the accused person in a particular case. They are never represented as having any power over law, language or information. The only other legal professionals over whom their power extends are other prosecutors (P-SA2d; P-SA2f) and the magistrate (P-SA2i). In contrast to the highly-charged relationship that emerges from the representation of advocates and judges, the relationship between prosecutors and magistrates appears to be more relaxed, with the prosecutor confident to simply 'ask' the magistrate to impose a jail sentence without the option of a fine (P-SA2i).

State advocates were represented as engaged in the even more generic actions of 'doing' (SAdv-SA2a, 2b; SAdv-SA3) and 'working' (SAdv-2c) with no breakdown of these tasks. The only instance of transactive social action extended the power of the state advocate over 'civil matters' and thus over clients. They were similarly never represented as having any power over law, language, information or other lawyers.

In both roles there were no relational clauses or if-then constructions that cemented the particular role to particular associations, as was evident in the roles of the preferred career path.

4.1.2 Circumstances of social action

The representation of resources predominated in both roles (five extracts in the six quotations relating to the public prosecutor, and three extracts in the three quotations relating to the state advocate respectively). There was otherwise no representation of emotion or location in the quotations relating to the state advocate. For the public prosecutor there were 6 extracts relating to location, and none relating to emotion.

The resources of the public prosecutor fell into three categories: The generic resource of 'evidence' or various types of evidence (such as the credit card, slip and bank statement in the case of a case of credit card fraud) (P-CSA2a, c); the resource of 'experience' (P-CSA3c; P-CSA4b); and interestingly, the magistrate herself ('I had an old battleaxe for a magistrate' – P-CSA1). The latter suggests that the relationship between the prosecutor and the magistrate is completely different to the relationship between the advocate and the judge. In the former, there are various hints – representation of the magistrate as a resource for instance, or the references to 'my court' (P-CSA2b, d) – which point to the prosecutor being seen as more powerful than the magistrate.

The resources for the state advocate similarly included 'experience' (SAdv-CSA1; S-Adv-CSA3) and then the same physical resources as 'an ordinary advocate'; i.e. an office and a set of law reports (SAdv-CSA2).

The public prosecutor was located exclusively in the spatial area of the court (P-CSA2b, d; P-CSA3a, b; P-CSA4a) and specifically, a 'dirty, dingy little court' (P-CSA2e).

4.1.3 Social actors

Public Prosecutors and State Advocates themselves

The classification of public prosecutors and state advocates followed the pattern evident in the other roles: There was no classification on the basis of race, minimal classification on the basis of class (e.g. an inference that can be made from a statement of the public prosecutor's typical salary – see P-V3b), and where gender classification was present (generally on the basis of pronoun usage) it was male (P-SAct1b; P-SAct2a; SAdv-SAct2a).

Accused persons and other social actors

There were 11 extracts representing social actors in the quotations relating to the public prosecutors. The accused persons over whom prosecutors were represented as holding sway were just as likely to be backgrounded (6 extracts) as they were to be included (5 extracts). Backgrounding of other social actors was achieved through the same range of resources as was apparent in the roles constituting the preferred career path; i.e. through talking about 'cases'

(P-SAct2b; P-SAct2d; P-SAct3a; P-SAct4a) or particular legal problems (such as 'credit card fraud' – see P-SAct2c). In the one instance where clients were represented in the quotations relating to the state advocate, they were backgrounded by use of the phrase 'civil work' (SAdv-SAct2b).

The lecturer's only more extended account of an accused person in the prosecutor set of quotations occurred in the anecdote relating to the credit card fraudster. This particular anecdote is interesting for its representation of the particular accused and of the out-workings of the administration of justice. 'This guy,' the lecturer explained, 'had thirty offences of credit card fraud for American Express', meaning he had stolen an American Express card and used it thirty times (P-SAct2e). Another prosecutor had already dealt with the case before it was forwarded to the lecturer's specialized credit card fraud court (P-SAct2d). The previous prosecutor had offered the accused a plea-bargain which in essence meant that if the accused pleaded guilty he would only be charged on one count; i.e. one instance of using the card unlawfully (P-SAct2e). This would obviate the need for a more lengthy criminal trial as well as take away the risk of possibly not securing a criminal conviction (P-V2c).[91] However, the lecturer's specialized credit card fraud court had been established not only to ensure 'uniform' but also 'harsh' sentences for this type of crime, based on the rationale that heavier sentences would have a deterrent effect (P-V2b). When the matter came before him, the lecturer refused to follow his predecessor's offer of a plea bargain (P-SAct2f), instead explaining to the accused:

> **LECTURER:** I said 'Look, you're now in a new court, a new prosecutor, the previous prosecutor said that you could plead guilty and we will only sentence you on one count. That's not going to happen. Um, you know. If you want to plead guilty you're welcome, but I'm going to charge you on all thirty counts.' So he asked: 'Well, is that the same … as one count?' I said: 'No it's not the same, you know, you're found guilty thirty times, it's not the same.' Like if you use this card thirty times, you're going to be penalized thirty times.'

Whilst a criminal record attaches to an individual whether they are found guilty on one charge or thirty, the commercial implications differ. If the accused were to only be charged with one count of using the stolen credit card unlawfully, then in a subsequent civil action the amount

[91] The underlying, implicit internal good in this offer would be something along the lines of promoting efficiency and effectiveness in the administration of criminal justice.

American Express could claim to recover their damages would be limited to the amount for the one count on which the accused was found criminally liable, which would be far less than the damage they actually suffered. Aware of this, the lecturer decides to charge the accused on all thirty counts (P-SAct2h) while also asking the magistrate to impose the maximum sentence for *all* thirty charges (P-SAct2i). The accused is represented as having a somewhat blasé response: 'Somehow he was tired or he just didn't understand what I said and … he said "Ag ja" you know, just wanted to finish it and not plead guilty, thinking he will pay a penalty, a fine' (P-SAct2c). To the accused person's subsequent misfortune, he *is* subsequently found guilty and the magistrate agrees to impose the maximum sentence – one year's imprisonment without the option of a fine – for all thirty counts, meaning the accused went to jail for thirty years: 'He's still there today. He's still in jail, unless he was released on one of these ridiculous amnesties,' the lecturer continues. 'Thirty years. This was about twenty years ago. So he's still rotting away in jail somewhere' (P-V2d).

There are interesting parallels between the lecturer's representation of the outworking of justice in this particular anecdote and the representation of particular accused persons in the role of the magistrate below. This case corresponds with the lecturer's representation of the trial of the upstanding bookkeeper, where the sentence imposed seems somewhat disproportionately harsh to the wrong committed, which contrasts with other cases where the accused seems to deserve punishment but escapes scot-free. This seems to invoke a sense that the administration of justice is arbitrary.

4.1.4 Values

There were only two extracts in the quotations relating to the public prosecutor pertaining to public prosecutors themselves, and no extracts of this nature in the quotations relating to the state advocate. In the case of the public prosecutor there were three extracts (37,5%) in which oblique reference was made to internal goods, whilst five extracts related to external goods (62,5%). For the state advocate, there were only two extracts relating to external goods. Interestingly, purposive constructions slightly dominated constructions based on moral evaluation (accounting for 8 of the 12 extracts in total).

Both evaluations of public prosecutors themselves were positive and were based on moral evaluation. In the first, the lecturer reminisces on one of the 'glorious' cases he prosecuted whilst serving as a specialist prosecutor (P-V2a). The second evaluation uses paradox to achieve its effect: 'I was a small little prosecutor in a dirty, dingy little court and he went to jail for thirty years which is longer than life' (P-V2e). Thus, notwithstanding the apparent insignificance of the prosecutor and the unimpressive surroundings in which he operates, the prosecutor was able to exercise a great deal of power over the accused in this particular case.

Fleeting reference to the internal goods relevant to the prosecutor role has already been made in the outline of the anecdote relating to the credit card fraudster above. All these internal goods, although only mentioned very cursorily by the lecturer, involved purposive constructions. Thus specialist courts were established to ensure uniform and harsh sentences and to prevent crime (P-V2b); plea bargains are entered into so that there is no need to go to trial (and thus to incur the expense and time involved) (P-V2c); and plea bargains are not acceptable where this will result in the complainant being unable to recover its commercial loss (P-V2d). Fairness to the complainant, as well as efficiency and effectiveness in the administration of justice thus emerge as possible internal goods.

The representation of external goods in the roles of the public prosecutor and state advocate related most frequently to 'experience' (P-V3a; P-V4; SAdv-V1; SAdv-V3). The rationale for entering and engaging with these roles was thus represented entirely instrumentally. In the lecturer's view, one becomes a prosecutor in order to obtain court experience, in order to know 'how to sit and stand in a court' (P-V3a). Moreover, if one cannot secure articles and thus commence on the preferred career track, joining the Department of Justice for two years as a prosecutor is a good move because one obtains this experience at the State's expense (P-V3a), albeit that the monetary rewards are not great (P-V3b). The lecturer thus appears to legitimate a strategic move on the part of young professionals that essentially robs the State: While the State invests in the training of young prosecutors for two years, it loses their expertise to the preferred career track after that time. This in turn potentially incapacitates the criminal justice system. Similarly, one becomes a state advocate in order to gain experience at the State's expense (SAdv-V3). In this regard the lecturer stated: 'You know whether you lose or win it's

not really important, you don't want to make a lifelong career out of it, you only want to, you only want to get experience' (SAdv-V3). Although he does follow this statement with a tag – 'Unless you want to become a civil servant, that's also possible, there are lots of things that you can do' – it is clearly the less-preferred option.

The instrumental motive behind becoming a public prosecutor is similarly constituted through the external good of 'promotion': '[E]verybody wants to become a state advocate but you can't do that off the street. You must first become a public prosecutor' (P-V4), and 'if you do go, if you do become a public prosecutor, you know, that is where you want to end up. To be a state advocate' (P-V5). Becoming and *staying* a public prosecutor, strengthening and supporting the role of the State in combating crime, is thus not presented as a valorized option.

The external good of intellectual stimulation – which threads through a number of the other roles in the lecturer's classroom talk – is represented as a reason for *not* becoming a public prosecutor, for at one point the lecturer holds that being a public prosecutor is 'boring' (P-V6).

4.1.5 Summary

The role of the public prosecutor continues the theme of the active, transactive and semiotic nature of the power of legal professionals. While the role of the state advocate differs significantly in terms of action being coded as non-transactive and material, this is an anomaly that arises from the small amount of data for this role. The objects over which the power of public prosecutors and state advocates were represented as extending are significantly restricted in range compared to the other roles discussed thus far, centering predominantly on the accused persons in a case and a limited range of legal professionals. Whilst internal goods such as fairness to the complainant, and efficiency and effectiveness in the administration of justice could be discerned, external goods predominated. A new form of external good – obtaining experience – came to the foreground, one that tended to position both roles as instrumental in the unfolding of a legal career. Further, the anecdote relating to the lecturer's experience of being interviewed for the position of state advocate is interesting for placing in tension the pursuit of neutrality and objectivity through the law and the use of law to advance a political agenda. His anecdote relating to the credit card fraudster, in turn, raises questions

around the capacity of the law to penalize, and the potential for disproportionately harsh sentences to be imposed. For both roles very little data was available on the circumstances of legal work. As regards legal relationships, notable was the extent to which the relationship between public prosecutor and magistrate differed from the relationship that the lecturer represented as pertaining between advocates and judges. The relationships between public prosecutors and state advocate with other legal professionals were otherwise underdeveloped. The parties with whom public prosecutors and state advocate engage were backgrounded slightly more than they were included. The social profiling of both roles was strongly male, but with no classification on the basis of race and very little on the basis of class.

4.2 The Magistrate

4.2.1 Social Action

There were 63 extracts pertaining to social action in the 26 quotations relating to the magistrate. The percentage of active, transactive and semiotic forms of action conformed to the general pattern evident in all the legal professional roles in this research in that active (50 extracts – 79%), transactive (46 extracts – 73%), and semiotic (42 extracts – 66%) forms of action predominated. In contrast to the role of the judge, the percentage of semiotic actions (where it had been 80% for the judge) was perhaps significantly less.

The major difference between the roles of the magistrate and judge, however, lay in the objects over which such social action extended. Whereas judges were represented as exercising power over people which then extended to extensive powers over law and language, magistrates were overwhelmingly represented as only exercising power over the parties in a case (accounting for about two-thirds of the transactive actions) and this is where their power ended. In relation to parties, magistrates were represented as placing the matter on the roll (M-SA14a) or directing it to the High Court (M-SA14b; M-SA15a); as hearing the case (M-SA2a; M-SA5a; M-SA8f; M-SA22b), cross-examining the witness (M-SA8h); giving satisfaction in the case (M-SA2d) or making an order (M-SA5c). The weight of a magistrate's power, however, was represented as coming most clearly to the fore in criminal matters. The magistrate must decide whether an accused should get bail (M-SA14b); whether he or she is guilty or not-guilty (M-

SA12d; M-SA16a); and what sentence to impose: Whether a fine or reprimand (M-SA16c; M-SA17) or a jail term (M-SA5b, SA7b; M-SA8k; M-SA8p, q; M-SA16b).

These powers are far-reaching (as is apparent from the two anecdotes for this role relating to the first-time offenders who went to prison for failing to pay maintenance (M-Q8), and stealing from their employer respectively (M-Q16)), but they are represented as being powers of a lesser order because in coming to a decision, the magistrate does not create precedent (M-SA3a). This is to say that magistrates' decisions are only binding upon the parties before them (M-SA1c), and not binding upon other magistrates or other courts (M-SA3c; M-SA4e). Magistrates are always bound by the decisions of the High Courts, the Supreme Court of Appeal and the Constitutional Court (M-SA4a). 'If a magistrate sits in a court case, … [he] can't just do what he wants to do' (M-SA4b). In contrast to the judge, therefore, the magistrates *practices* rather than makes or creates South African law (M-SA4a). Whilst district magistrates' courts do the 'lion's share' of the work (M-SA23), in the lecturer's estimation, as much as 'ninety-eight percent of all legal work criminal and civil' (M-SA13) their status as lower courts is forever fixed on the basis that they have no authority to create law.

There were two other ways in which the lecturer used the representation of social action to mark the lower status of magistrates' courts.

Firstly, through the process of appeal, a magistrate may have his decision over-ruled by a higher court. A judge may 'decide against' the magistrate (M-SA2b) on the basis that he has done something wrong (M-SA6a) or 'made an error' (M-SA6a, b). Here the emphasis fell completely on the magistrates' courts being *prone* to error with no balancing representation to the effect that frequently decisions in the magistrates' courts are confirmed on appeal.

Secondly, their lower status is indexed by the institution of automatic review whereby decisions of magistrates of less than seven years experience are automatically reviewed by a judge of the High Court if the magistrate imposes a sentence of imprisonment greater than three months without the option of a fine. This was vividly represented in the lecturer's anecdote of his personal experience of this process in M-Q8. What stands out so starkly in this tale of a junior magistrate facing a man who refuses to pay his maintenance, who spends all his money on

drinking and spoiling his eighteen-year-old girlfriend while his domestic-worker wife struggles to raise his four children, is the manner in which the magistrate's decision conforms to a layman's sense of justice. 'What do you do with a man like this?' the lecturer asks hypothetically, a man who refuses to admit he has any obligation toward his lawful wife and children. In the event the lecturer recalls: 'I gave him the maximum [gestures with arm and elicits laughter from students] sentence that I could which was one year. Twelve months. I gave him straight twelve months twelve thousand rand fine … or twelve months' (M-SA8k). As a result of his emotional involvement in the case, however, the lecturer as magistrate forgets that he is still 'very junior' and that the decision would go on automatic review to a judge of the High Court (M-SA8l, m). So three months later, on a Saturday evening whilst hosting a dinner party for a number of guests the lecturer is phoned by Judge Foxcroft and called to task for sentencing a first-time offender to jail. Instead of the irresponsible husband who initially appeared before him, it is the lecturer who is in 'big, big, big trouble' and whose name appears in the law reports as the magistrate who sentenced a first offender to twelve months in prison (M-SA8o). The lecturer maintains a critical distance to this episode, however, suggesting that it is only magistrates who can truly *see* the parties and thus discern what is just in the circumstances. The lecturer comments that a judge doesn't understand *seeing* the parties – their primary concern centres on procedural correctness (M-SA8n).

As a reflection, perhaps, of the low rank magistrates occupy in the overall system of the administration of justice – and the status of junior magistrates in particular who have no choice in being 'assigned' to a particular matter (M-SA15b) – it is interesting how the lecturer represents himself in this particular episode as over-exercising or over-extending his role as the adjudicator in the case: He loses his temper with the prosecutor (M-SA8g), takes over the inquisition (M-SA8h), shouts at (M-SA8j) and 'let's rip' into the accused (M-SA8i).

Like the judge, there were a number of (mostly non-transactive) social actions that employed the verb 'sit'. Whilst at least two of these were employed in a manner similar to the judge, i.e. in the more semiotic sense of 'presiding' over the court proceedings (M-SA21; M-SA22a), the other two were clearly employed in a more material sense: 'One Friday afternoon I was sitting in court and it was late' (M-SA8b) and 'I was the only magistrate sitting to hear the case', the

lecturer relates. Whilst judges' social power is encoded in the non-transactive and semiotic use of the verb 'sit' therefore, the verb that more appropriately describes the position of magistrates is that they 'serve' (M-SA8a).

Notwithstanding all these representations reinforcing the lower order status of magistrates, the lecturer still suggests that magistrates courts exercise power over ultimate outcomes, for he remarks that in sitting in judgment of the pass laws they were the 'primary movers for the implementation of apartheid' (M-SA24). Though he does not draw the link to apartheid, his comments regarding the extensive powers of the chief magistrate – the power to decide whether gatherings can take place in the city (M-SA18a) and whether a march can take place (M-SA18c), permissions critical to political mobilization – are aligned with this thought.

4.2.2 Circumstances of social action

The 26 quotations pertaining to the magistrate yielded 13 extracts relating to resources, 14 related to emotion, and 14 extracts to the location of social action.

I have already mentioned, with regard to the roles of the articled clerk, attorney and advocate above, that the richness and variety of resources represented at the disposal of a particular type of social actor tends to function as an index of social power. The relatively sparse representation of resources in relation to magistrates tends to confirm this thesis. While the lecturer did represent magistrates wielding significant symbolic resources – the extent of the courts' jurisdiction in regard to civil and criminal matters (M-CSA22), and the courts' capacity to craft orders imposing payment of a specified sum of money (in civil matters), or a fine or prison sentence (in criminal matters) (M-CSA6; M-CSA7) – in every other instance involving a semiotic resource, the tenor of the representation fell on magistrates *not having* the required resources. I have already quoted the passage in the data that suggests that magistrates did not require a formal qualification before appointment, at least in the days of apartheid, since 'walking past a few law books would have sufficed' (M-CSA11). The 'gravitas and knowledge' required for promotion to the High Court were represented as exceptionally rare qualities in the magistrate population. Most devastatingly, however, magistrates were represented as *lacking* the authority to create precedent (M-CSA3; M-CSA14c).

The lecturer also outlined a few material resources at the disposal of magistrates, such as a tape machine (for recording the court proceedings – M-CSA8f), and a diary for the High Court (M-CSA14b). The most interesting representation relating to material resources occurred in quotation 15, however, where the lecturer said:

> **LECTURER:** . Um and that's your court. It's your court orderly, it's your interpreter, it's your prosecutor, it's uh … the whole organization is yours. You are the king, you are the king of the of the dung heap. (M-CSE15e).

Notable regarding this representation is the instrumentalization and possessivation of court officials: They 'belong' to the magistrate, the court is his. Secondly, like the 'brief' in my discussion of the advocate above, material 'resources' are invested with symbolic meaning. Here however the meaning is decidedly derogatory. While the magistrate may be king, it is a hollow power indeed because the whole organization is nothing more than a dung heap.

Magistrates were represented as having a number of work-related emotions. These centred on three different objects: Their work and people involved in their work, the parties who appear before them, and the government. The emotion of stress and anxiety, which featured so strongly in the generic role of the lawyer and the roles of the articled clerk, attorney and advocate featured in only one representation (M-CSA15a). Instead, the predominant emotions of magistrates towards their work, which was represented both directly and indirectly, can perhaps be characterized as aversion, irritation, perhaps even disgust. Regarding the matrimonial court, the lecturer declares 'I had to serve for a limited period of time *thank heavens*' (M-CSA8a) and he even goes on record saying that he is 'reluctantly' hearing the case because no other magistrate is available (M-CSA8g). During the proceedings he is irritated not only with the client (M-CSA8k), who he sees as trying to shirk his responsibilities, he is tired and irritated with his colleagues sitting in their offices doing cross-word puzzles, and with the world for producing people like the accused who refuse to pay their maintenance (M-CSA8k). He loses his temper with the inexperienced prosecutor (M-CSA8j). When he receives a phone call on a Saturday evening, he immediately presumes it is someone requesting that he report for duty, and his immediate reaction is irritation (M-CSA8o). Mrs Gradiz, the old 'battleaxe' of a magistrate similarly arrives at her court in a bad mood (M-CSA16a). These emotional reactions

are understandable if the whole organization is comparable to a 'dung heap' (M-CSA15f), further evidence for which is provided in the following extract:

> **LECTURER:** If you become a magistrate and you're so unlucky to get this court that I talked to you about, the transitional court, the the directional court, uh that's a hideous court because it's like a supermarket. You you get there at nine o clock in the morning and you must take a decision every five minutes and all you get is the worst criminals in Johannesburg appearing before you and all you must do is decide which court they must go to. Um and because it's such a horrible court if they put a magistrate there permanently he will go mad, not that magistrates are not mad, I mean they are all mad [more laughter from class]. But if you put a person there permanently they will, I mean they will just resign after a week, I mean, it's like casualty … uh ward in Hillbrow. (M-CSA15a)

Work in this particular court is 'horrible' because the magistrate is required to process accused persons every five minutes like so many groceries through the check-out of a supermarket. The work is stressful – like the casualty ward in Hillbrow (a notoriously crime-ridden and 'rough' suburb in Johannesburg). It is additionally demoralizing because the people themselves are the 'worst criminals' and the magistrate disempowered to take any decision regarding the substance of their crimes. The lecturer's gloss on the mental and emotional stability of magistrates – 'they are all mad' – suggests that it is not only work in this particular court that is so trying.[92] Whereas the lecturer as magistrate records his empathy towards the mother whose husband has defaulted on the payment of maintenance (M-CSA8i; M-CSA8l), unsurprisingly, emotions expressed toward accused persons are harsh: Mrs Gradiz shows 'no mercy' to the genteel employee who steals R10 000 from her employer every month (M-CSA16c), the lecturer as magistrate 'feels wonderful' after sentencing the defaulting husband to the maximum time in prison and thinks 'rot in hell I hope you never come out' (M-CSA8m).

Negative emotions also featured in the relationship between magistrates and the new democratic government, one that the lecturer characterized as being one of 'animosity and mistrust' (M-CSA24). Taken together, therefore, the emotional undertones of being a magistrate were represented as being far from pleasant or enjoyable.

[92] A number of years ago I was privileged to monitor three workshops held with district and regional court magistrates at various locations in South Africa under the auspices of a justice programme run by the University of Cape Town. In my experience the toll of the work on their emotional well-being was absolutely palpable, particularly for those magistrates hearing rape cases and cases of the sexual and other abuse of children.

In all but one instance (the lecturer's reference to his dinner party at M-CSA8n), magistrates were located within the precincts of the court (M-CSA4; M-CSA8c; M-CSA16b; M-CSA21). Magistrates' courts were generally characterized as the 'lower' courts (M-CSA1). What was interesting was the more detailed spatial positioning of magistrates within the courts (e.g. references to magistrates being in the court building (M-CSA8d) or in their offices in the court building (M-CSA8e; M-CSA15d)), or within specific types of courts. Thus the lecturer referred to the matrimonial court (M-CSA8b), the transitional or directional court (M-CSA15b), and court 13 or court 25 within the Johannesburg magistrates' court (M-CSA14a; M-CSA15c). There was a slight geographical preference for Johannesburg (M-CSA14a) and Cape Town (M-CSA12a).

4.2.3 Social actors

Magistrates

The by-now familiar pattern of gender profiling through pronoun usage was also evident in the role of the magistrate: Of the 10 extracts indicating the gender of magistrates, eight indexed magistrates as male (M-SAct4a; M-SAct5b; M-SAct7a; M-SAct12c, d, f; M-SAct18; M-SAct19) and two as female (M-SAct16c, d). The two nominations (to 'Andre Legransie' at M-SAct12a and 'Mrs Gradiz' at M-SAct16e) were evenly split between male and female representations. The one (perhaps tenuous) representation of class was constituted by the lecturer relating the circumstances of his receiving a phone call from Judge Foxcroft regarding the defaulting maintenance accused. At the time he was having a 'dinner party' to which he had invited 'lots of people' – 'ten or twelve' in number – and had just finished serving them their 'first course' (M-SAct8l). The discursive markers 'dinner party', 'lots of people' and 'first course' index an upper or at least middle-class lifestyle, suggesting that even though magistrates are kings of the 'dung heap' they are not in dire straits financially.

Racial classification was again barely evident but the one clear extract in this regard is interesting for perhaps revealing *why* this was so: The lecturer, in mentioning Mr Andre Legransie, finds it necessary to tag on the comment 'I find it embarrassing always to refer to this, but he was a man of colour' (M-SAct12b). This is a curious tag for one wonders why the lecturer 'always' needed to make this point and why he found it 'embarrassing'. To me it codes

the complex nature of race relations in South Africa. The lecturer may have found it necessary to specifically state Mr Legransie's race because both the magistrate's first and surname are most commonly associated as Afrikaans names, and would thus conjure up a picture of a white male. His admission that the need to point out otherwise is 'embarrassing' is potentially double-sided. On the one hand it seems to speak of a reticence within him to notice race. He wishes to present himself as a person who is interested in the qualities (such as knowledge and gravitas) that distinguish one in the professional world without reference to race. Admitting the race of the person he is talking about thus goes against his own desire to appear to be 'colour-blind'. However, his admission of the embarrassing nature of highlighting race also codes a perception of the racial biases of his hearers. His unstated assumption is perhaps that his *hearers'* first assumption would be that Mr Andre Legransie was white and male, based on the racial and ethnic associations of the name and surname, coupled with the praise heaped on his professional qualities. This is a racial assumption because it assumes that those who are highly competent are ordinarily white and male. Correcting this assumption is thus embarrassing because it constructs the hearer as someone holding such a racial bias and positions the lecturer as the more enlightened other.

Instances of categorization in the quotations pertaining to the magistrate mainly revolved around the distinction between 'junior' (M-SAct8b, j) and 'senior' (M-SAct9; M-SAct15b; M-SAct16a; M-SAct22a) magistrates. This (once again) confirms the pervasiveness of the weight attached to hierarchy and status in the legal profession.

Parties

In contrast to the pattern established by the roles in the preferred career path, parties appearing before magistrates were included (17 extracts) to a significantly greater degree than they were excluded or backgrounded (6 extracts). There were also five extracts in which the discursive resources employed simultaneously included and backgrounded the parties. This high degree of inclusiveness underscores the chief focus of magistrates: The parties before them. It thus also confirms the limited reach of magistrates' authority discussed in the section

on social action above; i.e. as extending only over the parties before them and not over the law or the language of the law.

The discursive resources used to background the parties appearing before magistrates were generally no different from those used in the roles constituting the preferred career path. The most frequently used term was 'case' (M-SAct5a; M-SAct8c, d; M-SAct15c) followed by the words 'matter' (M-SAct17; M-SAct22b) and 'work' (M-SAct23). In two instances the lecturer excluded reference to the parties through a non-transactive construction of the social action – as in 'he imposes a fine or prison sentence exceeding three months' (M-SAct7b, see also M-SAct7c). The only new method of discursively backgrounding social actors was the lecturer's reference to pass laws in the statement 'the magistrates courts were those courts that sat in judgment on the pass laws' (M-SAct24). In this instance, then, social actors were taken up in a reference to a particular (and notorious) type of law.

Similarly to the role of the judge, the lecturer's inclusion of social actors was at times personal in the sense that he directly positioned students as the social actors appearing before magistrates through use of the pronoun 'you' (M-SAct2; M-SAct5a; M-SAct6). In other instances he referred to the 'people' appearing before magistrates: The 'people' who are 'involved in the case' (M-SAct4b), who 'don't pay their maintenance' (M-SAct8a), and who 'rot in jail' (M-SAct14a). Unlike the role of the judge there was a greater emphasis on social actors as 'lowlifes' – the magistrates deals with accused people, prisoners (M-SAct14b) and the 'worst criminals in Johannesburg' (M-SAct15a).

In four instances there were more extended cameos of the social actors who appear before magistrates: (i) The man who refused to pay his maintenance (M-SAct8c, d, e, g, h, I, m); (ii) the wife of the man who refused to pay maintenance (M-SAct8f, k); (iii) a politician in the Western Cape who was charged with corruption (M-SAct12e); and (iv) a bookkeeper who had stolen from her employer (M-SAct16b, f). In all four instances, the lecturer represents the social actor with strongly moral overtones that immediately tends to excite our sympathies as either for or against them. The man who refused to pay his maintenance is 'one of those typical … people who slips through the holes in the system' (M-SAct8e), he is a 'bugger' who is 'lounging around

… drinking out his money' giving the rest to his eighteen-year-old girlfriend (M-SAct8f); his wife is 'a wonderful decent person, with four children' (M-SAct8e), a 'domestic worker' who receives a 'pittance' for an income and still tries to keep her children at school (M-SAct8f); the politician is an 'absolute buffoon'; and the bookkeeper is a 'single mother, wonderful wonderful civilized, first-class citizen' who steals R10 000 from her employer every month for 30 years in order to put her children through university (M-SAct16b). In each case the representations tend to excite an intuitive moral and emotional response: The law should come up on the side of the wife and ensure that every measure possible is taken to ensure that the man who has defaulted on his maintenance for four years is not allowed to slip through the system once more; the politician should be found guilty of corruption; and the motives of the bookkeeper in stealing funds from her employer, as well as her character as a wonderful, civilized first-class citizen, should at least mitigate against her receiving too harsh a sentence. What is fascinating is that in all four instances the lecturer's representation of the working of the law did *not* affirm the intuitive moral and emotional response. In the case of the man who refused to pay his maintenance, as already described above, while he is initially sentenced to 12-months imprisonment this decision is taken on automatic review and subsequently reversed because as a first-time offender he should not have received a sentence that (constructively, because he could not afford the fine), landed him in jail (M-SAct8m). The politician facing corruption charges is found not guilty based on the facts. Even though this upsets the Scorpions (the security agents that formulated the charge), the magistrate staunchly maintains that the matter was not proved beyond reasonable doubt (M-SAct12f). The bookkeeper, by contrast, is sent to jail 'for a very, very long time' even thought she is a first-time offender. Everyone is shocked at the verdict and breaks down in court crying, saying that the bookkeeper will go for rehabilitation, for courses to which the magistrate responds 'yes, go do that in jail, there are lots of wonderful courses that you can do. Go stand down' (M-SAct16f). Contrary to the defaulting maintenance payer, the prison sentence for the bookkeeper – also a first-time offender – is confirmed on review. There is no doubt that in each case there were probably sound legal reasons for the magistrate deciding the matter in the way he or she did. The lecturer does not, however, make these explicit, or if they are mentioned they are not elaborated upon. The lingering impression of the law that arises from these representations is

of a somewhat arbitrary, unpredictable system that frequently supports those who we intuitively believe it should be defending us against.

4.2.4 Values

There were 36 extracts in the magistrate quotations in which magistrates or their work were valued or devalued. In this instance the overwhelming majority of extracts pertained to valuations of magistrates *per se* (22 extracts or 61%), with 10 and 4 extracts pertaining to the internal and external goods of the practice respectively. Similarly to the role of the judge, therefore, there was less emphasis on external goods. Moral evaluation once against constituted the most common way in which values were coded (in 28 extracts or 77%). The remaining evaluations were purposive in construction.

The majority of the lecturer's evaluations of magistrates themselves were negative (14 out of 22 extracts, or 63%). Although the lecturer twice remarked that magistrates courts are 'very important' because they do the lion's share of the work (M-V13; M-V23), they are also 'very neglected' (M-V23). Why this should be so appears to lie in their 'given' status as 'lower courts' (M-V1), which is in turn related to the fact that magistrates cannot set precedent – their decision is 'just' binding on the parties (M-V2a). Additionally, there is the possibility that the magistrate's decision can be overruled, either through the process of automatic review (M-V8f) or through the decision being appealed. In the passages illustrating the process of appeal, the lecturer placed a strong emphasis on the magistrate's decision being 'wrong' or 'incorrect' (M-V6a), or the magistrate making an 'error' (M-V6b). Instead of simply saying that the magistrate's decision could then be overruled, the lecturer remarked that the magistrate's decision is then 'worth nothing! It loses all it's value' (M-V2b), thus stating the effects of appeal on magistrates' courts in extreme terms. The lower status of magistrates' courts was further constituted by the use of the word 'even'. Thus it is possible to impress other lawyers 'even' in the magistrates' court (M-V25). The use of 'even' in this context suggests that while it may be possible to impress someone with your performance in the magistrates' court, this is at best a second-prize.

In numerous instances, the lecturer compared magistrates unfavourably in relation to judges. Thus he stated that 'even' though magistrates have become judges (M-V26), this is very much the exception. The ordinary, 'run-of-the-mill' magistrate (M-V12d) is very 'far removed' from being a judge (M-V10, M-V11). The reasons for magistrates being so far removed from judges are suggested, rather than stated explicitly. It could have something to do with their lack of knowledge, gravitas and professionalism (M-V12a, c), with their lack of training (M-V11), with their lack of independence and their resultant characterization as 'civil servants' and (particularly during the apartheid era) as 'lackeys' of the government (M-V18c; M-V24a), or with the conditions of their work (M-V15d).

I found it interesting that, comparatively speaking, there were a fair number of extracts associated with the internal goods of being a magistrate (10 extracts or 27% of the total number of extracts pertaining to values). These extracts suggested that the work of magistrate's is valued and valuable because it has to do with the promotion of human rights (M-V8e; M-V12b), the promotion of the rule of law (M-V8c), and the promotion of fairness in the administration of justice (M-V8a, b, d, e; M-V14a, b). The latter is interesting for examining how the lecturer both constituted and positioned himself in relation to this internal good. In the anecdote regarding the man who refused to pay maintenance there are four points at which the lecturer hints at the moral prescriptions under which he was functioning as a sitting magistrate. Three of these are professional in nature: Thus he indicates that he is hearing the matter 'because otherwise this man will stay in jail for the rest of the weekend' (M-V8a); he indicates his knowledge of the rule that while a magistrate can take over the inquisition of an accused in a maintenance matter, the magistrate should 'never' cross-examine the accused from the bench (M-V8b); as well as the rule that 'you never send a first time offender to jail' (M-V8d). All of these prescriptions relate to the value of fairness in the process of judicial adjudication and they are unique to the profession of law. The last moral prescription in this anecdote, however, is a 'lay' in character – an intuitive moral identification with the woman of the husband and her quest to raise her four children (M-V8e). The manner in which the lecturer relates the anecdote, however, seems to set up a tension between professional and lay values, with the professional values being presented as a constriction or cumbersome obstacle to the

desired outcome: That the defaulting husband be punished for his actions. Thus the lecturer indicates that he is hearing the matter 'reluctantly' and it is clear he breaks the rules regarding cross-examination from the bench and the sentencing of a first-time offender to a jail term. This tension is also evident in the two other representations relating to the internal good of fairness in the administration of justice. In talking of the rationale for the directional or transitional court the lecturer first states 'In order not to let the people *rot in jail*, you bring them to the magistrates' court to what we call a directional court, Court 13 in Johannesburg' (M-V14a, my emphasis). This statement is directly followed with a more official, sanitized statement:

> **LECTURER:** They've only got authority to send it to the High Court. Why do they do this? The main reason is so that the prisoners or the accused not remain in custody until the High Court can hear them in five or eight or ten weeks or months time.

While the lecturer is thus able to state the rationale in official terms ('so that the prisoners or the accused not remain in custody until the High Court can hear them …') the statement 'in order not to let the people 'rot' in jail suggests that his position on the rationale is, at best, ambiguous. The people who appear before the directional court are slightly dehumanized, associated with 'rot' and 'rotting' and jail is perhaps the best place for them.

Compared to the roles constituting the preferred career path there were relatively few representations of external goods. The possibility of promotion to the bench (M-V9), power (M-V18b; M-V19), status (M-V19) and control over work circumstances (M-V15c) were mentioned. Notable of course, is the lack of any representation regarding the monetary rewards of being a magistrate.

4.2.5 Summary

Unlike the judge, the adjudicator in the preferred career path, the magistrate 'practices' rather than 'creates' or 'develops' law. Whilst the actions of this role are still generally active and transactive, they are less semiotic in nature and, most notably, extend only to the parties in a case: Magistrates have no power to create precedent and to thereby extend the range of influence of their decisions. Numerous other features of the social practice mark the inferiority of the magistrate in relation to the judge. The internal goods of this professional role

encompass promoting human rights and the rule of law and fairness in the administration of justice, but they are mentioned in a very oblique fashion. The purposes and values of law and the legal profession are somewhat complicated by the representations relating to particular parties who appeared in the magistrates' courts on various criminal charges, with the penalties in each case seemingly running contrary to an intuitive sense of morality and justice. Of all the roles discussed in this chapter thus far, the role of monetary rewards is least prominent. The nature of the work of the magistrate appears at many times to be trying. Exclusively adversarial in nature, it is frequently stressful, demoralizing and routine. Magistrates appear to have, or at least to develop, a very hardened emotional response to the parties who appear before them, taking pleasure in the thought of a convicted criminal 'rotting' in jail. While the parties who appear before magistrates were included to a far greater extent than they were excluded, they tended to be people whom one would consider to have low levels of moral integrity. The social profile of the magistrate is predominantly male, with only one clear, but nevertheless revealing, classification on the basis of race.

5. THE LEGAL ACADEMIC

The role of the legal academic was constituted in relation to the other roles represented in the lecturer's classroom talk through a mere four quotations. The most outstanding aspect of this positioning was that the lecturer represented the legal academic as 'the best place to be in the legal field', 'the best profession of all' (LA-Q12; LA-Q20). This was underscored by the use of a relational clause. Unlike some of the other roles discussed thus far, the lecturer provided no indication of the social paths one follows in order to become a legal academic. He did however indicate that confirmed, established academics have the alternative options of going to the bar (i.e. becoming an advocate) (LA-Q3; LA-Q6), and being appointed as a judge (LA-Q9), thus representing alternative paths to becoming an advocate and judge respectively.

5.1 Social action

There were 37 extracts relating to social action in the 20 quotations attached to the role of the legal academic. Similarly to all the other roles constituted in his classroom talk, the lecturer represented the social action of legal academics as predominantly active (72% of extracts), transactive (64%) and semiotic (72%).

Legal academics were most frequently represented as 'writing', 'authoring', or 'publishing' books or journal articles (LA-SA1b; LA-SA3a; LA-SA6a; LA-SA7a; L-SA8c, e; LA-SA11; LA-SA12b; LA-SA18a). This aspect of their work clearly overshadowed their role as teachers of the next generation of lawyers, with teaching only receiving a cursory mention in three extracts (LA-SA7b; LA-SA12a; L-SA15). The capacity to produce books or journal articles simultaneously implies a mastery over language – a power the lecturer specifically associated with legal academics through his anecdote of Dr van der Merwe, the master of translation (LA-SA1a, e, h) who was 'very, very good with languages' (LA-SA1h). This is a lesser power compared to the judge, however, for nowhere does the lecturer suggest that legal academics have power to change meanings, as was illustrated by the case where the judge interpreted the word 'in' to mean 'not in' (see the section on the social action of the role of the judge above).

The power to produce books or journal articles, however, is an incomplete power and serves as no guarantee of success or influence. The writing of books and articles only becomes

meaningful when the views expressed therein are taken into consideration by the courts (LA-SA4). The aspiration of the legal academic, therefore, is to be quoted, especially by the courts (LA-SA5; LA-SA7c; LA-SA8a, d). A legal academic has the 'ability to change the law', but only if 'people listen to you … people follow what you say, the courts quote you, the courts follow on what your views are' (LA-SA12c, see also LA-SA4). This in turn rests heavily on one's reputation and standing. Referring to Professor John Dugard, the lecturer states (note also the presence of if-then constructions in this extract):

> **LECTURER:** If you quote John Dugard on an international issue it's more likely than not that the court will follow what John Dugard said. … If you are a senior professor with an international reputation then the courts will follow what you say. And if you are a junior academic, not impossible that the courts will listen to you, but it is very unlikely that the courts will be swayed by an un- unheard of or unknown academic. (LA-SA5, see also LA-SA)

Apart from promotion to senior status within the academy (LA-SA16a), reputation and standing would seem to rest on the publication of 'standard works' in a legal field, and rating by the National Research Foundation (LA-SA8b).

Because the lecturer constructs the meaningfulness of the legal academic almost exclusively around this capacity to influence changes in the law, the legal academic who does not rise to this status is threatened by the spectre of meaninglessness. Speaking of his then current research interest, the lecturer remarks, almost cynically:

> **LECTURER:** Nobody reads journal articles. … Um the only people reading journal articles, learned journal articles, are the thirty percent of academics who are involved in the publishing of those articles. You know, peer review and editors? They read it, but uh other … seventy percent of the other academics never read it. So you know it's a you know it's a it's like a little mouse in one of these little wheels but nevertheless perhaps we can cause some excitement. (LA-Q2)

While the role of the advocate is haunted by the spectre of the failed advocate, desperately trying to conduct his practice from the library steps of the bar in Sandton, the role of the legal academic is haunted by the image of a little mouse, in a cage, going nowhere on a play wheel.

The lecturer presented one counter-cultural example of a legal academic 'presenting' his views to the court other than through the normal route of publication – that of Professor Dugard's example in appearing for free for people oppressed by the apartheid system (LA-SA6b, c, d).

5.2 Circumstances of social action

The majority of extracts pertaining to the circumstances of social action of the legal academic were related to location (17 extracts), with only 9 and 5 extracts relating to resources and the representation of emotions respectively. The representation of location, however, offered nothing that was particularly surprising – in the majority of instances, legal academics were located within 'academia', 'tertiary institutions (LA-CSA3b; LA-CSA12; LA-CSA20) or particular universities (LA-CSA1a; LA-CSA5a, b; LA-CSA9; LA-CSA11; LA-CSA18). Somewhat strangely, the lecturer also represented 'Justice College' – the training unit for state prosecutors, magistrates and others attached to the Department of Justice – as a 'small little university within the department of justice' (LA-CSA1j, see also LA-CSA1b, d). Legal academics were also located at the courts (LA-CSA6; LA-CSA19b), as 'going to the bar' (LA-CSA1c), and as being able to work from 'home' (LA-CSA14b).

The representation of resources was somewhat more interesting. In contrast to the other roles represented in the lecturer's classroom talk, the working conditions of the legal academic were represented as being 'very very pleasant' (LA-CSA14a). The basis for this evaluation was essentially five-fold. The working conditions are pleasant because one as has ready access to books and other materials (LA-CSA14a; LA-CSA16c); ready access to computers (LA-CSA14a); the working hours are not fixed (LA-CSA14a); there are opportunities to attend international and local conferences (LA-CSA1e); LA-CSA14a); as well as opportunities to obtain advanced degrees, with such study funded by the university (LA-CSA14a). Each of these resources in itself codes value: Such working conditions are pleasant because the lecturer values books, flexible working hours, study and, perhaps, travel and meeting other academics. Also qualifying as a resource is the 'rule' that legal academics may use 20 per cent of their time to attend to their own private practices (LA-CSA19a). The rationale for the rule is ostensibly to allow legal academics to obtain court experience, but more importantly and like the resources listed above, it is meant to 'sugercoat' the role of the legal academic, to make being a legal academic more 'appetizing' (LA-CSA13) in the face of the reality that the salaries are much less than what professionals earn in the preferred career path.

As already mentioned, similarly to the roles in the preferred career path, the legal academic cannot escape the need to develop a good reputation as a key resource to success (LA-CSA3a; LA-CSA5c; LA-CSA8; LA-CSA16a).

The lecturer's representation of the emotions that stem from the work of being a legal academic was limited to the comment that there's lots of 'jealousy' in the academy and, especially in well-established legal systems where it is 'difficult to think of anything novel … the competition is fierce' (LA-CSA13). While the working conditions are thus 'very very pleasant' the emotional ground-tone of working in those conditions is apparently not. Apart from this, in his extended anecdote relating to Dr Van der Merwe, the lecturer represented legal academics as somewhat irrational beings that are driven by emotion to extreme positions. Dr van der Merwe 'falls in love' with the wife of a professor at UNISA (LA-CSA1d), an emotion so strong that he divorces his wife in order to be with her (LA-CSA1h). The UNISA professor is 'extremely cross' and obtains a court order to restrain Dr Van der Merwe from coming close to his wife or house. However, the doctor ignores this and carries on with his affair – 'he was in love with this girl'. So the other professor has him arrested and charged with contempt of court and Dr van der Merwe subsequently loses his job as a professor at the University of Pretoria because 'in those days, if you had a criminal charge, you couldn't be a professor' (LA-CSA1i). So unlike every other role in this research, the role of the legal academic perhaps allows for, even encourages an emotional life that can be lived out – even if it means going against the law and experiencing the consequences of this.

5.3 Social actors

For the role of the legal academic, it was only necessary to consider legal academics themselves as social actors, as clients or parties played no role in the constitution of this role. There were 11 extracts relating to classification on the basis of gender, of which male classifications were once again in the majority; three extracts related to classification on the basis of class; and none related to racial classification. A surprisingly large number of nominations were used in relation to this role (14 extracts), but these only referred to eight academics as some were nominated more than once.

In the nine extracts related to male classification (LA-SAct1b, c; LA-SAct3b; LA-SAct4b, c; LA-SAct8c; LA-SAct11b; LA-SAct18b), and the two associated with female classification (LA-SAct7b; LA-SAct9b) the gender classification was achieved by discursive resources no different than those employed for all the roles discussed thus far; i.e. through pronoun usage. The use of gender-specific pronouns was, however, very closely linked to nominations in the text (i.e. the lecturer would nominate a particular individual and then, through pronoun usage, indicate whether the individual was male or female). This means that when the lecturer spoke of legal academics more generally there was a tendency to use gender-neutral terms. Of the eight nominated academics, six were male and two female.

The lecturer's representations made it clear that legal academics occupy a lower social class than other legal professionals since practitioners 'earn five times what the academics earn' (LA-SAct19). Legal academics are seemingly middle class people. They 'can make a pleasant living' (LA-SAct17c), though it is 'difficult' to support one's self on the salary, writing books and journals (LA-SAct20). They will not be able to afford a 'Porsche' or a 'vintage Rolls Royce' (LA-SAct17c). The lecturer, however, indicates his preference for having the best of both worlds because he hints that this *is* indeed possible if one marries 'a very successful lawyer' (LA-SAct17c). An if-then construction relating to marrying a successful lawyer thus underlines the message that obtaining these kinds of material rewards is not possible for legal academics *per se*. In similar vein he holds that 'you must be independently wealthy' to become a legal academic (LA-SAct20).

There were at least ten forms of categorization in the quotations relating to the legal academic, though it was difficult to discern any pattern among these, as the bases for categorization were quite different. The only possible emergent theme related to categorization was on the basis of being confirmed or established (LA-SAct3c), being a 'full professor' (LA-SAct17b), being internationally-renowned (LA-SAct5b), one of the 'big guys' (LA-SAct7c). This idea of being 'established' could in turn be related to categorization on the basis of seniority (LA-SAct5d; LA-SAct8d). Other than this the lecturer categorized legal academic on the basis of their 'brilliance' (LA-SAct1d), their 'eccentricity' (LA-SAct1e), their ethnicity (referring to Afrikaners – see LA-SAct1f) and to their position as 'modern' academics (LA-SAct4).

5.4 Values

There were 25 extracts associated with valuations of legal academics themselves or their work and the overwhelming majority (21 extracts or 80%) were in the form of moral evaluation. The remaining 20% were in a purposive form and were evenly spread between the constitution of internal and external goods.

Nine of the extracts related to valuations of legal academics themselves and, unlike some of the other roles discussed thus far, the majority of the valuations were positive (LA-V1b; LA-V3b; LA-V5a; LA-V7a; LA-V9; LA-V18). Two 'negative' or 'ambiguous' valuations were difficult to classify as such because even though the lecturer was ostensibly representing a particular legal academic (Dr Van der Merwe) in a negative light, he used various devices to distance himself from the evaluation. For instance, he used intertextuality to convey the message that Dr Van der Merwe was fired because he had a criminal conviction: 'the university fired him – because he had a criminal conviction'. It is thus the university that makes the judgment call on the consequences of his criminal conviction, and not the lecturer himself. Additionally, the lecturer frames the anecdote by stating that Dr Van der Merwe 'was a professor at the University of Tukkies [Pretoria], and later on, because he was very *naughty* he became the head of Justice College' (LA-V1a, my emphasis). The word 'naughty' is an interesting choice in this context for it tends to trivialize the gravity of Dr Van der Merwe's transgressions – which really involved contempt of court and thus of the law. A child is 'naughty' but for transgressions that are also usually not serious. This – in addition to the lecturer's more strongly personally-situated valuation of the UNISA professor as a 'real stick in the mud' (LA-V1c) – conveys the impression that these negative aspects of Dr Van der Merwe's career should not be taken all that seriously and were far outweighed by the consideration, for instance, of his 'brilliance' (LA-V1b).

It was difficult to discern whether the lecturer's view of the life of the legal academic as the 'best profession of all' (LA-V12a; see also LA-V20a) was based on a consideration of internal or external goods. More clearly identifiable internal goods accounted for seven, and external goods nine of the remaining 16 extracts pertaining to value. In the case of internal goods, there were values associated with an academic career generally, such as the avoidance of plagiarism

(academic honesty) (LA-V10) as well as novelty and originality of thought (LA-V13), values which the lecturer held were both very difficult to comply with. The lecturer's admiration of Dr Van der Merwe's translations – from Afrikaans into 'beautiful English … very very good pure English' (LA-V1e) is perhaps also reminiscent of the 'shallow' internal good of an elegant or eloquent presentation that I first highlighted in the role of the lawyer. The internal good most strongly associated with being a legal academic, however, was the ability to change the law (LA-V4; LA-V6; LA-V7b; LA-V12b). This was represented as the form of the good towards which legal academics unquestionably aspire: To be quoted by the courts, for one's views 'through a process of osmosis' (LA-V7b) to become the views of the legal profession. This good emerges in its most stark relief in the following extract. Referring to Professor John Dugard, the lecturer states:

> **LECTURER:** [A]nd he often appeared in the courts for um people who were oppressed by the apartheid system. Who couldn't afford counsel, and he often appeared as pro amico for those people where it was where it was a groundbreaking and very important case. That's also one way that um you can present the court with your views.

Notable about this abstract is that the ultimate purpose of Professor Dugard's action of appearing for indigent and oppressed people in court is not represented as (a) the desirability in itself of rendering assistance to such groups of people, nor even (b) the goal of opposing and fighting against apartheid, but as presenting the court with his views. In his own mind the lecturer may have completed the value chain as follows: By presenting his views to the court Professor Dugard was advocating for a change in the legal approach to the interpretation of apartheid laws that would have rendered a massive chink in the apartheid armour, thus achieving objectives (a) and (b). However, he does not complete the value chain for the students so they are left with the impression – reinforced by other extracts constituting the importance of status and esteem (LA-V2; LA-V5b; LA-V8; LA-V16) – that the legal academic's chief concern is with being known, being quoted, being influential for its own sake. In this manner the internal good of desiring to change the law becomes intermingled with external goods.

After status and esteem, the next-most-frequently represented external good was monetary rewards (LA-V3a; LA-V17; LA-V20b) though the 'twist' in this instance was that the career of the

legal academic does *not* offer handsome monetary rewards: '[I]t is not the place you should go if you are very materialistic. Salaries are very humble' (LA-V17). The external goods compensating for this deficit are that the working conditions are 'very very pleasant' (LA-V14), and more so, that 'for intellectual stimulation, intellectual ability …. being able to be on top of what is going on your field, there is no better place … to be' (LA-V20b). The only thorn in the side of the legal academic thirsting for intellectual stimulation is the need to assess student's scripts: 'Unfortunately the bad part of an academic's life is you must mark scripts, that is really the bad part of it but … you know the first ten is fine but after that it does become very boring' (LA-V15).

5.5 Summary

Similarly to the judge, legal academics possess a power to create and develop the law, though this is dependent upon their views being taken up and followed by the courts. Even the success of the legal academic is thus caught up in the adversarial model of justice. Mastery over language – the ability to author books and articles – emerges as a key capacity in this regard. The internal good of changing the law in a manner that would address injustice is present, but is mixed up with the external good of status and esteem, having a good reputation for its own sake. The nature of the work of the legal academic takes place in relatively pleasant working conditions, though this does not seem to prevent certain negative emotions such as jealously from flaring up. Unlike the other roles discussed in this chapter, there is less of an expectation that legal academics will have control over their emotions – indeed a certain irrationality is seen as a marker of brilliance. Emphasis on the difference between 'seniors' and 'juniors' is also evident in this role. The social profile of the legal academic is predominantly male and it is clear that they occupy the middle classes, a designation they can circumvent by marrying a successful lawyer.

6. POLITICAL APPOINTMENTS – THE DIRECTOR OF PUBLIC PROSECUTIONS

The role of the Director of Public Prosecutions (DPP) was constituted by very few quotations – only five in number. The career option of a DPP is a 'political' one because it depends on appointment by the State President. Even though the appointment is thus political in this sense, in another sense the DPP should be a-political in his or her approach to prosecuting crime. This is to say that individuals or entities should be prosecuted for crimes in a manner that ensures the equality of everyone before the law – there should be no fear or favour based on the DPP's political allegiances. The DPP should stand for upholding the rule of law.[93]

The lecturer's representation of the role of the DPP came to the fore most dramatically in the anecdote of his personal interview by the DPP for the post of state advocate (DPP-Q5, I have already referred in part to this interview in the section outlining the constitution of the shadow career path above). The anecdote is interesting for two reasons: Firstly, it represents the figure of the DPP as antithetical to the ideals of equality before the law and upholding the rule of law, and secondly, it represents the lecturer – as a young public prosecutor desiring to become a state advocate – as responding from a moral ground which upholds these ideals but at the same time sacrifices his desire for career progression.

The lecturer's critical evaluation of the DPP who interviewed him is established by a number of techniques. Before even beginning the anecdote, he devalues the role of the DPP in general by speaking of the institution of 'a little character called the Director of Public Prosecutions' (DPP-V3). At the start of the anecdote outlining the interview, he comments that the DPP of the time (or attorney-general as he was then known) was 'a very very obnoxious character called Klaus … who was a Prussian military officer' (DPP-V5a). He then proceeds to describe the DPP's 'huge' office (being the room in which the interview took place), and notices that room is filled with military memorabilia, 'little swords and pictures of little men in uniform and rifles and things'. Once again, the adjective 'little' serves to devalue. He immediately codes a potentially troublesome opposition to the DPP by detailing his emotional response: 'I thought that this is hugely inappropriate for an attorney-general … So I sat down and I looked around and I was

[93] In this regard the Constitution states that national legislation must ensure that the prosecuting authority exercises its functions 'without fear, favour or prejudice' (s 179(4)).

very uncomfortable. I was really extremely uncomfortable. Because it's very important you know, it's an important interview' (DPP-CSA5a). Even though the lecturer links his discomfort to the importance of the interview in this extract, his evaluation of the military décor of the office as 'hugely inappropriate' suggests an alternative basis for such discomfort and one which links to the internal goods that could be associated with a DPP/attorney-general: The rule of law. Military memorabilia – which stand for power, for might over right – would essentially be opposed to the resolution of disputes by peaceful, legal means. After the DPP asks him a number of technical questions, and as noted in the section outlining the constitution of the shadow career path above, he begins firing what the lecturer perceives to be a number of 'political' questions relating to the prosecution of Winnie Mandela. Ostensibly, the purpose of these questions was to gauge the lecturer's own political allegiances with a view to ensuring that the legal professionals occupying the higher rank of state advocate would be persons that supported the government ideology of the time. In this manner, therefore, the DPP was violating the ideal of equality before the law. The ideal is not laid waste, however, for it is left to the lecturer, as public prosecutor, to stand for the a-political nature of the job by politely, explicitly and courageously refusing to answer the DPP's questions on the basis of their 'political' nature: 'And I just refused to answer the questions, I said "sorry I consider those questions inappropriate and I don't, I can't answer them. And that's a political decision and I can't answer them. Um I don't want to seem unthankful or unpleasant but I really can't answer"' (DPP-V5c). The upshot is that the DPP immediately ends the interview with a 'thank you, yes go back to the magistrates' court' (DPP-V5c). While the young public prosecutor's career aspirations lie shattered he leaves on the moral high ground.

6.1 Social action

There were eight extracts related to social action in the five quotations dealing with the DPP of which seven were active, transactive and semiotic (87,5% respectively). Arising from the anecdote outlined above, the primary object of the DPP's action was the prosecutor. This is interesting because the norms constructed around the position of the DPP would lead one to believe that his or her primary role should be related more to ultimate outcomes – the impartial and fair governance of the criminal justice system. As part of this broader function, he

or she should facilitate conditions in which prosecutors, the officials who represent the office of the DPP in every court (DPP-SA3), can function independently and without fear of retribution for the decisions taken in the course of their work. The lecturer's representation however, in which the DPP is represented as exercising undue influence on a prosecutor, is antithetical to these norms.

6.2 Circumstances of social action

There were only seven extracts constituting the DPP's circumstances of social action. All of the resources were semiotic in nature, being the DPP's 'discretion (DPP-CSA1; DPP-CSA2) and his or her 'delegation' to prosecutors, indicating the scope of their power to prosecute (DPP-CSA4). The emotions, both negative, were evenly split between the emotion of the DPP (DPP-CSA5b, dislike) and the emotion that he incited in others (DPP-CSA5a, nervousness, a feeling of discomfort). The DPP was located both in his military-memorabilia-filled office (DPP-CSA5c) and in the court (DPP-CSA3).

6.3 Social actors

The five quotations relating to the role of the DPP contained 12 extracts dealing with either the DPP himself (nine extracts) and various other social actors (three extracts). The only instance of classification present was based on gender, and all of these indexed the DPP as male based on pronoun usage (DPP-SAct3b; DPP-SAct5c; DPP-SAct5g) or nomination (DPP-SAct5b; DPP-SAct5f). Rounding off his anecdote of the 'tall', 'brash', 'obnoxious' Klaus, the lecturer presents the students with a counter-cultural example: Frank Kahn who, although not a 'pleasant guy' was at least intelligent and someone to whom one could talk (DPP-SAct5h). All the other social actors were included in the social action (DPP-SAct1; DPP-SAct2; DPP-SAct5e).

6.4 Values

The four instances of evaluation in the quotations relating to the role of the DPP were all based on moral evaluation. Two involved negative evaluations of the DPP himself (DPP-V3; DPP-V5a), whilst two – as detailed in the introductory section above – involved oblique constructions of the internal goods attached to the office of the DPP, being the rule of law (by way of reference

to the inappropriateness of the military memorabilia in the DPP's office – DPP-V5b) and the norm that the DPP should function independently of political structures (constituted by the lecturer framing the DPP's political questions as 'inappropriate' – DPP-V5c). There were no representations of external goods in relation to this particular role.

6.5 Summary

There small number of quotations relating to this role makes it difficult to reconstruct a comprehensive narrative. The most significant representation is undoubtedly the lecturer's account of the interview he faced with an apartheid-era attorney-general. Like other accounts in the text, this story paints some of the noble ideals of the law – the pursuit of equality before the law for instance – in a critical light.

CHAPTER SIX

DISCUSSION OF FINDINGS

1. INTRODUCTION

My point of departure in this study has been that the formation of legal professional identity is a process that is pervasive and implicit, a process of socialization that occurs irrespective of whether professional identity has been posited as a particular pedagogical object or not. I have put forward the thesis that representations about legal professionals in classroom talk constitute one particular form of socialization. In chapter two I outlined a theoretical model for understanding the significance of such representations in processes of identity formation, linking them to an understanding of 'identity regulation' that revolves around the concepts of 'role' and 'discourse'. Through an iterative process that engaged with the data I adapted a number of Van Leeuwen's (2008) semantic categories (and their commonly associated linguistic realizations) to analyze representational meanings relating to legal professionals at a micro-discursive level. The analysis reveals the discourse on legal professionalism that emerged in the particular classroom of my study and, thereby, the extra-individual resources regulating the formation of legal professional identity. In the preceding chapter I presented the findings of this analysis, organized according to the most prominent roles in the data.

In this chapter I discuss the findings in accordance with the three conceptual claims identified in chapter two, namely that:

- At a micro-level of discourse analysis, the basic elements of social practice (Van Leeuwen's 'reduced' model) and their associated sociosemantic categories and linguistic realizations, provide a useful schemata for understanding how representations function as a form of identity regulation.
- A micro-discursive study of representations of legal professionals in classroom talk allows one to situate the representations in a particular classroom in relation to broader discourses on the nature of legal professionalism and the teaching of legal ethics.

- The recontextualization of the legal profession within the social context of the classroom overlays representational meanings with the power that derives from that context.

In respect of claim one I argue that the basic elements of social practice in representational meanings name and describe the social practice of the legal professional both *directly* and *indirectly*. This is to say that the representation of social action, the circumstances of social action, social actors and values and the further semantic distinctions within each that were captured in the codes developed for the analysis, convey deeper, more implicit meanings or themes relevant to legal professional identity. In this regard I identify eight primary themes in section 2 below that emerged from my case study of classroom talk and show how each theme relates to the analytical codes employed to unpack the representation of each element of social practice.

In respect of claim two I align the emergent eight primary themes in the lecturer's classroom talk with five broader categories – the nature of legal professional power, the purposes of law and the legal profession, the nature of legal professional work, legal relationships, and the social profile of the profession. At the same time I consider each theme in relation to reports and statements on legal professionalism, in particular, the MacCrate and ACLEC Reports and the generic LL.B statement as well as the literature on legal ethics teaching introduced and discussed in section 2.2 of chapter one. This analysis shows that the lecturer's classroom talk tended to sustain fairly traditional conceptions of the legal profession and claims made in the literature on the teaching of legal ethics.

In respect of claim three I argue that the effect of representations of legal professionals in classroom talk – as extra-individual resources regulating identity formation – is enhanced by the power relations of the classroom itself, which thus invest them with a particular kind of authority.

2. DISCUSSION OF CLAIM ONE

One of the questions which I initially set out to address was to understand how representations about legal professionals in classroom talk could be linked to processes of professional identity formation in terms of fine linguistic detail. In chapter two I associated representations with the wide variety of terms used to designate the extra-individual resources with which an individual engages when he or she fashions personal and social identifications ('contextual' or 'cultural resources, 'cultural templates' or 'scripts', 'social discourses or narratives', and so on). I also associated representations with the representational meaning potential of language (Fairclough, 2003: 26). Fairclough's description of representational meanings in language suggested the first clear way in which representations function as contextual or cultural resources for processes of professional identity formation: They *name* and *describe* every aspect of a social practice and thereby construe human experience (ibid). The analytical codes I adapted from Van Leeuwen to unpack the elements of social practice, (namely, social action, the circumstances of social action and social actors) and values (as an element added to social practice by a recontextualizing context) provided analytical tools for fleshing out this naming and descriptive function.

In conducting the analysis, however, I realized that while the analytical codes I employed enabled me to describe the social action, circumstances of social action; etc in a direct way, they also frequently combined in subtle ways to convey deeper, more implicit meanings. This became evident as I compared and contrasted the content of the narratives prepared for each of the roles outlined in chapter five using the technique of cognitive mind-mapping. As a result of this exercise I identified eight primary themes in my case study of classroom talk, as follows:

1. Legal professionals are powerful and active social actors in relation to a fairly consistent set of objects including the possibility of power over ultimate outcomes;
2. The normative frame for most legal professional roles tends to foreground external rather than internal goods and at times devalues the legal professional;
3. Legal professional work is framed by an adversarial model of justice;
4. Despite an emphasis on the separation of law, morality and emotion, morality and emotion are intertwined with legal professional work;

5. The emotional tenor of the legal professional workplace is predominantly negative;
6. The legal profession is structured by multiple hierarchies that strongly preference the private over the public dimensions of legal service;
7. The client occupies a complex space in the legal professional world that is at the same time elevated and backgrounded in relation to the legal professional; and
8. Gender bias is foregrounded and prominent whilst bias on the basis of race and class is more subtly embedded.

While some of these themes were largely associated with the representation of only one of the elements of social practice, others emerged from a combination of the elements or their sub-elements, as captured in the analytical codes. In this section, therefore, I wish to demonstrate how the analytical codes employed for my entry level of analysis – the more overt focus on the basic elements of social practice – functioned to constitute these underlying themes.

1. Legal professionals are powerful and active social actors in relation to a fairly consistent set of objects including the possibility of power over ultimate outcomes. This theme relates to *whether* legal professionals are powerful or not, *how* or in what ways they are powerful, the *objects* over which they exercise power and the *contexts* in which their power holds sway. The analytical codes distinguishing between active/passive and transactive/non-transactive social action enabled me to determine whether legal professionals are powerful or not, and the objects over which their power extended, while the distinction between material/semiotic action provided insight into the forms of their power. The latter was supplemented by the analytical code designating resources because the analysis revealed how the lecturer could represent a particular resource in a semiotic or material way. For example, while the actions of the attorney toward the law were more often oriented toward the law as a physical object (e.g. a set of law reports in a library or a CD-ROM containing the law reports that sits on a desk), advocates were more often represented as acting toward the law as a semiotic resource, as in selecting which cases should be included in a law report and thus determining what stood as the law over time (p. 147). I did not develop separate analytical codes to describe the objects of the legal professional's power, but as the analysis proceeded law themselves, language, information, other legal professionals, clients or parties and 'ultimate outcomes' such as

creating order or chaos emerged as the most consistent objects of the legal professional's power. The representation of location, lastly, functioned to indicate the predominant social spaces in which legal professional power was exercised.

2. The normative frame for most legal professional roles tends to foreground external rather than internal goods and at times devalues the legal professional. This theme relates to the first by indicating the purpose or values to which legal professional power is oriented. It also indicates whether, and the bases upon which, the legal professional (as well as others) can hold him or herself in esteem. This theme was primarily constituted by the analytical codes developed around values. The purposes or values of law and the legal profession emerged from the code designating the evaluation of legal professional work and the further distinction between internal and external goods. The extent to which legal professionals were esteemed (or not) and the basis thereof were captured by the analytical code identifying evaluations of legal professionals themselves and whether such evaluations were positive or negative. The analytical codes that distinguished between the form in which the value was captured (purposive, moral evaluation, authority, mythopoesis) were relevant in determining the extent to which statements of purpose or value were explicit or not. Representation of value is, however, arguably more pervasive because values are implicated in the representational choices associated with *every* aspect of the social practice. This relates to what Gee has identified as the first principle of any process of meaning making – the *exclusion* principle. Meaning, as Gee writes, is always a matter of intended exclusions and inclusions (contrasts and similarities) within an assumed semantic field: It involves networking or associating certain words together and excluding others (1996: 72 – 4). Each inclusion, exclusion and association involves a value choice. Thus when the lecturer used the word 'draft' to describe the action of 'civil servants' who are the 'dud's who draft laws 'poorly', whereas elsewhere he referred to lawyers 'developing' and 'creating' laws (p. 127) he not only named and described a social action but imbued the meaning of 'draft' with a value inferior to the actions of 'developing' and 'creating'. By consistently referring to legal professionals using male pronouns he valued the male over the female. In failing to articulate and elaborate upon the internal goods of the practice for most of the legal professional roles, he implicitly devalues these. While the

Carnegie Study is correct in claiming that the ethical-social apprenticeship fundamentally involves 'professional ethics' and 'wider matters of morality and character' (2007: 129), what this research shows is that 'ethical' or 'moral' choices are not only related to explicit discussions of ethics or morality (in fact there were almost no explicit discussions of this nature in the data), but to the fine-grained choices lecturers make when they represent each aspect of the social practices in which legal professionals engage.

3. Legal professional work is framed by an adversarial model of justice. This theme, and the two that follow, extend one's understanding of *how* legal professionals exercise their power in terms of the nature of their work. There was no specific discussion of the adversarial system of justice in the classroom I studied, nor any explicit statement that associated legal professionals exclusively with this dispute resolution model. Yet the assumption of adversarial justice as a framing feature of legal professional life was strongly evident. This emerged, firstly, from the analysis of social action in cases where the legal professional was actively represented as engaging in adversarial processes of justice, for example, the lecturer representing the lawyer saying to the 'other side', '[w]e will sue you' (p. 129). It was also constituted in situations where the legal professional was passive in relation to the social action, as when the lecturer linked the success of the legal academic to 'being quoted' by the courts (p. 220). It emerged further from the types of resources legal professionals were represented as using, such as the 'brief' carried by the advocate to court (p. 154) as well as through locating the roles of the attorney, advocate, judge and magistrate predominantly or to a significant extent, in the court.

4. Despite an emphasis on the separation of law and morality/emotion, morality and emotion are intertwined with legal professional work. One of the hallmarks of legal reasoning is that it requires (or 'forces' in terms of a more critical perspective) a separation of legal and moral issues as well as a distancing from one's own emotions. This stance on the relationship between law and morality/emotion emerged in the analysis of social action, particularly where the object of the action was law. For example, in deciding a criminal case brought against a group of sadomasochists, the judge is represented as needing to separate out his 'personal baggage' from a particular issue even though he might find such practices 'abhorrent'. This is accompanied by a detailed account of the judge's discretion to 'look for the law' and to position

himself in relation to an existing semantic field of legal precedent (p. 175). The need to separate law and morality also emerged through the lecturer's evaluation of legal professionals when he rather sweepingly devalued all 'natural lawyers' – a type of lawyer who believes that moral criteria are intimately bound up with determining the status of a rule or principle as law – on the basis that through the ages, they have lacked the moral courage to advocate civil disobedience in support of their moral convictions (p. 137). The need to distance oneself from emotion also emerged through the coding of emotion, in those instances where emphasis was laid on the lawyer needing to maintain a façade of emotional calm (p. 132).

Other analytical codes, however, pointed to the ineluctable penetration of morality and emotion into the legal professional's work. This was most marked in the analysis of social actors. In cases where the social actor was included in the action, and particularly in relation to the role of the magistrate, the lecturer's representations suggested that legal professionals cannot resist a moral categorization of the persons with whom they engage (p. 214). It was also evident in the analysis of social action where the object of the action was ultimate outcomes. Legal professionals were represented as having the capacity to have a say on significant moral issues, for instance, to either support or speak out against the system of apartheid (p. 178). The coding of emotion, finally, pointed to instances where the legal professional was unable to control an emotional response. This occurred, most notably, in the anecdote of the lecturer as a magistrate, adjudicating the case of the father defaulting on his maintenance payments (p. 207).

5. The emotional tenor of the legal professional workplace is predominantly negative. This theme was predominantly related to the coding of emotion as direct or indirect and as positive or negative. However, it also emerged from the coding of social action through the nature of the verbs used to describe relationships between legal professionals themselves or others, as in the advocate 'attacking' the witness (p. 150), or the articled clerk being 'shunted around' by legal secretaries (p. 152). The coding of social action, particularly the identification of passive forms of action, highlighted a number of stressful contexts, such as judges being grilled by the Judicial Services Commission (p. 180) or advocates desperately waiting for work to come in from attorneys (p. 145). A negative emotional ethos was also associated with the legal

profession through the lecturer's evaluations of legal professionals themselves, which tended to be predominantly negative.

6. The legal profession is structured by multiple hierarchies that strongly preference the private over the public dimensions of legal service. This theme, which introduces the broader category of the range and quality of relationships a legal professional establishes and maintains through his or her forms of work, was linked to a variety of analytical codes. It was firstly evident in the coding of social action where both the choice between representing action as active/passive or material/semiotic played a part in establishing the power of each role relative to particular objects and relative *to each other*, and thus in constituting relationships and hierarchy. Advocates, for instance, were always active in relation to witnesses and in some instances in relation to the judge but they were almost always (and perhaps surprisingly) passive in relation to attorneys as regards obtaining work (pp. 150-151). The actions of articled clerks were predominantly material (p. 146) but the lecturer also suggested that once they have a few years experience under their belts, they become active and semiotic players in relation to legal secretaries (p. 152). The coding of resources in terms of the diversity and range of resources at an actor's disposal pointed to a higher status in the legal hierarchy. Relative to the number of extracts, for instance, the advocate was represented as acting with regard to a disproportionately wider array of resources than the articled clerk or attorney (p. 152), whereas the lower status of magistrates was in part constituted by an emphasis on their *not* having resources (p. 208). The coding of emotion also indexed hierarchy in that the tendency to express emotion or the difficulties involved in not being in complete control of one's emotions were associated with roles lower in the legal hierarchy, whereas the disentanglement of emotions from action was emphasized in the case of higher-situated roles. The magistrate is represented as 'losing' his temper and 'letting rip' into the accused while the judge in the same anecdote is cool, calm and collect, able to focus on the requirements of procedural correctness (p. 207). Finally, evaluations of legal professionals themselves and of legal professional work played a key role in constituting hierarchy, as the higher positions and the nature of their work – the roles of the advocate and judge – were generally (though not exclusively) evaluated in a positive light and *vice versa* (pp. 166, 190).

7. The client occupies a complex space in the legal professional world that is at the same time elevated and backgrounded in relation to the legal professional. This theme, which also relates to the broader category of legal relationships, emerged primarily from the coding of social actors and whether they were included or backgrounded in the action. The range of discursive resources used to background clients allowed for the legal professional to instrumentalize and possessivate client, as in the reference to clients being the legal professionals' 'bread-and-butter' (pp. 131, 136, 155).

8. Gender bias is foregrounded and prominent whilst bias on the basis of race and class is more subtly embedded. The last theme relates to the social profile of the profession and it emerged from the coding of social actors, and then through the analytical sub-categories of classification (and the further distinctions between gender, race and class), nomination and categorization. Undertaking the coding for gender classification was a fairly straightforward task in that it was indexed by the overwhelming use of male pronouns and male nominations. However, in the case of racial and class categorizations the linguistic cues that pointed to such classifications (such as classifiers in the nominal group) were largely absent. The very few racial and class categorizations that I was able to identify were therefore deeply and subtly embedded in contextual references, as in the lecturer's criticism of the use of the phrase 'what what' used by black students (p. 134).

Figure 9 below provides a graphical illustration of the manner in which the analytical codes developed around the model of social practice were interwoven amongst the eight primary themes identified above.

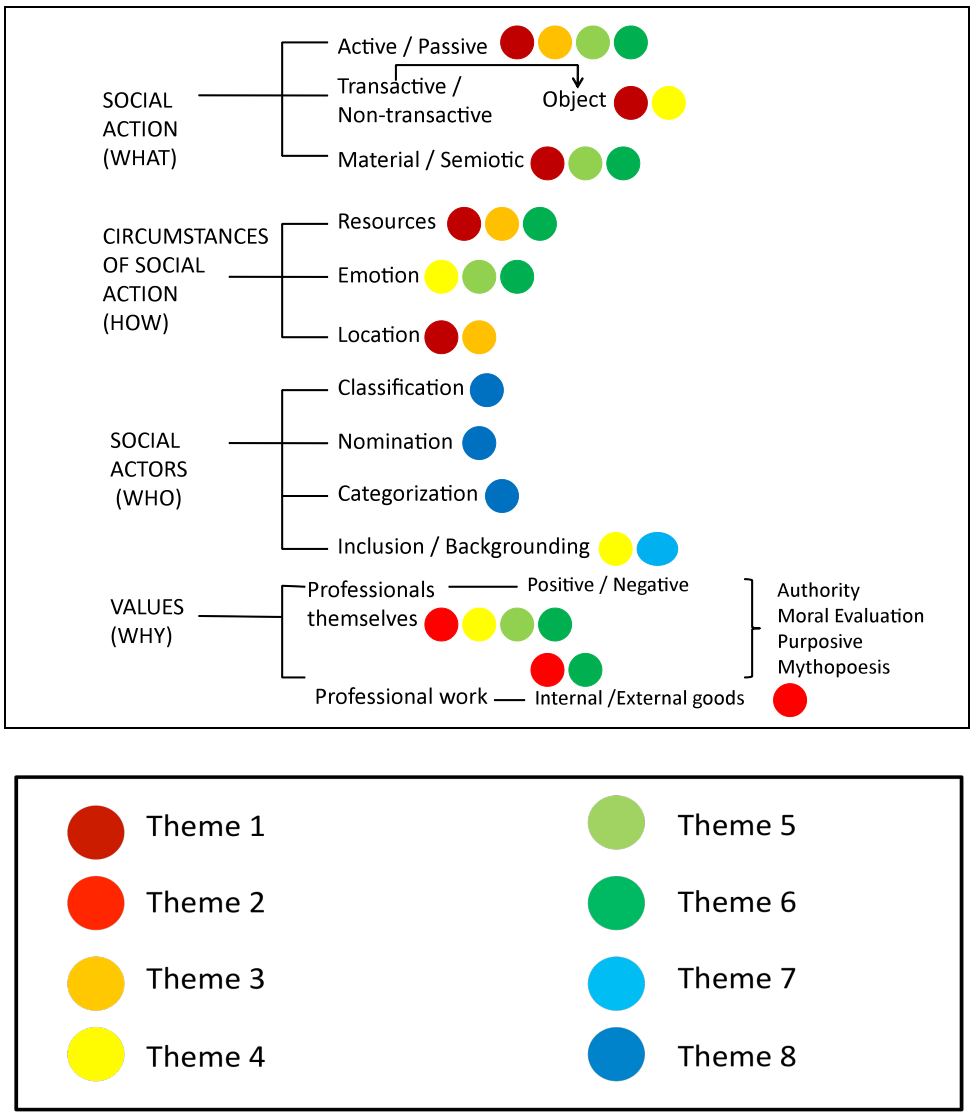


Figure 9: Graphical illustration of interweaving of analytical codes with themes.

In the foregoing section I have ascended one rung of the discursive ladder by explaining how the discursive codes functioned to constitute eight primary themes in the lecturer's classroom talk. In the following section I group the themes into five broader categories, namely the nature of legal professional power (theme 1), the purposes and values of law and the legal profession (theme 2), the nature of legal work (themes 3, 4, and 5), legal relationships (themes 6 and 7) and the social profile of the profession (theme 8) and discuss each in relation to the reports and statements on legal professionalism and the literature on the teaching of legal ethics introduced in section 2.2 of chapter one. The discussion in the next section follows the broader categories. Figure 10 below illustrates this analytical progression.

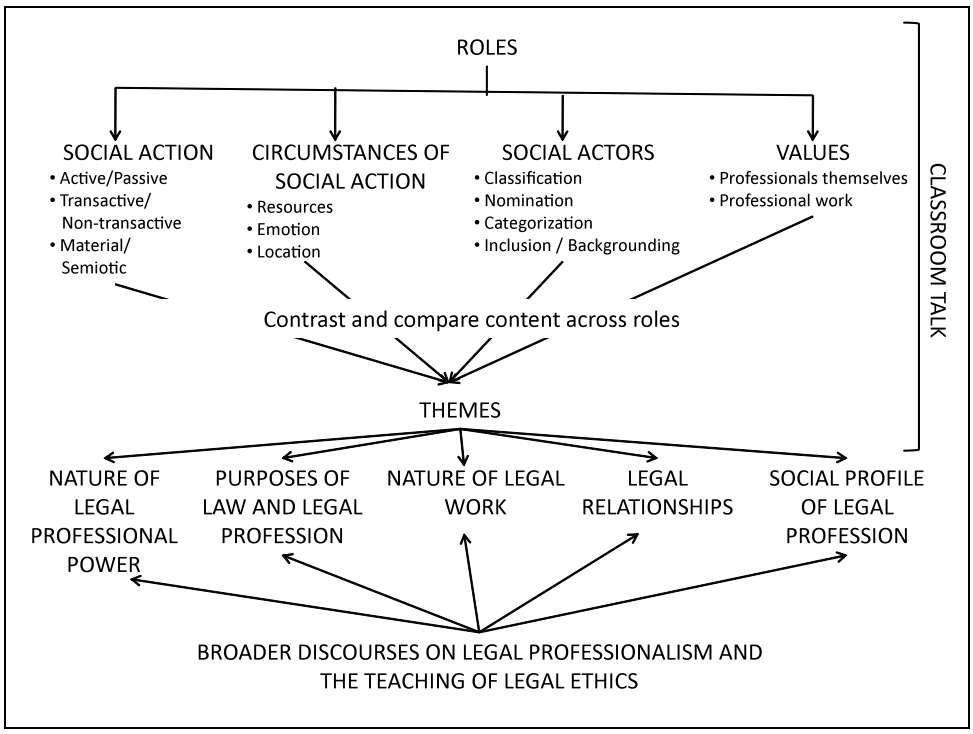


Figure 10: Illustration of the ascending levels of analysis.

3. DISCUSSION OF CLAIM TWO

The purpose of the analysis that follows is to provide some broader commentary on the 'horizon of observation' (Little, J.W. (2003) 'Inside teacher community: Representations of classroom practice' 105 *Teacher's College Record* 913 at 917, cited in Grossman (2009) 2065) that the lecturer's classroom talk established. It is limited by the fact that my analysis of the eight emergent themes in the literature on legal professionalism and the teaching of legal ethics is not based on the same rigorous analytical process I followed for the classroom talk. Nevertheless, reference to these resources in their broad outline allows me to make some observations on the aspects of legal professionalism the lecturer in my case study rendered visible and which he obscured from view, at the same time pointing out where the literature could be modified by a better understanding of what happens in the classroom.

In the discussion which follows words or phrases from the data are at times quoted merely to remind the reader of the content of the example to which I am referring – the quoted material is thus not new.

3.1 Nature of legal professional power

My claim that the lecturer's classroom talk constituted legal professionals as powerful and active social actors in relation to a fairly consistent set of objects was based on the patterning of active/passive, transactive/non-transactive and material/semiotic social action across the predominant legal roles. The percentages for each of these analytical codes, which I presented for each of the roles discussed in chapter five, are presented comparatively in Figure 11 below.[94]

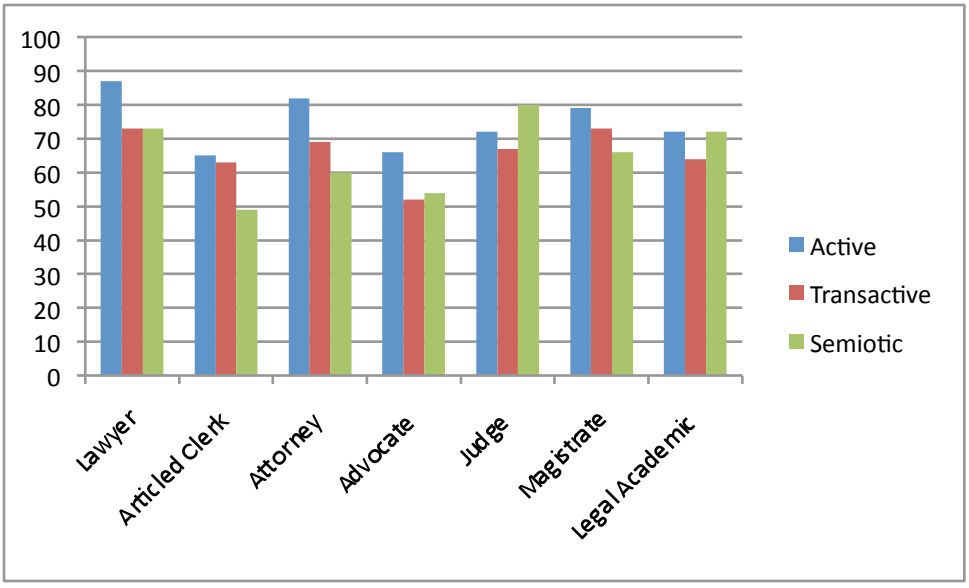


Figure 11: Percentages of active, transactive and semiotic action across legal professional roles.[95]

With the exception of semiotic action on the part of the articled clerk, which stands at slightly below fifty per cent, in all of these roles active, transactive and semiotic actions are greater than fifty percent. The patterning of active, transactive and semiotic action is most pronounced in the generic role of the lawyer in which power was represented as extending over law, language and information and, thereby, over people and ultimate outcomes. Two patterns appear to separate the other roles: The first is where semiotic action is pronounced, exceeding the percentage of active/passive or transactive actions. This occurs in the role of the advocate, judge and legal academic, and the second is where semiotic action is the least pronounced of

[94] The manner in which I developed these 'quasi-statistics' is described in section 3.5.4 of chapter three,
[95] Statistics for the roles of the Public Prosecutor, State Advocate and Director of Public Prosecutions were excluded from the graphs in this chapter based on the small amount of data available for each role with a concomitant skewing of the statistical results.

the analytical categories, which occurs in the roles of the articled clerk, attorney and magistrate. The prominence of semiotic action is significant because it captures a power that is more creative and far-reaching than material forms of power. This came to the fore most clearly in the roles of the judge and the legal academic. Judges possess the powers to 'interpret', 'develop', 'create' and 'change' the law and even to 'strike out' or 'demolish' laws (p. 176). As the lecturer's discussion of the judge's deliberation in *Ex Parte Doe* showed, they have a power to establish the legal meaning of particular words and phrases, even when these seem to be at variance with common meanings (p. 177). Legal academics exercise their potential creative power over law – the capacity to influence the law – through the authoring and publishing of legal academic works, an action that similarly implies a power over and mastery of language. Their semiotic power, however, is of a lower order because they are dependent upon the courts for taking up their views (p. 220). The advocate, while not ordinarily possessing the power to establish the law tended to be represented manipulating the law as a semiotic resource, as having the capacity to 'see' the law, to 'argue' for or against a particular position on the law (p. 147). Attorneys were more likely to be represented relating to the law as a physical resource and their only semiotic action resided in the action of 'contravening' the law (p. 147). The greater overall percentage of semiotic actions of the attorney in comparison to the advocate which Figure 11 illustrates can be ascribed to the fact that attorneys were represented exercising semiotic powers over other objects ('building' their own reputations for instance, 'referring' matters to and 'briefing' advocates, or 'practising' for their own account). However, a semiotic power over these objects appears to be of a lower order because it is more restrictive in its scope of influence than a semiotic power over law and language. Similarly, while the social action of the magistrate was also frequently semiotic, their power only extended to the parties before them. Even so, this is a significant power because, like the judge, this contributes to defining the status of parties (pp. 174, 205) and determines, in criminal cases, the forms and length of punishment they must bear (p. 206). Both judges and magistrates, uniquely amongst all the roles, were represented as determining 'ultimate outcomes' such as the capacity to create 'certainty' or 'chaos' or to stand up to or co-operate with the apartheid regime (pp. 178, 208).

The generic role of the lawyer was the only one in which mastery over information featured as a significant form of power (p. 128), although the role of the articled clerk offered an unusual gloss on this in pointing to the need for young legal professionals to also be aware of the social dynamics operative in the law firm (p. 148). One of the most interesting findings of the analysis was that a number of the actions of the legal professional roles in the law lecturer's talk were oriented toward other legal professionals – this dimension of their power is accommodated in section 3.4.1 below, dealing with the hierarchies in the profession.

The flipside of the representation of power in Figure 11 is also that no one role is thoroughly powerful. For each of the roles for which there was sufficient data, the lecturer exposed areas of vulnerability. For the lawyer role, these were the need to wait for clients to come off the street and to be paid by clients, as well as being the subject of 'gossip' on the part of colleagues (p. 131). The first of these resonates with the role of the attorney who serves as a first port of call for members of the public seeking legal services, while the latter is more closely associated with the role of the advocate, who is dependent upon the attorneys for work, and thus highly susceptible to evaluations of their performance in court (p. 153). As juniors, articled clerks are expected to be at the beck and call of their principals and must even submit, even for only a time, to the power exercised by legal secretaries (p. 151). Magistrates, while holding sway within their courts, were represented as vulnerable to the oversight of judges through the institution of automatic review (pp. 206-7). Even judges are not all-powerful: Their decisions may be taken on appeal, in being appointed as a judge they not only face criticism and evaluation of their performance as acting judges but also the heavy-handed scrutiny of the Judicial Services Commission, and they are vulnerable to changes in the political system – to the possibility that a new regime will 'chop off their heads' (pp. 180-181).

The horizon of observation that the lecturer established was thus multi-dimensional, exposing both powers and vulnerabilities and pointing to a range of objects through and in relation to which the legal professional is powerful. The picture is not complete however, and particularly for the roles in the shadow career path (public prosecutor, state advocate and magistrate), it is undeveloped. The paucity of terms to describe the social action of these roles (p. …) engenders a picture of this aspect of professional life that is blurred or out of focus, with no sense of how

these legal professionals use, for instance, the rules of evidence, the procedures of the court and other professional conventions to achieve authority in their professional domains.

Furthermore, and linked to the implicit and patchy representation of internal goods, it is not clear from the lecturer's representations how legal professionals should exercise their powers in order to achieve ultimate outcomes such as justice, fairness and morality, the provision of adequate legal services to the poor, the competent representation of clients, and promotion of the administration and development of legal institutions – outcomes for which the MacCrate and ACLEC Reports and the South African LL.B curriculum statement advocate. The emphasis in these reports and statements on legal analysis, reasoning and research (skills prioritized by the MacCrate Report – see Sonsteng, 2008: 45 – 6); a 'core' knowledge of the general principles, nature and development of the law and the analytical and conceptual skills required of lawyers (ACLEC, 1996: 21); and the importance of analyzing, evaluating, and commenting upon fundamental legal principles, statutes, cases and so on (Generic LL.B statement, see for instance Exit Level Outcomes 1 and 3) affirm the lecturer's emphasis upon the legal professional's relationship to *law* as one of the key modalities through which their power is exercised. However, the analysis shows that the objects of the legal professional's power are multiple and there is therefore a need to demonstrate how a lawyer acts in relation to these multiple objects in order to promote desired ultimate outcomes. This assumes the availability of discursive resources to describe social practices that lead to desired ultimate outcomes in sufficient detail; i.e. that break down abstract actions such as 'provision of adequate legal services to the poor' into more material social actions, sufficiently framed by the ambiguity of their circumstances, the full array of relevant social actors and a richly-developed set of terms capturing the appropriate values.

Both the MacCrate and ACLEC Report point to shifts in the nature of the provision of legal services, most notably an increased shift to non-court based methods of dispute resolution such as negotiation, mediation and arbitration (ACLEC, 1996: 10). As these methods and the contexts in which they operate did not feature at all in the lecturer's classroom talk, his representations sustained a more traditional perception of the locus of the legal professional's power located squarely in court-based litigation. The significant degree to which legal

professionals were located within the physical confines of the court – particularly the advocate, judge and magistrate – also affirmed this.

Lastly, statements on legal professionalism detail some of the vulnerabilities to which legal professionals will be subject in the 21st century, including increased globalization and competition for services and changing organizational forms (see, in general, the ACLEC Report, (1996: 15 – 17) as well as the comprehensive overviews in Kronman (1993) and Glendon (1994)). To a certain extent, the lecturer's emphasis, for instance, on the need to build a good reputation, pointed to the grim reality of competition for services. However, the phenomenon of changing organizational forms did not feature at all in his representations which seemed strongly premised on and thus sustaining of the traditional structures of the law firm (for articled clerks and attorneys), the bar (for advocates) and system of civil and criminal courts (for judges, magistrates, public prosecutors, state advocates and the Director of Public Prosecutions).

3.2 The purposes and values of the profession

The predominant theme identified in the lecturer's classroom talk in this regard – that the normative frame for most of the roles tends to foreground external rather than internal goods and at times devalues the legal professional – was based on the patterning of internal/external goods across the prominent legal professional roles, and the extent to which legal professionals themselves were either evaluated positively or negatively. I will deal first with the patterning of internal/external goods and, thereafter, with negative/positive evaluations of legal professionals themselves.

3.2.1 Foregrounding of external rather than internal goods

The MacCrate and ACLEC Reports and the South African generic LL.B statement emphasize what I have dubbed the 'internal goods' of the profession: Goods that are central to maintaining the integrity and meaningfulness of the practice which can be enjoyed by the whole community who participates therein (MacIntyre, 1981: 178). These include promoting justice, fairness and morality, enhancing the capacity of law and legal institutions to do justice, commitment to the rule of law, high ethical standards, addressing past and current injustices,

promoting a just and democratic society, and so on. They say little, however, on more subtle internal goods such as procedural fairness or correctness and how these might intersect with values such as justice or fairness. They also say nothing about, external goods – those that flow as a reward for or effect of the practice and which are enjoyed by the legal professional alone (ibid). The literature on the teaching of legal ethics, however, suggests that external goods receive a greater emphasis than internal goods through claims, for instance, that lecturers present lawyers as 'grubby money seekers' (Nicolson, 2008: 149) or as people who are only interested in morality insofar as it would work for a particular client or case (Menkel-Meadow, 1991: 7).

Figure 12 shows the patterning in the law lecturer's classroom talk of the representation of internal/external goods across the most prominent legal professional roles.

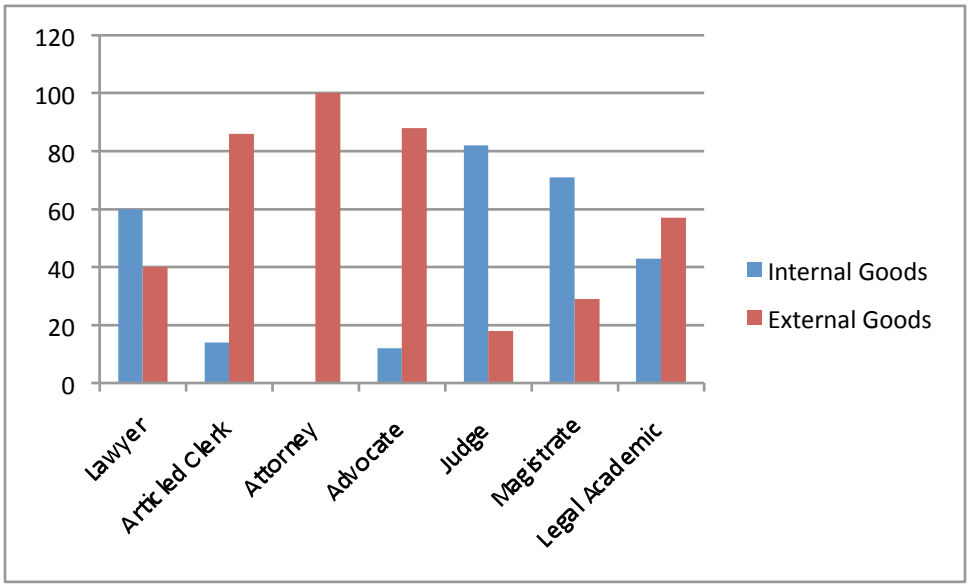


Figure 12: Percentages of internal/external goods across legal professional roles.

For the roles of the judge, magistrate and lawyer internal goods predominated. However, for all the other roles external goods were overwhelmingly pre-eminent. This was most notable in the case of the attorney, for which I could not identify a single representation of the internal goods of the practice.

The internal goods most frequently encountered included order, objectivity, rationality, logic, thoroughness and certainty (pp. 138, 193), followed by the importance of upholding constitutional values (p. 193). There were a few, oblique references to fairness, efficiency and effectiveness in the administration of justice (pp. 203, 216), democracy (through the judge representing society on the bench – p. 193), and respect for the rule of law (p. 216). The difficulty with the representation of these internal goods, across all the roles, was that they were almost all presented in the form of moral evaluation – encoding value through the use of morally loaded adjectives, adverbs and other evaluative forms. The lecturer did not explicitly link these goods to the standards of excellence or the history of the practice and, in certain cases, he even undermined these goods by presenting them as antithetical to a 'lay' perception of justice. The clearest example of this occurred in the role of the magistrate where a standard of excellence – the magistrate, for instance, not taking over the prosecution, was not linked to the internal good of objectivity and fairness and was implicitly justified by being presented as an understandable response to the accused's dismal attitude (p. 207).

The most frequently represented external good, by a fairly good margin, was material reward (pp. 138, 168). Talk about money featured in almost all the predominant legal professional roles, even for roles specifically identified as *not* facilitating the attainment of this particular good such as the roles of the judge (p. 194) and legal academic (p. 226). In both these instances, the lecturer offered a way of getting around the somewhat problematic fact that the material rewards are of middle-class standards: Before becoming a judge, a senior advocate must ensure he already has all that he needs, for the legal academic, he should be independently wealthy or perhaps marry a successful lawyer. The preoccupation with money in the lecturer's classroom talk resonates with Kronman's candid observations of the legal profession in the United States of America. During the 1960s', Kronman observes, lawyers working in large firms did not see their work in purely instrumental terms – as simply a means to make money. Rather, the culture of large-firm practice encouraged the different view that 'the work of lawyers is also inherently rewarding and offers satisfactions that make the doing of it valuable for its own sake' (1993: 294). By contrast, the big-firm culture had by the 1990s shifted to not only tolerating 'a degree of candor about money that would have seemed completely unprofessional a

generation ago' but to actively encouraging lawyers 'to be more and more exclusively preoccupied with it' (ibid: 295). While comparative sociological data on the legal profession in South Africa is not available, the prominence accorded to material rewards in the lecturer's classroom talk suggests the possible starting point of such a preoccupation.

Apart from material reward, reputation (pp. 168); status (pp. 168, 194, 226); success, elitism, distinction and specialization (pp. 139, 168) featured more than once across the dominant legal professional roles. One of the more surprising external goods identified in the lecturer's classroom talk was that of 'experience' (p. 203), which arose in relation to the roles of the public prosecutor and the state advocate. This external good allowed for both these roles to be constructed in purely instrumental terms, as the means to switch from the shadow to the preferred career path.

The external good of intellectual stimulation, associated with the roles of the advocate and the legal academic (pp. 168, 226) and specifically *disassociated* from the work of the attorney and public prosecutor (pp. 169, 204), could be related to the value of 'continuous professional development' captured in the MacCrate Report's reference to the values of 'seeking out and taking advantage of opportunities to increase knowledge and improve skills', and 'selecting and maintaining employment that would allow for development as a professional and the pursuit of professional and personal goals' (American Bar Association, 1992: Chapter 5). However, the lecturer's invocation of this good had a decidedly academic tone to it, which prompted me to regard it more as an effect of the recontextualization of the practice of law in an academic context than advocacy for continuous professional development.

In conclusion, therefore, the standards of excellence of the practice and the goods that emerge as a result thereof were faint and scattered points of light in an horizon of observation otherwise strongly imbued with the gaudy colours of alluring but ultimately shallow contingent goods. The patterning of internal/external goods – both in substance and form – appeared to sustain claims made in the literature on the teaching of legal ethics that external goods tend to be foregrounded, although the analysis pointed to the diversity of such goods in addition to material reward.

3.2.2 Devaluation of legal professionals themselves

Positive and negative evaluations of legal professionals support the normative framework guiding the purposes of law and the legal profession. Positive evaluations assume that legal professionals are aligned with such purposes and are making a positive contribution to society, whilst negative evaluations assume the converse. Within the literature on the teaching of legal ethics, it has been suggested that negative evaluations of legal professionals predominate and play a role in fostering an attitude of cynicism among students (Nicolson, 2008: 149).

There were relatively few evaluations of legal professionals themselves apart from the roles of the judge, magistrate and possibly legal academic. There were no evaluations at all of articled clerks, three of the attorney and six evaluations of the advocate respectively.[96] Figure 13 presents the extent to which legal professional roles themselves were evaluated positively or negatively in the lecturer's classroom talk.[97]

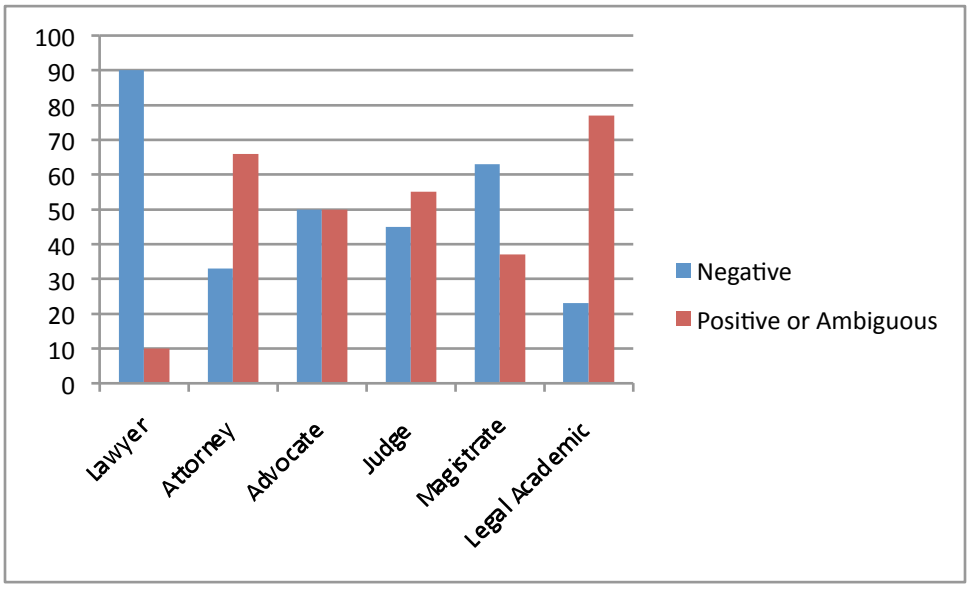


Figure 13: Percentages of negative/positive or ambiguous evaluations across legal professional roles.

[96] As regards the roles which are not included in the graphs, there were no extracts dealing with the evaluation of state advocates themselves, two extracts of this nature for the public prosecutor (both positive), and two for the Director of Public Prosecutions (both negative).

[97] Graph 6.3 excludes the role of the articled clerk as there were no extracts containing a positive or negative evaluation of articled clerks themselves.

Figure 13 indicates a predominance of positive evaluations in the roles of the judge, legal academic and attorney. Judges were positively evaluated on the basis of their wisdom, their brilliance (being the 'best brains in the business') and, to a lesser extent, a commitment to human rights (pp. 190–191). Yet they were also devalued on the basis of being long-winded and confusing (p. 192). Legal academics were also valued on the basis of their intellectual capacities but here, as was the case with the attorney, the lecturer's evaluation of *specific* individuals (Dr Van der Merwe, in the case of the legal academic; and Michael Dale and Deneys Reitz in the case of the attorney) played a significant part in increasing the number of positive evaluations. The negative evaluations in the roles of the advocate, magistrate and (significantly so) in the generic role of the lawyer suggest a difficult professional environment in which one is subjected to evaluation on a variety of negative grounds, including a charge that one is 'quick, clever and wrong' (p. 133), lacking in moral courage (p. 137) prone to making errors (p. 206); and lacking knowledge, gravitas and professionalism (p. 216). However at least some of the evaluations seem more related to the recontextualizing work of the lecturer as an academic, because he devalued legal professionals on the basis that they are stupid in the context of his personal specialization, Roman law (p. 192).

Throughout the roles there were moments where the lecturer modeled a cynical attitude toward legal professionals that could serve as the basis for the development of cynicism in students. These included, for instance, his depiction of attorneys unable to keep their hands off trust monies (p. 165), reference to magistrates as kings of the dung heap (p. 209), his attitude toward sitting judges (which evinced a veiled sarcasm – see p. 191), his depiction of the political contamination of the work of the Director of Public Prosecutions (p. 227–8); and his cynical view of the impact of legal research, comparing it to a mouse going round in a little wheel (p. 220). Overall, therefore, the horizon of observation was haunted somewhat by negative lawyer stereotypes.

3.3 The nature of legal work

The lecturer's representation of the nature of legal work has already been foreshadowed and in part captured in his representations relating to social action and the objects over which such

action extended. The three themes discussed in this section relate instead to broad-ranging qualitative features of legal work, specifically, that legal professional work is framed by an adversarial model of justice; that morality and emotion are intertwined with legal professional work despite advocacy to the contrary; and that the emotional tenor of the legal professional workplace is predominantly negative.

3.3.1 An adversarial model of justice frames legal professional work

Schechter has claimed that law schools in the United States of America emphasize litigation as a method of conflict resolution to such an extent that students have a 'reflex reaction' to file a lawsuit whenever they are consulted by a client (1996: 373). More commonly, commentators have argued that the legal classroom fosters 'adversariness, argumentativeness and zealotry' (Menkel-Meadow, 1991: 7) – qualities that resonate with the adversarial model of justice prevalent in most common law jurisdictions, including South Africa. Mertz' empirical study on the common legal epistemology in law schools in the United States of America has provided a more nuanced understanding of how an adversarial model of justice is subtly perpetuated in this particular jurisdiction; i.e. by conveying, uncritically, the message that justice is best served by this particular model, together with the assumption that it is a form of reasoning to which social conflicts of any kind can be fitted. The outworking of justice in an adversarial system involves, moreover, 'combative verbal dueling' between opposing sides (2007: 4). Statements on legal professionalism, however, do not accord a special emphasis to litigation. As noted above, both the MacCrate and ACLEC Reports point to the need for legal professionals to diversify the forms of work and contexts in which they engage including non-court based forms of dispute resolution.

The adversarial nature of legal professional work appeared first in the role of the lawyer in the lecturer's explanation of the meaning of the term 'without prejudice'. The lawyer in the lecturer's representation engages with 'the other side' on the basis of a threat to sue, even though the focus initially is on negotiation and discussion (p. 129). It also surfaced in the verbs used to describe processes of verbal dueling: The need for the lawyer to 'argue', 'convince' and 'persuade' (p. 129). An adversarial tone featured less strongly in the role of the attorney,

primarily because attorneys ordinarily engage advocates to undertake courtroom litigation. Attorneys were, however, represented in the action of undertaking the 'backroom work' – driving around, getting statements together, organizing files, and so on – required in order to provide the advocate with a decent file that he can work from (p. 149). It was however, strongly evident in the role of the advocate for whom, the lecturer advocated, a trait essential for success is a taste for 'intellectual violence' (p. 156), as manifested in 'arguing' for or against cases (p. 147); and 'confronting' the judge with their side of the argument (p. 151). The mere presence of judges and magistrates in the lecturer's representations and the fact that both emerged as prominent roles, sustains the model of an adversarial system of justice, for they are undoubtedly the kingpins of court-based dispute resolution. The lecturer represented each as engaging in actions typical of litigation: Listening to and being confronted 'by both sides' (p. 172) and deciding who wins or loses the case (pp. 174, 206). In the case of the public prosecutor, the lecturer's combative attitude toward the accused charged with credit card fraud is suggestive of an adversarial approach that goes beyond problem-solving (p. 201). Even the role of the legal academic was linked to the social context of litigation, via the need to be quoted by the courts (p. 220). The location of legal professionals within the physical space of the court also strongly emphasized the social context and importance of adversarial litigation. While there was some diversity in the representation of the work places of the articled clerk and attorney (p. 159), the workplace of the lawyer (p. 133), advocate (p. 159), judge (p. 185), and magistrate (p. 211) was overwhelmingly constituted as the court.

Whilst the lecturer's representations did not seem to approach the extremes suggested by the North American literature, the horizon of observation established did point to the adversarial model of justice as a key framing feature of legal professional work – a representation that was strengthened by the absence of alternative models of dispute resolution.

3.3.2 Legal professional work is intertwined with morality and emotion

The separation of the legal issue in a case from the various moral arguments which may be presented in order to provide a solution, and the emotional distancing from the case required not only of the judge or magistrate as arbitrator but also from those representing a particular

party are regarded as key features of legal reasoning and legal professionalism (Cownie, 2003: 159; Nicolson, 2008: 148). In this section I will deal firstly with the separation between law and morality and then with the emotional distancing supposedly characteristic of legal professional work.

Law and morality

In her empirical study of the nature of legal reasoning in eight classrooms in the United States of America, Mertz found that it typically involved identifying and understanding the applicable legal authorities, articulating the social dispute in the categories and language derived from these authorities, and ignoring details of the context to which people would attach significance on social or moral grounds (2007: 4). She observed, however, that law lecturers also discussed the social or policy implications of court cases, and the motivation of social actors (ibid: 65). While law lecturers policed the aspects of classroom talk that constituted the main parameters of legal reasoning very closely, she found that discussion of social or policy factors paradoxically allowed for a rather free association of social and moral issues with the core legal disputes through the telling of anecdotal, speculative or even hypothetical stories (ibid). Thus students were taught that *any* social conflict can be rearticulated in terms of the narrow categories of a legal reading, whilst, at the same time, the discussions of macro- or micro-level social processes that frame the conflict permit legal readers 'to speculate on almost any social or moral aspect of the situation involved' (ibid: 83). Others have claimed, however, that law lecturers abstain from pronouncing upon the relative merits of the possible moral positions which could be adopted in a situation (Cownie, 2003: 159) and almost habitually defer to formally legitimate kinds of legal authority; i.e. the various sources of law applicable within a particular jurisdiction (Chapman, 2002: 68; Kennedy, 1982: 594; Nicolson, 2008: 149; Webb, 1998: 137).

Statements on legal professionalism, however, appear to acknowledge that legal professional work encompasses a moral dimension. The second of the MacCrate Report's fundamental values, for instance, requires the legal professional to 'promote' morality in his or her practice (American Bar Association, 1992: Chapter 5). The ACLEC Report noted – in its cursory statement of what legal education and training should achieve – the importance of 'contextual

knowledge', being an appreciation of the law's social, economic, political, philosophical, moral and cultural contexts (1996: para 2.4).

In this study I did not intend to focus on whether these features of legal reasoning were present in the classroom of my study[98] apart from the representation of legal professionals; i.e. I was interested in determining whether the legal professionals in the lecturer's classroom talk *were represented* as separating law from morality, or whether morality featured as an inevitable dimension of their work. In effect, I found evidence for both of these themes.

The need for the legal professional to separate law and morality was implicit, firstly, in the emphasis the lecturer placed on seeking the law on a particular issue and knowing how to work with legal authorities (see, for example, pp. 127, 147). This was most pronounced in the generic role of the lawyer, the attorney and the advocate. The judge, in turn, was strongly represented as operating within a web of legal precedent. While his capacity to move within this semantic field was not completely constrained, legal authority serves to rein him in and discipline him (p. 175). At one point, however, the lecturer stated the judge's need to separate law and morality in explicit terms: The judge must 'look for the law' and set aside his 'personal baggage' (p. 175). The separation of law from moral issues was also affirmed by the lecturer's sweeping devaluation of natural lawyers, who believe that moral criteria are intimately bound up with determining the status of a rule or principle as law (p. 137).

In a number of other representations, however, the lecturer pointed to the presence of, or at least the need for, undeniable moral sensitivities. While this was not strongly evident in the other legal professional roles and, in particular, the role of the judge, the parties appearing before magistrates were represented with strong positive or negative moral overtones: They included the 'bugger' who was 'lounging around … drinking out his money' and giving the rest to his eighteen-year-old girlfriend, versus the domestic worker who was a 'wonderful decent person'; the corrupt politician; and the 'civilized, first-class' bookkeeper who steals from her employer to finance her children's education (p. 214). These representations suggest that it is magistrates themselves who cannot resist a moral categorization of the persons with whom

[98] The very first lecture in the series – which explicitly focused on the separation of law from morality by way of a discussion of the legal theories of natural law and positivism – however clearly affirmed that this was the case.

they engage. However, the failure of the law to affirm the lecturer's representation of an intuitive moral evaluation of the parties in each case transmits a complicated message: On the one hand it affirms the need to separate law and morality, on the other it presents the outworking of the law as potentially arbitrary or unfair (p. 215).

In addition to the moral categorization of parties, in a few instances legal professionals were represented as being able to speak with a powerful moral voice on particular issues: The morality of mixed relationships, the trustworthiness of women as regards monetary issues, the societal response to sodomy, and so on (pp. 130, 175). Most importantly for a South African context, they were represented as having had the capacity to either support or speak out against the system of apartheid (pp. 178, 184, 185). This points to the moral *effects* or *significance* of the work of the law, an aspect of legal professional work that involves a fusion, rather than a separation of law and morality.

Finally, in the case of the attorney, the lecturer emphasized the apparently pervasive *lack* of morality in their handling of trust monies (p. 149).

The horizon of observation thus exhibited a contradiction: On the one hand, advocacy to separate law from morality, but on the other a depiction of legal professionals who cannot avoid making moral judgments in or considering the moral effects of their work. Similarly, they cannot avoid the need for moral conduct in their own practice. These issues were not, however, explored in any great depth.

Law and emotion

As regards the need to maintain an emotional distance from professional work, the lecturer espoused the norm of emotional disentanglement directly and explicitly in both the roles of the judge and the magistrate. It was evident, firstly, in his strongly worded statement regarding judges leaving behind their 'personal baggage' when sitting in judgment. What was particularly interesting about this extract was the manner in which a moral stance on sodomy was expressed by way of a fairly extreme emotional reaction – the judge finding sodomy 'abhorrent' (p. 184). Notwithstanding the intensity of his feelings, therefore, the judge needed to set aside

both a moral and an emotional response. The lecturer's subsequent anecdote of his experience as a magistrate sitting in judgment of a man who refused to pay his maintenance illustrated both the difficulty of emotional distancing and the perils of allowing your emotions to hold sway (p. 207).

Apart from these two direct instances, in a number of other representations legal professionals were represented as needing to function with a façade of emotional calm in situations where tempers typically may have flared and conflict ensued. Examples here include the manner in which the advocate is represented as responding to the judge who threatens to throw his case out of court on the basis of a technical error (p. 151); and the manner in which the magistrate changes his tone from one of irritation to submission when he is called by Judge Foxcroft on a Saturday evening (p. 207). The only legal professional who is at liberty to allow his emotions free reign is apparently the legal academic, as manifested in the lecturer's anecdote regarding the love triangle in which Dr Van der Merwe became entangled (p. 222).

The lecturer's representations relating to the emotional content of legal professional work thus tended to affirm the norm of emotional separation and distancing.

3.3.3 The legal professional workplace has a predominantly negative emotional tenor

In addition to the need to promote emotional distancing from an issue, commentators have argued that the 'psychic malaise' in which the legal profession is apparently mired (or at least, legal professionals in the United States of America) – based on findings that levels of depression, alcoholism and drug dependency amongst lawyers were almost double that of the population as a whole – has its roots in traits that are developed during the law school years (Goodrich, 2000: 148). Law school, it is claimed, fosters a competitive culture, producing lawyers who are arrogant, confrontational, controlling, unfeeling, rude and ruthless (Menkel-Meadow, 1991: 7; Nicolson, 2008: 149; Schechter, 1996: 374, 379, 389; Webb: 1996: 274).

Once again, the question was not so much whether these attitudes and traits were being fostered in law students, but whether they were exhibited in the legal professionals that peopled the lecturer's classroom talk.

Both direct and indirect representations of the emotional tenor of legal professional work in fact strongly sustained this theme. Directly expressed negative emotions predominated across all of the predominant legal professional roles. They included the emotions of fear, hatred and terror (p. 159); boredom and distrust (pp. 184-185); aversion, irritation, disgust and anger (p. 209); jealousy (p. 222); and nervousness and discomfort (p. 229). These alone painted a fairly grim picture of life in the law but they were affirmed by a variety of indirect representations. Foremost among these was the positioning of legal professionals in situations that would commonly be regarded as 'stressful'. In the preferred career path, they are present from the start: The young articled clerk must find articles and face being 'vetted' in a formal interview to determine whether he or she is a 'fit and proper person' (p. 142-143). Having secured these they must hit the ground running and begin earning fees even though they do not yet know the ropes (p. 157). While the advocate enjoys the freedom of working on his own, he waits in silent desperation for attorneys to bring him work (p. 144). Almost all the roles are represented as having too much work for the time available in which to complete it. As a result they need to work extraordinarily hard. The articled clerk needs to put in 18 hours a day to clear the 'mountain of files' on his desk, the attorney must 'work like a dog', the advocate must make do with 4 hours sleep a night (p. 157). The stress of the situation is heightened by the need for technical perfection – the stakes are high for articled clerks, attorneys and advocates because if the file they place before the judge is not technically perfect they risk their case being thrown out of court (p. 173). Even if the file is perfect they need to be ready to respond to the unexpected in a trial: The lawyer, for instance, needs to look 'very hastily' for an authority in court in order to respond to a challenge from the judge and to 'think on his feet' (p. 132). The lecturer justifies the stresses of these environment, however, by holding that legal professionals are people who 'thrive' on nervous tension (p. 158). While the judge does not face these kinds of stressors – they, for instance, whilst still facing a large workload and legitimately claim the time in which to complete it – they too must deal with stressful situations such as being 'scrutinized' as a potential candidate for the judiciary, by the Judicial Services Commission, proving themselves for purposes of promotion, and dealing with changes in the political order (p. 179). Stressful situations are just as evident in the shadow as in the preferred

career path – the magistrate, for instance, must process a criminal every five minutes in the directional court, a situation comparable to the casualty ward in Hillbrow (p. 210).

The harsh nature of the legal professional world also emerged in other ways. Advocates 'attack' and 'chip away' at witnesses (p. 150), attorneys 'shunt' their legal secretaries around (p. 152), advocates use their friends in order to obtain 'fat briefs' (p. 155). Judges show no mercy in refusing to condone a technical error on the part of the advocate (p. 173). The 'old battleaxe' of a magistrate refuses to allow for any mitigation of sentence in the woman who stole from her employer (p. 210). Magistrates feel good about the accused people whom they sentence 'rotting' in jail (pp. 210. 213, 217). All of these representations are indicative of a professional world in which people and relationships do not appear to be highly valued. They appear to run counter to the calls for 'respect' and 'tolerance (generic LL.B statement, see Exit Level Outcome 6 and 9).

This overview thus tends to affirm claims in the literature of the legal professional world being represented in the classroom in a manner that is harsh, stressful and antagonistic. The horizon of observation established by the lecturer however, also hinted at the *reasons* for the negative emotional tenor of the professional environment.

3.4 Legal relationships

The extent to which the lecturer's representations fleshed out the complex web of relationships in the legal profession was a surprising finding in the analysis. This web encompassed relationships amongst legal professionals themselves, and relationships with clients and parties. This section discusses the multiple hierarchies that appear to govern the former, before turning to the rather ambiguous space occupied by clients and parties.

3.4.1 The legal profession is structured by multiple hierarchies

In his famous article 'Legal education and the reproduction of hierarchy', Duncan Kennedy put forward the strong claim that 'legal education causes legal hierarchy' (1982: 607). He linked the characterization of legal education as a reproducer of hierarchy to a number of features of the law school experience, including the inculcation of a set of attitudes toward the economy, society and law in general, the institutional practices of the law school itself that mirror and

reinforce the importance of hierarchy, and the 'realities of professional life' that students encounter in their second and third years as they begin to search for employment (according to the system in the United States of America – ibid: 595 – 607). Kennedy alludes to the construction of a broad hierarchy of work with, on the one hand, the preferred option of 'jobs in the hierarchy of the bar' (which encompasses, in the United States of America,[99] work at large and prestigious firms), against the less-preferred and subtly denigrated possibility of 'work outside the established system' – legal services for the poor and neighbourhood law practice (ibid: 601 – 2). He also alludes to internal hierarchies within the established system, the 'hierarchical life' of the bar, the legitimacy of which is coded 'into the smallest details of personal style, daily routine, gesture, tone of voice, facial expression, a plethora of little p's and q's for everyone to mind' (ibid: 602). He notes how the teacher/student relationship in particular models subsequent relations between junior associates and senior partners and between lawyers and judges (ibid: 604) through a variety of interactional moves that ensure deference on the part of the student toward the teacher (ibid).

Others have affirmed that the law school experience constructs a hierarchy of work whereby students are discouraged from pursuing career options in the public services as opposed to private practice, from providing access to justice for the poor and from providing pro bono legal services (Erlanger & Klegon, 1978 – 9, 1996; Granfield, 1992; Schechter, 1996: 384). This flies in the face of both the MacCrate and ACLEC reports which affirm that the profession has a responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them and to ensure that justice, fairness and morality are promoted in their practice (American Bar Association, 1992: Chapter 5; ACLEC, 1996: para 2.4). However, there has been very little commentary, if any, on the manner in which the classroom experience constructs the internal hierarchies of the legal profession.

My analysis of classroom representations of legal professionals affirmed the private/public hierarchy as a broad structuring principle for the legal profession in general. The manner in which this achieved was a less a case of actively *discouraging* the provision of legal services to

[99] In the United States of America there is only a single bar and thus no distinction between attorneys who work in firms and advocates who work at the bar.

the poor, and more a case of bestowing far greater attention to the private career path and its promise of commercial success. As indicated in chapter five this could be seen in purely quantitative terms: Thirty quotations to constitute the private career path (p. 141) as opposed to a mere ten constituting the 'shadow' career path of work in the public service (p. 196). Questions of access to justice and the provision of *pro bono* legal services simply didn't feature in the lecturer's classroom talk at all. They were thus rendered insignificant through their absence. Together with the factor of emphasis, the private was privileged over the public by way of three additional discursive strategies. The first consisted in direct devaluations of the people who work in the public service, as when the lecturer remarked that 'the bright lawyers are in private practice. And only the duds go into civil service and they draft laws' – p. 127); or the places in which public service work occurs, as when he compared the lower courts (where those who pursue a career in the public service will predominantly function) to a 'dung heap' (p. 209). The second related to his framing of the value of pursuing a career in the public service in purely instrumental terms, as a means of gaining experience to enter the private part of the profession at a later stage (p. 203). Thirdly, the lecturer actively positioned students' probable point of entry into the profession as an entry into the *private* part of the profession (p. 141).

The internal hierarchies within both the preferred and shadow career paths constituted a major focus in the law lecturer's talk. Within both paths there was a clear progression of roles that moved from a lower to a higher status (pp. 141-142; 196). Even more surprising was the *range* of semantic moves through which such internal hierarchies were constructed. The coding of action as active or passive functioned to establish internal hierarchy only to a certain extent: Apart from the initial actions of seeking employment, for instance, articled clerks were almost always passive in relation to attorneys (p. 151). However, advocates – who occupy a higher rung in the preferred career path – were represented as passive in relation to attorneys as regards obtaining work (p. 150). The coding of action as semiotic/material tended to serve as a better indicator of internal hierarchies as in, for example, the distinction drawn between 'drafting' (done by civil servants) and 'creating' law (done by the bright lawyers who become advocates and then judges) (p. 127); the progressively more semiotic actions of articled clerks, attorneys and advocates respectively in relation to law and the semiotic nature of the

advocate's actions toward clients (p. 147). Roles higher in the legal professional world were represented as exercising power over a far greater range of resources than the counterparts lower down (pp. 152,182). Whilst positions in the lower echelons tended to be associated with emotion (p. 152), the highest roles – the advocate and the judge (and the lawyer to the extent that the representations in this regard invoke the role of the judge) were represented as acting, or at least needing to act, with cool, unemotional calm (pp. 132, 184). The legal professional's relationship to time (pp. 132, 157, 182), their ability to influence their conditions of work (p. 178) and the use of seniority as a basis for categorization (pp. 155, 163) also mirrored the constructed hierarchy of the legal profession in the lecturer's classroom talk.

In addition, therefore, to a horizon of observation that was strongly bifurcated into the public and the private, the lecturer's classroom talk reproduced a perception of the legal profession as being structured by fairly rigid, but at the same time subtle and possibly even unspoken, conventions that determine 'seniors' and 'juniors'.

3.4.2 The client is simultaneously elevated and backgrounded

According to the various statements on legal professionalism outlined in chapter one, clients should occupy a prominent position in the legal professional world. The MacCrate Report posits the competent representation of clients as part of its first fundamental value. Indeed the legal profession is defined as one 'dedicated to the service of clients' (American Bar Association, 1992: Chapter 5). Bringing in another dimension, the ACLEC Report identifies representing clients without fear or favour as one of its six legal values (ACLEC, 1996: para 2.4). The generic LL.B statement in turn refers to the need for young lawyers to be 'responsible', 'respectful' and 'effective' – traits which are all of direct application in the lawyer-client relationship. As already noted above, however, the literature speaks of legal education producing young lawyers who are arrogant, confrontational, controlling, unfeeling and rude (Menkel-Meadow, 1991: 7; Schechter, 1996: 374, 379; Webb: 1996: 274) which, if true would have a detrimental effect on the integrity and value of a legal professional's relationship with his or her clients.

My research cast this issue in a somewhat different, more nuanced light. To begin with, the category of the 'client' is problematic because as my analysis of the representation of social

actors showed, clients only really featured in relationship to the generic role of the lawyer and the roles of the articled clerk and the attorney. In the case of the judge and the magistrate, the 'client' becomes a party who appears before the adjudicator. The change in category could involve the need for a different range of ethical prescriptions (hinted at in the lecturer's anecdote regarding the man who refused to pay maintenance; i.e. that it was not proper to examine him from the bench – p. 216). Moreover, in the case of the advocate, the 'clients' are really the attorneys, and this constitutes one of the many ways in which the actual clients, the people embroiled in a particular type of dispute, are backgrounded. In the case of the public prosecutor, the client is also the State and broader civil society who have an interest in the effective prosecution of criminal offences. I also found it notable that one particular kind of client, namely commercial entities – likely to feature extensively in at least civil claims, did not feature at all in the lecturer's classroom talk (p. 190). In the ensuing discussion, however, I will use the term 'clients' to refer primarily to the private individuals who seek the legal services of an advocate/attorney, or who appear as parties before judges/magistrates.

The treatment of clients was slightly different between the preferred and shadow career paths. Two somewhat contradictory themes predominated in the preferred career path: The backgrounding of clients on the one hand, and the positioning of clients as one's 'bread-and-butter' on the other. Across all the roles constituting the preferred career path clients and parties were backgrounded in the social action. I highlighted, at numerous points, the range of discursive resources by which this was achieved (pp. 135-136, 164, 189, 213). Generally speaking, from 'people' they become identified in terms of the main categories of legal doctrine ('a divorce' or a 'rape') to the more generic appellations of the 'case' or the 'matter' with which the legal professional has to deal. These discursive moves functioned to remove the client from the social action with the emphasis then shifting to the legal professional's relationship to law, language and other legal professionals. The progressive distanciation of the client in the lecturer's classroom talk would thus not seem to be conducive to constructing the client as an object of service, as the statements on legal professionalism require. The metaphorical representation of the client as the legal professional's 'bread-and-butter' that peppers the lecturer's representations at various points (pp 131, 136, 155) does not ameliorate this. The

manner in which this metaphor is used conjures up more of a sense of the legal professional needing to be 'fed' by, rather than standing in a position of service towards the client.

In the case of the shadow career path, the parties being prosecuted by the public prosecutor in proceedings presided over by the magistrate were more likely to be foregrounded than backgrounded (pp. 201, 213). This is understandable if one recalls that the primary objects over which roles in the shadow career path exercise power are the parties in a case, rather than law and language. The 'ruthless' manner in which public prosecutors and magistrates deal with the parties before them has already been mentioned in a foregoing section. A weak sense of service – less towards the State but more towards the victims of criminal behavior – was manifested in the empathy expressed by the magistrate toward the women whose husband refused to pay maintenance (p. 214) and in the public prosecutor's awareness of the relationship between the manner in which he prosecuted the credit card fraudster and the ability of American Express to recover damages in a subsequent civil claim (p. 201).

The lecturer's representations in this regard, therefore, did not situate the client in a central position in the horizon of observation.

3.5 The social profile of the profession

Both the MacCrate and the ACLEC Reports emphasize the importance of ridding the legal profession of bias and promoting equality of opportunity. While the MacCrate Report refers specifically to bias on the basis of race, religion, ethnic origin, gender, sexual orientation or disability (American Bar Association, 1992: Chapter 5), the dominant conception in commentary upon the legal profession holds out gender (male), race (white) and class (middle- to upper-class) to be predominant forms of bias (Kennedy, 1982: 605; Kronman, 1993: 292; Sommerlad, 2007). Writing in the early 1980s Kennedy observed that teachers were overwhelmingly white, male and middle-class and that over time a white, male, middle-class tone assimilates and predominates over other voices (female, black and poor) that also constitute the student population.[100] Writing in the early 1990s, however, Kronman noted how the demographics of

[100] Describing the process of assimilation, Kennedy writes: 'Its not that the teacher punishes you if you use slang or wear clothes or give examples or voice opinions that identify you as different, though that might happen. You are likely to be sanctioned, mildly or severely, only if you refuse to adopt the highly cognitive, dominating mode of

the legal profession in the United States of America had become more diversified with at least greater numbers of women and students from a wider range of socioeconomic backgrounds entering the profession (1992: 293). This trend is affirmed in the ACLEC Report (ACLEC, 1996: 16).

As regards the social profile of the profession, my focus was to determine whether male, white and middle- to upper-class classifications predominated in the lecturer's representations of legal professionals. I also took note of instances where the lecturer related these classifications to students in a manner that could be viewed as enforcing a male, white, middle-class ethos. Although the lecturer himself, as detailed in chapter 3, was white, male and (as he intimated at various points during the course) probably of the upper class, this was not the norm for the lecturers in the course as a whole, at least as regards gender and race. In the year in which the course was presented the lecturer was the only male amongst six lecturers and one of two whites, the remaining lecturers being female and black or asian.

As Figure 14 below indicates classification on the basis of gender overwhelming foregrounded the male across all legal professional roles.[101] Nominations in the text generally followed a similar pattern.

discourse that everyone identifies as lawyerlike. Nonetheless, the indirect pressure for conformity is intense' (1982: 605). He also notes how it is unlikely that students at the brunt of racist, sexist or otherwise discriminatory treatment will do anything about it in class (ibid).

[101] There were also no female classifications in the roles of the public prosecutor, state advocate and Director of Public Prosecutions.

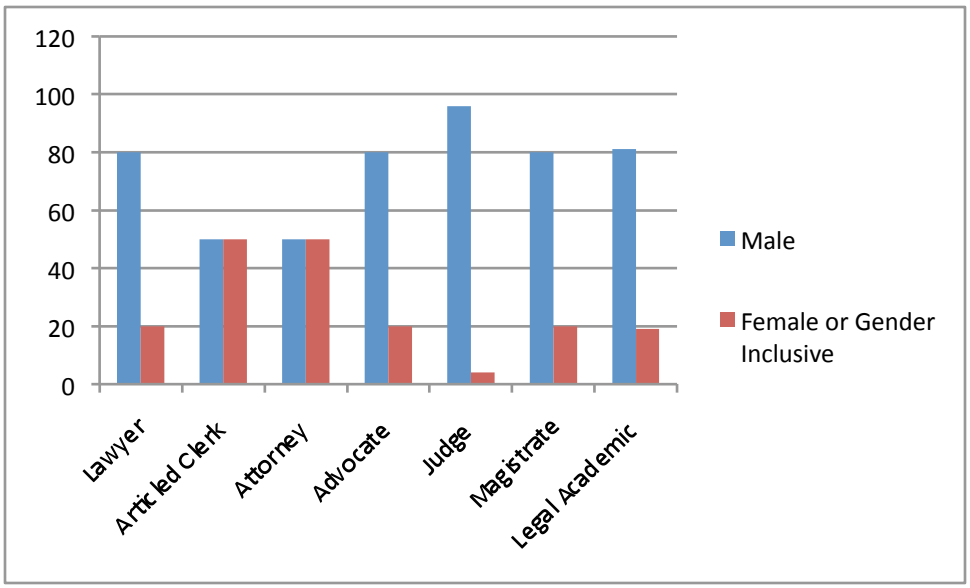


Figure 14: Percentages of male versus female categorizations across legal professional roles.

While male and female classifications were on a par for the roles of the articled clerk and attorney (the lower echelons of the preferred career path), female classifications were disproportionately lower for all other roles. Interestingly, given the statistics set out in footnote 20 above this is an accurate reflection of the constitution of the advocates' profession and the judiciary.

In addition to the underrepresentation of women in the roles of the advocate, judge, lawyer, legal academic and magistrate there were a few noticeable instances of female stereotyping in the data, both occurring in relation to the role of the advocate. These included the lecturer's advocacy regarding 'power dressing' (pp. 155-156) and his comments regarding the stereotypical female advocate (p. 161). In contrast there were no stereotypical sketches of male advocates or other male legal professionals.

There were a few instances where the lecturer applied gender classifications to students directly: For instance his reference to Student 1 as 'a beautiful girl from Scotland' whose physical beauty is 'not going to help' in being a successful lawyer (p. 143). At another point, the application of gender categories is once again centred on physical appearance when the lecturer speaking as if in the voice of the client disparages a student for wearing a pink Oxford tracksuit (p. 155). It is possibly through representations such as these – ones which play at the

boundary of the extra- and the intra-discursive by associating extra-discursive constructions of role with concrete individuals – that Kennedy's observation of an 'assimilation' of students to a male (and possibly white and middle-class, depending on the content of the representation) ethos takes place. In all instances the students who were at the 'brunt' of this sexist treatment as well as the other students in the class treated these remarks as if they were a 'humorous' way of bringing across a point and did not challenge the lecturer's representations in any way.

Across all the legal professional roles, classifications based on race and class were either not evident, or were thickly veiled by the need to understand the context. This included the lecturer's admonition of black students' use of the phrase 'what what' (p. 134) as regards racial classification;[102] and his references to annual salaries and material resources at the disposal of attorneys, advocates (p. 162), and judges (p. 187) as regards classification on the basis of class. The role of the magistrate presented interesting examples of both race and class classification: The complex nature of racial relations in South Africa was, as explained in chapter five, were subtly coded in the lecturer's anecdote regarding the magistrate Mr Andre Legransie whereby he noted his 'embarrassment' in needing to point out that Mr Legransie is a person of colour (p. 212). While the lecturer's reference to throwing a dinner party whilst a magistrate situates this role in at least the echelons of the middle class, his emphasis on the 'lowlifes' who appear before magistrates associates this role with the lower classes (p. 213).

What these classifications in respect of race and class have in common is that they are extremely implicit. At no point was there an explicit discussion or even reference to these forms of bias in the legal profession even though, as the statistics in footnote 20 indicate, racial discrimination is a very real issue – at the very least in the case of the attorneys' and advocates' professions.

[102] One of the most fascinating inputs regarding the role of language in racial discrimination was the 'Report on Racism in the Cape Provincial Division' compiled by the contentious Judge Hlophe in 2005. One of the instances of racism reported on in this document concerned a white, male judge correcting the grammar of a circular compiled in English by a black African official in the Department of Justice. The judge had written on the circular: 'Corrected so as to render intelligible'. The circular had been sent around by Judge Hlophe who was Judge President of the Cape Provincial Division of the time. The regarded the white male judge's corrections as insulting in the extreme because the act implied that Hlophe himself did not have the capacity to correct the errors.

3.6 Summary

Looking at the pattern of the lecturer's representations relating to the nature of legal professional power, the purposes and values of law and the legal profession, the nature of legal work, legal relationships and the social profile of the profession, it appears that the horizon of observation established tends toward claims made in the literature on the teaching of legal ethics: The lecturer affirms the power of legal professionals and the centrality of law and legal rules in the exercise thereof; tends to foreground external rather than internal goods; tends to devalue legal professionals; affirms the adversarial model of dispute resolution as a framing feature of legal professional work, the separation of moral and legal issues, and the need to emotionally distance one's self from the issues in a case; reproduces the hierarchy between private and public forms of work; fails to affirm the centrality of the client; and reproduces the gendered social profile of the profession while failing to address racial and class discrimination. This is not surprising since, as I pointed out in chapter three, the lecturer can be regarded as an illustrative case based on the views he expressed toward the legal profession in his interview. This summary, however, belies the subtlety and the complexity of his representations. The range of objects, for instance, over which legal professionals exercise power, the range of available internal and external goods, the difficulties associated with separating morality and emotion from one's engagement with a case, and the intricacies of the hierarchies that pertain among and within the various legal professional roles.

4. DISCUSSION OF CLAIM THREE

In chapter two I referred to Van Leeuwen's understanding of the recontextualization of social practices which occurs when a social practice shifts from one context to another. This entails transformations of various kinds, in particular, substitutions, deletions, rearrangements, repetitions, and the addition of reactions, purposes, legitimations and evaluations (2008: 17 – 21). In the final part of this chapter I briefly consider the implications of the particular classroom I studied as a recontextualizing space for the social practices of the legal profession.

Central to this discussion is the understanding that discourse is both determined by, and determining of social structures. It reflects existing social arrangements and can function to

either sustain or transform them. The variables that determine this are probably extensive and cannot be canvassed here. In this section I consider only two: The outworking of the lecturer's authority in the classroom in terms of discursive choice, and the extent to which the lecturer's representations constructed agency.

4.1 Lecturer authority and discursive choice

The lecturer occupied a position of authority in the classroom not only by virtue of the conventions that apply between lecturers and students in a tertiary setting but also because he was white and male. In addition, however, the lecturer's personality, physical appearance and movements within the classroom supported such institutional authority. He is a large man, who speaks fairly loudly and eloquently. During most of the lectures he positioned himself behind the lecturn much like a judge behind his desk on the bench. His pedagogical framing of each lecture was very strong. He appeared to gain the students' respect, particularly when he spoke of his experience in practice. These features, in themselves, bestowed his representations of legal professionals with authority and an enhanced significance. The first-year students, possibly because of the nature of the authority that he exercised, but also because they had no alternative experience on which to base an argument, never challenged or questioned any of the representations he made – even when these were arguably sexist as in the instances of the female stereotyping of advocates. His position of authority thus afforded him a fairly broad discretion to effect the transformations recognized by Van Leeuwen – he was free to add, substitute, rearrange, evaluate and legitimate – to present a version of the social practice of legal professionals as 'truth'. His representations might have been considerably more qualified if, for instance, the students in his class had already had some experience of legal practice.

In addition to the discursive choices the lecturer could make regarding the content of the social practice, his authority also enabled him to freely *position* students in relation to the representations he was making, and to *cement* the meanings he was constructing with varying levels of certainty.

The lecturer's positioning of students was effected through his use of the pronouns 'you' and 'we'. The latter functioned as a technique of inclusion. When the lecturer stated, for instance,

'We know how to read a court case. We know how to read a contract. We know the mysteries behind the legal texts' (p. 128) he positioned the students alongside himself as a member of the elite 'monopoly' that is the legal profession. In saying: 'Let us talk about the legal profession now shortly ladies and gentlemen. It's something that fascinates you … and … let us start … not at the top but … at the part of the profession which would probably be …. Where you're going to enter the profession' (p. 141) he not only positioned them in relation to entry into the preferred career path but also assumed and constructed their desire to do so. When he stated: 'if you are opening litigation …' he positioned the students in a hypothetical future legal professional role that, at the same time, functioned to assure them that this would occur (p. 129). However, unlike Cramton who claimed that students are invariably positioned as advocates in legal classroom talk (1977: 256), and even Mertz who found that students were predominantly positioned in the role of the lawyer through the technique of 'footing' (2007: 105), the lecturer I studied positioned students in a variety of roles. In relation to the role of the judge, for instance, he positioned the students in the role of an accused who has been found guilty and wishes to appeal against the decision (p. 74). In the case of the magistrate he positioned students both as a party to a civil case ('If *your* dispute is less than R100 000 or more … then *you* go to the magistrate's court and the magistrate's court hears *your* case' (p. 205), and a criminal matter ('the magistrate will decide whether *you're* going to be released on bail, or whether *you're* going to be kept in prison' – M-SAct5a, p. 206). The lecturer's authority to position the students in relation to the representations he was making thus formed part of the discursive choice he exercised in the classroom.

The lecturer's representations also functioned to cement representational meanings with varying levels of certainty. As highlighted at varying points in chapter five, the two linguistic constructions I found to be particularly powerful in this regard were the use of relational clauses and what I have termed 'if-then' constructions. As explained in chapter four, relational clauses are one of six 'process types' in Halliday's transitivity system (2004: 170) and they function primarily to classify the world by relating one experience/object to another. They therefore seem to have a particularly powerful role to play in constructing reality. 'If-then' constructions, on the other hand are sentences comprising clauses which stand in a conditional

semantic relationship to one another (Fairclough, 2003: 89). In these constructions the clause containing the condition codes an implicit assumption about what exists, or the way the world simply 'is' (ibid: 55). They similarly function, therefore, to cement meanings.

Mindful then of the kind of work such constructions can do, it was interesting to determine the contents to which they were applied; i.e. which aspects of legal professional life were in a sense privileged and cemented with greater emphasis through the use of these constructions. Beginning with relational clauses, the lecturer used these to define the abstract entities of law ('Law is an elitist or exclusive profession (p. 127)) and justice ('Justice is not something that you can rush … justice is not something that uh you can use a sausage machine for' (p. 182). They were also used to define various professional roles (an advocate is 'the person who appears in court' (p. 160); a judge 'is the one evaluating the evidence' (p. 174) or 'the representative of society on the bench' (p. 193) or the kind of work undertaken by various professionals ('That is what lawyers do. They argue to convince you' (p. 136). In these instances, the definitions were linked to particular social actions. Roles, and the work undertaken by various roles were also linked to evaluations as when then lecturer remarked: 'there's nothing worse than a professional typist … There is nothing, nothing worse' and 'they are absolute terrors' (p. 165; 'a court is a meritocracy, it is something that is based on merit, it's based on on um professionalism' (p. 190); being an advocate 'is only for the very best, reserved for the very best lawyers (p. 166), amongst others. This kind of relational clause requires a cautious approach because it is less objectively based in the social practice and more sensitive to the recontextualizations that occur when a social practice is represented within another. Situating an evaluation within a relational clause seems to bestow that evaluation with a greater force than if it were embedded in the text in other ways (e.g. through adjectives or adverbs).

If-then constructions on the other hand also posit a condition for a certain state of being or situation that is presented as inevitable or obligatory. So when the lecturer says 'If you're a lawyer, you must never do anything if you are in a bad mood or if you are emotionally unstable' (p. 132) it cements emotional disentanglement from a legal dispute with a heightened force. Or when he remarks that 'if you are at the bar … you rely one hundred percent on the side-bar' (p. 143) he constructs the hierarchy and relationship between advocates and attorneys with a

particular solidity. In other cases, however, 'if-then' constructions seem to code an inevitable consequence, as when he states that 'if you go directly from university to the bar you're going to sit in an office somewhere here in Johannesburg and wait for your telephone to ring and it's never going to ring …' (p. 143) or 'if you enter into a law firm as an articled clerk you are a threat to everybody' (p. 151). These kinds of statements construct the world in a fairly rigid way, not allowing for the possibility that different people might have different experiences of the same situation.

In certain places the lecturer used if-then constructions and relational clauses in close proximity to one another, as when he said 'you know that is … what makes you a lawyer. If you don't read court cases you're not a lawyer' (p. 126) or 'if you are going to become a lawyer you must be informed in our society … A lawyer in society is somebody who's informed' (p. 128) or legal certainty 'is very very important. Your society is based on legal certainty. If you have a society where there's no legal certainty … then you live in chaos' (p. 193). The combination of these constructions conveys an even more powerful impression that 'this is the way the world is'.

4.2 Agency

Speaking out against the occlusion of agency in studies of corporate influences on individual lawyers Kuhn argues that portraying institutionalized discourses as driving subjectivity risks erasing the active, choice-making subject (2009: 682). He notes how contemporary identity research shows that subjects are 'interpellated products of social institutions who simultaneously exercise agency, constrained though it may be' (ibid). This is completely in line with the position adopted in this research and outlined in chapter two; i.e. that personal and social identifications emerge from the complex interactions of identity regulation and identity work, with the latter concept affirming that agency is indeed operative in processes of identity formation. While Kuhn and others have studied agency by squarely focusing on the 'active choice-making subject' my emphasis in this research was slightly different. I wished to understand how representations could be made to either open up or close the possibilities of construing a particular aspect of the world differently. For example, in my outline of the preferred career path, I pointed to how the lecturer constructed the beginning stages of

becoming either an attorney or an advocate in terms that highlighted the agency of the potential incumbent. You started by *studying* for the LL.B degree, *finding* a principal or pupil master, *making* an appointment with this person and so on (p. 142). The positioning of the incumbent as active in these actions tends to affirm their initiative and control over the process. A shift towards passive action then takes place – as illustrated in the lecturer's construction of the social actions of the articled clerk who is given articles, is trained, is rotated amongst the various branches of the firm, is admitted, and so on. The passive positioning of the social actors in the lecturer's representations implies a lack of social power, that one's fate is dependent upon the decisions and actions of others. Similarly, in the progression from being an advocate to a judge, the predominance of passive constructions in the data carries with it the message that potential judges are vulnerable and have far less control over the process, compared to the considerable powers they wield in the adjudicatory process. What this potentially indexes is the relationship between the representation of a social actor as active, and extent to which the recipients of such representation then identify with being active and able to make choices, with being in control of their own destiny.

The coding of action as active or passive, however, would not in itself be conclusive as to the effects of a representation on agency and one would need to have regard to other semantic moves in the text. The most striking instance of this in the representations constituting the preferred career path was the lecturer's multi-dimensional closure of the option of becoming an advocate straight out of university: He points to the practice of attorneys referring work to advocates but then immediately invokes the critical resource of 'reputation'; he invokes depressing images of the failed advocate; he evaluates the action of going straight to the bar from university as foolish; he invokes the real-life successful example in the anecdote of his former student and he affirms the practice of referral between attorneys and advocates via relational clauses on two occasions (pp. 143-145). Cumulatively, these strategies seem to restrict the agency of one who perhaps thought they could apply to the bar straight after their studies.

I also took note of instances where the lecturer's representations constructed the qualifications for or criteria for belonging to a particular role, and the extent to which these 'qualifications'

allowed for action, or simply had to be accepted as a given. So, for instance, when the lecturer states that 'if you don't read court cases you're not a lawyer' (p. 126), or 'if you are going to become a lawyer you must be informed in our society' (p. 128) he posits reading court cases and ensuring one is informed as essential to becoming a lawyer. Both these actions allow for a fairly extensive degree of agency – reading a court case or a newspaper or professional journals are things that one can choose to do and over which one can exercise control. Similarly knowing the internal politics of the legal firm (p. 148); being willing to work '18 hours a day' (p. 148); knowing attorneys and befriending in-house counsel (p. 155); and dressing the part (p. 156) allow for agency. By contrast, when the lecturer remarks 'if you are not good with languages, if you are not good with words, understanding words, writing words, speaking words, then the legal profession is going to be very hostile …' (p. 127) or 'if you're a lawyer, you must never do anything if … you are emotionally unstable' (p. 132) – he defines *dis*qualifications to the practice over which agency would seemingly have little effect. The difference lies in the object of the qualification/criteria: In the first set, the object is an action – reading court cases, or being informed, and so on. In the second the object is a trait, capacity or resource – all of which are seemingly more resistant to change.

4.3 Summary

In this chapter I have discussed the findings of the analysis in relation to the three claims derived from the conceptual frame outlined in chapter two. In respect of the first claim I have demonstrated how a micro-discursive analysis that utilizes the basic elements of social practice as a point of entry can be useful for a greater understanding of the role of representations in identity regulation. This was undertaken by demonstrating how the analytical codes developed around the model of social practice were interwoven amongst the eight primary themes identified in the lecturer's talk. In the case of the second claim, I situated each of the eight themes in relation to broader discourses on the nature of legal professionalism and the teaching of legal ethics. In doing so I found that the lecturer's representations were more closely aligned with claims made in the latter, rather than the former. Finally, in respect of claim three, and noting the institutional and personal authority the lecturer exercised in the classroom, I discussed the effect of such authority in terms of the lecturer's capacity to position

students in relation to his representations, and to construct or occlude agency in the process of making a representation.

CHAPTER SEVEN

CONCLUSION

In this chapter I return full circle – to the key research questions that guided the study and the motivation that inaugurated the research journey. I turn thereafter to some of the teaching and learning, policy and research implications of the research.

7.1 Conclusions

For ease of reference, the four key research questions that guided this research were as follows:

(a) What conceptual resources exist for theorizing the relationship between the representation of legal professionals in classroom talk and the formation of legal professional identity?

(b) Which methodological approach would best elucidate the content and form of representations about legal professionals in classroom talk?

(c) How were legal professionals actually represented in the classroom of the study? How did language function to constitute these representations?

(d) How did the lecturer's representations relate to broader discourses on legal professionalism and the teaching of legal ethics? i.e. what 'horizon of observation' did the lecturer's representations establish?

Chapter five as well as sections 1 and 3 of chapter six set out my detailed response to the third of these questions, while section 2, chapter six responds in similar vein to the fourth. Whilst interesting (and at times downright entertaining), the actual *content* of the lecturer's representations of each of the legal professional roles is the least significant aspect of this analysis. More important was, firstly, being able to show the explicit and implicit linkages between representations of basic elements of the social practice, the eight primary themes I

identified as central to the lecturer's discourse on legal professionals, and the five broader categories (nature of professional power, purposes and values of the legal profession, nature of legal work, legal relationships, and social profile of the profession) which can be regarded as pillars of this type of discourse. It is these linkages that constitute the more enduring value of the research – the awareness, for instance that the representation of social action functions not only to name and describe the actions of the practice, but also codes the nature of the power exercised by legal professionals, the hierarchies obtaining amongst them, and the nature and emotional tenor of the work; that gender classification is predominantly a function of pronoun usage and nomination; or that legal professional values are not predominantly imparted through explicit discussion but rather through the subtle choices involved in the terms used to name *every* aspect of the practice as well as the adjectives, adverbs and adjectival/adverbial phrases used to qualify such aspects.

Secondly, *that* I was able to produce such a rich narrative from an analysis of the basic elements of the social practice is in itself an important finding. It points to the value of this hitherto neglected aspect of classroom talk and suggests, importantly, that the tight coupling of professional identity formation with the explicit teaching of 'ethics' or 'professional responsibility' courses is misguided. Teaching and learning that goes toward professional identity formation is indeed pervasive and occurs whenever the lecturer imparts a representation of the profession – which probably happens in every single course taught during the course of a legal education programme.

Regarding the first research question, it is clear that there is a great variety of conceptual resources from which to choose across a range of disciplines. The concepts of 'identity work' and 'identity regulation', however, fitted my purpose well in that they enabled me to conceptualize distinct but inter-related processes, both of which are critical to identity formation. My research is essentially an elaboration and exploration of the identity regulation concept in the form that it takes through language use. As discussed in chapter two, 'role' and 'discourse' served as the primary conceptual vehicles to effect this elaboration. In line with the reformulated concept of 'role' put forward by Simpson and Carroll (2008) whereby it is shorn of its functionalist overtones (roles as symbols designating relatively stable and formal social

positions) and re-characterized in terms of a 'flux ontology' (ibid: 31), I have demonstrated how each of the main legal professional roles in the lecturer's classroom talk was discursively constructed. I found roles to be points of attraction and coherence in synthesizing a narrative on the representation of legal professionals in classroom talk.

It was the understanding of discourse employed in critical discourse analytical studies, however, that served to deepen my understanding of identity regulation the most. Thus, realizing the multi-functionality of language – the distinction between representational, interactional and identificational meanings – enabled me to understand that identity regulation through discourse is multi-faceted, occurring at least through *both* representational and interactional meanings (with identificational meanings being the resources speakers use to position themselves in relation to the other two types). This phenomenon was briefly illustrated in section 2 of chapter four where I used a short extract to show how different roles were *simultaneously* being constructed in one text.

As I have made clear at various points, however, the focus of my research was on representational meanings which are associated with identity regulation in decontextualized practices (see the distinction between contextualized and decontextualized practices introduced in section 3 of chapter two). What my engagement with Van Leeuwen's research showed is that the practice is never simply 'decontextualized', it is always recontexualized, there are substitutions, alterations, additions and so on as one practice is represented within the context of another as when the social practices of various kinds of legal professional are represented in the context of a university classroom. This implies at least a potential for the progressive reworking and reshaping of a practice – the outworking of the power of discourse to both represent but also to influence social reality.

In response to the second research question, I have set out my reasons for using CDA as the methodological approach that would best elucidate the content and form of representations about legal professionals in classroom talk in section 4.2 of chapter two above. In short, CDA provided me with an understanding of discourse as tightly coupled and *articulated* with other elements of social practice and with the resources to undertake a micro-discursive analysis of

the text. Van Leeuwen's work on representational meanings and especially his grounding of the analysis of those meanings in terms of the various elements of social practice was an invaluable aid in my analysis and subsequent synthesis of the representation of various legal professional roles and their social practices. However, his extensive range of semantic and linguistic categories was too complicated for undertaking an analysis of such an extended body of text and it was necessary for me to work with what I considered to be the 'basic' elements of social practice. The codes I developed from the work of Martin and Rose (for the representation of emotion) and MacIntyre (for the representation of internal and external goods) fitted well with Van Leeuwen's scheme. The limited range of categories I employed in my internal language of description nevertheless enabled me to construct a rich narrative for each of the main roles.

Critical discourse analysis was appropriate as a methodological approach also because it recognizes that discourse can have major ideological effects in the sense of everyday beliefs which often appear disguised as conceptual metaphors and analogies (Wodak & Meyer, 2009: 8). What my research suggests is that ideologies are not only imparted through conceptual metaphors and analogies, but also simply through the way in which people, actions and things are named or circumstances are described. The thought with which I am left after conducting this analysis is that when students take up a *manner of speaking* about legal professionals they in effect take on a particular view of the legal professional world. In the classroom of my study this view was *implicit* because the lecturer did not present his views on the legal profession in a critical light, or allow for or structure discussion but more importantly because the representations themselves were scattered and diffused.

Returning to the motivation that set the research journey in motion, I have now attained a greater understanding of my own agency and potency as this bears upon the discursive construction of the social practices of the legal professional in the classroom. It has made me, however, more convinced than ever of the need for teachers of the law to be cognizant of the full range of social practices in the legal profession into which students will find their way in order to ensure that representations of the legal profession in the classroom context are both comprehensive and authentic. Teaching students 'to think' like lawyers is not enough.

7.2 Implications

7.2.1 Implications for teaching and learning

One of the major implications of this study is that the understanding and use of representations of legal professionals in the classroom is underdeveloped and that such representations may play a far more important role in the development of legal professional identity than has heretofore been assumed. For lecturers of law in tertiary education this should entail expanding the existing focus on the nature and form of particular pedagogical interventions aimed at instilling and shaping legal professional identity – the 'continuum of pedagogies', for instance identified by the Carnegie study (Sullivan *et al*, 2007: 147) – to focusing on classroom talk as a source of discourse on legal professionalism that contributes to 'shaping their students' values, habits of mind, perceptions, and interpretations of the legal world, as well as their understanding of their roles and responsibilities as lawyers and the criteria by which they define and evaluate professional success' (ibid: 139). Because of the subtle and pervasive nature of representations on legal professionals in classroom talk, the manner in which they 'slip in' or become intertwined with teaching on other substantive areas of law (but not eschewing the possibility that the legal profession may also be a substantive topic on its own), the first responsibility of university law lecturers that flows from this study is to become aware of the extent to which such representations feature in their classroom talk. The analytical method adopted for this study may be considered helpful toward this end. Law lecturers need not undertake a full-scale critical discourse analysis of their lectures as I have done here, and indeed time and resource constraints militate against this. However, by paying heed to this study they may better understand how social action, the circumstances of social action, social actors and values are coded in classroom talk and how these elements, in turn, function to construct the nature of legal professional power, the purposes and values of the profession and so on. Following awareness, the second responsibility is to utilize such representations in a fashion that would more strategically give effect to ideals expressed in

statements on legal professionalism. The area in which this would probably make the most dramatic difference would be in the representation of the internal goods of the profession which, I would argue, require a far more explicit and careful focus. However, as I have shown the representation of every aspect of the social practice of the legal professional implies a discursive value choice that would need to cohere with the representation of internal goods. As outlined in the section on implications for legal research below, the strategic use of representations of legal professionals in classroom talk needs additionally to go hand-in-glove with a better understanding of the nature and forms of legal professionalism in South Africa.

For law students, the key implication of this study is an awareness of the manner in which representations of legal professionals in classroom talk function in their own processes of identity work. With such understanding they might be better situated to critically engage with the representations being put forward in the classroom context and the manner in which they are positioned in relation thereto, even where they lack sufficient practical experience to offer alternative representations.

7.2.2 Policy implications

The implications of this study for the policy leaders of legal education – the deans and heads of school of law, working collaboratively with the organized profession – are at least two-fold. Firstly, deans and heads of schools of law may initiate more systematic surveys of the nature and extent of representation of legal professionals taking place in the classrooms of their schools. They would, in this way, become more aware of the pervading ethos on legal professionalism being communicated in their institutions of learning, as well as the possibility of areas of incoherence and inconsistency. Such surveys may be done for particular courses or through a strategic selection of courses throughout the course of study of a legal degree. In order to plumb the depth and richness of such representations surveys should be based on a qualitative, discursive approach in line with the method adopted for this study. This clearly has resource implications in terms of funding, human capital and time but Mertz' work – in which the contracts classes in eight law schools in the United States of America were recorded and transcribed verbatim and subsequently analyzed – shows that it can be done.

Secondly, deans and heads of schools of law could collaborate with the organized legal profession to provide opportunities for university teachers of law to obtain greater exposure to the social practice of different legal professional roles. This may take various forms, including the possibility of ethnographically-oriented research, limited internships or the use of sabbatical time spent working in the different branches of the legal profession, and staff exchanges. These suggestions are premised on my personal experience and awareness that university teachers of law may have no experience in the social practices of law at all. One of the implications of this study is that this could impact on the comprehensiveness and authenticity of their representations of legal professionalism within the classroom, which in turn impacts upon the identity work taking place within the student. The interventions I propose would allow university teachers of law – who do not necessarily have a desire to *be* in practice on a permanent basis – to experience and assimilate different models of the social practices of law and then bring that richness back into their classrooms. In referring to collaboration with the 'organized profession' I have in mind an expanded conception of associations which cover both the private and public spheres of the profession; i.e. associations of public prosecutors and magistrates in addition to the Law Society of South Africa and the General Bar Council. Through such relationships, and the creation of the institutional crevices that would allow university teachers of law to experience both public and private practice, the hierarchy of private over public work – the preferred over the shadow career path – may be transformed, so that a more diverse range of career options can be presented to students.

7.2.3 Research implications

At least three areas of further research flow from this study. The first, already mentioned, is for more systematic surveys of representations of legal professionals in classroom talk to be conducted within and across law schools. This would allow for more generalizable claims regarding the nature and extent of such representations to be made.

The second area of research is to examine classroom representations of legal professionals in terms of the counterpart of identity regulation – being the identity work undertaken by students at the time and/or after exposure to such representations. The design for such

research may take a variety of forms, including longitudinal studies involving focus groups, interviews and student journaling or ethnographically-oriented research aimed at understanding the contexts in which students talk amongst themselves about their future career options in the law. Such research may of course be discursively oriented or involve less text-focused forms of content analysis.

Finally, in order to gauge and guide the appropriateness of the representations of legal professionals in classroom talk, it is important to develop a richer research literature on the nature of legal professionalism in South Africa. The challenges facing the legal profession and the organizational and cultural forms that it assumes are not necessarily the same as those put forward in documents such as the MacCrate and ACLEC Reports. The transformational agenda of legal professionalism in South Africa should be informed by an accurate understanding of the diversity of forms of legal practice and associated models of professionalism that already exist. In this way the nature and depth in which significant cross-cutting challenges (such as the comprehensive articulation of the internal goods of the profession; racial, gender and class discrimination; client-centredness and responsiveness; and access to legal justice for the poor) manifest in different forms of legal social practice can be better understood and represented in classroom talk. This may establish the conditions of possibility for the next generation of legal professionals to transform the legal profession for the better for the greater good.

APPENDIX 1: ANALYSIS OF GENERIC LL.B STATEMENT

Element	Content (Source in parentheses)
Social role of lawyers	A lawyer: • *Analyzes*: Fundamental legal concepts, principles, theories and their relationship to values critically (ELO1); the law (SSO1.2); current and controversial legal issues (SSO1.3); the relationship between law and society (SSO1.4); statutes and cases (SSO2.2); • *Evaluates*: information (ELO 3); legal material (SSO3.2); different solutions to a problem (SSO5.3) • *Comments upon* the law (SSO1.2); current and controversial legal issues (SSO1.3); the relationship between law and society (SSO1.4) • *Conducts*: research (SSO2.1) • *Uses*: electronic databases (SSO2.2); library and internet facilities (SSO3.1), (SSO7.2); word-processing software (SSO7.3) • *Collects* and *organizes*: information (ELO3); legal material (SSO3.2) • *Communicates*: in a legal environment (ELO4); within a group (SSO6.1); the deliberations of group work effectively (SSO6.3); using email (SSO7.1) • *Argues*: different points of view coherently and persuasively (SSO4.1) • *Takes and records instructions* (SSO4.2) • *Counsels*: clients (SSO4.2) • *Drafts*: relevant legal documents (SSO4.3) • *Solves*: complex and diverse legal problems (ELO5), (ELO10) • *Works effectively*: with colleagues and other roleplayers in the legal process (ELO6); with members of other professions or disciplines (SSO6.4) • *Manages and organizes* his life and professional activities in the legal field (ELO8) • *Participates as a responsible citizen*: in the promotion of a just society (ELO9); in legal development at a local, provincial, national, regional and international sphere (SSO9.6)
Purposes of law or lawyers	• To sustain the development of a just and democratic society based on the rule of law (R), (EL09) • To solve legal problems (ELO5), (ELO10) • To address past and current injustices (R) • To participate in promoting the administration of justice (P) • To participate in the development of legal institutions in South African society (P) • To balance competing interests (ELO9) • To promote constitutional principles and values (ELO9)
Attitudes	• Responsible (P), (ELO2), (ELO3), (ELO5), (ELO8), (ELO9), (ELO10) • Critical (ELO1), (ELO5), (ELO10) • Innovative (P), (ELO5)

	• Respectful (ELO6), (ELO9) • Tolerant (ELO6), (ELO9) • Entrepreneurial (ELO11) • Confident (ELO11)
Ethical standards	• 'Requisite' ethical standards (P) • Can act 'responsibly and ethically as researcher and scholar' (ELO2) • Can act responsibly and ethically 'with due regard for applicable conventions (SSO3.3) • 'The learner has acquired ethical standards and values to guide and assist him or her to organize their life and professional conduct' (SSO8.4)
Values	• Criticism (ELO1), (ELO3), (SSO5.3), (ELO10) • Principles in the constitutional Bill of Rights (R), (ELO9) • Justice (R), (P) • Creativity (SSO5.3), (ELO10) • Respect (ELO6), (ELO9) • Accepting responsibility (ELO9), (ELO10) • Democratic values (R), (P) • Rule of law (R), (P) • Sustainability (R) • Lifelong personal intellectual growth (P) • Effectiveness (ELO3) • Authority (SSO5.2) • Innovation (SSO5.3) • Tolerance (ELO9)

ELO = Exit-level Outcome; SSO = Supporting Specific Outcome; P = Purpose of the Qualification

APPENDIX 2A: ETHICS CLEARANCE

APPENDIX 2C: CONSENT FORM SIGNED BY LECTURER

APPENDIX 3: DATE AND MAIN TOPIC OF EACH LECTURE

No.	Date	Topic
1	12-Feb-08	Two schools of legal thought - Natural law and positivism
2	14-Feb-08	Legal certainty
3	19-Feb-08	History of South African law
4	21-Feb-08	Sources of South African Law - Legislation
5	21-Feb-08	Sources of South African Law - Legislation contd
6	26-Feb-08	How to work with a statute
7	28-Feb-08	How to cite legislation, the concept of the common law, interpretation of statutes
8	28-Feb-08	Interpretation of statutes
9	04-Mar-08	Interpretation of statutes contd
10	06-Mar-08	Presumptions of statutory interpretation - Precedent - Court system
11	11-Mar-08	Court system contd - How to read a judgment
12	13-Mar-08	Discussion of assignment - Abbreviations used in court - Case summaries by students
13	13-Mar-08	Case summaries by students contd
14	18-Mar-08	The common law
15	01-Apr-08	The old authorities
16	03-Apr-08	The legal classification system
17	03-Apr-08	The legal classification system contd
18	08-Apr-08	Jurisdiction of the courts
19	10-Apr-08	Jurisdiction of the courts contd
20	10-Apr-08	Jurisdiction of the courts contd
21	15-Apr-08	Jurisdiction of mag courts contd - Legal profession (advocates)
22	17-Apr-08	Legal profession (advocates, judges etc)

APPENDIX 4A: QUOTATIONS – LAWYER

N = 41

Quotation 1
L1:39
In other words, if you're a natural lawyer, you must have a system - somewhere - against which you can test your positive law, your man-made law, the laws on earth. Man-made, woman-made, person-made law.

Quotation 2
L1:62 - 66
062 **LECTURER:** The law of nature, natural law [crosses floor] is one of the schools of thought that equates morality with law. You remember last week you were all very worried about that now this week you don't remember it [pauses with hand raised in front of students]. OK What is wrong with equating morality with law? Now I've led you up to the up to the water you must be able to get this one. Why is there such a huge hue and outcry against equating morality and law? [S2 raises hand] No no somebody else. Yes?
063 **STUDENT 7:** Morals differ according to the people.
064 **LECTURER:** No but you must put it like a lawyer now that's not …
065 **STUDENT 7:** Each person has their own set of morals and principles ….
066 **LECTURER:** Yes yes that's what you said and now you're just putting it in other lay terms, I want you to talk like a lawyer. What does that mean? You are hundred percent right. You are hundred percent right. Talk like a lawyer. Morality is subjective. Morality is subjective.

Quotation 3
L1:67 - 69
067 **LECTURER:** OK the second great problem with the natural law school is, and this is slightly more complicated, I'm only going to mention it don't break your heads about it, natural lawyers can never take the step of saying - I'll rephrase this so that you can write it down - natural lawyers can never, they haven't got the moral courage to say, 'if a law is unjust, you as a just citizen have got the right not to obey it.' Must I say that again? OK. Natural lawyers, no natural lawyer has ever admitted that you can use force or revolution to overthrow a government that makes unjust laws.
068 Look, if you are really a natural lawyer then the logical consequences of unjust laws - bad laws - is that if this law, take for instance the apartheid laws, if this law that says 'a black man cannot fall in love with a white woman' that these are the laws of the apartheid, you may not remember it but um but I remember it very well, that is a law against nature, You agree? Its against your its against your brain, it is against what God

says, the Christian God, it is against all religions its is against everything that it natural and that is logical. You cannot tell people that they may not fall in love because of the colour or their skin. This is what the apartheid government did. So you have a bad law. You have a law that is not in rhythm with the higher set of laws. So what do you expect a natural lawyer to do? I expect a natural lawyer to say 'sorry, is not in accordance to the higher law. It is an unjust law and therefore the citizens that is oppressed by this law have the right to disobey that law. Did they do it? [Pauses]

069 No. St Augustine, both St Augustine and Thomas Aquinas said [pause] 'Order is more important than justice'. Order is more important than justice. And therefore, you do not as of right, as a citizen, have the right to disobey an unjust law. What do you have, according to these church fathers? You have the right to ask the church fathers to decide whether this law is just or unjust and then take the steps that they may, that they deem necessary to oppose the law within the status quo. OK.

Quotation 4
L2:67
But the very first thing that we work with as lawyers, the very first thing that can create uncertainty of course is language.

Quotation 5
L4:07

07 What we are going to do today however, if there are no further questions on the previous work, um, what we are going to do today, after we've done the philosophy and the history of law, is we're going to start doing the nitty-gritty. You are um you are um candidate lawyers, you all want to become lawyers or hopefully all want to become lawyers of some kind. Um and if you're a lawyer you must know the tools of the trade. There are certain things uh that you must know and certain things uh that you must be able to do. Uh its uh its like uh a doctor must be able to work with the human body. You must be able to know how to handle a scalpel, even if you want to become uh a h psychiatrist which is also a kind of a doctor, you must still go through the training of using a scalpel, you must be able to dissect the human body, you must know the nervous system, you must know, um all the technical things about the human body. Lawyer, its exactly the same thing, you have to gain certain uh specialist knowledge about certain specialist things so that when people come to you and ask for legal advice that, you wouldn't necessarily know everything immediately but the important thing is you will know where to go and find it. Uh no lawyer can say that he knows the law, the law is very difficult, um, very difficult mistress and nobody can claim to know everything that there is to know about the law. It is a *vast* field, but what you must know is you must know where to find the information, and this is what this course is all about, is to assist you in finding that information.

Quotation 6
L4:19
Please ladies and gentlemen if you're a lawyer you must follow the news. Its one of the things,

like if you're a doctor you must read up on the drugs. You must know what drugs to prescribe, what is new on the market.

Quotation 7
L4:80

080 Um. So. Its just like that. That is how they make laws. Its, you know, they put lot of / they have - I must be careful what I'm saying now, this is just a joke, I'm not serious but um. They take the worst people. They make them MPs. They make them members of Parliament [class giggles]. You know if a lawyer is a failure, a dismal failure, the only thing that tha remains open to him is to become a politician. They take these people now that can succeed at nothing else but sitting there and and making noises, And then they bombard them with absolute, hopelessly drafted legislation, and then they expect these two things to come out on the other side with something coherent. Uh and strangely enough it does, you know, our laws are not great, our laws are not drafted with any kind of elegance, ours laws are very poorly drafted in this country. And this was true of the apartheid years and its now true of the new government, so its not a criticism against the new government. But in South Africa we don't make good laws, they're drafted by civil servants … so … your bright lawyers are in private practice. And only the duds go into civil service and they draft laws. So what do you expect.

Quotation 8
L5:44 - 47

044 **STUDENT 15:** Government Gaz / Government Gazette what what ....

045 **LECTURER:** The what what what government what is the government what is this thing Government Gazette You can't talk like that like a lawyer you can't use 'what what', its not legal phraseology ….

046 **STUDENT 15:** It's a document keeps the [gestures with hands] Act and ..

047 **LECTURER:** OK I don't understand what you're saying … Anybody else? Where are the signed Acts kept? Yes?

Quotation 9
L5:58 - 9

058 **LECTURER:** Pius Langa, you should all know this ne? Who's the deputy chief justice (sshhh sshhh) Who's the deputy chief justice, he's on sabbatical at Wits now … he's sitting here in Wits, he's doing sabbatical work, he's also the chancellor of this university ….[Student: Edwin Cameron I think it is - other students murmur their disagreement or assent] Ooohh Edwin is the chairman of the council, who is the chancellor [Student 6: Chaskalson] No no Chaskalson is long retired, we long forget about Chaskalson. Who is the chancellor of the university of the Witwatersrand? [Another student attempts an answer but L already starts whistling incredulously] Ladies and gentlemen, I am going to kill myself [class laughs] I give you a hundred bucks if you can tell me. [Student: Is it a contract?] [Class laughs] It's a verbal contract, ja [more students laugh] [One other student attempts to answer] Justice? What? ….Does anybody know? [slight pause] Have you ever heard of Justice Dikgang Moseneke? [cries of 'oh' from class and chatter] Oh

yes of course Dikgang ja ja ja ja ja [imitates class]

059 You must know these things ladies and gentlemen, if you are going to become a lawyer you must be informed if our so-ciety, in your comm-unity and if he's the chancellor of your uni-versity … you are going to run into trouble, you must know this, ladies and gentleman, I'm making a joke about this now because its-a hot and it's a long lecture but *please* don't underestimate what I'm saying: A lawyer in society is somebody who's informed. People come to you / and they pay you a thousand to three thousand rand an hour, to get advice from you because you know. And if you don't know what's going on in your immediate vicinity you're not going to make it. Please you must read your law reports every year/ month, you must read your newspaper every day, you must know a a read the professional journal every uh month or every week two weeks when it comes out, you must know what's going on in the university in the bar in the side-bar, you must know things. You must know which cases are before the courts, you must know who are the most important movers and shakers in the country [gestures 'no' with his hand before the class]. That's your work, I'm sorry, that's the that's the that's the um course that you've chosen uh and if you're not going to do it um you're not going to be a successful lawyer. OK.

Quotation 10

L6:22

022 Um today we are going to do um [setting up transparency on OHP] we are only going to do the uh um legislation statutes. We are only going to look at that so that so have a very clear idea of what a statute uh is. Now I asked you last time when we looked at the mechanics of legislation how legislation is made, how it goes through different readings, and how it is eventually signed by the President and it is lodged in the office of the Chief Justice. Do you remember that? [Some students answer 'yes'] Yes ok, those are all important things. You must know those things. Um you know you work with laws you must know as much as possible about laws um uh that you can. You must not um you mustn't have any uncertainty about legislation. Legislation and cases uh the the the court cases um those are the things that you are going to earn your money with one day. Those are the things those are the tools of your trade, you must know what's going on there.

Quotation 11

L6: 112:112

112 **LECTURER:** Tell everybody what you did, now, step for step. Knowledge ladies and gentlemen if you're a lawyer is not very valuable. If you can't share that knowledge, if you can't convince somebody else, of your point of view, you can't tell somebody what you did, its useless. Its dead gold in the safe. Its not in anybody's interest, its not, its not worth anything. It is very important that you project yourself, that you convince people, that you tell them step by step what you did. OK …

Quotation 12

L6: 151 - 155

151 **LECTURER:** Um then there's the um uh statutes um uh related to Sundays and public holidays, Prohibition of the Exhibition of Films on Sundays and Public Holidays Act 16 of 77 what is that? What is that? The Prohibition of the Exhibition of Films on Sundays and Public Holidays Act comma number sixteen of 1977. Yes?
152 **STUDENT:** Is that not the full title?
153 **LECTURER:** No, its not called the full title, but you are very close. It is the ….
154 **STUDENT:** Long title.
155 **LECTURER:** Long title. It is the long title. It sounds funny but uh lawyers are like / you must / if you don't use the right word it doesn't work.

Quotation 13
L7: 12
[Judge] [Lawyer]
The common law is the law created by the jurists. By the lawyers. In England it is the judges, judge-made law, and law made by lawyers.

Quotation 14
L7: 28:28
[Judge] [Lawyer]
Thank you. Thank you. Very clever. Very very clever. When the courts, not the laws like Mr … said, when the courts, the judges, when they sit, and they decide law cases, what do they use? They use legislation and they use the common law. They use other cases. Why do they do this? They develop our common law. The judges, since 1910 when we had uh a united uh appellate bench the judges and the lawyers develops the common law.

Quotation 15
L7: 29
OK, ladies and gentlemen. This is exactly the kind of thing that will be expected of you as a lawyer. This is *one* word. Common law. And I have now in fif-fifteen minutes, I don't know how long, given you at least five or six distinct different meanings of that one word. And it would be expected of you as a lawyer one day to read a sentence and from that sentence to deduct what does the 'common law' mean … in that sentence.

Quotation 16
L7:30
Many constitutional lawyers will say that. Many constitution lawyers will say that, you know, 'forget about the bloody Roman-Dutch law, that is old news, look at the Constitution if you want to interpret it'. It doesn't mean that.

Quotation 17
L7:30
What it does mean is, Hugo de Groot in the 16th century - Hugo de Groot was a great Dutch lawyer - Hugo de Groot in the 16th century said, in one of his books, you can't trust with money a woman that is not a public uh a 'umbaarkoopvrou', um if a female is not a public merchant you cannot trust her with money. That was the uh uh well it is a little bit chauvinistic, but that

was the going concept in the 16th century. Women who are not trained in mercantile things, women who are not trained in business, must not be allowed, in terms of the law, to work with money. That is what Hugo de Groot said. And that is one of his major uh uh pieces of writing in his [states title of one of De Groot's works]. So that is an old authority. Can we use that as part of our common law? No! Of course not. What will stop us? Section forty-nine two will stop use because it says yes, look at the Roman-Dutch law, but if you get an absurdity such as this then ignore it. Obviously that is not the way we think anymore. Um, we can't use that.

Quotation 18
L7:32
Ladies and gentlemen, we as lawyers, when you become a lawyer … one day, the tools that you are going to use in your trade will be books, dictionaries and, most of all, words. If you are not good with languages, if you are not good with words, understanding words, writing words, speaking words, then the legal profession is going to be very hostile. A very hostile environment for you. You must be literate, you must be able to understand words in their very very difficult and multifaceted way in which they they operate.

Quotation 19
L7:33
Let use start this lecture by saying that every communication between two human beings, every communication, whether you say 'I love you' or whether you say 'I will, I will put the cheque in the post or uh I will see you next week', every communication is virtually flawed. Communication between two subjects is one of the most difficult things to overcome, and in part the role of the lawyer is to identify legal arguments, legal concepts where misunderstanding took place between two parties, whether it is in a divorce proceeding, whether it is in a contract, whether it is in a will, whether it is in a [pauses slightly], partnership agreement, it doesn't matter. The function and role of the lawyer is essentially to solve miscommunication. [Breathes in deeply]

Quotation 20
L7:34
Now, the first way in which a lawyer will solve miscommunication is by interpreting legislation.

Quotation 21
L8:2
And you need to broaden your horizon when you are a lawyer. Because what lawyers do is they sit in their office and they wait for people to come off their / to come off the street to bring their problems to them. And it can be anything. It can be from the theft of an artwork to a divorce to a rape to a uh uh uh disputed uh uh uh uh testament, a will.

Quotation 22
L8:33
The point is in South Africa, if the, if the meat is landed in South Africa as processed meat, as processed meat, the tax, the import tax is extremely high, why? Now you see if you can work this out, even if you've read the case, if you can work this out, then then you're becoming a

lawyer.

Quotation 23
L11:10
And read the instructions very carefully, um that is something that lawyers don't always do um they don't read their instructions carefully, their … quick, clever, and wrong is what my wife always says. If you're a, if you receive an instruction, that's your bread and butter. That is your profession. Go and sit down, read the instruction. Take it in, read it again, make sure you know what the client wants. Um you know, there's no rush whatsoever. We are not working with the lives of other people, you are not a paediatrician or a a cardiac surgeon, nobody's going to die, I've never seen anybody die in a law office. Um so there's no urgency, although I might be saying something to the contrary - sit, relax see that you know what is going on. And you don't miss anything.

Quotation 24
L11:16
Because its something that you should know as a practicing lawyer. I mean you should know the jurisdiction of the courts. But you don't have to worry about that now.

Quotation 25
L11:53
And its not always clever, if you're a practicing lawyer it might be clever just to keep them like this. Because sometimes you must take them to court, and then you must take your whole library to court. You now … it's sometimes much better just to have uh uh the book um and here you are um.

Quotation 26
L11:60
060 [clears throat] But of course the ideal would be if you, if you could speak Afrikaans [class laughs and he imitates them, laughing feebly] It is a beautiful language despite all the … OK ladies and gentlemen, number seven there, the headnote, typed in italics. Please don't read that before you read the case. And, more importantly, don't think by reading that that you don't have to read the case. Students, I don't know why, but students are lazy to read the case. The cases. Um. [shrugs shoulders in despair] I don't understand it. You know that is that is what makes you a lawyer. If you don't read court cases you're now a lawyer. You know then you must go and start or study dramatic arts or something. But you must read your court cases. And you must read them in full.

Quotation 27
L11:63 - 4
063 And although it is very beneficial for you to read the headnote before you read the case because then you get a very good idea of what's happening in the case, a kind of a pocket version of the case, the idea of the headnote ladies and gentlemen is not for students. No, I'm very serious. If you talk to the editors of Juta about the the South

African Law Reports, the idea of the headnote is only for the practitioners. It is made for the practitioners. If you sit in court and you are looking very very hastily for some authority then you haven't got time, in court, if the judge asks you 'Please address me on the following point', you haven't got the time to read the whole case. But you may have time to read the headnote. And then, if you're a good lawyer, you may be able to argue on … argue on that.

064 Please don't think that the headnote is there for you as a student to summarize the case. That is not true. The only time when you have time to read a case in peace and quiet is when you're at university. So enjoy and *do it*, don't not read your cases. OK.

Quotation 28

L11: 43 - 4

043 But we're going to use this case just to show you the structure of a case. The skeleton of a case. It is sometimes good to know what all these little figures um and things are for. You must reme - remember that the beginning of your profession, or one of the beginnings of your profession as you now know if you're doing Roman law, the profession started with the priests in Rome, who had the monopoly not only of the lex sanctiones, knowledge of the Roman law, also the calendar. You all know what I'm talking about. Those people who are with me will know what I'm talking about but I don't know if other lectures are teaching this.

044 So the legal profession ladies and gentlemen, this profession that you so eagerly want to enter, the legal profession started with a monopoly. It started with a mystery. It started in a temple. It wo/ it sta it it you would bring your case to the temple to the priests to find out whether you had an action and whether there was a good day on which you could bring your action. So the legal profession generally is always surrounded by um things that make it mon-monopolistic or elitist. Uh I know that's a swear word and its not a good word to use in a democratic institution like Wits but a university's also an elitist institution although they don't want to agree with it. But law is an elitist or an exclusive profession. And it is exclusive because we almost have our own language, in the old days people used Latin, but we almost have our own language. And we have all these specialized tools. We know how to read a court case. We know how to read a contract. We know the mysteries behind the legal texts. And that is that is that is the origin um of the of the legal profession. Don't don't expect now if you go for your articles you know that you're going to be initiated in temple [hands become very flowery at this point] with smoke and whatever [class laughs] that's not going to happen unfortunately. But it is a profession and in a profession you are dis you are distinguished from other people because you you've got specialized knowledge and this is one of them. You need you need … [break in recording].

Quotation 29

L12:28 - 31

028 **STUDENT 8:** And then before the times, I mean back in the day, how did lawyers go about sorting it out?

029 **LECTURER:** Umm you have …

030 **STUDENT 8:** Finding the cases.

031 **LECTURER:** …. noter uppers. And you had indexes. And they did the same thing but just in hard copy. And you still have them, noter uppers and indexes in the in the uh uh in the library and you can find any topic uh and all the cases that are decided on that topic. In the noter upper or or the index. If you you know that's uh ub not the in that sense legal research is not difficult. If you know what you're looking for, you know, either legislation or court cases you can find it very quickly.

Quotation 30

L16:5

005 And it's a very good, it's a very good exercise for for law students to go to a play like that so that you can sharpen your wits. Because what happens, in a funny way, what happens in Stoppard, what happens in the theatre is what's going to happen one day in court. Um you know. Yes, preparation is everything regardless of the details and you can't be a good lawyer if you don't prepare. But the good lawyer is distinguished from the exceptional lawyer in the areas where you are not prepared. And that's - and I'm going to say now a controversial thing, I don't know if I should say this - um, let's neutralize it and say some people are better lawyers than others because they can think on their feet. Because they've got the mental capacity to be not just witty but to be intelligent in responding to a challenge which you've not prepare for. That is the that is the exceptional lawyer.

Quotation 31

L16: 33

033 **LECTURER:** … Uh and people must you know there's one thing that a lawyer can't resist and that is gossip. And the whole profession is built, in a positive and a negative sense on gossip. Um its not negative gossip but people because its such a small profession people immediately talk about your performance in court.

Quotation 32

L16: 66

But what they did do - the Scandanavian people are very good at exhibiting things, what they did do is they showed the whole classification. The whole classification that he did and it is absolutely magnificent because it is so simple. It is so absolutely basic and simple. Uh and it works up to today because it is a system that we all understand. Even lawyers can understand it.

Quotation 33

L17:56

LECTURER: Absolutely! That's what that is why I made the whole thing about Lineus and about how arbitrary everything is. But, you know, don't put international law under the law of property and not you know and not telling me why. You must/ that's why you're a lawyer. That is what lawyers do. They argue to convince you.

Quotation 34

L18:1

001 **LECTURER:** In this short lecture we're going to try and look at the jurisdiction of the courts. Now this is the kind of information uh that I don't think one should be teaching at a university. Um it's the information that you should be getting in your articles. But um there is space in this curriculum now so we're doing it here. But please beware, this is not real knowledge. Um jurisdiction of the courts, the theoretical part as I'm going to tell you today, that is of course real knowledge and that you must keep the theoretical stuff you must always uh uh have to answer any question. So this theoretical part is fine. But as soon as we come to the factual part, ladies and gentlemen, as soon as we come to 'how much can this court fine a person on each du-uh-uh count, that is factual. And although I'm going to give you the figures today, and I'm going to ask you the figures in the exam, um it changes. It is just a flick of the pen of the Minister of Justice and the jurisdiction of the magistrates' courts go up. Not so much the Supreme Court of Appeal or Constitutional Court or High Courts but that can also change. So please, this is not um this is not cast in stone, it can change. Very recently two or three years ago the uh small claims court changed from R3000 to R7000. It was a huge leap and the magistrates' courts and uh regional courts also changed. And ubuhubuhubu substantial changes so you must know these things of course, if you want to be a lawyer that's just the kind of stuff you must know.

Quotation 35

L18:5

LECTURER: Um that's uh yes, the more elegant way to put that, the more lawyerly way to put that is to say that the Constitutional Court has got criminal and civil jurisdiction. Not not all courts have criminal and civil jurisdiction.

Quotation 36

L18:7

Now why does the magistrates' courts not have constitutional jurisdiction. Can somebody think and tell me? It's a kind of a lawyerly question that you ought to be starting to can answer by this stage. [silence for about 3 seconds] Why would you say the magistrates' court does not have constitutional jurisdiction? What is the reason?

Quotation 37

L18:86

Now one thing that you can learn from this uh embarrassing episode uh is that you must never, if you're a lawyer, you must never do anything if you are um in a bad mood or if you are emotionally uh unstable. If you if you've been, if you've lost your temper, don't do anything.

Quotation 38

L20:20

LECTURER: Custos custodius … What does that mean? Custos custodies. Oi oi oi. ... what does custos custodies mean? These are the words you are going to use when you're a lawyer to impress your clients. So that they will pay you R20 000 an hour.

Quotation 39

L22:1 - 18

001 **LECTURER:** A lawyer - no you mustn't put it on.

002 **STUDENT 3:** Oh, I've already put it on …

003 **LECTURER:** If you're a lawyer then things have a legal meaning. This is a legal commercial legal uh journal with a name 'Without Prejudice'. What, what does that mean? Yes?

004 **STUDENT 12:** [Inaudible]

005 **LECTURER:** Yes, that's good that's good. That's good, no no no no no no um I'm hesitant to allow you to go on because I can see you're going to say something wrong.

006 **STUDENT 12:** [laughs] OK.

007 **LECTURER:** A minor, if he enters into a contract, he might be prejudiced. Ne? Because he hasn't got full capacity to act. Now that's a legal answer. That's a nice answer. But that's still not the truth ne? What is 'without prejudice'? Oooo … Yes?

008 **STUDENT 8:** Without imposing your own opinions or views.

009 **LECTURER:** Yes, but I mean why would they call their magazine 'Without Prejudice'?

010 **STUDENT 8:** Because they're putting it down as it is they're not putting in their own thoughts or comments …

011 **LECTURER:** OK, from a journalistic point of view that's right. But we're not journalists ne, thank … heavens. Yes because you know journalists are … boring. Yes?

012 **STUDENT 9:** I suppose in the broader sense it means [inaudible] to anyone.

013 **LECTURER:** Yes, but now how / you're hundred percent right. Where did you get that?

014 **STUDENT 9:** Prejudice means 'harm'.

015 **LECTURER:** Where did you get that? What is your authority for that?

016 **STUDENT 9:** [inaudible]

017 **LECTURER:** Yes yes yes! [laughter] Yes! The dictionary. Ladies and gentlemen did we not do interpretation of statutes? The first way, the functional approach, the first thing that you do, is you look at the dictionary meaning. OK, so now you've got the dictionary meaning: Without harm to anybody. You've got the dictionary meaning. That's very good um uh dictionary meaning. But, in law, it means something else. Do you know this or not? Must I tell you. You don't know what I'm talking about ne?

018 Ladies and gentlemen if you are opening litigation, you know what litigation is? When you are starting in the first phase of litigation, in other words exchanging documents. If you are just feeling the water, if you exchange your first documents, before you start exchanging pleadings, you are writing to the other side and you say: 'Look', according to my client, this is what happened. My client says this is what happened. Um … if this is true, we are going to sue you. Um … if you want to, if you want to negotiate, if you want to talk, you know, lets do so.' Your first opening. *That* letter, gets a stamp [bangs fist on lecturn]: 'Without prejudice.' Without any harm, nobody is bound by what you say in that letter. Its without prejudice. You are reserving your rights. Did you know that? No? oh dear. OK. Um you must know that. But you'll probably pick that up in articles, ne? But remember now if you get that stamp what it means.

Quotation 40
L22:70

070 **LECTURER:** No no no I would always recommend European languages. For a lawyer, languages is like the secret. If you don't / if you're not good at languages you will never be a good lawyer. And that's why, in the apartheid days unfortunately they prescribed that you must have English, Afrikaans and Latin. And I would say English, Afrikaans, Latin plus a European language. And an African language. Yes say Afrikaans and or any other African language. English at a first-year level, Latin at a first-year level and a European language at a first year level. Otherwise you can't become a lawyer. Um and then they must gear the languages towards the lawyers. They mustn't you know they mustn't give you um Goethe to translate in German or Moliere in French, they must give you legal texts and make it easy for you to learn French.

Quotation 41
L22:26

026 **LECTURER:** Look, journal articles in law is mostly reserved for academics. Um people in practice don't have time to write journal articles. They've got time to write these short little superficial things. Um in the De Rebus and in Without Prejudice. But they haven't got time to go and do thorough research like we have, the academics. So, journal articles, serious journal articles, are mostly academics writing them. Perhaps a judge here and there. Perhaps a very very academically-oriented practitioner, but very rarely. Its not like its not like in natural sciences.

APPENDIX 4B: QUOTATIONS – ARTICLED CLERK

N = 11

Quotation 1
L11: 51
LECTURER: You are never going to have anything to do with the file number unless you're going to be an articled articled clerk and you must run around and go and find the file and go and lodge some documents in the file but that you'll still discover.

Quotation 2
L15: 69
LECTURER: Believe me I don't know how people how people survive you know if you start off with a with a articled clerk's salary I don't know how you survive without credit. Because its just impossible. And now its going to be impossible to get credit. Uh so it is difficult.

Quotation 3
L21: 47
[Articled clerk] [Attorney]
LECTURER: After you've passed your LLB exam and obtained your LLB degree either post- or undergraduate, you must find a principal. In other words somebody that you know and that you trust that will be willing to train you in the legal profession. If you've found such a person, you make an appointment and you go see such a person and you request him or her, uh, to consider you for articles of clerkship. Articles of clerkship is an old hangover of the medieval training of jurists. It is where you are trained by, uh, in-service training. It is for two years. You enter a contract for two years. The contract may be ceded, but it is frowned upon, it is not something you must try and do. And during this two years you get a smallish salary, you are, you are salaried and you do, um, all kinds of legal work so that you can pass the Society, uh, the Law Society's admission exam.

Quotation 4
L21: 65
[Articled clerk] [Legal secretary]
If you enter into a law firm as an articled clerk you are a threat to everybody. You are a threat to everybody and you don't know that. And the people who are most threatened by you are of course the … office personnel that's been there for years and years and who, uh, has got a vested interest in the firm and all they see is this young upstart's coming from university and within two or three or four or five years they become partners and then, you know, they start earning more than they do and they start shunting them around. So they've got a window of two, three years to make sure that they, that they use their seniority to make life difficult for you. My mother always said, there's nothing, nothing worse, and I hope I'm not offending somebody here but it is *true*, I mean as my personal experience there's nothing worse than a professional typist, uh, in a law firm, a secretary. There is nothing,

nothing worse. They always have personal problems, they never have enough money, they always want to borrow money and they are absolute *terrors*.

Quotation 5
L21: 66 - 70
[Articled clerk] [Legal secretary]

066 **LECTURER:** I can remember the first time wha, uh, when I did my articles at [Ahmed and Achoo] and we rotated on a six month basis so you would have a general six months - uh it's a very large firm so you're trained in the whole firm and then the next six months you are posted out in various branches, uh various branches of the firm. And my principal was a trade mark agent so I was automatically placed in the trade mark department. Um, which is fine, you know, I was interested in trademarks and its fine, but the trademark's section is one of the biggest earners in the company, uh, and therefore it is … uh, you have far more infrastructure than in the rest of the company because it was the great fee … uh. So if you come, if you arrive as a qualified candidate attorney you get your own secretary, your own desk, your own office, your own files, everything. First day (slams hand on lecturn) you get everything you are, you start you get your own number that you can charge fees you get everything because they haven't got time not to give it to you. You must start earning now. You must start doing trademarks.

067 And there I got a corner office, a beautiful large office with an inter-leading door to my secretary's office and there was my secretary sitting in the corner. And she was *enormous*. She was really, you know, she was an *enormous* person and she had, uh, make-up, you know, false eyelashes and dark dark makeup. And I thought, well this is wonderful, she is going to help me to do this trade, these trademarks. And she also said, 'Well now we're going to work together and uh you must just listen what I say and then you'll be very successful'.

068 And of course I didn't you know, I had to learn, you know, you know if I wanted to learn something I went to the partner and I said how do you, how do you redeem a trademark in Papua New Guinea? And I didn't know that I should have asked her first and if she says I don't know or I haven't got the book here *then* go to the manager or the partner to find out. I didn't know that I was just working 18 hours a day trying to get these *mountains* of files out of my office.

069 And of course, uh, you know, I irritated the living daylights out of her because I didn't ask her anything. Uh, because I was afraid of her I must admit. I was really afraid of her and then instead of getting off on the right foot she then decided she would boycott me. And everything I did, uh, she sabotaged. You know. She would take a file, every file that I did and she would listen to my dictation. If I made an error she would take my dictation to the senior partner and said 'You're going to lose money here this man doesn't know what he's doing'. And I *didn't* know what I was doing, I was there for my fourth day or, you know, for a month.

070 So it was an *absolute* nightmare, I, uh, I cannot tell you, it was an absolute nightmare. So please, if you go to, if you go to a firm of attorneys see to it that you get on with the secretaries, because they can make your life an absolute misery. Um, and don't, you know, its only two years, you know, just count out them and just say yes sir no sir or whatever you say. We eventually got to that stage and then we became very good friends and everything went very hunky dory but it took us three, four, five months before we could get there and by that stage my reputation in the firm was ruined. Because everybody thought I couldn't do a thing. Um, ah,

and the whole legal, the whole legal profession is built on reputation.

Quotation 6
L21: 48
LECTURER: Hmm … now there're lots of configurations to be trained, uh, for this, um exam, um, nowadays there is the law, uh, School of Legal Practice where you can go for two years and get one year remission of articles. Two years full-time. And after that you write, uh, you write the articles, uh you write the exam and you're admitted as an attorney. Um, there are also short courses which of course, you know, I recommend you to attend. There's a six-month course and for people who really don't need any further training there's a four-week, uh, exam preparation course. So its either two year's full-time, six months' crash course or just a four week, uh, exam preparation. Then you write the admissions exam and when you pass the admissions exam you are admitted in court as an attorney.

Quotation 7
L21: 50
LECTURER: you will be invited once you have been given articles, you will be invited to an interview with one of the leading lights of the Law Society, uh, and you will have to convince him, or he will have to be convinced that to join, to eventually join the profession. Um, in other words its a formal interview, uh, where they will ask you ethical questions and they will ask you where you come from, what kind of person you are just to vet that you are a fit and proper person, uh, to become an attorney.

Quotation 8
L21: 64
LECTURER: You really do, um, my dearly-departed mother was an attorney and when I, when I wanted to study law I worked in her firm during the vacs, um, and you know, I was a sweet little boy and very nice personality and everybody loved me and I thought well this is what legal practice is going to be like. But, um, I discovered that its *not*. Um, and if you enter a law firm you will discover this within a year or so.

Quotation 9
L22: 22 - 3
022 **LECTURER:** Yes, Taryn Sefton. She lectured Roman Law here last year uh she was one of my Roman Law students. She became a tutor, she qualified, and now she's at uh candidate attorney at [Bower and Gowar] and part-time attorney at University of the Witwatersrand. Hi [addressed to two students coming in late]. This ladies and gentlemen - she wrote a small little note - I mean, one, two, three, four [referring to paragraphs in the magazine]. How long can it take you to write that? But she took the trouble, she did the research, its on some difficult subject, prescription and the limits placed on access to the courts. It's a difficult topic, some of the people would like to know. And she wrote a short note. And what now? All of a sudden, her picture's here. OK it helps that she's an attractive Jewish lady, obviously. But the fact is anybody that opens this, and this is the whole legal profession reads this article. When they have a problem, they're going to call her. They're going to say, 'Look you wrote an article on this, uh you obviously know what's going on, can you can you help me?' And that is, ladies and gentlemen, how you build up your reputation.

023 If she's going to the bar, she's now a candidate attorney, she's working to qualify, she qualifies at the end of this year. If she then stays on another year or so at [Bower and Gowar], big firm, lots of contacts, she then goes to the bar, everybody knows that she's an authority on prescription. And that - that's how you get people to phone you. That's how you get people to phone you. That's how the legal profession works, ladies and gentlemen, that is unfortunately how it works.

Quotation 10

L22: 82 - 4

082 **LECTURER:** Um um you know, will you be able to do the work? Will you be a will you be a asset for them or will you be a liability? Do you understand law? Are you clever? Your marks, they look at your marks. Will you be you know have you got any previous experience? Um things like that.

083 **STUDENT 1:** … and extracurricular activities?

084 **LECTURER:** Yes yes volunteer have you been a volunteer for something, have you taught other people. Have you, you know, what kind of person are you? Do you care for your environment? Are you involved in community? Those things are all important. They're also important to get articles but vac work is not so difficult to get. Um don't you know, if you get reasonably good marks you will get in with one of the big firms.

Quotation 11

L22: 67 - 8

067 **LECTURER:** Um, my, my wife, um, I met my wife when she was in the publishing industry. Um and she was, she was making lots of money she was a very capable person. And she landed up in the publishing industry because she studied up to her Master's degree in South Africa and then she went overseas and she got her PhD in, uh, in languages, in French from the Sorbonne in France. Now, that's not, that's very impressive, I mean that's why I fell in love with her because she is so clever. Um, and um, and she, its not uuuh, I can tell you, in the days, this was in the high days of apartheid, uh, to get a bursary, to go to Paris, to stay there for four years, to do a PhD in French, uh, on French literature mmmm I don't think, you know, not a lot of people can do that. That's very impressive, that is very impressive. So she came back when, with her PhD from the Sorbonne, and the only job that she could get was, uh, teaching immigrant children, French immigrant children English at a secondary school. That's the only job she could get. And she did that for a couple of months and that was not very stimulating so she started doing translating and from translating she landed up in the publishing world and she became a publishing, uh, executive. And then, she was doing publishing, she was doing books for the the company that I was working for and that was where I met her, and, after I got to know her I said but why are you in publishing with a PhD in in in languages. Why are you not, you know, doing something in languages. And she said no she's done with languages. She's very happy where she is. So I got to know her much better and I said, 'but you are not a teacher' and she's not, she's really not a teacher, although, perhaps, if she really wants to do it, but she's not a teacher she's a good lawyer. I said why don't you go and study LLB after uh uh at RAU after hours.

068 So she did that and she got her LLB cum laude and she started working for [Smith, Brown and Mngomezulu] as an articled clerk. this is late in life, ne, this is, she was in her forties. And and

she did, uh articles with [Smith, Brown and Mngomezulu] and she didn't like [them] because at that stage, I don't know if they still are and I shouldn't say this, they were very chauvinistic, you know, it s very boy's orientated firm. Its better now but, you know, they don't think that girls can really become partners. They've changed now I think they've got *one* female partner, out of 85 and she clashed with the senior partner, you know, he came to her and said, um, you probably want to become um uh an partner now but uh and you've you're on your way you will become a partner but its our discretion and it will cause a lot of unhappiness in the firm if we make you a partner now because other people came with you cannot be made partner and they will feel that we are um putting you to an advantage and she said take your partnership and shove it and she started her own firm.

APPENDIX 4C: QUOTATIONS – ATTORNEY

N = 33

Quotation 1
L3: 58
LECTURER: If you go into uh, if you go to do your articles one day, ladies and gentlemen and you go to a commercial firm to do your commercial articles, you do it in a commercial department of a commercial firm, once you've finished and you've qualified as an attorney that's the only way you can transfer to England or to another part of the Commonwealth. They will immediately take you, even with a South African LLB, because you've got a practical training in commercial law which is the same the world over. So the only way in which you can transfer, in South Africa, over the law degree is commercial law. And the reason is the commercial law is English law so anywhere in the Commonwealth you can go. Australia [in mock Australian accent] if you want to sit every evening and sift your garbage in ten different bags, then you can go to Australia. If you want to go to England and you want to live with those hideous people then you can go there. They'll make you.. they'll not make you a partner, they'll make you an associate, they'll pay you nothing, and you'll work like a dog. For the rest of your life. You'll never become a partner. That's what the English are like. And America [in mock American accent] perhaps you can go there. I don't know why you want to go there you'll probably also work, you know, 24 hours a day.

Quotation 2
L6: 47
LECTURER: Who is it? OK maroon in colour. Ladies and gentlemen it might seem like a very stupid trivial detail um but if you are looking for a piece of legislation and you're in a hurry and its not the law library uh where you now know, hopefully all of you now know where the Butterworths and the Jutas um uh statutes are. Go to a um uh uh client's library or you go into another attorney's library you must immediately be able to go to the Butterworths. Um you know, its no use you falling around there saying 'um we oh we oh where will I find the ….' You must know. What's going on.

Quotation 3
L6: 140
LECTURER: No I thought you could give us a lecture on electronic resources. Ladies and gentlemen the electronic resources um in South Africa is very very very good. Virtually every journal article, virtually - not virtually - every single reported case, every um uh uh uh legal new piece of legislation be it from the from the Parliament in Cape Town or from provincial, is on electronic resources. So uh in the old days if you had to set up shop as a one-man uh attorney, you had to buy a whole set of Law Reports from eighteen voetsek till today. And that would

cost you something like fifty to eighty thousand bucks, depending on whether they're bound or not. You had to buy all the statutes. You had to get a librarian to put the statutes up to date, well you still need that. Nowadays, if you know what you're doing, you need a pile of CDs and you can start your practice. You can really start practicing with a pile of CDs, you know. Not taking up more than five square inches on your desk.

Quotation 4
L11: 44
LECTURER: It's a case about the attorney's misconduct and it is a very interesting case because it's a it's a its almost a grey area. It is an attorney that um uh was a trustee, he received monies in his trust account um and he uh had various other accounts that would pay in and um and its was um it was a a housing project, and people paid monies in and he then - we don't know whether he ran into a cash flow problem, but he used his trust account, where a huge sum of money was deposited for the uh complex. He used that trust account to make personal loans to his family. Uh - he paid it back immediately, you know, when it was discovered, he had the money to pay the the the shortcoming shortcoming back, uh but the question is, you know, can you do that?

Quotation 5
L11: 82
LECTURER: In any case, the final thing that I want to say is the attorneys and the attorneys of record are written at the end of the case. Now for you its not important but if you're one day an attorney then that's that used to be the only advertising allowed in my days is the appearance of their names at the bottom of the case. Um you know and then you can uh you can discover uh who was the attorney.

Quotation 6
L13: 151
LECTURER: Yes … the the attorney that stole the money from the trust account.

Quotation 7
L16: 33
[Advocate] [Attorney]
LECTURER: Well, uh you know, it's a difficult question. Its like, you know, it really is a difficult question. Because if you are at the bar uh uh and when I say at the bar it means if you're an advocate, you rely one hundred percent on the um side-bar, and those are the attorneys to send you briefs, to send you um to send you work. So if you go directly from university to the bar you're going to sit in an office somewhere here in Johannesburg and wait for your telephone to ring and its never going to ring. Because nobody knows about you. So in that sense it is much much better to go, do your articles, build up your contacts as they say, during your articles you know get to know as many lawyers uh many attorneys as possible um see that you know the attorneys in your firm uh very very well so that at least they will brief you when you're an advocate, and you must also be um you must have a very good reputation. Now if you're straight through your LLB by you know getting 60 or 68% you know that's not good enough. You must get your LLM uh LLB cum laude. You must you must be distinguished. People

must talk about you. Um and then you know you must get a distinction in your in your admissions exam for the bar or for the um uh attorneys' profession.

Quotation 8
L16: 34
[Advocate] [Attorney]
LECTURER: Um to give you an example we had a colleague here who was a very good lecturer and he was a student of mine he was a very good student but irritating student, he asked very piercing and um tenacious questions, you know, he wouldn't let go. You know if you didn't answer the question he'd come to you afterwards and say 'look you didn't answer the question, I want the answer'. Uh so he was a difficult student but a very good student. And he became a lecturer here and he was a very good lecturer and he wrote a book and decided to go to the bar. He wrote his exam, he passed his exam with flying colours, and because um um my wife is an attorney, and I mix with lots of attorneys, uh within three or four months everybody was talking about him. Uh as the new guy at the bar whose brilliant.

Quotation 9
L16: 36
LECTURER: But that's what I say, people are all talking about one another. And people are all talking about whether you are good or not at the bar. So the attorneys know, when they've got a case, who to brief.

Quotation 10
L20: 3
LECTURER: Denys Reitz. [STUDENT 3: Denys Reitz] He was the Minister of Justice. He was um uh a politician. He was a - has everybody got one [referring to books he has been handing out] - he was um he was an attorney, he started the firm Denys Reitz which is one of the great firms in Johannesburg today. Um he was also a boer. And not a boor as in um an uncouthed and unwashed man. He was a farmer. He wrote a trilogy of books um um called Outspan. Um I can't remember the all three books, can somebody remember the three books? The one is Outspan, the one is On Commando and the other one is … I can't remember. But he wrote a trilogy of books, so he was an intellectual, he wrote books. Uh uh and he was a friend of General Smuts. Um uh he did a lot for, both his work in Parliament and as a Minister of Justice, he did a lot for labour relations in South Africa. Specialized labour relations and that is why Denys Reitz still today is a major player in labour law. Um and it was a very impressive very impressive man. He was an Afrikaner, um uh but he was taken up by the English establishment. You have these rare Afrikaners that becomes part of the English establishment or the liberal establishment and then they become stars in that establishment. Like like Jan Hofmeyr, uh like Bram Fischer. Those were all Afrikaans speaking people that became very prominent um lawyers. Um so he's a he's a he's a very very impressive character.

Quotation 11
L20: 6
LECTURER: Now Denys Reitz wrote creatively, wrote three books. He was, ok, he was a successful politician, that's not so difficult. You know, anybody can become a successful

politician. Well, perhaps not anybody. I'm very skeptical about politicians you know. They always say, if you can't do law then do politics, you know, there's always a back door. But OK that's very cynical and there are good politicians. And Denys Reitz was one of the good politicians. But he was a Minister of Justice in the Smuts cabinet. And he started one of the major law firms in South Africa. Its *amazing* how some people just have an aptitude to to do all these things. I mean, some of my colleagues … I can't even get around organizing my own day. You know I can't/ leave alone writing a PhD and writing a textbook and writing articles and serving on all the academic committees and being an editor. But some people can do it and other people, you know, we're not all equal. That is unfortunately true. Its very cruel but it is true. Um, so that's Denys Reitz.

Quotation 12
L21: 44
[Advocate] [Attorney]
LECTURER: Let us talk about the legal profession now shortly ladies and gentlemen. Its something that fascinates you, um, and, uh, let us start, uh, not at the top but, um at the part of the profession which would probably be, uh, the part where you're going to enter the profession. South Africa's got a divided bar, we've got a bar, um, where we have, um advocates, and I will come to the advocates just now. And then we've got what we call a side-bar, Uh, and in the side-bar we have the attorneys.

Quotation 13
L21: 45
LECTURER: Now attorneys, um, are people who work in partnerships or in incorporated companies, in other words they work in teams, they sit in big large buildings or in derelict old renovated houses, um but they have a whole office structure. An attorney is somebody who works in co-operation with other lawyers to do the administration of a legal case. Um, an attorney is the place of the, uh, the first contact for the man on the street. If you go, if you're looking for legal advice you, what you most probably do is you look for an attorney first. You cannot go to an advocate directly. The attorney must refer you to an advocate or the attorney appoints an advocate on your behalf.

Quotation 14
L21: 46
LECTURER: OK, to become an attorney you need to study for the LLB degree, either the 4-year LLB or the LLB that you are doing, an undergraduate course plus then the postgraduate LLB which is preferable. Which is preferable and the profession, um, uh, has very clearly indicated that they prefer the 5-year LLB, uh, alternatively an LLM, a 4-year LLB followed by one year postgraduate study, um, specializing in some field of the law, uh, with an LLM. Which makes it five years.

Quotation 15
L21: 47
[Articled clerk] [Attorney]
LECTURER: After you've passed your LLB exam and obtained your LLB degree either post- or

undergraduate, you must find a principal. In other words somebody that you know and that you trust that will be willing to train you in the legal profession. If you've found such a person, you make an appointment and you go see such a person and you request him or her, uh, to consider you for articles of clerkship. Articles of clerkship is an old hangover of the medieval training of jurists. It is where you are trained by, uh, in-service training. It is for two years. You enter a contract for two years. The contract may be ceded, but it is frowned upon, it is not something you must try and do. And during this two years you get a smallish salary, you are, you are salaried and you do, um, all kinds of legal work so that you can pass the Society, uh, the Law Society's admission exam.

Quotation 16
L21: 48
LECTURER: Then you write the admissions exam and when you pass the admissions exam you are admitted in court as an attorney. You can then practice for your own account, in other words you can open your own business. You can practice for your own account, or you can join a firm as a professional assistant or they also call them associates, or if you are very lucky, perhaps get two or three of your friends and you can start your own firm and you will be a director or partner of that firm.

Quotation 17
L21: 49
LECTURER: The work of an attorney is not glamorous. It is not glamourous work, it is hard, boring, slogging work. It is administration for 95 per cent. You are not going to find in the ordinary work of the attorney great intellectual challenges or great innovative, uh, law changing challenges. If you are looking for that then there are other places where you can join the legal profession but that is not what you're going to do if you become an attorney. I'm not saying that the attorney's profession is all boredom … um, if you, if you join the attorney's profession and it is your specific niche, uh, patents or commercial law and that is what you want to do, then you can become a leader in the field and you can (a) make lots of money and (b) you can have a stimulating profession. Ordinary work for the attorney however, uh, divorces, estates, trusts, transfer of property, uh, general attorney's work it not, uh very challenging. Its not intellectually very challenging. It is routine rather than intellectual effort. Perhaps that's unfair. I don't know. If you've done your articles come and tell me whether you agree with me or not.

Quotation 18
L21: 50
LECTURER: The attorney's profession is organized, uh, organized by an organization called the Law Society of South Africa and they have representatives in each province and you will be invited once you have been given articles, you will be invited to an interview with one of the leading lights of the Law Society, uh, and you will have to convince him, or he will have to be convinced that to join, to eventually join the profession. Um, in other words its a formal interview, uh, where they will ask you ethical questions and they will ask you where you come from, what kind of person you are just to vet that you are a fit and proper person, uh, to become an attorney.

Quotation 19
L21: 51 - 2

051 **LECTURER:** Why is this important? Ladies and gentlemen, the great prob … the great temptation of the attorney's profession is of course trusts money, trust money. Um, attorneys act as custodians for huge transactions (breathes in loudly), for example, if you are an attorney or a conveyancer and somebody wants to buy a huge building in the north of Johannesburg, you attend to all the formalities and you are also the receiver of the deposit of the buyer of this building. Now this building can be, uh, 600, 700 million rand and 10 per cent of that is then placed in your care. You have absolute control over that money, uh, of course it is not your money, it must go into the trust account, but uh, you as the partner or as the responsible person have got absolute one hundred per cent control over that money. So the temptation to say 'ag, I'm just going to borrow R30 000 for the weekend, I've forgotten to draw money, I'll put it back on Monday' is very great. And if you go and look in the *De Rebus* which is uh the professional magazine for the uh, professional journal for the attorneys, you will see there is a column, um of the attorneys being struck from the roll and the reason, mostly, the reason given, mostly, uh, is contravention of the trust or the trust monies Act or the Trust Act. Attorneys take, I don't know why but they can't keep their hands off the trust money.

052 Please [wry laugh] if I can give you some very good advice today, uh, make it impossible in your firm for anybody to get to trust monies. And make it *extremely* difficult to withdraw money from the trust account. Insist on at least two or three signatures plus original, foundational documents. The original document, not copies or a fax copy or a note 'IOU' by partner [gestures 'no' with his hand]. A foundational document, you know what I mean by a foundational document? The reason why that monies has to be transferred, attached to two or three signatures of the partners plus the accountant. Its its not a joke. It is a lot of money and attorneys cannot resist, uh, the temptation to take some of that money.

Quotation 20
L21: 64
LECTURER: Ok, um, uh the other thing I must tell you ladies and gentlemen if you become an attorney, you need a BSc degree in social sciences.

Quotation 21
L21: 71
[Attorney] [Legal secretary]
LECTURER: So please, don't underestimate the office personnel in a legal office. You must, you must, if you want to become an attorney, must be able to get on with the office manager and the office personnel uh in the office.

Quotation 22
L22: 53
LECTURER: Or there must be some compelling reason why you must now appear. Say for

instance now, you know, um there's a specific divorce that um, its your god daughter that is getting divorced and you wanted to do the divorce, then the judge will allow it. If it's an uncontested divorce. If you know, if you're a senior, uh, practitioner, the judge will of course allow it uh because you know uh want to do it yourself. Uh, but usually, it is better that the advocates do the court work and the attorney does, uh, the off-the-street work, the preparation. Um, but it is possible now that the attorneys can appear in the High Court. But you do need, you do need permission from the judge.

Quotation 23
L22: 92
[Attorney] [Judge]
LECTURER: You didn't really take notice. OK. Um uh judge must be have an LLB. Must have a good practice and they must be a senior uh advocate. Uh nowadays of course its no longer compulsory that you must be a senior advocate. Uh uh attorneys have been appointed as judges. Judge Kathy Saxwell Sax sax Sacks Sackswell is an attorney. She specialized in family matters. And she's now a judge here at the Witwatersrand Local Division.

Quotation 24
L22: 51 - 2
[Advocate] [Attorney]
051 **STUDENT 8:** What are the incidences when attorneys appear in court, when …
052 **LECTURER:** Um, it's a new thing that has happened with the new Constitution and with this whole thing of opening up the profession. Um if you ask me personally, I think it's a, it's a, its wrong, its stupid, because the attorney's profession has got certain things that they must do and the advocates have got certain things that they must do and it is stupid to mix the two.

Quotation 25
L22: 52
LECTURER: But sometimes you get a very good attorney. Like Dr Dale now, Professor Dale here at Denys Reitz, he's an honorary professor at Wits and he's in mining law and he's mostly the the the worldwide expert on South African mining law So if there's an application for the prospecting of new mineral rights, then obviously you can appoint uh Dr Dale uh to appear in the High Court. He's the best there is. It's a very specialized field, He knows absolutely everything and he then, with the permission of the judge, can appear in the High Court. (Breathes in deeply). This is … its an exception. You must apply, you must have extreme expertise. You must be a leader in your field.

Quotation 26
L22: 54 - 5
054 **STUDENT 9:** What … so when you join a big firm, it's a firm of attorneys period …
055 **LECTURER:** Yes

Quotation 27
L22: 57

LECTURER: The litigation department prepares, does all the backroom work. The litigation department, um is the fall-back of the advocate. The litigation department - well they do maj court, maj court litigation obviously, that's what they do and when it goes to the High Court you do, um, all the backroom work, you get all the expert witnesses together, you get all the statements together, you get the file together, because the advocate can't do that. The advocate is is is is office bound. You drive around, um and get the statements from witnesses, you drive around and um uh do inspections in loco, and things like that. You do all the prep [becomes tongue-tied] preparatory work so that you can give the, uh, advocate a decent file that he can work from. And that's what the litigation department does. Not lucrative, not lucrative. Um, even in, even in *commercial* litigation or insurance litigation where you're talking about *millions* of rand, not lucrative. Um, you know, uh it (sighs) what can I say, that's a fact of life. Rather do something more lucrative like trademarks or patents or the.. uh, commercial work straight-forward commercial work, um uh mergers and acquisitions, management buy-outs, things like that. Very, very lucrative.

Quotation 28
L22: 60 - 3
[Advocate] [Attorney]

060 **STUDENT 1:** Um, sorry Mr Serfontein, I was just wondering, I spoke to someone on the weekend and they were telling me that … I remember you telling us the process that once you got your LLB you do six months pupilage and then only you go on, um to practice um

061 **LECTURER:** Plus the exam.

062 **STUDENT 1:** Ja, plus the exam. Someone else was also telling me that its better to rather do, uh, your articles first and, um, become qualified as an attorney and then only go …

063 **LECTURER:** Mmmm, but I, we discussed that as well. Yes, I said, um, I said that you can, if you finish your LLB, you can, technically, you can do that. You can go directly to the bar. But I mean you're a, you're a fool because as I've just shown you by the the the magazine, it all depends on your reputation. And what kind of reputation have you got? Um, you know, you're a beautiful girl from Scotland and that's not going to help. It helps with other things but its not going to help with the law. But, if you do your articles first then at least you're getting to know the attorneys. And you're getting to know the partners at that firm and other firms because every case that you do in your two years' articles you have to work with other attorneys. And if you impress them, even in the magistrates' court, you appear there and you make a name for yourself, far far better, Not only do you do your articles, um, but also stay on a little while as a professional assistant or associate, uh, its at a better salary and there you get more senior work. And you can, you know, you can specialize especially if you go to a very large firm. Um, you know. I would agree with that. Um. I would say nobody can go to the Bar before they've been to the side-bar. But there's no such rule. It's a split bar so you can do what you want.

Quotation 29
L22: 66
[Advocate] [Attorney]
LECTURER: OK. Those are the two, um, parts of the profession that I think most of you are going to go into. Um, there .. those are the two private, uh, private parts of the profession. Um, and in both these, um, uh, professions, you will make, you'll make a living. Definitely. You'll make a good living. And the higher up you go in these professions the better your living is.

Quotation 30
L22: 68
LECTURER: She with three other people started her own firm. And she, I think, I don't know exactly, but she works extremely hard um try not to work too hard, works extremely hard and I think you know its now a bit personal but I think her salary is about 3, 3.5 per year. Um, so that is what you can achieve if you are in a commercial firm if you are top of your class and if you work very hard within seven years after after qualifying at university, you can achieve that kind of salary. But, it doesn't come easy, its now, you know, you can't sit in your office and twiddle your thumbs like I do to earn that kind of salary.

Quotation 31
L22: 137
LECTURER: No well some people thrive on that, some people live / like like [Isobel], I mean if she doesn't have an adrenalin rush every five minutes you know she gets bored. So some people really like that, they thrive on that nervous tension and they are their best and sharpest when they have … but you know you can't its impossible to sustain it for weeks and weeks and months and months and then you must take a break um you must look after yourself, you must you know / it's a very / it's a high tension job.

Quotation 32
L22: 44
[Advocate] [Attorney]
LECTURER: A brief is a, um, is a document in blue that is folded like this, and we have discussed this I'm sure. It comes from the formula of the praetor, It's a document like this, its blue, its this colour, slightly light, it's a light blue like your jersey (gestures towards one of the students). It's a light blue and its got printed on such and such versus such and such, the attorneys and the advocates and its tied together, inside there are, uh, papers or whatever and its tied together with a pink ribbon. I don't know why its pink. I don't know if it must be a pink ribbon but its tied together by a pink ribbon. And this is what the advocate takes to court with him and this is called a brief. B-r-i-e-f it is his brief, his instruction from the attorney. It it's the instruction that the advocate receives from the attorney.

Quotation 33
L22: 41
[Attorney] [Legal secretary]

LECTURER: OK, we were talking about the office personnel of an attorney's office, um, and you know to beware of the typists, Please beware, its very good advice one day you're going to say I though that I spoke a lot of nonsense in the first year but it is *so* true You are really going to discover that.

APPENDIX 4D: QUOTATIONS – ADVOCATE

N = 54

Quotation 1
L1: 52
LECTURER: No um uh its not necessarily because Cicero said that the higher power is your own rationality. The recta ratio. He went a little further and he said 'Ok that comes from nature'. And, you know, I don't know exactly what he means by nature, he's also not a philosopher he's more a orator so he doesn't write very well on these uh you know write like a philosopher. He he writes within a system of rhetoric he's trying to convince you so he doesn't go into detail things that he can't prove, you know, he just he talks, like an advocate in a trial you know he's not going to say 'Oh excuse me judge here's a very good point against me if you don't mind looking at this' - it's what they should do but they don't.

Quotation 2
L5: 42
LECTURER: You're not sure what I'm asking. [student interjects] I'm asking, the debates on the second reading, the debates about philosophy and policy, they are published in Hansard, [Student: yes]. So say for instance the Act is now passed, and it is now an Act of Parliament, and the Act comes before a court of law, to interpret. Which happens. May you, as the advocate, use the debates of Hansard to prove the intention of the legislature in the legislation.

Quotation 3
L10: 58
[Advocate] [Judge]
LECTURER: So what you do is you become an advocate, you if you're a very good advocate they ask you to become a uh acting judge, if they say that you can do the work then they invite you to become a full-time judge in the provincial division, or the local division, after years of service in the provincial division or the local division, if you are deemed to be fit, they are invited as an acting judge to the Supreme Court of Appeal or to the Constitutional Court. So it's a hierarchy, its not the same judges and they don't exchange. You are promoted to to one.

Quotation 4
L10: 93
[Advocate] [Judge]
LECTURER: No um ….de-uh … Look I have difficulty in following you, I don't know exactly what you mean but um judges in private law matters sit and they are confronted by both sides represented by an advocate. The advocates make sure - that's their job - they make sure that the judge is informed of very single possible authority uh that their case, that their side of the case um uh that will support their side of the case. So the judge, when he sits in the provincial division has got the advantage of the

entire scope of authorities, presented by the two advocates. Of course not all advocates are the same. And some advocates are more thorough than others. What then happens uh is the judge hears the case, he gains all the authorities, he then retires and then um he does his own investigation. He does his own sources he investigates the advocate's sources, he does his own research, he comes to a conclusion based on everything that was laid before him.

Quotation 5
L10: 99
LECTURER: L: No no no no what you're conf - what you're confusing is the authority of the precedent of the case itself and the cases that are quoted in reaching that authority. Um [clears throat] when a case is brought to court um you appoint an advocate and it is the work of that advocate to promote your case. So he will get all the precedents that is in favour of your case. And he will put that before the judge. And he will try everything - with his arguments, with your affidavits, with everything, he will try to convince the judge to decide upon the cases that he has quoted to the judge. The opponent will do exactly the same. And usually, if it is a moot point, if it is an open point in law then there will be authority for both sides - yes! Yes! That is very possible. As a matter of fact that's what happens every day in court. Is trying to convince a judge to accept your authorities rather than your opponents' authorities. And then? That's why you have to use logic, that's why you have to use uh rational deduction. The judge then has all these authorities in front of him with various weights that he attached to the authorities, depending on what they are, and then he does his own research and he comes to a conclusion, which authorities to accept and which to reject because every case is different. When I talk about a precedent, no two cases can be exactly the same. I mean, you can understand that for yourself. The facts will - every case will have different facts. So there will always be cases that you can argue are for, and cases that you argue are against it.

Quotation 6
L11: 48
[Advocate] [Judge]
LECTURER: Uh etc etc you know how it works, the profession. In the past if you are a very good advocate and they um the council the bar the minister and the judicial services council think you should be promoted, you are invited to act as a judge. For a couple of weeks, or a couple of months. And if you prove yourself, if you prove to be a good judge, if your judgments are sound then they invite you to become a judge. Uh but you are an acting judge before you are a full judge.

Quotation 7
L11: 87
LECTURER: He will say 'the advocate for the defence' or ' the advocate for the respondent said the following, I'm not accepting his version. I'm rejecting his authority. Advocate for the other side forwarded these arguments and I find them acceptable. And for these reasons I'm going to follow that. Um but that is very confusing, you know, If you don't know what he's doing, is this now part of the judgment or what he's doing. Um … uh… you know. The best is go to the order, go to the end where you look for the ratio decidendi, the reasons for the decision, where he says, 'OK everything considered now, this is what I've decided.

Quotation 8
L12: 14
LECTURER: If it is an application - in other words its just one person involved. When is an application? If you apply for voluntary liquidation, if you apply to be admitted as an advocate, if you apply to be declared [gestures with hand] something, sane or insane. If you apply for for the court to make any de- uh declaratory statement. Then it is an application - it is usually on a Tuesday morning, well in the Transvaal its on a Tuesday morning, we call it the motion court, where all the simple applications are heard.

Quotation 9
L12: 19
LECTURER: You get the Gregorowski law reports and that just means it is an advocate Gregorowski who collected the law reports. You get the Munro set. You get um Roscoe, um you get um there are many. There are many people who collected the uh the law reports.

Quotation 10
L12: 124
LECTURER: That they come from the from the - Searle S-e-a-r-l-e- Searle. It's a it's a col/ it's a it was an advocate in that um division that collected those court cases uh an its just an additional way of finding court cases.

Quotation 11
L12: 186
LECTURER: You know we have/ not all our case are even reported, as you know. Uh in those days, in those days um and that's what I wanted you to pick up, it that uh the the people who collected them, these specific collections - I will go fetch my law reports now so that I can show you - um, these people's collections, it was in their discretion! Which cases to report. They decided, and they were advocates. Practitioners of the court! And they could decide at the end of the year, OK I can put this into my collection, I'm going to put that into my collection, and that's how cases got reported.

Quotation 12
L13: 150
LECTURER: He didn't have the authority to declare it invalid, but he said - and it wasn't argued by the advocates - but he just mentioned in passing

Quotation 13
L14: 11
[Advocate] [Judge]
LECTURER: Common law, England is the common wisdom of the judges and the the um uh advocates that's where the word comes from, so it's a traditional law, it's a tradition it's the background to the law.

Quotation 14
L14: 108

LECTURER: I don't know. No I don't think so. I don't think so no. No he was a he was a a um senior counsel. And a bilio-biblio-bibliophile. Like like myself. He collected uh. He was an advocate and uh uh you know he had a thriving practice [inaudible] but his his passion was books. Um and he collected these old books and in his time you could still collect them you could still collect these books.

Quotation 15
L14: 110
LECTURER: And when Glenda, Glenda Fick and I went to to look at these books the first book, the first thing that I saw - he had a study about the size of this room - and the first book, the first thing that I saw when I walked in into the door, there was the full set of Cujacius. The full set, brand- in pig-skin. Br- not brand new but virtually untouched. The full set. So that's $43 000 times 42. Um and so he asked - his son is an engineer, this Suzman's son is an engineer, and his mother stayed in the house and his mother died and then and he's of course emigrated, and they just want to get rid of the books and he said 'Are you interested in these things?' And I said 'well, vaguely' [laughs] No no the thing is we already have Cujacius, we have the full set of Cujacius in our old authorities room. So now we have two.

Quotation 16
L16: 33
[Advocate]
LECTURER: Well, uh you know, it's a difficult question. Its like, you know, it really is a difficult question. Because if you are a the bar uh uh and when I say at the bar it means if you're an advocate, you rely one hundred percent on the um side-bar, and those are the attorneys to send you briefs, to send you um to send you work. So if you go directly from university to the bar you're going to sit in an office somewhere here in Johannesburg and wait for your telephone to ring and its never going to ring. Because nobody knows about you. So in that sense it is much much better to go, do your articles, build up your contacts as they say, during your articles you know get to know as many lawyers uh many attorneys as possible um see that you know the attorneys in your firm uh very very well so that at least they will brief you when you're an advocate, and you must also be um you must have a very good reputation. Now if you're straight through your LLB by you know getting 60 or 68% you know that's not good enough. You must get your LLM uh LLB cum laude. You must you must be distinguished. People must talk about you. Um and then you know you must get a distinction in your in your admissions exam for the bar or for the um uh attorneys' profession. Uh and people must you know there's one thing that a lawyer can't resist and that is gossip. And the whole profession is built, in a positive and a negative sense on gossip. Um its not negative gossip but people because its such a small profession people immediately talk about your performance in court.

Quotation 17
L16: 31
LECTURER: No if you want to become an advocate you only need to do six month's pupilage. There's a difference between articles and pupilage. Pupillage you get a master at the at the uh uh a senior advocate or an advocate that you have confidence in and you enter into a contract with him and you go with him for six months just to so that he can show you the ropes. Um you're not paid for that six months uh but you must do the six months to be admitted to the bar and um when you're admitted to

the bar, after you've written your bar exam, then you become an an admitted advocate.

Quotation 18
L16: 34
[Advocate] [Attorney]
LECTURER: Um to give you an example we had a colleague here who was a very good lecturer and he was a student of mine he was a very good student but irritating student, he asked very piercing and um tenacious questions, you know, he wouldn't let go. You know if you didn't answer the question he'd come to you afterwards and say 'look you didn't answer the question, I want the answer'. Uh so he was a difficult student but a very good student. And he became a lecturer here and he was a very good lecturer and he wrote a book and decided to go to the bar. He wrote his exam, he passed his exam with flying colours, and because um um my wife is an attorney, and I mix with lots of attorneys, uh within three or four months everybody was talking about him. Uh as the new guy at the bar whose brilliant.

Quotation 19
L16: 36
LECTURER: But that's what I say, people are all talking about one another. And people are all talking about whether you are good or not at the bar. So the attorneys know, when they've got a case, who to brief. They know who are the bright stars. And if you're one of those bright stars you'll make it at the bar. Whatever you do to get there. But you must be a bright star. Uh the bar's not for mediocre people. Um you know. I can say it because I'm not there. Um its not for you know you can go to the bar and you can open your office and you can be admitted but you know the lights are going to be on but nobody's going to phone you. So it's a very tough profession. But we'll have a whole lecture on on the legal profession and then you know I'll answer some more questions.

Quotation 20
L16: 35
[Advocate] [Legal academic]
LECTURER: Also professor Cockerell who was also here, who decided he doesn't want to stay in academia, and he went to the bar. Now he already had a reputation, everybody knew him, he published widely, he's a confirmed, very established academic, and he then went to the bar. And immediately he got enormous briefs, you know, um uh you know constitutional court cases and very important cases. And he's doing exceptionally well at the bar.

Quotation 21
L18: 73 - 7
073 **LECTURER:** A senior, a Queen's Counsel or a King's Counsel is um QC, is a title you obtain when you become a very very senior advocate.
074 **STUDENT 8:** 'K
075 **LECTURER:** Or a very senior barrister. Um it means that um that the Minister of Justice or the State President or the Queen then in England, considers you above the others. Uh the only implication is that you get to wear now not only a cotton robe, but you can wear silk robe. Your robes are now made of silk and the more important thing of course is that it is a prestige. Um you are now senior counsel, you are only briefed in very complicated matters, and of course

you charge no longer R3000 an hour but

076 **STUDENT 12:** R20 000

077 **LECTURER:** R20 000 an hour. So that's the main, that's the main consideration.

Quotation 22

L18: 79

LECTURER: N- I don't think so .. it's not … you know that's something in the discretion of the Minister of Justice. Um … uh … you know … uh senior advocates, senior advocates are a very rare breed. Um its not a lot of them around. So, if you've been around for ten or fifteen years then your name will be sent forward by the bar and the Minister will look at your at your practice and if you are a person of substance and you've done uh important cases and you've got stature and you've got a very solid practice, then he will make you Senior Counsel. I don't think there's a closed number. Um but its not, its not something that is granted lightly. Its not something that you get in a lucky packet.

Quotation 23

L18: 82 - 3

082 **STUDENT 6:** Excuse sir? This is just in passing, so if you look the these uh I just get sometimes overwhelmed by the bills which they are charged, the Jacob Zuma and the McBride .. They run into millions and millions of money. Within a short period of time. Can we assume that those represented by something similar like a QC, a Senior Counsel, the advocates that represent them in court, cos

083 **LECTURER:** No I don't. I don't know about Mr McBride, uh I'm not following his case, but Zuma, definitely. Um you know, obviously. Um it is a very, it's a it's a … it's the most important case uh criminal case in any case that's serving before the courts at the moment. So, on both sides, from the State and from his side. He will um, he will employ uh very very senior, very senior advocates. He will employ the best he can get. And that will be, that will be senior advocates. And that's why the the … um that's why the fees are exorbitant. Uh you know, they .. and the cases are running for a very long time. So those people can't take any other cases so they are on a a um on a retainer by Zuma and probably McBride. But legal costs are something we can talk about later if we have time.

Quotation 24

L18: 96

LECTURER: The judge sits in his chambers, the judge is now a senior advocate who's been elevated to a judge.

Quotation 25

L20: 24

LECTURER: Well … some people will not agree with that. But the idea is the very *best* senior advocates. The very best of the practicing advocates are appointed as judges.

Quotation 26

L21: 44

[Advocate] [Attorney]

LECTURER: Let us talk about the legal profession now shortly ladies and gentlemen. Its something that

fascinates you, um, and, uh, let us start, uh, not at the top but, um at the part of the profession which would probably be, uh, the part where you're going to enter the profession. South Africa's got a divided bar, we've got a bar, um, where we have, um advocates, and I will come to the advocates just now. And then we've got what we call a side-bar, Uh, and in the side-bar we have the attorneys.

Quotation 27
L21: 45
LECTURER: If you go, if you're looking for legal advice you, what you most probably do is you look for an attorney first. You cannot go to an advocate directly. The attorney must refer you to an advocate or the attorney appoints an advocate on your behalf.

Quotation 28
L22: 23
LECTURER: If she's going to the bar, she's now a candidate attorney, she's working to qualify, she qualifies at the end of this year. If she then stays on another year or so at Bowman Gilfillan, big firm, lots of contacts, she then goes to the bar, everybody knows that she's an authority on prescription. And that - that's how you get people to phone you. That's how you get people to phone you. That's how the legal profession works, ladies and gentlemen, that is unfortunately how it works.

Quotation 29
L22: 42 - 3
042 **LECTURER:** OK, um, a legal advisor of a company. Now ladies and gentlemen this is something completely different. It is somebody that has an LLB, a BA or preferably a B.ComLLB who does not want to practice law. Is usually not the sharpest tool in the shed, um, people who become legal advisors to a company are people who can't practice. You know what they say about academics, you know people who can do and people who can't teach … but that's not true, ah well, I don't think its true …

043 Um but legal advisors, or what we call them a better word for them is in-house counsel, it's a nicer word for it, in-house counsel. That is an attorney or advocate that joins a *huge* firm like Billiton or Anglo-American or Old Mutual or Sanlam or whatever and they sit in a large office and they are the first line of defence for that firm. In other words they are the in-house lawyer for that firm. And they don't do anything. You get a problem if they can do it they, the the most simple things they do themselves. But as soon as it gets complicated then they appoint an outside lawyer or outside advocate to do the practical side, to do the practical side of it. They do some of the work themselves, but very little only the, um, only the very menial, the very basic things. Collections and bad debts and things like that. They do however, on a personal note, they do however get a very large salary. Um, and they are privy to some very very sensitive information. So, if you have friends becoming legal advisors to large firms, they are very good to know. Uh, these are people who will brief you if you are going to become an advocate. They will brief you and they will give you *fat* briefs. Do you know what the word brief means? Have we done that?

Quotation 30
L22: 44
[Advocate] [Attorney]

044 A brief is a, um, is a document in blue that is folded like this, and we have discussed this I'm sure. It comes from the formula of the praetor, It's a document like this, its blue, its this colour, slightly light, it's a light blue like your jersey (gestures towards one of the students). It's a light blue and its got printed on such and such versus such and such, the attorneys and the advocates and its tied together, inside there are, uh, papers or whatever and its tied together with a pink ribbon. I don't know why its pink. I don't know if it must be a pink ribbon but its tied together by a pink ribbon. And this is what the advocate takes to court with him and this is called a brief. B-r-i-e-f it is his brief, his instruction from the attorney. It it's the instruction that the advocate receives from the attorney.

Quotation 31
L22: 45
LECTURER: So, if you're an advocate this is what you take to court with you, this is your bread-and-butter. This is what you make and this is what people, legal advisors in a company will send to you when they brief you, you know, on the restructuring of the company or whatever. So very very very valuable.

Quotation 32
L22: 46
LECTURER: OK, um, the second one, the second possibility is if, and we've spoken about this, is an advocate. Advocate is more, uh, the work of an advocate is more intellectually stimulating. You work on your *own*. You work on your own. You have your own office, you have your own secretary which you appoint and you pay for. You've got your own law reports. You've got your own work, you've got your own telephone, you've got your own dictaphone, you've got *nothing* to do with anybody else. There's not somebody who will come and knock on your door and five o clock and say: 'Why are you still … ' or 'Why are you not here' or 'Why are you still working' or 'Have you finished this or that. You work for yourself. You charge by the hour and what you do is you prepare everything for the court. You appear in the High Court. You appear on behalf of an attorney. You appear in the High Court.

Quotation 33
L22: 47
LECTURER: Ladies and gentlemen, if you stand up in court, and you will feel that (shakes head) I hope every one of you will at least once in your life have that feeling of appearing in a court. You are, and I don't care *who* you are, if, you can be Sydney Kentridge, if you appear in court you are *scared*. And if you are not scared then you are not prepared. You are scared, uh uh .. appearing in a court is very very intimidating. Um, so if you're a good advocate you will see that all your papers are in order. What are your papers?

Quotation 34
L22: 48
[Advocate] [Judge]
LECTURER: The papers are the things filed in the court file and served upon the other side that you are going to base your case upon in the form of affidavits, expert witnesses, whatever, I don't, I can't go into all those technical details. But it is a paper file that is opened for your case in the court and that file goes to the judge, not to you, that file goes to the judge. If there's *anything* wrong with that file,

the judge will only keep you responsible. The judge will ask *you*, um, Mr [state's student's surname] why is the file not properly paginated? And its no use saying, uh my lord I'm terribly sorry but that must have been the clerk, the clerk of the attorney who did not attend to the pagination. You must see to it that everything is in order. Up to such a small detail as pagination. You know what pagination is? You have a file of ten thousand pages and every day a new document arrives to be put into that file. Sometimes, the order changes. So before the document goes to the judge on the day of the trial, somebody, usually the clerk of the, the candidate attorney of the attorney's office, must go to the file and see to it that it is paginated, in pen, in pen, you paginate it in pen because it changes. And its paginated from page one to page ten thousand. Correctly. If it is not correct then the judge can throw out your case.

Quotation 35
L22: 49
[Advocate] [Judge]
LECTURER: You must be able to see every single thing. If there's a spelling error in your pleadings, oh please. If there's a grammatical error. If there's a technical error, a legal error, if you've made an aversion on a statement that is wrong technically, legally, your case is thrown out. The judge will give you an opportunity. He'll say, uh, please Mr [state's student's surname], address me on this novel interpretation that you have in clause 3. And then you will be able to address him but I mean if you, uh uh, if he talks like that you know you're stuffed. You can just as well, you know, pack up and say 'I'm sorry my lord, um uh, I'm relatively inexperienced in these matters and uh, it slipped in, I beg your lordship's indulgence to amend it. And your lordship will not give you an indulgence. He will say, well the indulgence I will give you is that I will take the case off the roll for you completely and then you can put it back again when its correct. And then you've wasted costs. You've wasted *thousands* of rand by appearing and preparing to appear for that day for trial in court and its just thrown out because you've made something wrong. You've referred to section 2(1) instead of section 1(2). Uh a. And the guy sitting on the bench, the judge is a senior advocate of twenty-five year's standing. So, for twenty-five years he's been looking through these pleadings. So he, it *jumps out* uh uh at him. As soon as he reads the pleadings and you've made an error it jumps out. He's an expert, he knows everything.

Quotation 36
L22: 49
LECTURER: It's a small detail ladies and gentlemen, but God in the law, lives in the detail. (waves hand as if saying 'no') If you don't have an eye for detail if you're a, if you're a more of a forest type person and you can't see the detail, you can't see the leaves for the forest (gestures 'no' once again). Stay away. Don't even try to become an advocate.

Quotation 37
L22: 50
LECTURER: So (clears throat) advocate is the person who appears in court. If you're not a good public speaker, well, I must say, I have seen some very poor public speakers being reasonably successful at court, but it will help you know. Then go for elocution lessons, um, if you are shy and you don't like conflict, you don't like uh, intellectual violence, don't become an advocate. Please, its not .. it is a *very* very demanding job. You are fighting from the morning you open your eyes, from the first thing you do

to the last thing you do and your hours are *long*. You work from 4, 5 o clock in the morning to get everything ready for court until 12 o clock the next evening. So you have three four hours every night that you can sleep. If you want to have a family, then, you know, then try to get to sleep. (class laughs)

Quotation 38
L22: 51 - 2
[Advocate] [Attorney]
051 **STUDENT 8:** What are the incidences when attorneys appear in court, when …
052 Um, it's a new thing that has happened with the new Constitution and with this whole thing of opening up the profession. Um if you ask me personally, I think it's a, it's a, its wrong, its stupid, because the attorney's profession has got certain things that they must do and the advocates have got certain things that they must do and it is stupid to mix the two.

Quotation 39
L22: 53
LECTURER: Uh, but usually, it is better that the advocates do the court work and the attorney does, uh, the off-the-street work, the preparation. Um, but it is possible now that the attorneys can appear in the High Court.

Quotation 40
L22: 57
LECTURER: The litigation department prepares, does all the backroom work. The litigation department, um is the fall-back of the advocate. The litigation department - well they do maj court, maj court litigation obviously, that's what they do and when it goes to the High Court you do, um, all the backroom work, you get all the expert witnesses together, you get all the statements together, you get the file together, because the advocate can't do that. The advocate is is is is office bound.

Quotation 41
L22: 58
LECTURER: OK, um [clears throat] advocates are specialist uh uh litigators. They are specialist, um, in appearing in court.

Quotation 42
L22: 58 - 9
058 **LECTURER:** Um, uh, what must you have, what must you be to be a good um advocate? You must have an enormous reputation, You must have a very good reputation. I told you about my colleague who started here, well he was first my student. Extremely irritable, irritating student because um, he was in my jurisprudence class and he um, he wouldn't stop asking questions until he had the answer. Um, which was irritating for me but, you know, he was a very good student. He then came … he then tried to do his articles which he hated. He then came to Wits and he lectured for two three years here and he's gone to the Bar. And, I mean, within six months, um everybody, every single person at the Bar was talking about him. Uh, because of how brilliant he is and how perceptive he is and how *tenacious* he is. Um, he's a, he's a small unopposing little man. He's not a, you know, fiery lion or something. But, he chips at you until you crack. And he doesn't .. I remember I gave a paper on unjustified enrichment (coughs) and I

gave th paper first thing in the morning, it was a day session, um and he was fascinated at the, at my view, that I had on this, uh specific issue .. its complicated and I can't even remember it. But it was a novel view on extending unjustified enrichment. And he, as soon as the session was over he came to me and, you know, he .. it was teatime I can remember and he was standing here and he said: 'Um you said this and this .. what exactly did you mean?' And he went on and on and on .. throughout teatime, throughout uh the second session the the mid-morning session, throughout lunch time. And I said 'Andrew, please, dear God, can I *eat* I mean, I don't want to be rude but, you know, can I just have a break?' And he said 'Yes but uh um what exactly did you mean, you can eat you can talk to me while you eat. And he stayed with me until that afternoon that we, that the conference was over, he did not give up until he understood exactly what was going on. And he didn't uh, he didn't accept uh my version of it at all. First of all I had to explain it to him and then, you know, he started attacking me on why, why it couldn't be.

059 So, um, that is the kind of person that you want, uh, as an advocate.

Quotation 43

L22: 59

LECTURER: Razor-sharp, you must have, uh, a razor-sharp intelligence. You must be very good analytically. You must have an extremely well-founded, um, and developed legal feeling. If you see something you must know what is the law. Is it right? Is it not? You must have a encyclopaedic knowledge of the law. Um, and then of course you must be able to present yourself. Must be able to present yourself.

Quotation 44

L22: 59

LECTURER: Very hard work, um, very very tough profession. Always very lucrative, very well paid. Wonderful profession, nobody's your boss. Um, but if you don't work you don't get paid. If you go for ten days to Athens then for ten days you don't get paid. And, you know, you must pay the bills, you know, you must pay your chambers, you must pay your secretary, lots of things that you must pay. Um, so it is only for the very best, reserved for the very best lawyers.

Quotation 45

L22: 60 - 3

[Advocate] [Attorney]

060 **STUDENT 1:** Um, sorry Mr Serfontein, I was just wondering, I spoke to someone on the weekend and they were telling me that … I remember you telling us the process that once you got your LLB you do six months pupilage and then only you go on, um to practice um

061 **LECTURER:** Plus the exam.

062 **STUDENT 1:** Ja, plus the exam. Someone else was also telling me that its better to rather do, uh, your articles first and, um, become qualified as an attorney and then only go …

063 **LECTURER:** Mmmm, but I, we discussed that as well. Yes, I said, um, I said that you can, if you finish your LLB, you can, technically, you can do that. You can go directly to the bar. But I mean you're a, you're a fool because as I've just shown you by the the the magazine, it all depends on your reputation. And what kind of reputation have you got? Um, you know, you're a beautiful

girl from Scotland and that's not going to help. It helps with other things but its not going to help with the law. But, if you do your articles first then at least you're getting to know the attorneys. And you're getting to know the partners at that firm and other firms because every case that you do in your two years' articles you have to work with other attorneys. And if you impress them, even in the magistrates' court, you appear there and you make a name for yourself, far far better, Not only do you do your articles, um, but also stay on a little while as a professional assistant or associate, uh, its at a better salary and there you get more senior work. And you can, you know, you can specialize especially if you go to a very large firm. Um, you know. I would agree with that. Um. I would say nobody can go to the Bar before they've been to the side-bar. But there's no such rule. It's a split bar so you can do what you want.

Quotation 46
L22: 63
LECTURER: But I can assure you there are people sitting here, um, in town or at um, Sandton, *praying* for the telephone to ring. Uh, and they're sitting there week after week, hopefully only week after week and not month after month. Um, because, you know, I've heard of people sitting on the library steps of the, of the chambers in Sandton, uh, trying to conduct a practice from the library steps. I mean, can't go into the library because the library is, is preserved for the members of the Bar. Sit on the steps and trying to get your practice going. I mean that's not [clears throat] that's not, you know, nobody's going to employ an advocate on the library steps.

Quotation 47
L22: 64
LECTURER: Um [clears throat], three things that you must have tech .. formally. LLB, six month's pupilage without payment, nobody pays you, you must have financial support to live for six months, uh, without support uh to live for six months without a salary. Perhaps you might, you might think its easy to do that as a student it is, you know, because you've got lots of support structures, but if you are in a profession you must have a car, you must have a cellphone, you must have money to entertain people, you must have money to go out, you must have money to buy books, you must have money to buy, money to buy make-up, you want to buy nice clothes … you can't, you know, not be well-dressed, you're an advocate, you must dress very very well you must impress the people. You can't sit there with uh a denim and slacks … it just doesn't work. If you, if you if you've got a multi-million contract that is a bit shaky and you want to take it to court and you get to this guy and he looks like you look now today … Not that, not that you don't look beautiful but, um, you know, this is not, you know, he's going to say 'uuuh, you know, please, this guy doesn't know what he's doing or this girl doesn't know what she's doing. She's in a pink Oxford tracksuit [gestures towards one of the students] please, you know'. You must power dress: black, red, white; high heels, silk stockings, pencil-striped skirt, jacket, neat hair, and, you know, power, power, power. You mustn't, you know, there's no softness there.

Quotation 48
L22: 65
LECTURER: Ok, um, and then the third thing you need is your bar exam. Bar exam - difficult but not impossible. Bar exam - lots of work - but you must know your Rules of Court. And your *ethics*. Ethics, remember that, if you prepare for the bar exam those are the things that they're going to ask. Your

Rules of Court. You must know your etiquette, your Rules of Court and your ethics. What may and may you … can't you do.

Quotation 49
L22: 66
[Advocate] [Attorney]
LECTURER: OK. Those are the two, um, parts of the profession that I think most of you are going to go into. Um, there .. those are the two private, uh, private parts of the profession. Um, and in both these, um, uh, professions, you will make, you'll make a living. Definitely. You'll make a good living. And the higher up you go in these professions the better your living is.

Quotation 50
L22: 87
LECTURER: Judges ladies and gentlemen should be, they were always in the past, the best senior advocates.

Quotation 51
L22: 87
LECTURER: People like George Bizos who is a well-known advocate

Quotation 52
L22: 92
LECTURER: You didn't really take notice. OK. Um uh judge must be have an LLB. Must have a good practice and they must be a senior uh advocate. Uh nowadays of course its no longer compulsory that you must be a senior advocate.

Quotation 53
L22: 100 - 102
100 **LECTURER:** Um the problem with becoming a senior advocate and then a judge is what? [some murmurs from class] Hmm?
101 **STUDENT 3:** The salary.
102 **LECTURER:** The salary. A judge gets about a, a junior, a newly appointed judge gets about seven six hundred thousand a year. And a senior advocate, well as I said, gets from four to five up to eight million in a year.

Quotation 54
L22: 134 - 9
134 **STUDENT 3:** I don't have a question but I just had a / I don't have a question but when you were saying, when you were talking about advocates being scared in court, I remember when I was in standard nine, we had to do work experience and I went with a friend of mine, her dad works for Bell, Dewar and Hall.
135 **LECTURER:** Hmmm
136 **STUDENT 3:** And I went with Nigel and I spent a week with him. And he took me to a court in Joburg Centre, I just remember it was close to the Brazilian Coffee Shop, and I sat in court that day and I've never been / I didn't know what was going on and I could feel the nervous tension

in that room it was just too awful for words.

137 **LECTURER:** No well some people thrive on that, some people live / like like [Isobel], I mean if she doesn't have an adrenalin rush every five minutes you know she gets bored. So some people really like that, they thrive on that nervous tension and they are their best and sharpest when they have … but you know you can't its impossible to sustain it for weeks and weeks and months and months and then you must take a break um you must look after yourself, you must you know / it's a very / it's a high tension job.

138 **STUDENT 3:** I met a lovely / after the case and everything because we spent the whole day in court, and Nigel was worried and said 'Aren't you tired, aren't you hungry?' And I said 'No no I'm actually fine I'm enjoying this quite a bit, its different' and I met up with, well I met some of his colleagues, there was a lovely tall blond lady - I don't recall her name - lovely tall blond woman and she was an advocate and she was wearing her robes and walking, you know we all walked across the road and it was very romantic and everything we sat in the Brazilian [class and lecturer laugh], we had lunch and she asked me all questions about school and then she said 'Oh you studied French at school!', she started rattling off in French for like half an hour and I just sat there with a mouth full of teeth.

139 **LECTURER:** Ja that's the stereotypical, that's the stereotypical idea that I have of a of a female advocate but I'm uh I shouldn't talk to you about that but um tall, long, blond, um you know multi-faceted, multi-functioning, multi-tasking uh super elastowoman, you know three children on the hip and uh you know five hundred thousand briefs on this side, that's what you must be.

APPENDIX 4E: QUOTATIONS – JUDGE

N = 79

Quotation 1
L1:6
LECTURER: OK and that's where um, that where the interesting thing starts, that's where you have the different judges uh who gives on the same set of facts uh four or five different judgments.

Quotation 2
L1:87
LECTURER: You can believe on a metaphysical level - do you understand the word metaphysical - it means behind the physical, you can believe on a spiritual level, you can believe 'this is how law works, law is just a reflection of a higher law' and still be a judge and sit in judgment of others objectively.

Quotation 3
L2:62
LECTURER: Well, you're opening a whole can of worms now because um uh uh towards the end of the course we will do the difference between a review and an appeal and this is also in England, they've got different rules than what we have in South Africa so I'm not quite sure how it works but certainly if there is something fundamentally wrong in a case. If [there are] things which have not been taken into consideration or if they think that the judge made a mistake then of course you can appeal, even if you pleaded guilty.

Quotation 4
L2:63
LECTURER: Um so the important thing that I want you to take from this case is uh what the judge said um and I can't get the quotation right now but um, one of the judges said 'look, when we sit in judgment on a matter like this you don't bring along with you your own personal baggage. You don't / because this is abhorrent to everything you stand for / first of all you don't agree as a judge, you don't agree that males should have intercourse with one another. That is something that is abhorrent to you. That's not strange, five years ago in this country it was against the law. That's not strange at all. But you don't bring your personal subjective view to court. Secondly, you might find it from a Christian point of view or from a decency point of view completely abhorrent that uh people have to hurt themselves to … in order to get sexual gratification. That is not relevant. What you think of it while you are uh busy with recreation with your family and your friends and uh socializing and your view in society outside the courtroom is is one thing. What you must do when you sit in judgment on a matter like this is you must look for the law.

Quotation 5
L2: 71
LECTURER: Now obviously, here you have a judge that has to interpret whether this man's marriage is uh uh valid or not. On the on the surface of it, purely, on the / without investigating it, what we call as lawyers *prima facie*, on the first face of it, looking at it, this guy's correct because it *wasn't* in the house. They were in the garden. They w .. got married in the garden. But the judge said 'no, marriage is a very very serious and a very solemn um contract between two people and uh it shouldn't be handled frivolously and meaning 'in' the house also means in the garden.

Quotation 6
L2:73 - 5
073 **LECTURER:** OK What do I .. What do I want to illustrate with this case? I want to illustrate to you that legal certainty is very elusive. Legal certainty is very very important. Your society is based on legal certainty. If you have a society where there's no legal certainty; if you don't know how fast you must drive on the highway; if you don't know uh at what age you can consent to marriage or if you don't know when you must start paying tax or ex/ all these things …then you live in chaos. Then you lived in an uncivilized an anarchic society. Now there is an argument to say that that is not so bad but we won't visit that now. What we're trying to expl/ establish here is how important is legal certainty. In this case there was uncertainty in the language of the statute, uncertainty about the word 'in', and the judge didn't follow the letter of the law, but he rather preferred to give a decision whereby certainty would be confirmed. Certainty would be confirmed. Do you understand that? Hmmm … Any questions?
074 **STUDENT:** Just say that again he didn't follow the letter of the law …
075 **LECTURER:** He didn't follow the letter of the law because then 'in' would mean 'inside the house'. Um, the ordinary Oxford English Dictionary if / and that's what he used / means uh if you look at the ordinary Oxford Dictionary in means … 'In' is defined as follows: inclusion or position within limits of space.' That is what the Oxford English Dictionary says about 'in'. So if you follow the Oxford English Dictionary the judge should have said 'mmmm … sorry .. your marriage is, is over.' But, it is a characteristic of law of good law, of a ordered society that we strive towards certainty. So the judge looked *beyond* the dictionary meaning of the word 'in' and he extended it to mean also in an open space, outside the closed space. There's very good reason why the legislature used the word in because people get married within an enclosure. The legislature said you must have open doors and when these people went through the open doors and outside, the judge said, no that is also inclusive.

Quotation 7
L2:80:293 - 301
LECTURER: Um I'm not sure you understand this concept the uh concept is very important here. The law will be interpreted to give um law will be interpreted to preserve something that people believe in. I mean and that is that is what the judge based his decision on. The ma .. the contract of marriage is so important that the judge said 'I'm not going to be bound by what the dictionary says. I will ex … I will use my discretion' - we'll get to discretion now. 'I will use my discretion to to widen this concept of "in", just so that we have certainty. That we don't have people thinking that if they just go over a threshold that your marriage can be null and void.'

Quotation 8
L2:80:304 - 310
LECTURER: Only if you know if if if there was a blatant disregard of all the formalities will a judge uh consider uh declaring the marriage null and void. Uh for instance if you marry somebody who is 8 years old. That's against the law, you can't do that, not even with the permission of the Minister of the Interior. The judge would have interpreted that as null and void because that that goes to the core of the marriage, you can't marry somebody whose eight years old, there can be no real consent from that person.

Quotation 9
L2:105
LECTURER: But, for legal certainty, what we do is we have the courts. So, what will happen is exactly the same as this one. If you get married in a submarine, and then you subsequently want to declare it ann … null and void um because it was not in a house then you have to go to court and the judge will then decide whether he will interpret the legislation and he will decide whether it was valid or not. It is the best way

Quotation 10
L2:113 - 119
113 **LECTURER:** Look, a judge has got a discretion. A judge has got a discretion to interpret um uh legislation and the judge will always in a case where he has to interpret something like this, will always favour the interpretation that gives the greater legal certainty. And that's not difficult to establish. Um uh what you what you must establish is, if I interpret this [points to the word 'in' on the blackboard] as the dictionary says, and declare these people's marriage null and void, what will the result be? The result will be hundreds of people are now going to come to court and say 'Ja but we also got married in strange places and we are now also tired of our spouses and we don't want, we also want it null and void. You understand? That will lead to massive uncertainty. Even people who don't want to declare their marriage null and void may now think 'Oh, but I also got married in a garden, is my marriage now valid?' [Makes a gesture that seems to say 'You see?]
114 **STUDENT 1:** So he's just referred to what the majority of society would … find acceptable …or
115 **LECTURER:** Uh no no it's a it's a you know I can't its it's a it's a common sense thing Its more than common sense it's a … you know the judge doesn't go out and have a census of society um …
116 **STUDENT 1:** No that's why I was just wondering ….
117 **LECTURER:** Uh ow uh the judge the judge is the representative of us on the bench, of society on the bench. And the judge must make the decision that will create the greatest amount of certainty in society. In other words, uh huh uh uh uh you, if you judge a case, you are not, you must avoid creating chaos.
118 **STUDENT 1:** It's the opposite of certainty …
119 **LECTURER:** Yes, so um if you do / but of course you can't do this at all costs. If the overwhelming legal argument is, to take a decision where you even make some uncertainty, but, you know, there is just no other decision to take, then you can. But in general the judge

will always decide on the minimum change in society.

Quotation 11
L2: 119
LECTURER: Where / in a society like South Africa you know that is very uh its its very almost flippant to say that because um where the judges had to decide about um uum the gay marriages uh that would cause enormous friction in society [coughs]. But they had the Constitution to consider, and the Constitution is an *overwhelming* authority. So you can't go against the Constitution. So, they decided to declare gay marriages valid, to declare it valid that people of the same sex can get married, create some uncertainty, but in accordance with the Constitution. OK, now everybody is nice and confused. Any, any other questions?

Quotation 12
L4:65 - 8
065 **LECTURER:** No no no its not that good either [laughs]. They have got / the President appoints a kind of committee called the Judicial Services Committee. Uh and the Judicial Services Committee consists of a wide spectrum of people involved in the legal world. And it's a huge panel consisting of the Minister of Justice, other law lords [laughs wryly] hmm other law lords, other justices, the chief justice, ummm even a representative from the magistrates' commission. Lots of people involved in in law. And then they interview all the possible candidates, but where do they get the candidates from? [pulls face]
066 **STUDENT 3:** Aren't they nominated by their peers?
067 **LECTURER:** Yes, partly. But who compiles the list that goes to the Judicial Services Commission? The President. The President gives the list to the Judicial Services Commission and say[s] 'These are the people I think you should interview'. Then they interview them. They interview the people on the list. They can, strictly speaking, they can add, it is possible, but they never do. And then they make a shortlist. And then they send the shortlist where? To the President and the President appoints who he wants on the shortlist. He can also appoint everybody, which he usually does.
068 But if he, if he's got a problem with somebody … with a political appointee, if there's somebody on that list that the Judicial Services Commission wants to uh appoint and he doesn't want to appoint, the person doesn't get appointed. It has never happened. It has never happened, uh, the only the only time that there was any kind of contro controversy and it's a very slight controversy, was when Justice Mohammed was appointed Chief Justice uh and its was that strange time when South Africa was in transition so what you had was Justice Corbett, who was the old chief justice, and who swore in minster Mandela as the first president, he retired, and of course he had a deputy in the Supreme Court of Appeal that was waiting in the wings to become the chief justice, Hefer, who was who a-a-a- white uh old judge from the old uh dispensation. He wasn't he wasn't a bad judge, he was as a matter of fact a very good judge but he was a judge appointed by the previous government. And the President instructed the Judicial Services Commission, or the President made it known to the Judicial Services Commission that his candidate for the position of chief justice is not Hefer but Mohammed, who was at the Constitutional Court. And then of course, you know, strangely enough, the Judicial Services Commission appointed uh uh Mohammed. That was the only slight slight

controversy that the President gave his impressions to the Judicial Services Commission. Strictly speaking that that's you can't do that you know. If you say there must be watertight division, then that shouldn't be, that shouldn't be. But we live in a broken reality, you know, it doesn't happen. Not even in the United States.

Quotation 13
L5: 64

064 **LECTURER:** Oh um its very simple [moves around front row of chairs and leans against this row in front of her as he responds to her question] In the uh past it was possible um to use force to extract a confession out of a prisoner. There was a section in the Criminal Procedure Act, section 171 … (d) … (4) that said if a prisoner does not want to co-operate and there's a reasonable suspicion, then he may be forced to make a confession. And that confession will be allowed in court subsequently. Now your legal feeling, such as it is at this moment, should already tell you that there's something wrong with that. Uh-h-h you can't have (a) the right to silence; uh (b) the presumption of innocence, (c) decent ordinary human rights of dignity. You can't have that and a Criminal Procedure Act that says you can be forced to make a confession, the confession can be accepted against you and you can uh be tortured, your dignity can be um uh affected. So that was one of the first things, in the case of State versus Zuma, that was one of the first things that went to the Constitutional Court, to test whether the confession was made by a prisoner can be accepted by a subsequent court. And the constitutional court, by the mouth of the then Judge Kentridge, he was a judge for a very short time, he's now in England, um, he found that its unconstitutional and he struck it out.

Quotation 14
L5:59

LECTURER: Pius Langa, you should all know this ne? Who's the deputy chief justice (sshhh sshhh) Who's the deputy chief justice, he's on sabbatical at Wits now … he's sitting here in Wits, he's doing sabbatical work, he's also the chancellor of this university ….[Student: Edwin Cameron I think it is - other students murmur their disagreement or assent] Ooohh Edwin is the chairman of the council, who is the chancellor [Student 6: Chaskalson] No no Chaskalson is long retired, we long forget about Chaskalson. Who is the chancellor of the university of the Witwatersrand? [Another student attempts an answer but L already starts whistling incredulously] Ladies and gentlemen, I am going to kill myself [class laughs] I give you a hundred bucks if you can tell me. [Student: Is it a contract?] [Class laughs] It's a verbal contract, ja [more students laugh] [One other student attempts to answer] Justice? What? ….Does anybody know? [slight pause] Have you ever heard of Justice Dikgang Moseneke? [cries of 'oh' from class and chatter] Oh yes of course Dikgang ja ja ja ja ja [imitates class]

Quotation 15
L7: 12:12) (Super)

Codes: [Judge] [Lawyer]

LECTURER: The common law is the law created by the jurists. By the lawyers. In England it is the judges, judge-made law, and law made by lawyers.

Quotation 16
L7:28

[Judge] [Lawyer]
LECTURER: Thank you. Thank you. Very clever. Very very clever. When the courts, not the laws like Mr … said, when the courts, the judges, when they sit, and they decide law cases, what do they use? They use legislation and they use the common law. They use other cases. Why do they do this? They develop our common law. The judges, since 1910 when we had uh a united uh appellate bench the judges and the lawyers develops the common law.

Quotation 17
L9:26
LECTURER: Uh these things are extremely theoretical and I can guarantee you, the judge, when the judge sits in the court he does he does he or she doesn't decide 'OK I'm going to decide this interpretation on this rule'. Its an ex post facto theoretical um construct in other words you look at all the ways in which judges interpret uh rules, and then we formulate the theory. You understand? That's how all theories work. They don't, its not watertight compartments neatly stacked that you can choose like pigeon holes which one you're going to use and that's not the way its done.

Quotation 18
L9:35
LECTURER: Um um they they first draft the legislation. Then the legislation is passed and it becomes an Act, and it becomes the law of the land. And then there's a case, like this case, which asks for the interpretation of the legislation. And then a completely different group of people, ie the judges, sit in judgment. And they must decide how are they going to solve this problem.

Quotation 19
L9:67
067 **LECTURER:** Uh law is far more speculative. Um the the the theories that we have are theories that are composed, not through empirical experimentation, like you would do in natural science, but are theories that are composed, as I said in the beginning, ex post facto through deduction. We see this is what the judges do. The judges when they sit, they don't have in their minds, the old judges especially, they didn't have these theories. But through a hundred years of jurisprudence, we saw that this is what the judges do. So we sit down and we extract from that, we deduct from that the four different theories.

Quotation 20
L10: 58
[Advocate] [Judge]
LECTURER: So what you do is you become an advocate, you if you're a very good advocate they ask you to become a uh acting judge, if they see that you can do the work then they invite you to become a full-time judge in the provincial division, or the local division, after years of service in the provincial division or the local division, if you are deemed to be fit, they are invited as an acting judge to the Supreme Court of Appeal or to the Constitutional Court. So it's a hierarchy, its not the same judges and they don't exchange. You are promoted to to one.

Quotation 21
L10:93:515 - 527

[Advocate] [Judge]
LECTURER: No um ….de-uh … Look I have difficulty in following you, I don't know exactly what you mean but um judges in private law matters sit and they are confronted by both sides represented by an advocate. The advocates make sure - that's their job - they make sure that the judge is informed of very single possible authority uh that their case, that their side of the case um uh that will support their side of the case. So the judge, when he sits in the provincial division has got the advantage of the entire scope of authorities, presented by the two advocates. Of course not all advocates are the same. And some advocates are more thorough than others. What then happens uh is the judge hears the case, he gains all the authorities, he then retires and then um he does his own investigation. He does his own sources he investigates the advocate's sources, he does his own research, he comes to a conclusion based on everything that was laid before him.

Quotation 22
L10:93:527 - 533
LECTURER: So there's virtually no chance that if there's an authority on either for or against uh the decision the judge wants to make that he won't know of it. If he's involved in that case he will know of it, he will evaluate it and he will decide yes I'm going to use this authority or no I'm going to decide against the authority. A judge can't make his own authority. I think what you mean his own research. Ja. Judge can do his own research, that's what he's being, that's what they do.

Quotation 23
L10:99
LECTURER: And he will put that before the judge. And he will try everything - with his arguments, with your affidavits, with everything, he will try to convince the judge to decide upon the cases that he has quoted to the judge. The opponent will do exactly the same. And usually, if it is a moot point, if it is an open point in law then there will be authority for both sides - yes! Yes! That is very possible. As a matter of fact that's what happens every day in court. Is trying to convince a judge to accept your authorities rather than your opponents' authorities. And then? That's why you have to use logic, that's why you have to use uh rational deduction. The judge then has all these authorities in front of him with various weights that he attached to the authorities, depending on what they are, and then he does his own research and he comes to a conclusion, which authorities to accept and which to reject because every case is different. When I talk about a precedent, no two cases can be exactly the same. I mean, you can understand that for yourself. The facts will - every case will have different facts. So there will always be cases that you can argue are for, and cases that you argue are against it. And it's the work of the judge to decide which of the cases to use to support his decision. And when he makes a decision, and he reports that decision, that decision becomes authority for that specific point that was raised in court.

Quotation 24
L10:36
[Judge] [Magistrate]
LECTURER: Yes, in other words, the judges. [Student: Ja] Ja because you have magistrates in the lower courts and judges in the higher courts.

Quotation 25

L10: 39
LECTURER: The word 'precedent' is merely a technical word referring to a previous case taken as an example for subsequent cases or as justification. In the le- technical legal sense, the word pre-precedent means a court case which you quote in a court of law as a judge as authority for your decision.

Quotation 26
L10:47
LECTURER: South Africa works on a system of a hierarchy of courts and of precedents. We work on a system called *stare decisis*, in other words the lower courts are bound by the higher courts. So if you've got a case that is exactly the same case as a case in the Transvaal, yes, and you are now say in Durban, yes you've got the right to come to a different conclusion, and say for these reasons, very good reasons must they be, I'm not following my brother in the Transvaal. Ok so that that you understand. When you then have a new judge and a new case, and the facts are similar to both the previous case that didn't follow the Transvaal, and the Transvaal case um that was decided originally, the judge in the Natal case, in the Durban case, will - if he wants to follow the Transvaal case - will very pertinently state: 'My brother in the Transvaal made this decision in 1962, it was wrongly not followed by my brother in 1968 but now in 1992 I am overruling him and I am following the Transvaal judgment. Uh he wouldn't say, he wouldn't you know its unthinkable of making a whole judgment and not referring to the Transvaal judgment. Because what you're ultimately aiming at is that all the courts will agree with all the legal points that may exist. And for that reason we also have the Supreme Court of Appeal. If there's a dispute between two courts and this dispute is really damaging to legal certainty, that case then goes up to the Supreme Court of Appeal, the Supreme Court of Appeal makes a precedent makes a decision, and *everybody* is bound by that.

Quotation 27
L10: 68
LECTURER: No no its not like the praetor's edict. Um if there's a if there's a if there's a, if there's a precedent there's a court case for instance in the um Cape Provincial Division and that judge made a decision on a certain set of facts, and he came to a conclusion, and that is now the law in the Cape. That case is what we call a precedent. It is used and it is followed by other judges in the Cape. If a judge in the Transvaal wants to follow that precedent, he has to say so in his judgment. Say that he is following that precedent for this and this reason and then that precedent becomes binding on the Transvaal as well. Um the facts may change, but he may not - obviously if he's following the precedent - he cannot change uh the law.

Quotation 28
L10:83
[Judge] [Magistrate]
LECTURER: Yes of course it happens every day! Yes of course, this is how law is made. You you go to uh the magistrate's court if you are within a certain uh uh a certain jurisdiction um s-um R100 000. If your dispute is less than R100 00 or more than uh uh then you go to the magistrate's court and the magistrate's court hears your case. If you're not satisfied with the magistrate's court, then you appeal to the - here in Johannesburg - you appeal to the local division. You don't appeal to the provincial - you

go to your local division. There the judge decides against the magistrate. But that is now a precedent. The magistrate wasn't a precedent. What the magistrate decided was just you know, binding between the parties. Now in the Supr- in the High Court when the judge gives a a decision that decision is a precedent and it binds the whole of the Transvaal. Your opponent, who got satisfaction in his favour from the magistrate is now unhappy. So what is he going to do? First he's going to appeal to a full bench. But that is now technical detail. He's going to appeal from a single judge in the local division to a full bench, either in the local division or the provincial division. If that if the full bench gives judgment against you and for the guy that won in the magistrates' court then that is the precedent. Then the whole of the Transvaal is bound by that precedent and the previous precedent of the single judge disappears. Now of course what are you going to do? Now you are I mean you are I wanted to use a bad word now but we're now on camera you are not satisfied and you are going to, you want to appeal. You appeal to the Supreme Court of Appeal. Which is the highest court. And whatever the Supreme Court of Appeal decides, that's it. Unless it's a constitutional case. That's it. There's nothing higher. You can't go to God or the Privy Council or you know George Bush or whoever you think is powerful. That's it. You stop at the Supreme Court of Appeal and what the Supreme Court of Appeal says - that's law. Whoever and in whoever's favour the Supreme Court of Appeal has decided that is law. And you will - all the other things from the magistrates' court is worth nothing! It loses all its value. What the Supreme Court of Appeal says, that is where law is made.

Quotation 29
L11:84

084 **LECTURER:** And unfortunately the only way to learn this is to expose you to the best brains in the business. Um the court the judgments are written by you know the best advocates that there were. The judges. And usually they are highly intelligent and very very good lawyers. And they they talk in a language of their own they have arguments of their own and it is extremely long-winded. You can get confused.

Quotation 30
L11:48

[Advocate] [Judge]

048 **LECTURER:** Uh etc etc you know how it works, the profession. In the past if you are a very good advocate and they um the council the bar the minister and the judicial services council think you should be promoted, you are invited to act as a judge. For a couple of weeks, or a couple of months. And if you prove yourself, if you prove to be a good judge, if your judgments are sound then they invite you to become a judge. Uh but you are an acting judge before you are a full judge.

Quotation 31
L11:47

LECTURER: And if you know your judges well then you will know that Judge King and Foxcroft and ol' are both very well-known as judges from the Cape uh Provincial Division. As a matter of fic/ fact King at this stage was the JP.

Quotation 32
L11:47

047 **LECTURER:** JP, Judge President. In other words he is the highest judge in the Cape Provincial Division. He is the highest judge, he is the judge president of the Cape Provincial Division.

Quotation 33
L11:67 - 8

067 **LECTURER:** And then it gives you a verbatim judgment of the judge. You will see it is in a narrative. The judge talks. Its not a uh uh it is a formal document of course, but it is in the form of a judgment. The judge sits, it is something that he has prepared, and he's reading it out to the court. That is the judgment.

068 Some of these judgments can become very tedious and become very long-winded and you must distinguish between what is important and not important.

Quotation 34
L11: 73

LECTURER: Now in this case um the judgment was given by the Judge President, King, and his brother Foxcroft, J concurred. In other words that means uh they discussed the matter and Foxcroft agreed with King, they both agreed that King would write the judgment and Foxcroft had nothing to add.

Quotation 35
L11:75

LECTURER: Yes, He concurs but for different reasons. And then he gives a separate judgment. Is that important? Do they look at who's the most senior or which judge has agreed with who? Huh? No. If he concurred, if the judge concurred he agreed with him, then it is academic almost. He might differ on the reasons that he came to the conclusion, but they concurred, they agreed. They, there's no difference between the two judges. This doesn't always happen. In one of the uh great court cases in my field, in unjustified enrichment, *Nortje v Poole*, um the judges were split three-two. In the appellate division. And it was whether we should have a general enrichment action or not, and three judges said uh no, its not ready yet, and two judges, Roelf and Ogilve, Ogilvie Thopmson said you should have a general enrichment action. And by just missing it with one judge, the South African legal science was put back um thirty, forty, now going on for fifty years.

Quotation 36
L11:87

LECTURER: The judge will, when he starts giving his order, just before that, towards the end, he will say these are the reasons why I decided like I decided. Um during his judgment he will play. He will say 'the advocate for the defence' or ' the advocate for the respondent said the following, I'm not accepting his version. I'm rejecting his authority. Advocate for the other side forwarded these arguments and I find them acceptable. And for these reasons I'm going to follow that. Um but that is very confusing, you know, If you don't know what he's doing, is this now part of the judgment or what he's doing. Um … uh… you know. The best is go to the order, go to the end where you look for the ratio decidendi, the reasons for the decision, where he says, 'OK everything considered now, this is what I've decided.

Quotation 37
L13:39

LECTURER: They don't say who the judge was. Perhaps it was all three judges. Um if you look in the

front of the law report you will see there's a list of the judges, very short list of the judges. They were: Frances William Reitz, chief justice. James uh Buchanan and Melliers de Villiers. Three three um judges and um well they all have stories of course. Melliers de Villiers became the Chief Justice eventually. And um uh Buchanan was one of the people who compiled these um cases.

Quotation 38
L13:87 - 94

087 **LECTURER:** What are his initials? Ja look at his initials.
088 **STUDENT 10:** Oh Judge President
089 **LECTURER:** He was the judge President. Yes and who sat with him?
090 **STUDENT 10:** [inaudible]
091 **LECTURER:** Who? He was the Judge President, he gave the judgment and who sat with him?
092 **STUDENT:** Jones and Murrans.
093 **LECTURER:** Thank you. And what did they say?
094 **STUDENT:** They concurred.

Quotation 39
L13:117

LECTURER: Ratio decidendi is the reason for the judgment. Those are the specific reasons that the judge provides why he's come to the decision uh in the case. This has usually only got to do with law. Very seldom, but its not impossible, very seldom will you find that the judge will base his reason for the decision on fact. The way to differentiate between an obiter dictum and a ratio decidendi is to look for something that is involved with law. Obiter dictum is those things that the judge will say that is not binding, that is not binding but that he feels he cannot keep his mouth shut about. Just observations in passing. [pauses to open textbook].

Quotation 40
L13:121 - 2

121 **STUDENT 3:** The judge isn't the one whose doing the interrogating on the person
122 **LECTURER:** No … but the judge is the one evaluating the evidence. So the judge, if she said: 'I sat on the station bench. At quarter to four in the morning, after I'd been to a party. And I can't really remember because I had lots to drink. And then somebody with a dark brown jacket walked in front of me. And then I woke in the hospital'.

Quotation 41
L13: 144

LECTURER: OK she … she summarized it quite correctly. This is an old rule. It's a rule that comes from the Roman-Dutch law. Uh it's the old its very old pre-constitutional conception of females that females are emotional and they can't that they they don't know what's going on in reality and more so when they've been sexually violated. They lose touch with reality. And they fantasize and you can't trust them. [pulls face toward STUDENTS 1 and 19] That's the old concept of uh of females being raped. This judge had the unenviable task of evaluating a rape victim's uh evidence before the Constitution, uh. He did so, he came to a conclusion that her evidence was fine but, and here's the thing, he said *obiter dictum:* 'Listen, we live in a new era, I can't take into consideration here now the Constitution that has not been promulgated yet. But I know this rule is going to be declared unconstitutional under the new

Constitution. So if I had been under the new Constitution I would not have used the cautionary rule. As it is in this instance I didn't use the cautionary rule because I believed what she said and I I didn't use it at all. She was a good witness and I accepted her word on the face of it it wasn't necessary for me to use it. That's the *ratio decidendi*. In this case I didn't use it but' and that's the word you must look for ' but, I just want to say in passing, for instance if you don't think I know it, that there is a Constitution and that I agree with the Constitution and in future the cautionary rule will be abandoned.' That is called *obiter dictum*. Do you understand? Its got nothing to do with this case because the Constitution is not has not been um promulgated yet. But the judge is just saying; 'In future there won't be this kind of case. This question will not come before a court in future again. Because the cautionary rule will be declared unconstitutional.'

Quotation 42
L14:11
[Advocate] [Judge]
011 **LECTURER:** Common law, England is the common wisdom of the judges and the the um uh advocates that's where the word comes from, so it's a traditional law, it's a tradition it's the background to the law.

Quotation 43
L14:5
005 **LECTURER:** My rule of thumb with ratio decidendi is usually it has go t to do with law and not fact. So on the first [inaudible] yes, if the if the judge is quoting another case, that is law. Um eh you can't ever have a rule of thumb, you must apply it uh to f-find whether it is indeed the ratio decidendi. So a-a judge can indeed refer to another case only in passing. Uh especially if he doesn't apply that case in his judgment. Uh that is possible, so then its obiter dictum. If the judge starts his decision, says 'Oh there's another case in Namibia and this is what the case said, um I'm not going to follow that case, I'm not bound by that case because I'm not in the Western Cape' or whatever 'I'm not going to follow that case, I think that that case was um was uh not correctly uh decided um and I would rather follow the following authorities.' Then obviously that is not ratio decidendi. That is not the reasons for his decision, that is obiter dictum. He's just mentioning it in passing, mostly to show you that he knows about this case. And that his judgment was based on the fact that he considered that case, found it uh wanting and he's just mentioning it in passing. But, of course, nine out of ten times if a judge starts analyzing a case then you can be certain that he is going to follow that case. Uh but you must first see what is the question in the in the case what wh-wh-what was put before court, what authorities did he use and what did he decide. And only then can you say, ok this is his decision. The reasons for his decision are the following. And they are supported by the following uh authorities. And that is his ratio decidendi. Ratio decidendi is just reasons for decision. Reasons for decision.

Quotation 44
L14:87
087 **LECTURER:** This is only for highly specialized private law matters, its not for for contemporary um constitutional matters you can't do that kind of study for that. But there's still a large part

of our law that is open to that kind of research. Um um its not for the faint-hearted, but it is very rewarding if you do it. What you must know however is how to do it, vaguely. You must know uh why we say what we mean when we say old authorities, and you must know that some of those old authorities are still valid today. Obviously in the past twenty, thirty, forty years lots of the- huge pieces of Roman law - like the senatusconsultum masoconaum and the senatusconsultum omolierum - those have been demolished, the actio doli has been demolished in the case that you're going to do, uh there are many, there are many pieces of Roman law that has been taken out because they've just become uh anachronistic. Uh or not, the judges perhaps are just a little bit stupid.

Quotation 45
L15:24

024 **LECTURER:** Dankie. OK this is a case that you must go and read ladies and gentlemen. It is a case by the wonderful and very eccentric and very learned uh judge of appeal Solomon. Um and you must read the case - its not a long case, its only four pages - and you must read the case so as to so as to understand his personality. Solomon was one of the of the bright lights of the 1920 the 1920 appellate division. A brilliant, brilliant jurist.

Quotation 46
L18:19 - 21

019 **LECTURER:** Courts and judges. So when there's a new, when there's a new dispensation, what happens? What does a new dispensation do to the sitting judges, because a judge is not a - unlike in America and those funny places, but - the court is not an elected institution. A court is um uh a court is a meritocracy, it is something that is based on merit, its based on on um professionalism, its not a political appointment, you're not elected to be a judge or a magistrate. So what is what do you think the new dispensation would do to the judges, or what do you think they did [clears throat].

020 **STUDENT 4:** They would change their frame of reference, the way they …

021 **LECTURER:** Now how do you do that? A sixty-five-year, middle-aged old male? How do you change his frame of reference? Its not just like, you know, chop off his head and give him another head. How do you do that?

Quotation 47
L18:31

LECTURER: That takes time. That's takes that's only happening now. Ten years later. You don't just [clicks fingers] create 250 new judges. Ne? A judge takes a long time to train. Its not an its not an easy its not an easy job. I don't think/ I think any one of you can jump into President Mbeki's job um and run it for a day or two. I don't know for longer but for a day or two you'll be able to do it. But I don't think anyone in this room except myself, I think, that can do a judge's job.

Quotation 48
L18:34

LECTURER: Um [coughs] the High Court was not a big problem because apparently there was an understanding, there was a sunset clause in the interim constitution that sitting judges will be respected and they will be retrained to uh uh understand the Constitution. And indeed the sitting

judges were retrained, I don't know how effective that was, its very difficult to train a judge. Believe me. Um its not a its not the easiest thing to do.

Quotation 49

L18:46

[Judge] [Magistrate]

Now appeal means you go to a higher court than the court where the case was heard in the first instance. You go to a higher court if you are convinced that uh that something was done wrong in the lower court uh and that the sentence uh that the magistrate court or judge came to uh was incorrect. The appeal rests only on the four corners of the record of the case. There is no vive voce evidence to be led in an appeal. You cannot, when you have an appeal, introduce new evidence. So, an appeal is a second bite at the cherry. You've gone through the whole thing, the magistrate or judge has made an error. According to you, something was done incorrectly. You want to take this to a higher authority uh to rectify that in order that the sentence can be changed.

Quotation 50

L18:53

LECTURER: No I suggested when the when the um when the Constitution was being written I was at um Justice College. I lectured at the um Justice College and we went all around the country to lecture to all the magistrates and judges to introduce the new Constitution to them. And we also had workshops with um all the stakeholders to determine how the new Constitution's going to work because we didn't have any court cases or any precedents to go on. And then somebody asked the same question. Where do you go from here? Where do you go from the Constitutional Court? Um and um Arthur Chaskalson the judge, Chief Justice retired was in the audience and Dullah Omar was still daar, still there and the deputy Minister of Justice was the Minister of Health now, what is her name?

Quotation 51

L18:84

LECTURER: Mostly the High Court judges confirms the the judgment of the magistrate, but if it is an over enthusiastic magistrate, uh um it can be sent uh back and the magistrate must then supply reasons why he um sentenced the person to such uh to a higher sentence than is customary uh and if the court is satisfied, if the High Court is not satisfied it will change the the judgment of the magistrate.

Quotation 52

L18:96

LECTURER: But of course what I had forgotten, you know I was still a very junior magistrate, what I had forgotten is it goes on automatic review to the judge of the Supreme …. Now the problem with the system, is: The judge sits in his chambers, the judge is now a senior advocate who's been elevated to a judge. He sits in his chambers he's high on on on human rights and things - which is fine - but he doesn't understand what a magistrate's court looks like. He doesn't understand seeing this woman with four children and this man who refuses to pay the maintenance. He doesn't you know they've never seen that, its just not part of their frame of reference. They are just concerned about procedural correctness.

Quotation 53

L18:98 - 100

098 **LECTURER:** Of course three months later on a Saturday evening, on a Saturday evening in Cape Town, um I had a dinner party, I had lots of people there, at my dinner party,and it was about se- seven o clock. You know just after after the people have arrived and they've had their first course, then there's a phone call. Now, I'm irritated because you know - the food is in the kitchen, I must look after the food and I've got ten or twelve people to serve and I don't want phone calls now. Grab the phone: 'Yes who's this!'

099 And a very civilized English voice on the other side:' Excuse me, but um may I please talk with magistrate Serfontein?' [raised pitch] I said 'Yes its him talking I'm not on duty this weekend *please* who is this?' 'Mr Serfontein this is Judge Foxcroft'. [starts laughing] 'Do you remember the case of State v Ngobe' or whatever. I said 'No I don't remember the case your honour or my lord' or I don't know what I called him or judge um and I said 'uh-h. 'I have tonight issued an urgent mandamus' or something 'instructing Pollsmoor Prison to release this man and I would like it if you could send me a full set of reasons why you for a first offender sentenced this man to twelve months in prison. I'm forwarding the court record to you and if you could reply by Monday afternoon latest I would appreciate it'.

100 So of course I was in big big big trouble. Um and the man was released after three months and the judge - it was a reported case - my name came in the law reports as the magistrate who sent a first offender to twelve months in prison.

Quotation 54

L19:42

042 **LECTURER:** No no two different people but they are related. So um you can go and read about Oliver Schreiner. Um there are many articles in the law journal about him. Professor Kahn wrote a beautiful obituary about him when he passed away. Um but he was indeed involved in the Harris case and he was one of the few judges that stood up against the apartheid regime. Uh he was a brilliant judge. Uh even his technical cases, on things like mining rights and um uh administrative law, he was a true blue lawyer, you know, one of the … one of the greats.

Quotation 55

L19:8 - 10

008 **LECTURER:** OK the first thing that we know about the Constitutional Court is that it was instituted by the um 1994 Constitution. It is a new court. Justices were appointed to that uh court which um were charged with looking after the Bill of Rights and looking after the human rights of South Africa. The courts, up to that point, as I said on Tuesday, the courts were not wholly trusted by the new regime or by the new government because they were seen as co-operating with the apartheid government and they were not a hundred percent completely trusted by the new government.

009 So the one thing that the new government did, the most or the least revolutionary or the least disruptive element that the new government put in place was the new Constitutional Court. Um in other regimes in other um uh jurisdictions where there has been a transfer of power from one group of people to another uh it happened on a much more revolutionary basis and all the old judges were simply uh dismissed. Or they were simply, they were simply uh retired. Uh if you look at the problem in Pakistan not that that is now a modern democracy, but it least

it strives to be a modern democracy, one of the major upheavals in Pakistan is the fact that the President dismissed the chief justice.

010 Now this didn't happen in South Africa. We had an evolutionary change. Um uh and the chief justice of the previous regime, Justice Corbett was asked by President Mandela to officiate at the swearing in ceremony of the new President. So the chief justice of the previous regime was asked to swear in the new President of the new government. I'm making that point just to illustrate to you that there wasn't a clean sweep. The only clean sweep that there was, was that eleven new justices were appointed to a new court called the Constitutional Court.

Quotation 56

L19:14

014 **LECTURER:** Um [fumbles over words] of course its true, because all courts are only sitting for certain times of the year. Um and the Constitutional Court has got um a specific diary or r- roster and they are in session for certain times and they are in recess for other times. So ub-h exactly the same with High Courts. The High Court doesn't sit for the whole year, and the same for the Supreme Court of Appeal. Um and that is to give the Justices times to do research. And write the judgments. And um to come up to date with the most current law. To be a just- to be a uh um to be a justice in South Africa, to be a judge in South Africa is not easy. Um it's a very dynamic environment. So uh besides holiday they need time off from court work, so that they can catch up with their research.

Quotation 57

L19:32

LECTURER: So the only challenge to the superiority of the Appellate Division the old apartheid Appellate Division, though its unfair to call them the apartheid division of the Appellate Division, there was some sterling judges in the Appellate Division uh especially white, of course white but English liberal judges um uh also some Afrikaner professional judges that were above the apartheid nonsense um uh but the new dispensation, the new government still saw the Appellate Division as a bit tainted and uh as not supporting but standing quietly by while the apartheid government ravished human rights.

Quotation 58

L19:38

038 **LECTURER:** Ja Oliver Schreiner [STUDENT 3: … came from the Eastern Cape or Cradock]. Oliver Schreiner is the very very famous and very intelligent and wonderful judge that we've called our law school, that we've named our law school after. So it's the Oli*ver* Schreiner School of Law. And if you go into the library you will see pictures of Oliver Schreiner. And he is indeed related to Olive Schreiner who wrote 'Pictures of an African Farm' or whatever. Um who was a um supporter of human rights even in the beginning of the twentieth century. And she was a novelist, a very famous novelist.

Quotation 59

L19:63

LECUTRER: The names and the geographical jurisdiction of the High Courts are being considered or they have been considered and a Commission of Inquiry under Judge Hoexter who is the father of

Professor Hoexter who's one of our leading academics at the Wits Law School. The Hoexter Commission has designed a new structure for the whole of South Africa.

Quotation 60
L19:67
LECTURER: The judges that sit in the local division are the exact same judges that sit in the provincial division. They are interchangeable. It's a roster. You sometimes sit in the provincial division, sometimes in the local division.

Quotation 61
L19:71
LECTURER: Obviously not, you can't uh what is the Latin? You can't you can never be the judge in your own case. Uh suo iudex non [inaudible] est - you remember that Latin? No. You can never be/ its like um its like um audi alteram partem, the other side must always be heard? Its natural justice, you can never be a judge in your own case.

Quotation 62
L19:11
LECTURER: Justice Albie Sachs, a fighter for human rights. Although he practiced for a very limited matter, very limited matter in Mozambique, and the neighbouring countries, and he is a qualified lawyer um he is he was appointed because of his role in the struggle, because of the sacrifices that he has made and because of his passion for human rights. You can go through all the justices of the uh uh Supreme uh of the Constitutional Court, they were all appointed specifically for uh uh very specific human rights reasons.

Quotation 63
L20:24
024 **LECTURER:** The guardian of the guardian? There's no custos custodius for the High Court. Except of course the Constitutional Court when it goes on review in the Constitutional Court. But no no automatic review for the High Court. You must also remember, a district court magistrate, and a regional court magistrate, to a lesser extent, is *far* removed from a judge. Judges are appointed the best of the best. Well … some people will not agree with that. But the idea is the very *best* senior advocates. The very best of the practicing advocates are appointed as judges. So uh when you reach the stage where you are invited to become a judge, uh you really know your business. You've been through the mill and you really know your law.

Quotation 64
L20:26
[Judge] [Magistrate]
LECUTRER: Having said that, and we'll do this when we do the profession, please remember that it was one of Dullah Omar's objectives, the previous Minister of Justice, that the curriculum vitae, the cursus honorum, the career path of a magistrate and a judge would eventually in South Africa become one. You would start by being a junior prosecutor, senior prosecutor uh being elevated to the bench becoming a magistrate, senior magistrate, regional court magistrate, senior court magistrate, regional court president and then be invited to become a judge in the High Court. He tried to bridge that gap.

Quotation 65
L20:29
LECTURER: And a judge in the High Court, especially with some standing, a couple of year's standing, you don't need to review his work, you know.

Quotation 66
L20:50
LECTURER: And went on review and was confirmed on review. By the way, if you think all my cases were turned over [laughs, amid class laughter]. It was confirmed by no lesser luminary than judge Eloff, who was Judge President. It was confirmed on review.

Quotation 67
L20:56 - 7
056 **STUDENT 3:** Sir, I was under the conception that um if someone pleads guilty in court the magistrate or judge is more likely to give a tiny bit less of a harsher sentence because of a …
057 **LECTURER:** Yes, it could be, it could be. If you plead guilty, it save an enormous amount of time, it saves an enormous amount of time, um and um you are helping the court. And it shows remorse! You admit 'Look, mea culpa, I'm guilty, I'm here, I'm throwing myself on your mercy.' Then of course the court will take it into consideration.

Quotation 68
L20:70
070 **LECTURER:** Yes, of course, a court all courts except if the judge rules that it is in camera. In camera means that because of the sensitivity of the case uh it shouldn't be held in public. Those cases are usually where children are involved. If the child has been molested then obviously you don't want the public to sit there and look at the poor child giving evidence. Um you know if its high priority - Zuma asked that his case be heard in camera and the judge said 'No'. Um but usually if its high profile or if its very sensitive. If it concerns national security as Zuma said it did, national security on the weapons, whatever, then the judge can decide that the court will be heard in camera. And that the court doors are closed and that there are notices that this court is in camera.

Quotation 69
L21:36
The idea is that they would help to alleviate the pressure on the High Court. And unopposed divorces, why do you need a High Court to listen to unopposed divorces. Have you ever heard an unopposed divorce? I mean, three three minutes. Um if there's an agreement, the judge says 'Ok, the agreement is now an order of the court and the parties are divorced. Thank you' Chup [makes as if he is slamming down with a gavel].

Quotation 70
L21:38 - 9
038 **LECTURER:** You know, um justice is not something that you can rush, on the one hand. Um uh

justice is not something that uh you can use a sausage machine for. Its um you know, you must consider the cases. It takes time. And then, you know, we've been through a transformation. We've expected an enormous amount from our justice system. And its it's the price that we have to pay instead of having a complete breakdown and no courts and no and chop off the heads of the old judges, that's on the one hand. The price that you have to pay is you must slowly but surely appoint new judges, the old judges must train the new judges and the new judges must get used to the work. And that takes time, that you don't / you know, a judge is not made overnight. Um uh uh you know even a plumber, if you ask me now to become a plumber it will take me, well, me specifically, about 28 years [laughter] but you know you can't send somebody in to do a complicated electrical job if he's not trained electrician. Or even if he's a trained electrician if he hasn't got experience. You know, it takes time, it really takes time. Um and what we want from our judges is common sense. And, you know, the tree of common sense is very high. You don't, you don't get to it very easily.

039 So, um and there's lots of work. You know, that's the other thing that people forget about the stupid electricity problem as well. Um you know, there's a shortage of electricity, yes perhaps because there wasn't maintenance and because there wasn't transformation and affirmative action and all those arguments but the main reason why the electricity is in short supply is the fact that South Africa's economy is booming so much. That we need such an enormous amount of electricity. Um, you know, the courts are full because there's lots of commercial activity, there's lots of criminal activity, there's lots of work, because it's a society in transformation. There is just an enormous amount of work. Couple that with the fact that we're in transformation situation then, you know, you have your answer. Um and its going to take a generation to solve it. Not not not a decade. Its going to take a generation to solve it.

Quotation 71
L22:48
[Judge] [Advocate]
LECTURER: The papers are the things filed in the court file and served upon the other side that you are going to base your case upon in the form of affidavits, expert witnesses, whatever, I don't, I can't go into all those technical details. But it is a paper file that is opened for your case in the court and that file goes to the judge, not to you, that file goes to the judge. If there's *anything* wrong with that file, the judge will only keep you responsible. The judge will ask *you*, um, Mr [state's student's surname] why is the file not properly paginated? And its no use saying, uh my lord I'm terribly sorry but that must have been the clerk, the clerk of the attorney who did not attend to the pagination. You must see to it that everything is in order. Up to such a small detail as pagination. You know what pagination is? You have a file of ten thousand pages and every day a new document arrives to be put into that file. Sometimes, the order changes. So before the document goes to the judge on the day of the trial, somebody, usually the clerk of the, the candidate attorney of the attorney's office, must go to the file and see to it that it is paginated, in pen, in pen, you paginate it in pen because it changes. And its paginated from page one to page ten thousand. Correctly. If it is not correct then the judge can throw out your case.

Quotation 72
L22:49

[Judge] [Advocate]
LECTURER: You must be able to see every single thing. If there's a spelling error in your pleadings, oh please. If there's a grammatical error. If there's a technical error, a legal error, if you've made an aversion on a statement that is wrong technically, legally, your case is thrown out. The judge will give you an opportunity. He'll say, uh, please Mr [state's student's surname], address me on this novel interpretation that you have in clause 3. And then you will be able to address him but I mean if you, uh uh, if he talks like that you know you're stuffed. You can just as well, you know, pack up and say 'I'm sorry my lord, um uh, I'm relatively inexperienced in these matters and uh, it slipped in, I beg your lordship's indulgence to amend it. And your lordship will not give you an indulgence. He will say, well the indulgence I will give you is that I will take the case off the roll for you completely and then you can put it back again when its correct. And then you've wasted costs. You've wasted *thousands* of rand by appearing and preparing to appear for that day for trial in court and its just thrown out because you've made something wrong. You've referred to section 2(1) instead of section 1(2). Uh a. And the guy sitting on the bench, the judge is a senior advocate of twenty-five year's standing. So, for twenty-five years he's been looking through these pleadings. So he, it *jumps out* uh uh at him. As soon as he reads the pleadings and you've made an error it jumps out. He's an expert, he knows everything.

Quotation 73
L22: 52 - 3
[Judge][Attorney]
052 **LECTURER:** He knows absolutely everything and he then, with the permission of the judge, can appear in the High Court. (Breathes in deeply). This is … its an exception. You must apply, you must have extreme expertise. You must be a leader in your field.
053 Or there must be some compelling reason why you must now appear. Say for instance now, you know, um there's a specific divorce that um, its your god daughter that is getting divorced and you wanted to do the divorce, then the judge will allow it. If it's an uncontested divorce. If you know, if you're a senior, uh, practitioner, the judge will of course allow it uh because you know uh want to do it yourself. Uh, but usually, it is better that the advocates do the court work and the attorney does, uh, the off-the-street work, the preparation. Um, but it is possible now that the attorneys can appear in the High Court. But you do need, you do need permission from the judge.

Quotation 74
L22:86
LECTURER: Because its not very taxing - these people are only coming for the last part. OK of course the most important civil service and they will kill if I say that they belong in the civil service but the most important civil service job that there is is of course a judge. Um judge's doesn't belong in the civil service but they get paid by the government, they get a car, they get a government car, um uh and um just for you know for interest's sake, its they're certainly not private I mean they don't earn their own salaries, so its just to put them somewhere I put them under the civil service.

Quotation 75
L22:87
[Judge]

LECTURER: Judges ladies and gentlemen should be, they were always in the past, the best senior advocates. Uh, are asked to act as judges and then they if they are good then they prove themselves then they are asked by the Minister of Justice to consider becoming a judge. Their names are then sent to the Judicial Services Commission. That is how a judge is appointed. You must know this. The, uh, names are vetted by the State President, the State President sends, the State President gets them from the Minister of Justice. The Minister of Justice gets it obviously from the Bar association. Um and those people are then scrutinized uh albeit behind closed doors which I think is wrong. But they get they get scrutinized by a panel which is called the Judicial Service Commission. Judicial Services Commission is made up of the Minister of Justice and lots of other important people in the legal field. People like George Bizos who is a well-known advocate, um the Director-General of Justice, Minister of Justice, Deputy Minister of Justice, other judges, Chief Justice, Deputy Chief Justice, Judge Presidents. It's a very high-powered, a very high-powered panel that you appear before. And they ask you everything. They ask you about your personal life, they ask you about your political views, they ask you about your sexual orientation, they ask you about your health, they ask you everything.

Quotation 76
L22:88 - 90

088 And this is where - perhaps you will remember - this is where it happened, that uh when Judge Cameron was interviewed uh for the Supreme Court of Appeal, he was already a Judge but he was interviewed for the Supreme Court of Appeal, uh he took the very bold step of saying - they didn't ask him - everybody knew that he was gay bit they didn't ask him, they asked him about um uh about his sexual orientation and of course he explained that to them and what he will do and how he thinks that will add value to the job, and then on his own he said: 'Look, before you move on I think it is necessary for you to know that I am HIV-positive and I have been for seven years. I am on uh retroviral medicine, thank heavens I can afford it, and I am being looked after by very high qualified medical people and it is under control and there's no reason why I shouldn't be able to carry out my job as any other person if I am if I keep on using my medication.' And of course that was that caused front frontpage highlights and everybody was everybody was asking whether it was necessary to do that and or was it very courageous to do it.

089 Well I don't know you must maar decide for yourself. I know Edwin very well and he is a very courageous person. Sometimes of course everybody's got a got a political agenda and sometimes he is very enthusiastic about HIV/Aids. And the new role that gay people have in the community but perhaps, you know, it is necessary. Uh its something that you must decide for yourself. But that's where it came out. At the Judicial Services Commission.

090 And they appointed him, despite his uh revelation before the committee, they appointed him and as you know he's still going strong. Ooh it was about ten years ago or how long was it ago? Five years ago? Six years ago? Do you know about this or …

Quotation 77
L22:92

[Judge] [Attorney]

092 **LECTURER:** You didn't really take notice. OK. Um uh judge must be have an LLB. Must have a good practice and they must be a senior uh advocate. Uh nowadays of course its no longer

compulsory that you must be a senior advocate. Uh uh attorneys have been appointed as judges. Judge Kathy Saxwell Sax sax Sacks Sackswell is an attorney. She specialized in family matters. And she's now a judge here at the Witwatersrand Local Division.

Quotation 78
L22:93 - 6

093 **STUDENT 6:** [inaudible] defeats the whole purpose of, I mean [inaudible] hierarchy. If you are an attorney you become …

094 **LECTURER:** Well,

095 **STUDENT 6:** [inadaudible]

096 **LECTURER:** I think it makes the bench more representative. Um I think it makes the bench more diverse. Its not just old middle-aged white men that were successful advocates that can now become judges. Um you know obviously you must have something to do with law. You can't be a teacher, a secondary school teacher and then all of a sudden become a judge. Um but if you're an academic, Judge Carole Lewis who was the Dean of this law school became a judge in the Witwatersrand, and now she's at the Supreme Court of Appeal. And, according to everybody that I've spoken to, a brilliant judge. So, I think it brings more diversity to the bench. It creates more attributes to the bench, she is more academic and her judgments are far better theoretically-founded than her colleagues, um I don't know, I don't think its I don't think its um its cast in stone that only senior advocates can become judges. I think you need, you need something else .. magistrates have even become judges, as I told you.

Quotation 79
L22:100 - 102

100 **LECTURER:** Um the problem with becoming a senior advocate and then a judge is what? [some murmurs from class] Hmm?

101 **STUDENT 3:** The salary.

102 **LECTURER:** The salary. A judge gets about a, a junior, a newly appointed judge gets about seven six hundred thousand a year. And a senior advocate, well as I said, gets from four to five up to eight million in a year. So that's a *big* drop uh in salary. You must be very comfortable, uh and have whatever you want, and then you can become a judge as a kind of retirement.

APPENDIX 4F: QUOTATIONS – PUBLIC PROSECUTOR

N = 6

Quotation 1
L20: 59 – 61
[Magistrate] [Prosecutor]

059 **LECTURER:** Never steal from your employer. If you steal from the hand that feeds you, you can, I can remember when I was a prosecutor, one Friday, the sentences are always postponed to the Friday so that you do all your sentencing on Friday, and I had an old battleaxe for a magistrate. She's now senior magistrate here in Johannesburg. But she was *extremely* strict. And we had a case of a bookkeeper, a lady, single mother, wonderful wonderful civilized, first-class citizen. Worked thirty years for her employer, she stole ten thousand rands every month. Every month for thirty years. And she stole it for her children, to put her children through university and you know she had her psychiatrist and everybody there and everybody came to give evidence. First offence. First offence. No criminal record. Wonderful, wonderful employer. You know, the manager was there, the owner of the business was there. Said 'never a better person, we don't want her to go to prison we just want, you know, basically, to remove her. We want her to be found guilty and she must not come back. That's what we will ask the court to do.' And everybody, including myself, was expecting a, perhaps, house arrest, you know this provisional supervision. But, you know, it was a first offence as a mother looking after her children! Its, you know .. .

060 And old Mrs Gradiz walked in there and I could see [indicates that the magistrate was frowning], *not* in a good mood. And she sent her, she sent her to jail for a very, very long time. And the woman, everybody in court broke down crying, you know, they were not prepared, they didn't, they didn't expect it *at all*. And they said they will go for rehabilitation, they will go for courses she said 'yes, go do that in jail, there are lots of wonderful courses that you can do. Go stand down …' I think it was something like twelve and a half years. Stand down.

061 On a Friday morning you pack your bag and you go to magistrates' court and you think you're going to get a fine perhaps and a reprimand, and you get twelve and a half years. And it was confirmed. So, if you steal from your employer, do anything, you know, steal from anybody but don't steal from your employer: a) because its so easy and b) because you never its so the courts take an *extremely* dim view of it. And there's no mercy. As far as .. drug dealing, credit card fraud, things like that. Very little mercy. Even if you plead guilty, even if you plead guilty. OK.

Quotation 2
L20: 45 – 49

045 **LECTURER:** When I was a when I was a specialist prosecutor one of my glorious cases that I prosecuted was sommer a very quick case that was sent to my court, I prosecuted credit card

fraud as a specialist uh uh court. So all the credit card fraud was brought to my court and you know to to see to it that uniform sentences and harsh sentences and to prevent credit card fraud uh was done they centralized all credit card fraud in my in my court. And credit card fraud is not difficult to prove. You know, you have the real evidence there you have the credit card, the slip, you have the bank statements, that's not difficult its not a difficult case to prosecute, but the credit card fraud is one of the fraud matters, and we'll deal with that soon, the magistrates' court's jurisdiction is extended in certain circumstances, for drugs and drug trafficking, credit card fraud, uh human trafficking, etc etc the district or as we call them the specialist courts have increased jurisdiction.

046 So, there was this guy and he had thirty offences of credit card fraud for American Express. He stole an American Express card and he used it for on thirty individual times. We had all the evidence there, and the prosecutor that forwarded the case to my court, um entered into a plea bargain with the accused, saying: 'If you plead guilty on one count, we'll find you guilty on one count and, you know, you'll only be charged on one count. And, you know, that's the end of it. OK then you plead guilty, there's no trial, thank you very much. But that was the previous prosecutor.

047 When it came to my court I said: 'I am not going to accept this.' Because you can imagine, American Express, if this guy's only found guilty on one count they only, when they institute civil action they've only got grounds for one offence. Its true, whether you're found guilty for one offence or thirty offences the criminality is the same. But the commercial implications differed. So when the person, the accused came to my court, I said: 'Look, you're now in a new court, a new prosecutor, the previous prosecutor said that you could plead guilty and we will only sentence you on one count. That's not going to happen. Um, you know. If you want to plead guilty you're welcome, but I'm going to charge you on all thirty counts.' So he asked: 'Well, is that the same … as one count?' I said: 'No its not the same, you know, you're found guilty thirty times, its not the same.' Like if you use this card thirty times, you're going to be penalized thirty times. And somehow he was tired or he just didn't understood what I said and he, I put the charge to him, all thirty counts, from a to z, all thirty counts, took half an hour to read the charge sheet, and he said: 'Ag ja' you know, just wanted to finish it and not plead guilty, thinking he will pay a penalty, a fine.

048 Which is, for the first offence, quite normal to pay for one credit card transgression, to pay a fine, even if it's a lot of money. But, you can, if you are a good prosecutor, ask the magistrate to impose a fine, a jail sentence without the option of a fine. So he pleaded guilty on all thirty charges, and I asked for the maximum sentence on all thirty charges. And the maximum sentence is twelve months per charge, per count. So he went to jail for thirty years, without the option of a fine.

049 He's still there today. He's still in jail, unless he was released on one of these ridiculous amnesties. Thirty years. This was about twenty years ago. So he's still rotting away in jail somewhere. So please be careful. I mean I was a small little prosecutor in a dirty dingy little court and he went to jail for thirty years which is longer than life ... imprisonment, because life imprisonment is twenty-five years.

Quotation 3
L22: 103

LECTURER: [Clears throat] OK. Other professions in the civil service where you will start is uh public prosecutor. You'll prosecute ordinary cases in the district court. Once you are au fait with that - that's the best training you can get for court. Who asked about the articles, yes, that's another thing, if you don't do the articles then go and join the Department of Justice for two years. Um you won't build up contacts, well perhaps, but you will know how to sit and stand in a court. That's also excellent, *excellent* experience because you do it not on your own account, you do it on the state's account. So if you want to become a good practitioner, if you want to know what to do in a court, become a public prosecutor. I don't know what they pay public prosecutors now, its not much, um 'bout two hundred thousand a year, to begin with, I think so, I'm not sure.

Quotation 4
L22: 104
LECTURER: And anycase if you become a senior public prosecutor, you prosecute specialized cases like I told you about the credit card fraud, or uh environmental law or tax law, or um labour law, or - there are specialized courts for all these things in the magistrates' court. And you can become a public prosecutor there. You can then become a senior public prosecutor um and if you're a senior public prosecutor, the director of public prosecutions invites you for a interview and if you pass the interview then uh you become a state advocate. Now that's excellent, excellent experience. Uh and everybody wants to become a state advocate but you can't do that off the street. You must first become a public prosecutor.

Quotation 5
L22: 107
LECTURER: But if you do go, if you do become a public prosecutor, you know, that is where you want to end up. To be a state advocate

Quotation 6
L22: 109
LECTURER: Um its not boring like being a public prosecutor

APPENDIX 4G: QUOTATIONS – STATE ADVOCATE

N = 3

Quotation 1
L22: 104
LECTURER: if you're a senior public prosecutor, the director of public prosecutions invites you for a interview and if you pass the interview then uh you become a state advocate. Now that's excellent, excellent experience.

Quotation 2
L22: 105
LECTURER: Uh state advocates does the work of an advocate but he only works for the State. So most of the work is civil but there are also civil work. There's also civil matters that the state advocate's do. And you have virtually the same kind of working conditions that an ordinary advocate has. You've got your own office, your own set of law reports, but you work for the State, you work for the Director of Public Prosecutions.

Quotation 3
L22: 107
LECTURER: But if you do go, if you do become a public prosecutor, you know, that is where you want to end up. To be a state advocate and do work for the state because then you get High Court experience at the State's expense, you know. You know whether you lose or win its not really important, you don't want to make a lifelong career out of it, you only want to, you only want to get experience. Unless you want to become a civil servant, that's also possible, there are lots of things that you can do.

APPENDIX 4H: QUOTATIONS – MAGISTRATE

N = 26

Quotation 1
L10: 36
[Judge] [Magistrate]
LECTURER: Yes, in other words, the judges. [Student: Ja] Ja because you have magistrates in the lower courts and judges in the higher courts.

Quotation 2
L10: 83
[Judge] [Magistrate]
LECTURER: Yes of course it happens every day! Yes of course, this is how law is made. You you go to uh the magistrate's court if you are within a certain uh uh a certain jurisdiction um s-um R100 000. If your dispute is less than R100 00 or more than uh uh then you go to the magistrate's court and the magistrate's court hears your case. If you're not satisfied with the magistrate's court, then you appeal to the - here in Johannesburg - you appeal to the local division. You don't appeal to the provincial - you go to your local division. There the judge decides against the magistrate. But that is now a precedent. The magistrate wasn't a precedent. What the magistrate decided was just you know, binding between the parties. Now in the Supr- in the High Court when the judge gives a a decision that decision is a precedent and it binds the whole of the Transvaal. Your opponent, who got satisfaction in his favour from the magistrate is now unhappy. So what is he going to do? First he's going to appeal to a full bench. But that is now technical detail. He's going to appeal from a single judge in the local division to a full bench, either in the local division or the provincial division. If that if the full bench gives judgment against you and for the guy that won in the magistrates' court then that is the precedent. Then the whole of the Transvaal is bound by that precedent and the previous precedent of the single judge disappears. Now of course what are you going to do? Now you are I mean you are I wanted to use a bad word now but we're now on camera you are not satisfied and you are going to, you want to appeal. You appeal to the Supreme Court of Appeal. Which is the highest court. And whatever the Supreme Court of Appeal decides, that's it. Unless it's a constitutional case. That's it. There's nothing higher. You can't go to God or the Privy Council or you know George Bush or whoever you think is powerful. That's it. You stop at the Supreme Court of Appeal and what the Supreme Court of Appeal says - that's law. Whoever and in whoever's favour the Supreme Court of Appeal has decided that is law. And you will - all the other things from the magistrates' court is worth nothing! It loses all its value. What the Supreme Court of Appeal says, that is where law is made.

Quotation 3
L10: 30
LECTURER: But the magistrates in a magistrates' court does not create precedent. Magistrates in a

magistrates' court does not create precedent. Why? Well firstly because they haven't got the authority. And secondly, their decisions are not recorded. They don't form part of the precedent system. They cannot bind anybody with their decision.

Quotation 4
L10: 38
LECTURER: The magistrate's court is b/ like all other courts. Magistrate's court is bound by the precedents of the High Court, the Supreme Court of Appeal and the Constitutional Court. So, if a magistrate sits in a court case, the magistrate the magistrate can't just do what he wants to do. He is bound by the South African law. Obviously. He practices South African law. So he is bound by South African law. He is bound by the precedent of the High Court. So he can't - if there's a decision in the High Court, that says 'we accept traffic photographs' you know these photo things that are now so controversial, that's the decision in the High Court, it is binding on everybody in the province. Its also binding on the magistrate. The magistrate can't say, 'well the High Court they will accept the photographs but here's my court and I won't accept it'. So he can't say that. It is binding. But, the decision of that magistrate, is not is not - I wouldn't say its not binding, its binding on the people who are involved in the case - but it has no precedent. Its not binding on other magistrates and its not binding, obviously, on other courts.

Quotation 5
L10: 89
LECTURER: Usually if usually all criminal cases are heard by the magistrates' court first. And the magistrate will decide (a) whether you're going to be released on bail, or whether you're going to be kept in prison and he then makes an order.

Quotation 6
L18: 46
[Judge] [Magistrate]
LECTURER: Now appeal means you go to a higher court than the court where the case was heard in the first instance. You go to a higher court if you are convinced that uh that something was done wrong in the lower court uh and that the sentence uh that the magistrate court or judge came to uh was incorrect. The appeal rests only on the four corners of the record of the case. There is no vive voce evidence to be led in an appeal. You cannot, when you have an appeal, introduce new evidence. So, an appeal is a second bite at the cherry. You've gone through the whole thing, the magistrate or judge has made an error. According to you, something was done incorrectly. You want to take this to a higher authority uh to rectify that in order that the sentence can be changed.

Quotation 7
L18: 84
LECTURER: A review takes place either um uh automatically, or through application. A review takes place automatically from the magistrate's court to the High Court if a magistrate of sev- of less than seven years seniority, if a magistrate is, has been a magistrate for less than seven years, And he imposes a fine or prison sentence exceeding three months and I'm not sure, I'm not sure of the amount of money. But three months or a certain amount of thousands of rand in money, Then, because he's still a junior magistrate that case must go on automatic review to the judge of the

Supreme Court to see if the magistrate is not it not um imposing too harsh a sentence. That is only magistrates that have been a magistrate for seven years or less. Magistrates that's been um more senior than seven years, if they impose a sentence of longer than six months, per count. Six months per count then it goes on automatic review. Please remember there's no, there's no nothing you can do about it, it must go to the Supreme Court or uh to the High Court for review by a High Court judge.

Quotation 8
L18: 85 - 101

085 **LECTURER:** Um … the anecdote I can tell you about this matter is when I was a magistrate I had to serve for a uh limited period of time thank heavens in the um matrimonial court um the so-called maintenance court where people don't pay their maintenance.

086 Now one thing that you can learn from this uh embarrassing episode uh is that you must never, if you're a lawyer, you must never do anything if you are um in a bad mood or if you are emotionally uh unstable. If you if you've been, if you've lost your temper, don't do anything.

087 Uh this happened on a Friday afternoon. One Friday afternoon I was sitting in court and it was late, and all my colleagues had already adjourned - I was the most junior magistrate in the in the court building. And all my colleagues had adjourned for the weekend. They've closed their courts and they've gone - you know they haven't left the building but they're sitting in their offices and you know chatting and doing cross-word puzzles and things like that. So I was the only sitting magistrate. And this uh-w case was a long outstanding case with a warrant and of course somehow the police on a Friday afternoon - you know don't ask me how they manage to do it on a Friday afternoon- they caught this man and of course I was the only the only magistrate sitting to hear the case and the case was an ordinary maintenance case. You know what maintenance is? [inaudible] you have to pay for.

088 And [coughs] it was late, it was already after five o clock and I went on record, you know you have a tape machine, and I went on record saying 'It is now five past five [struggles with coughing], there are no courts available and I am reluctantly hearing this case because I'm the only sitting court that can hear this case otherwise this man will stay in jail for the rest of the for the rest of the weekend, or another magistrate must come out after hours to hear a bail application. And of course, you know, I was tired, I was irritated um uh I was cross with this man, I was cross with my colleagues, cross with the world.

089 And here he appears and he's one of those typical um people who slips through the holes in the system. He hasn't paid maintenance, his wife was in court. He hasn't paid maintenance for four years. He has a a job, he has an income, of say three thousand rand a month. But he has a girlfriend and he gives all his money to his girlfriend. He doesn't/ he's left his wife, a wonderful decent person, with four children, living without any income.

090 So, you know [clears throat], we call we call the we call the wife and she gives evidence and um I'm very um uh, I've got lots of empathy with her. Um and she's really struggling. She is uh a single mother she's um uh uh domestic worker, she gets a pittance for an income. And she must keep four children at school and this bugger is lounging around, he's drinking out his money and the rest he gives to his eighteen-year-old girlfriend.

091 So then he of course gets into the um he gets was brought up from the cells um and um the prosecutor starts asking questions, very inexperienced prosecutor so I lose my temper with the prosecutor as well um and I take over the inquisition, because in a maintenance matter you can

do it. And I start cross-examining him from the bench. And that is something you must never do. But nevertheless I start cross-examining him. And of course I am - well, at that stage - I was an excellent cross-examiner because I've just been a senior public prosecutor. So I knew all the tricks of the trade. And within five minutes I've got him in a corner like a spider, I mean he is … he couldn't say a thing. And of course the more I ask him the more, you know you can hear on the tape, ja I'm getting more and more irritated because he's lying and he's getting out he's trying to get out of his responsibilities. Um and you can you know I um I just let rip into him, forgetting that I'm the magistrate and not the prosecutor. And then I started shouting at him.

092 So, you know, long story short / and he's attitude - this … idiot [outburst of laughter from class] his attitude to me is um 'Well, you know, its my money I can do what I want.' Um and 'I haven't paid my maintenance because I must look after my my girlfriend.'

093 Now, you know, what do you do to a man like this? I said 'But you can't do what you want there's a court order. And, you know, this is the fabric of society, you don't look after your family, you know, your children are all going to become just like you!

094 And then what where we going to be? In any case, it went on for an hour or two. For an hour or an hour and a half. And um when I was finished with him of course um uh he also started shouting he said he will do what he wants and I can't do anything to him. And then of course, you know [more laughter] … um I sent him to uh you know the first thing is, he was a first offender. It's the first time that he's been before a court. So you never send a first offender to jail. Obviously, you know, you never send a first offender to jail. So uh I gave him the maximum [gestures with arm and elicits more laughter] sentence that I could which was one year. Twelve months. I have him straight twelve months twelve thousand rand fine uh uh or twelve months.

095 And of course he didn't have the tw- I knew he didn't have the twelve thousand rands, it was St Athlone's and the people don't have twelve thousand rand and he went to jail for twelve months. Finish and klaar.

096 But of course what I had forgotten, you know I was still a very junior magistrate, what I had forgotten is it goes on automatic review to the judge of the Supreme …. Now the problem with the system, is: The judge sits in his chambers, the judge is now a senior advocate who's been elevated to a judge. He sits in his chambers he's high on on on human rights and things - which is fine - but he doesn't understand what a magistrate's court looks like. He doesn't understand seeing this woman with four children and this man who refuses to pay the maintenance. He doesn't you know they've never seen that, its just not part of their frame of reference. They are just concerned about procedural correctness.

097 So about - so this is the end, its Friday night you know I send him off to jail and I feel wonderful you know I say 'rot in hell I hope you never come out.' I just go, I just go off and well I forget about him.

098 Of course three months later on a Saturday evening, on a Saturday evening in Cape Town, um I had a dinner party, I had lots of people there, at my dinner party,and it was about se- seven o clock. You know just after after the people have arrived and they've had their first course, then there's a phone call. Now, I'm irritated because you know - the food is in the kitchen, I must look after the food and I've got ten or twelve people to serve and I don't want phone calls now. Grab the phone: 'Yes who's this!'

099 And a very civilized English voice on the other side:' Excuse me, but um may I please talk with magistrate Serfontein?' [raised pitch] I said 'Yes its him talking I'm not on duty this weekend

please who is this?' 'Mr Serfontein this is Judge Foxcroft'. [starts laughing] 'Do you remember the case of State v Ngobe' or whatever. I said 'No I don't remember the case your honour or my lord' or I don't know what I called him or judge um and I said 'uh-h. 'I have tonight issued an urgent mandamus' or something 'instructing Pollsmoor Prison to release this man and I would like it I you could send me a full set of reasons why you for a first offender sentenced this man to twelve months in prison. I'm forwarding the court record to you and if you could reply by Monday afternoon latest I would appreciate it'.

100 So of course I was in big big big trouble. Um and the man was released after three months and the judge - it was a reported case - my name came in the law reports as the magistrate who sent a first offender to twelve months in prison.

101 So, um that is an automatic review. It goes to the judge to see that the young magistrates don't send people to twelve years imprisonment if they're not, if they shouldn't really be, go be there. Uh but he stayed for three months and I still feel that that's a good vindication of him.

Quotation 9
L20: 26
[Judge] [Magistrate]
LECTURER: Having said that, and we'll do this when we do the profession, please remember that it was one of Dullah Omar's objectives, the previous Minister of Justice, that the curriculum vitae, the cursus honorum, the career path of a magistrate and a judge would eventually in South Africa become one. You would start by being a junior prosecutor, senior prosecutor uh being elevated to the bench becoming a magistrate, senior magistrate, regional court magistrate, senior court magistrate, regional court president and then be invited to become a judge in the High Court. He tried to bridge that gap.

Quotation 10
L20: 24
LECTURER: You must also remember, a district court magistrate, and a regional court magistrate, to a lesser extent, is *far* removed from a judge.

Quotation 11
L20: 25
LECTURER: While a magistrate, nja, is just trained here in Pretoria for six months and you know par de par. Here they didn't even have to have an LLB. Now they must have an LLB. But in the old days mje just a public service diploma or you know walking past a few law books would have sufficed. Um, nowadays its more formalized. But magistrates and judges are very very far removed.

Quotation 12
L20: 26 - 29
026 **LECTURER:** And some senior regional court magistrates on criminal matters have made it into the High Court.

027 As a matter of fact, one of my colleagues, who is now a very controversial character Mr Andre LeGransie, he was with me a magistrate in Cape Town. And he was very bright, very bright young guy. He was really very very clever. And very fair, you know he was a - I find it embarrassing always to refer to this, but he was a man of colour. From the Cape. And he did his LLB at the University of the Western Cape and when he was a magistrate, he was very, deeply

concerned about human rights. You know, obviously. Um and so he was a magistrate.

028 He became a regional court magistrate um and in the beginning of this year he was the magistrate in the case with that other buffoon, that politician in the Western Cape that was found not guilty on um corruption charges … with that development of that golf course … You remember him … Pipi, its not Morkel, Pieter somebody, van der Westhuizen or you know was an absolute buffoon, he was always, like Rajbansi in the apartheid years 'The tiger is here again', you know, he was found guilty on every single thing uh charge of corruption uh who always came back, you know, if you [inaudible] he's on the voter's roll again and he's standing for himself or he's standing for a new party. Now he was like that what was his name? Can't you remember? In any case, he was the magistrate in that case and he found him not guilty based on facts and the Scorpions were very upset and they asked him for reasons and he said um his reasons are evident from his judgment and it was not a matter based on law it was merely on facts of the case he found it um that there was enough grounds uh for doubt, it was not proved beyond reasonable doubt that this Pieter van der Merwe or Pieter Vermeulen or I don't know what his name is … and he was found not guilty.

029 Uh and he's now in the High Court. Andre Legransie. And I think he will be you know an excellent High Court judge. He's got the gravitas and the knowledge and the professionalism to become a High Court judge. OK so it is possible to become a magistrate, a High Court but the run of the mill magistrate is very far from the High Court.

Quotation 13
L20: 32
LECTURER: We get to the difficult ones now, in the regional magistrates' court. Unfortunately, they are very very important. Ninety-eight percent ladies and gentlemen, you won't believe this, ninety-eight percent [writes '98%' on board] of all legal work criminal and civil, is done in the magistrates' court. Unbelievable, I couldn't believe it but its true. Ninety-eight percent of all legal work is done in the magistrates' court so it is an enormously important court.

Quotation 14
L20: 36
LECTURER: The High Court is very very busy, although they only do two percent of the work, they're very very busy it's a very formalized court, their court rolls are very full and you can't bring somebody off the street to the High Court. On a criminal case. Because it would just be chaos. So what happens? In order not to let the people rot in jail, you bring them to the magistrates' court to what we call a directional court, Court 13 in Johannesburg. And the magistrate, the regional court magistrate in Johannesburg, has got a diary for the High Court, and they place the matter on the roll for the High Court in the magistrates' court. Doesn't mean that the magistrates' court has got authority to hear that matter? They've only got authority to send it to the High Court. Why do they do this? The main reason is so that the prisoners or the accused not remain in custody until the High Court can hear them in five or eight or ten weeks or months time. So they appear in the magistrates' court a) to be directed to the High Court; b) to consider whether they can get bail or not.

Quotation 15
L20: 54 - 55

054 **LECTURER:** No no no, it depends. If you become a magistrate and you're so unlucky to get this court that I talked to you about, the transitional court, the the directional court, uh that's a hideous court because its like a supermarket. You you get there at nine o clock in the morning and you must take a decision every five minutes and all you get is the worst criminals in Johannesburg appearing before you and all you must do is decide which court they must go to. Um and because its such a horrible court if they put a magistrate there permanently he will go mad, not that magistrates are not mad, I mean they are all mad [more laughter from class]. But if you put a person there permanently they will, I mean they will just resign after a week, I mean, its like casualty … uh ward in Hillbrow.

055 You know, you can do it for one day but they rotate that one, but if you're a nice senior magistrate, especially senior regional court magistrate, you pick and choose what cases you want and then you've got court 13, or court 25. And your offices is attached to the court. You walk out of your office into the court. Um and that's your court. Its your court orderly, its your interpreter, its your prosecutor, its uh … the whole organization is yours. You are the king, you are the king of the of the dung heap.

Quotation 16
L20: 59 - 61

059 **LECTURER:** Never steal from your employer. If you steal from the hand that feeds you, you can, I can remember when I was a prosecutor, one Friday, the sentences are always postponed to the Friday so that you do all your sentencing on Friday, and I had an old battleaxe for a magistrate. She's now senior magistrate here in Johannesburg. But she was *extremely* strict. And we had a case of a bookkeeper, a lady, single mother, wonderful wonderful civilized, first-class citizen. Worked thirty years for her employer, she stole ten thousand rands every month. Every month for thirty years. And she stole it for her children, to put her children through university and you know she had her psychiatrist and everybody there and everybody came to give evidence. First offence. First offence. No criminal record. Wonderful, wonderful employer. You know, the manager was there, the owner of the business was there. Said 'never a better person, we don't want her to go to prison we just want, you know, basically, to remove her. We want her to be found guilty and she must not come back. That's what we will ask the court to do.' And everybody, including myself, was expecting a, perhaps, house arrest, you know this provisional supervision. But, you know, it was a first offence as a mother looking after her children! Its, you know .. .

060 And old Mrs Gradiz walked in there and I could see [indicates that the magistrate was frowning], *not* in a good mood. And she sent her, she sent her to jail for a very, very long time. And the woman, everybody in court broke down crying, you know, they were not prepared, they didn't, they didn't expect it *at all*. And they said they will go for rehabilitation, they will go for courses she said 'yes, go do that in jail, there are lots of wonderful courses that you can do. Go stand down …' I think it was something like twelve and a half years. Stand down.

061 On a Friday morning you pack your bag and you go to magistrates' court and you think you're going to get a fine perhaps and a reprimand, and you get twelve and a half years. And it was confirmed. So, if you steal from your employer, do anything, you know, steal from anybody but don't steal from your employer: a) because its so easy and b) because you never its so the courts take an *extremely* dim view of it. And there's no mercy. As far as .. drug dealing, credit

card fraud, things like that. Very little mercy. Even if you plead guilty, even if you plead guilty. OK.

Quotation 17
L20: 65
LECTURER: Ladies and gentlemen this looks very innocuous, it looks very innocent, um and most, very few magistrates, district court magistrates will go up to the three years and the sixty thousand rand but if you get a serious matter, if you get a serious matter you can be hurt very very badly in the magistrates' court. OK.

Quotation 18
L21: 9 - 10
009 **LECTURER:** OK, uh what I've forgotten to tell you and which was a major political problem in the old dispensation, who is the, who is the leader of the regional magistrates' court? Do you know? Who's the chief in charge, chief bottlewasher in the regional court? In any regional court? [pause] And in the magistrates' court? In the district court? Did I not do this with you?
010 OK in the district court it's the chief magistrate, the chief magistrate. Now the chief magistrate is an enormously influential person. Uh he decides whether you can have um gatherings in his city. He's the person to decide where the court's going to be, uh what court will listen to what case, uh the organization of the court, the organization of the regional court even uh enormously politically powerful person. Everything, whether there's going to be a march, whether he will give permission for a march to be held, um uh whether you can have / if you have a huge pop concert you must get permission from the chief magistrate. So the chief magistrate is a *hugely* influential political person. Uh its also a very high senior public uh um service uh appointment. No longer because the magistrates now have their own act and they see them as no longer being civil servants. But that's more perceived than real. They are still being paid by the civil service, they work in the civil service, their buildings, they've got their own commission. But um they're not completely independent.

Quotation 19
L21: 11
LECTURER: The head of the regional court is the regional court president. The regional court president. Now a regional court president is, in status, in protocol, is higher, he is more senior than a chief magistrate, but the chief magistrate has got more political power than the regional court president. The regional court president is only concerned with the organization of the regional court in his region. He's got nothing to do with the district court, he's got nothing to do with political issues, he's got nothing to do with the outside world, he's only a president for the regional court.

Quotation 20
L21: 12
LECTURER: Now, in the past, there were lots of very interesting clashes between regional court presidents and chief magistrates, especially if they are of two different political persuasions. Then you can get quite a lot of fireworks.

Quotation 21

L21: 14
LECTURER: Ordinary magistrates, with an LLB sit in the civil court.

Quotation 22
L21: 15
LECTURER: OK. This is being investigated. The idea is that it will be changed, that a senior civil court will be introduced, where senior magistrates would sit. It would have a jurisdiction of R300 / well, when I, when I last heard they were considering a jurisdiction of R300 0000. Jurisdiction of the amount, the cases they could hear, R300 000, but that may change to R500 000, depending on when this court is going to be instituted. And that unopposed divorce matters might be moved to this senior civil court.

Quotation 23
L21: 16
LECTURER: Just quickly let us run through the jurisdiction of the district court. Now the district court, the district magistrates' court ladies and gentlemen, is the lowest court that you can get in the hierarchy, um it doesn't mean that its not important, it does virtually all the work. Between the regional court and the district court it does virtually the lion's share of the work. So the district court is is very important, although it is um very neglected.

Quotation 24
L21: 17
LECTURER: You remember when we started this series of lectures on jurisdiction, I told you that the magistrates' court was introduced, the new government was introduced and there was a, I wouldn't say an animosity but a mistrust between the magistrates' court and the new government. Because the magistrates courts were those courts that sat in judgment on the pass laws, they were the primary movers for the implementation of apartheid, they were seen as civil servants and lackeys of the apartheid government. This has now changed, we are fifteen years later into the new government and uh the whole magistracy has changed and they are now, it seems as if they are now ready for constitutional jurisdiction.

Quotation 25
L22: 63
LECTURER: And if you impress them, even in the magistrates' court, you appear there and you make a name for yourself, far far better

Quotation 26
L22: 96
LECTURER: magistrates have even become judges, as I told you.

APPENDIX 4I: QUOTATIONS – LEGAL ACADEMIC

N = 20

Quotation 1
L11: 58
LECTURER: Um, so if you're lucky you get the whole translation and the translation was done by an old friend of mine, Dr van der Merwe, you might remember him, I wonder, I wonder whether he's still alive. He's he was very old when I saw hi, last time. He was the uh author of Van der Merwe & Rowland, Suid-Afrikaanse Erfreg. And he was a professor at the University of Tukkies, and later on, because he was very naughty, um uh he became the head of Justice College. He [looks at researcher recording and then shrugs his shoulders] He fell in love with a professor at Unisa's wife, I'm not going to tell you who that professor is, you won't even know her. But this we're talking about in the early 40s, 50s. So he was married and he was a he was a brilliant academic. He - when I was at Justice College, he would open his door, he had a huge office like this. And he opened his door in the corridor to see when you arrived at the office. And then if you walked down the corridor, he would shout at you. He was extremely eccentric. He would shout at you and give you a piece of Latin to translate, just to [clicks fingers] to get your brain working for the morning, and um you know, very few people could do it. Um but I'm very fond of Latin and I could translate some of it. But he would sit there from, he was very nervous about the traffic in Pretoria, so he would drive in at five o clock in the morning because he didn't want to have to drive in traffic. And then he would translate Greek and Latin and then if you came in he would call you to translate, if you could translate and what you thought of the translation. But in any case, that is now way off the topic [class laughs] he fell in love with another professor at Unisa's wife, and he divorced his wife and he eventually married this uh lady. But of course the professor at Unisa was of course extremely cross, that he's now taking his wife away … [laughs] you know. Its not the kind of thing that Afrikaners do, you know Boere are very, you know they are very religious and … but Van der Merwe is not a is not like that. So he got a court order, the professor at Unisa, got a court order to restrain Van der Merwe from coming close to his wife, or to his house. And of course Van der Merwe ignored the court order and, you know, he carried on with his affair. Um he was in love with this girl. And he you know [flicks hand] of course this other professor was a real stick in the mud. So he had him arrested. And he was charged with contempt of court. And then of course in those days, if you had a criminal charge, you couldn't be a professor. Um he was a professor, I think, at the age of 24. At 24 he was a full professor and had already written his first or second book. And then this thing happened and that ruined his whole career. Um and then the nationalist government took him from the university - because the university fired him - because he had a criminal conviction. And they made him head of Justice College, which was the university of the department of justice, you know, the small little university within the department of justice that trained judges and prosecutors and things like that. And there he translated all these things, he was very very good with languages. And he translated all - he and a couple of his colleagues - the all the Afrikaans um in beautiful English. I mean he's Van der Merwe from the Free State, he's not an Englishman at all, but very very good pure English. Uh, you know understandable English that students

would understand.

Quotation 2
L14: 100
LECTURER: But it won't happen of course. Nobody will read it. Nobody reads journal articles. Thirty percent of all journal articles are only read uh how what does that how does the statistics work? Um the only people reading journal articles, learned journal articles, are the thirty percent of academics who are involved in the publishing of those articles. You know, peer review and editors? They read it, but uh other p- he he seventy percent of the other academics never read it. So you know it's a you know it's a its like a little mouse in one of these little wheels but nevertheless perhaps we can cause some excitement.

Quotation 3
L16: 35
LECTURER: Also professor Cockerell who was also here, who decided he doesn't want to stay in academia, and he went to the bar. Now he already had a reputation, everybody knew him, he published widely, he's a confirmed, very established academic, and he then went to the bar. And immediately he got enormous briefs, you know, um uh you know constitutional court cases and very important cases. And he's doing exceptionally well at the bar.

Quotation 4
L16: 50: 217-220
LECTURER: there would be a series of articles or there would be uh textbooks by modern authors by modern academics and then depending on whether the courts take that into consideration next time when such a court, when such a matter comes to the court, the academics then have influence in changing the law.

Quotation 5
L16: 52
LECTURER: Professor John Dugard who was a professor at this university is an international, an internationally-renowned academic. He is not/ his field is international law but he is an international jurist. He is um the rapporteur for uh for the Palestinian question in the Middle East, um he was a professor at the University of Leiden. And that is the kind of person that you can quote uh with authority. And you can say that the court would follow him. If you quote John Dugard on an international issue its more likely than not that the court will follow what John Dugard said. The court is not bound to do this. It works very much the same way that the ius respondendi worked in the Roman time. If you are a senior professor with an international reputation then the courts will follow what you say. And if you are a junior academic, not impossible that the courts will listen to you, but it is very unlikely that the courts will be swayed by an un- unheard of or unknown academic. It is a secondary source secondary source of law. Its not a primary source of law.

Quotation 6
L16: 53 - 54
053 **LECTURER:** By writing simply by writing uh articles, um journal articles, peer peer-evaluated

journal articles, these things that are prescribed to you - even like professor John Dugard did - he was an academic member of the bar in order words he did his pupilage and was admitted to the bar as an academic member, and he often appeared in the courts for um people who were oppressed by the apartheid system. Who couldn't afford counsel, and he often appeared as *pro amico* for those people where it was where it was a groundbreaking and very important case. That's also one way that um you can present the court with your views.

054 Unfortunately, professor Dugard during the apartheid era was not uh successful, he asked the courts to look outside the scope of the legislation and very few of the judges then um considered that being possible and they rather followed the very comfortable um uh *dicta* of *ius decere non facere* - our task is to uh speak the law, not to make the law. OK that brings in lot of lot of philosophical questions but um that is that is what happened.

Quotation 7
L16: 54: 267-278
LECTURER: And then of course the final the final way in which you can make your views known is through writing a textbook. If you are an authority on your field, if you're an authority and you've been a professor for a long time in your field, uh like Professor Hoexter whose just written a magnificent book on administrative law, um uh and uh that book you know, not only reflects the law as it is at a certain stage uh in life, end of 2006 I think, but it is also her view. Certain interpretations certain uh uh innuendos and slants on the law is of course what she thinks how the law of uh uh administrative justice should be. Because its her book. And she teaches from that book. She teaches to her students and the book is quoted in court. It is a leading textbook on administrative law. And through that, through process of osmosis, um her views become the views of the legal profession. OK those are the big guys, you know, I'm not uh its not everybody whose a professor that that gets to that. Um OK.

Quotation 8
L16: 51
LECTURER: Now the value that we place on modern authors as you can imagine, is not the same as the emphasis which we place on the primary sources of South African law. Modern authors are rated according to their status. Now as I said earlier this this morning in in the legal profession reputation is everything. In the legal profession your reputation is absolutely paramount. And whether you are going to whether you are whether you are going to quoted by the Supreme Court of Appeal or by the Constitutional Court depends on your reputation. Um a a academic like Professor Iain Currie or Professor Cora Hoexter who are, I don't know if they've been rated but if they were to be rated they would be A-rated academics. They are excellent academics who've published standard works in both their fields. So if you need to quote an academic on constitutional law then you would go to Iain Currie, um, and if a judge quotes uh Professor Currie, every time a judge quotes him his reputation is augmented. So obviously Professor Currie has got a far more persuasive influence on the courts than a junior lecturer would have on the courts. If a junior lecturer would write an article the courts would wouldn't uh would not it could be an article that could be ground-breaking, and it could be quoted, but it is unlikely. Do you understand the principle how it works?

Quotation 9
L19: 11: 90-95

LECTURER: They have appointed academics to this court, Justice Kate O Regan was a professor at the University of Cape Town and she was appointed as a Justice and now she is an acting Deputy Chief Justice. Made an enormous impact on the constitutional jurisprudence and she was never an advocate or a practicing member of a uh a bar in South Africa or anywhere else. She was an academic. She was an academic and she was appointed as such.

Quotation 10
L20: 5: 33-38
LECTURER: My colleagues always complain that legal writing is difficult and you will now complain to me that legal writing is so difficult because everything must be footnoted and authorized and you must be very careful not to commit plagiarism and its *really* difficult not to, to write academically, legal academic writing is one of the most difficult things to do. And the only thing more difficult than legal academic writing is creative writing.

Quotation 11
L21: 5
LECTURER: No no, no no you can I mean / there's an academic at UNISA called professor Wessel … professor Wessels. Or is it professor Wessel something … I don't know. He writes about the architecture of judicial buildings. He writes, he compares the new constitutional court with the Supreme Court, the High Court in Pretoria for example uh where one is open and reflective of human rights and the other is a monumental building reflective of the State uh power at that state uh at that stage uh when Paul Kruger and his government built the building. So if you're interested in that you can go and read, he's written several articles on judicial buildings, as a reflection of the society that we are in.

Quotation 12
L22: 128: 830-836
And then finally ladies and gentlemen there's of course the best profession of all. Yes. The best place to be in the legal field is an academic. Legal academics, they teach at tertiary institutions, they train lawyers, they write journal articles, and they they have the ability to change the law, if you are a legal academic of very high standing, and people listen to you - like John Dugard - or Iain Currie or Cora Hoexter, people follow what you say, the courts quote you, the courts follow on on what your views are

Quotation 13
L22: 836-841
LECTURER: um it is sometimes a difficult profession because uh there's lots of there's lots of jealousy, there's lots of um competition, there's not a lot - in South Africa its not so bad but in a country like Scotland or England where very little new develops you know its very difficult to think of anything novel in a legal system that's been going for centuries. So the competition is fierce

Quotation 14
L22: 841-845
LECTURER: and um to make it more appetizing the conditions, the working conditions are very very pleasant. You have all the books and materials, computers whatever you need at your disposal, um you

don't have fixed office hours, you can work at home. Um you have the opportunity to go to conferences, one international conference per year, two local conferences.

Quotation 15
L22: 845-847
LECTURER: Unfortunately the bad part of an academic's life is you must mark scripts, that is really the bad part of it but … you know the first ten is fine but after that it does become very boring.

Quotation 16
L22: 847-853
LECTURER: Um and uh you also get a title. If you are promoted you become an associate professor or professor and people uh think very highly of you. There's opportunity to get advanced degrees. University stimulates further degrees, LLMs and LLDs, you can study for free. And you can obtain those degrees at the university's expense. Um there are many many grants many many opportunities to get money for books and for study.

Quotation 17
L22: 853-864
LECTURER: Uh it is not place you should go if you are very materialistic. Salaries are very humble - well, it depends, if you are a full senior professor or the Head of School which is now also not a pleasant job because its all administrative - but if you're a full professor like Cora or Iain Currie, I'm sure that you can survive on the on the salary. I don't know what it is, I think … I don't know what a full professor and I think it is about forty or fifty thousand a month. Between forty and fifty thousand a month, um but I stand to be corrected, please don't quote me now you'll get the labour unions on me or things, I don't, I really don't know, it also differs from university to university but that's about what they should get uh about forty forty-five fifty thousand rand a month. So you can make a pleasant living, you can't have a Porsche or you can't have a vintage rolls Royce, unless of course you marry a very successful lawyer.

Quotation 18
L22: 129-130
129 **STUDENT 2:** But if you publish books you get money for that …
130 **LECTURER:** Yes, you do. If you publish books like Professor Skeen, you don't know you don't remember Professor Skeen. Professor Skeen was the Dean of this Law Faculty and he was a very dear old man. He was a great friend of mine, I was very fond of him. Uh and what he did is he wrote a series of books on criminal, he did a uh he did a PhD or Masters degree in criminology from Oxford [break in recording].

Quotation 19
L22: 131
LECTURER: Because they could just as easily become practitioners and earn five times what the academics earn. So to sugarcoat that there was a rule that if you become an academic you may use twenty percent or your time, at university, for your practice. If you are a practitioning uh a practitioner, either at the bar or at the side-bar. You may use twenty percent of your time to attend to your practice. And that's what's happening. But it's a two- is a double-edged sword because if you allow your academics to go to court they get experience in court, and, you know, when they come back they

are better teachers. Because they can tell you what happened in court. Um you don't want people without any practical experience uh being academics ,you want a well-rounded person being an academic. So it is sometimes uncomfortable and you can't tell the court that they must wait because you've got a lecture, you know that's unfortunately doesn't work that way, so it is sometimes, it is a problem but they must maar organize, make up lectures.

Quotation 20
L22: 132
LECTURER: But still, this is the best place and you don't have to believe me. Being an academic at a reputable university, with international standing like Wits is the best place in the legal profession to be. Um for a variety of reasons. But you know you must be independently wealthy and you must be able to support yourself you know its difficult to support yourself on the salary, and on writing books and journals, but uh stimulation, for interaction with other people, for challenges, for intellectual stimulation, intellectual ability uh uh being able to be uh on top of what is going on in your field, there is no better place .. to be. OK.

APPENDIX 4J: QUOTATIONS – DIRECTOR OF PUBLIC PROSECUTIONS

N = 5

Quotation 1
L10: 85
LECTURER: No no ja … what I'm talking about here is private law. Criminal law has got different jurisdiction. Um uh it doesn't matter. Um uh you are heard … its in the discretion of the director of public prosecutions where you are being prosecuted.

Quotation 2
L20: 14: 87-91
In a criminal case, the jurisdiction is decided by the Director of Public Prosecutions based on the same considerations: Where the accused lives, or where the crime took place. That is in the discretion of the Director of Public Prosecutions but those are the general outlines.

Quotation 3
L20: 39
LECTURER: When the death penalty was a possibility you go to the High Court otherwise you go to the magistrates' court. That is what it was in the old days. But that has fallen away. So they've instituted a little character called the Director of Public Prosecutions. There's a Director of Public Prosecutions in each province and he's represented by his public prosecutors in every court.

Quotation 4
L20: 40: 243-248
LECTURER: A delegation is a piece of paper signed by the Director of Public Prosecutions saying this person can take decisions on my behalf. So the prosecutor in the court takes the decision where this rape or where this murder should go to. If he or she thinks it should go to the regional court, it goes to the regional court, whatever reason they advance or whatever instructions they get from the Director of Public Prosecutions.

Quotation 5
L22: 106
LECTURER: And in my days it was a very very obnoxious character called Klaus [inaudible], who was a Prussian military officer. And he invited me for an interview … and the moment I sat down, he had a huge office and his whole office was full of military military uh memorabilia, little swords and pictures of little men in uniform and rifles and things and I thought that this is hugely inappropriate for an attorney-general - that is even what he was called at that stage. So I sat down and I looked around and I was *very* uncomfortable. I was really extremely uncomfortable. Because its very important you know, its an important interview. And so he says: 'Why are you so nervous?' He was a very brash tall Prussian.

‘Why are you so nervous’ he asks. And so fortunately, I had an answer ready. I said ‘People are like race horses you know, the more intelligent you are the more nervous you are.’ And so ‘that’s a slick answer, I don’t like that.’ And so he asked me three or four questions and um and I answered them, I think correctly. One of the questions he asked me is ‘can you exhume a body if you’ve got new evidence?’ and I said, ‘Yes if you get the necessary certificate’ and I told him what the requirements for getting the certificate was, you can exhume a body, *obviously* you can exhume a body. Um and I can’t remember what the other questions were but legal technical questions. And then he started asking me political questions. At that stage he was prosecuting Winnie Mandela. Um and he started asking me questions what I would do if I had been the attorney-general. And I just refused to answer the questions, I said ‘sorry I consider those questions inappropriate and I don’t, I can’t answer them. And that’s a political decision and I can’t answer them. Um I don’t want to seem unthankful or unpleasant but I really can’t answer …’ And then he stopped. Immediately. He said ‘thank you, yes go back to the magistrates’ court.’ Uh so if you don’t get on with the character, if you don’t get on with the personality, of the director of public prosecutions, then then its difficult. In the Cape, when I was a magistrate, there was - what was his name, Frank Kahn - he was the director of public prosecutions. And we got on famously, did some very interesting cases. Um and um we, you know, he wasn’t a pleasant guy, but he was intelligent and you could talk to him. Um so it’s a question of personality …

APPENDIX 5A: EXTRACT ILLUSTRATING REPRESENTATIONAL, INTERACTIONAL AND IDENTIFICATIONAL MEANINGS

Lecture 2, paragraphs 09 – 65.

009 **LECTURER:** Now is there anybody who can start with Rex v Brown, is there anybody who can give us the um facts in Rex v Brown. [Two students a male and a female raise their hands, L addresses the male] Yes yes your name?

010 **STUDENT 4:** I can try this …

011 **LECTURER:** Yes yes you must try. This is what to, why you …. Your name?

012 **STUDENT 4:** [States name]

013 **LECTURER:** [Repeats name] … Ok [student name] can we hear what you have to say?

014 **STUDENT 4:** Um there was a group of sadomasochistic homosexuals …

015 **LECTURER:** OK now you must explain what all those words mean to us, we don't know what that means.

016 **STUDENT 4:** All right ….

017 **LECTURER:** What is a homosexual?

018 **STUDENT 4:** Um, homosexual is a man who has sexual interest in another man (said with slightly mirthful expression).

019 **LECTURER:** Can you have female homosexuals?

020 **STUDENT 4:** Course you can … oh well

021 **LECTURER:** [Laughs together with whole class] A ha course you can .. its not so of course. No, we call people who are interested in the same gender we call them, well the popular name is gay but that also seems to be a bit problematic. But gay people, I've heard people of this persuasion call them 'queer', the word 'queer' is no longer considered to be um offensive. Um queer legal theory is an acceptable word. But there is this distinction. Homosexual is the word referring to men preferring to have sexual intercourse with their uh own gender, men and men, and lesbian is where you have female, um, variety. Ok? What is sadomasochist?

022 **STUDENT 4:** Um sadomasochism is like deriving pleasure from pain, as far as I understand [looks to JL for approval] …

023 **LECTURER:** Um hmmm its more complicated than that but lets go with that …

024 **STUDENT 4:** And this group of men willingly participated in the commission of acts of violence against each other for like purposes of sexual pleasure.

025 **LECTURER:** Umm Hmmm For how long?

026 **STUDENT 4:** Sorry?

027 **LECTURER:** For how long?

028 **STUDENT 4:** For how long – I think it was over a period of ten years?

029 **LECTURER:** Yes for a long period. Its not something that they you know its not their first try that they get to bed/together you know whatever they call themselves – the leather fairies or whatever. They – it was for a very long time that they did this, once a month or once a week its their social um social recreation. Uh huh?

030 **STUDENT 4:** And the passive partner, the victim in this case um consented to these acts and also suffered no permanent injury.

031 **LECTURER:** Mmm Hmmm

032 **STUDENT 4:** Also, these activities took place in private and were recorded on video tape. Um The applicants were tried on charges of assault occasioned by actual bodily harm and unlawful wounding.

033 **LECTURER:** OK now [student name], you've made a huge leap now ne? Um, you've said they're doing this, um, they they're doing all these things and then they were charged? [Makes a questioning gesture] uh uh … there's something in the middle… that's missing.

034 **STUDENT 4:** Um, well obviously these activities were seen as / well obviously the plaintiff or/

035 **LECTURER:** Who's the plaintiff?

036 **STUDENT 4:** The victim …? I don't know, they didn't say the victim's name they just referred to him as 'Kay'

037 **LECTURER:** No but the victim is not the plaintiff, he didn't complain.

038 **STUDENT 4:** Was it the state that complained? [inaudible, lecturer starts laughing] What I'm saying is whose the plaintiff, whose the defendant?

039 **LECTURER:** By way, by way of speaking it was the state. It was a criminal case. Ok. I think we've tortured you long enough ne and you don't derive pleasure from this. What about you? You wanted to say something?

040 **STUDENT 3:** Ah no I was just going to say we couldn't really be sure who the plaintiff was in this case. We knew there was … I kind of got a little bit confused, I knew that basically it was the younger members of the group who were then brought into the group under the age of 21 initially.

041 **LECTURER:** Ja

042 **STUDENT 3:** But were now over 21 years old. And knew that they were the ones that were ….

043 **LECTURER:** Hurt

044 **STUDENT 3:** hurt

045 **LECTURER:** No but um …

046 **STUDENT 3:** But I couldn't understand who Rex was (confused smile).

047 **LECTURER:** Who? Rex?

048 **STUDENT 3:** I couldn't understand ,.. It was Rex v Brown …

049 **LECTURER:** [Laughs] ah ha you thought that Rex was one of these hairy old men that [student carries on talking inaudibly]. No Rex is the king my dear. Rex, that's the Latin for king. I'm sorry I should have told you. Uh its in England the case is in England so it is the King versus Brown who was the perpe .. the main uh the main uh uh ring leader. But I still wanted to know from the facts how did this case come to court? Yes?

050 **STUDENT 14:** Uh the police were investigating him for something else and they stumbled into these activities and reported them ..

051 **LECTURER:** Um [looks quizzically at student]
052 **STUDENT 14:** [inaudible]
053 **LECTURER:** No, I think that there were, there were complaints. The police were investigating similar uh similar things and then there was a complaint by a neighbour of noise from this from this uh from this house, And so the police there was a police raid and that's how they discovered it. Um … Yes?
054 **STUDENT 4:** How did the police come into possession of the tapes?
055 **LECTURER:** No but they raided the house, they raided the house, that's easy. That's what, that's how I remember it, I could be wrong. Um uh but it was definitely a neighbour complaining.
056 OK, so the case is now before the court. What did the, what did the judge, what did say or what did some of the judges say? [Student raises hand] Yes?
057 **STUDENT 9:** I wanted to ask you something because according to this it says in the trial they were found guilty. Um. They pleaded guilty.
058 **LECTURER:** Yes
059 **STUDENT 9:** Um the judge said that consent was not wasn't a defence, wasn't a decent defence. Um and then and I wanted to ask you /can you / see / well this is what happened / it seems strange that they pleaded guilty and then and then appealed that, their conviction. Surely … are you entitled to appeal once you've pleaded guilty?
060 **LECTURER:** Yes! No of course, it happens very often. No no no that's quite /
061 **STUDENT 9:** It seems contradictory [continues inaudibly]
062 **LECTURER:** Well, you're opening a whole can of worms now because um uh uh towards the end of the course we will do the difference between a review and an appeal and this is also in England, they've got different rules than what we have in South Africa so I'm not quite sure how it works but certainly if there is something fundamentally wrong in a case. If [there are] things which have not been taken into consideration or if they think that the judge made a mistake then of course you can appeal, even if you pleaded guilty. And even after you pleaded guilty, you know, you had a change of heart you can still appeal. It is a natural it flows naturally from a trial that you are entitled to an appeal. Um so but don't I forgot to tell you you know it's a very long case and there are many many things in the case and I didn't want you to read the whole case I just wanted you to read the [sneezes] sorry excuse me [sneezes again silently]
063 Um so the important thing that I want you to take from this case is uh what the judge said um and I can't get the quotation right now but um, one of the judges said 'look, when we sit in judgment on a matter like this you don't bring along with you your own personal baggage. You don't / because this is abhorrent to everything you stand for / first of all you don't agree as a judge, you don't agree that males should have intercourse with one another. That is something that is abhorrent to you. That's not strange, five years ago in this country it was against the law. That's not strange at all. But you don't bring your personal subjective view to court. Secondly, you might find it from a Christian point of view or from a decency point of view completely abhorrent that uh people have to hurt themselves to … in order to get sexual gratification. That is not relevant. What you think of it while you are uh busy with recreation with your family and your friends and uh socializing and your view in society outside the courtroom is is

one thing. What you must do when you sit in judgment on a matter like this is you must look for the law.

064 Now, granted, this was done in England, it was done in 1993 um it was not done in South Africa where we have a beautiful, liberal Constitution and this case would have been completely different in South Africa. But the point remains very clear. That when you sit in judgment you do not bring your own ethics, your own religion, your own morality to court. In this case they looked for the for what the law said. And the only piece of legislation that they could get was the so-called Offences against the Person Act of 1861. [licks lips] They then interpreted / what they did they interpreted this Act um and they found in terms of this Act of 1861 what these men did was against the law. Um you know and then you had many legal arguments as to whether you can have consent, whether such an old law can still bind people etc etc but the fact is, the first station, the first point of departure is you must apply the law as it is. That is the first rule of positivism. Of course, uh in natural law its different. But the first rule of positivism, and this is in England where positivism was uh uh discovered and it was the home of positivism. And the rule that they have is that you look at the law as it is. Now … and this brings us to / are there any questions about this case? Are there still things that people don't understand about this case? [No questions]

065 It is a very good idea to go and read this case to see what your own feelings are. To see how you react personally against this. And then to see what you feel uh what you feel about the judgment.