

THE PRACTICE OF LAW AND THE INTOLERANCE OF CERTAINTY

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I INTRODUCTION

Despite the law being a moving tension between that which is known and that which is unknown, certain myths and narratives hold particular sway, including in the characterisation of legal practice and the role of lawyers. One of these is the idea that law can and should be intolerant of uncertainty and seeking of certainty. Examples are not difficult to find. Predictability, stability, consistency and transparency are all commonly identified as core components of the rule of law,¹ even though the rule of law is not incompatible with, and even requires, uncertainty and vagueness.² More tangibly, the doctrine of precedent, rules of civil procedure and principles of natural justice can be narrated as attempts to minimise surprises in order to reduce arbitrariness and to tame the unknown.³ On the other hand, without the discretion, interest and creativity generated by the uncertain and vague, legal problem-solving and decision-making would be a desiccated task unworthy of being a core function of the legal profession.⁴

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1 See, eg, John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47; Martin Krygier, 'Law as Tradition' (1986) 5 *Law and Philosophy* 237; James R Maxeiner, 'Some Realism about Legal Certainty in the Globalization of the Rule of Law' (2008) 31 *Houston Journal of International Law* 27.

2 Timothy A O Endicott, *Vagueness in Law* (Oxford University Press, 2000); Timothy A O Endicott, 'The Impossibility of the Rule of Law' (1999) 19 *Oxford Journal of Legal Studies* 1.

3 See, eg, Australian Law Reform Commission, *Discovery in Federal Courts*, Consultation Paper No 2 (2010) 22–4; J W von Doussa, 'Natural Justice in Federal Administrative Law' (1998) 17 *Australian Institute of Administrative Law Forum* 1, 5; Alexander Holtzoff, 'The Elimination of Surprise in Federal Practice' (1954) 7 *Vanderbilt Law Review* 576.

4 Jean Stefancic and Richard Delgado, *How Lawyers Lose Their Way: A Profession Fails Its Creative Minds* (Duke University Press, 2005).

Creating certainty is also commonly held up as a fundamental part of legal practice.⁵ Clients seek the assistance of lawyers to bring about determinate, final outcomes to otherwise unresolved problems. Lawyers are often retained to reconcile conflicts caused by ambiguity, unexpected events and missing knowledge. Stereotypes of lawyers contain further clues to this myth of certainty. Lawyers are caricatured, not without some truth, as dispassionate, argumentative, outcome-oriented, rule-following agents skilled in operating the technical machinery of the minutiae of law to achieve a definite end.⁶ This comes at the expense of compassion, empathy, creativity and other qualities derogatorily reduced to ‘soft skills’. Yet such ‘thinking like a lawyer’ is usually what is taught and modelled in law school, both intentionally and implicitly.⁷

Of course, there are many advantages to this ideal of certainty. The minimisation of arbitrary power and unpredictable behaviour, particularly by powerful entities, is something to be treasured and protected in a liberal democratic society. Yet it does not tell the entire story. Behind this public image of law is a normative epistemological orientation which elevates the ideal of certainty and is adverse to uncertainty.⁸ This worldview of certainty and knowledge in the law has deep parallels with values entrenched throughout post-Enlightenment western society.⁹ Curiously, despite this history of progress towards knowledge, understanding and predictable order, there is a fear that uncertainty is gaining ascendancy, that the world until recently was manageable and stable but is now too complex and uncertain.¹⁰ Winning the war against

5 ‘Legal professionalism is discursively constructed as the quintessential Enlightenment project’: Hilary Sommerlad, ‘Researching and Theorizing the Processes of Professional Identity Formation’ (2007) 34 *Journal of Law and Society* 190, 216.

6 Kath Hall, Molly Townes O’Brien and Stephen Tang, ‘Developing a Professional Identity in Law School: A View from Australia’ (2010) 4 *Phoenix Law Review* 21. But see Austin Sarat and William L F Felstiner, ‘Law and Strategy in the Divorce Lawyer’s Office’ (1986) 20 *Law & Society Review* 93.

7 Hall, Townes O’Brien and Tang, above n 6. For general critiques of ‘thinking like a lawyer’, see, eg, William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, 2007); Phyllis E Bernard, ‘The Lawyer’s Mind: Why a Twenty-First Century Legal Practice Will Not Thrive Using Nineteenth Century Thinking (With Thanks to George Lakoff)’ (2010) 25 *Ohio State Journal on Dispute Resolution* 165; Elizabeth Mertz, *The Language of Law School: Learning to ‘Think Like a Lawyer’* (Oxford University Press, 2007) 14; Judith Welch Wegner, ‘Reframing Legal Education’s “Wicked Problems”’ (2009) 61 *Rutgers Law Review* 867; Kate Galloway, ‘Thinking Like a Lawyer’ (2012) 37 *Alternative Law Journal* 298; Caroline Maughan, ‘Why Study Emotion?’ in Paul Maharg and Caroline Maughan (eds), *Affect and Legal Education: Emotion in Learning and Teaching the Law* (Ashgate, 2011) 11, 17–24.

8 The metaphors used for certainty and uncertainty are revealing: see Michael Smithson, ‘The Many Faces and Masks of Uncertainty’ in Gabriele Bammer and Michael Smithson (eds), *Uncertainty and Risk: Multidisciplinary Perspectives* (Earthscan, 2008) 13, 16–18.

9 Sommerlad, above n 5, 216; Bill Vitek and Wes Jackson, ‘Introduction: Taking Ignorance Seriously’ in Bill Vitek and Wes Jackson (eds), *The Virtues of Ignorance: Complexity, Sustainability and the Limits of Knowledge* (University Press of Kentucky, 2008) 1, 2–3.

10 For an account of a possible underlying cognitive bias here, see Jordi Quoidbach, Daniel T Gilbert and Timothy D Wilson, ‘The End of History Illusion’ (2013) 339 *Science* 96.

uncertainty is thus seen as *the* defining contemporary problem, as expressed with almost hyperbolic urgency by Carroll, Arkin and Oleson: ‘the human struggle with personal uncertainty is a grand and epic battle that only promises to increase in lockstep with the ever-increasing forces of change in daily life’.¹¹

The only certainty, however, is that fighting such a battle is doomed to defeat. This article provides a preliminary sketch of an alternative epistemology applied to the law in practice, with particular application to the preparation of lawyers and their transition from law student to legal professional. The problem is not that law contains mixed epistemic motivations and messages. Rather, it is in the dissonance between the discursive construction and portrayal of law on the one hand, and the psychological experience of lawyering as it relates to both certainty and uncertainty on the other.¹²

Understanding this dialectic requires revisiting some of the assumptions and norms around uncertainty, including seeing that uncertainty can be as much of a positive, motivating and creative resource as it is something to be regulated and feared. Uncertainty is something which, in the right contexts, can be actively sought, created and harnessed, but it can never be completely subdued or contained.

Importantly, such uncertainty must be understood from a psychological and experiential level rather than described from afar. Moreover, this psychological approach to uncertainty for lawyers can be framed pedagogically and prescriptively as a core part of professional identity and competence. An ‘intolerance of certainty’ is one approach to challenge the dominance of certainty-seeking narratives and their effect in promoting unthinking and automatic neglect of uncertainty. This is illustrated using two aspects of legal practice and professionalism in which the value of certainty is balanced against the need for appreciating and making use of uncertainty. This discussion is preceded by a conceptual exploration of certainty and uncertainty, particularly in the experience and expectations of lawyers and lawyers-to-be.

II HOW NOT TO KNOW

A Towards a Psychological Model of Uncertainty and Lawyering

An exploration of uncertainty within the practice of law requires, perhaps ironically, a higher level of certainty in the preliminary question of where to situate this analysis. The intention here is not to duplicate that which has already been written about uncertainty within law as an institution, particularly from a

11 Patrick J Carroll, Robert M Arkin and Kathryn C Oleson, ‘Introduction: The Uncertain Self’ in Robert M Arkin, Kathryn C Oleson and Patrick J Carroll (eds), *Handbook of the Uncertain Self* (Psychology Press, 2010) 1, 2.

12 Sommerlad, above n 5, 201.

jurisprudential or socio-legal lens. This discourse, for instance about the linguistic or textual uncertainty in the products of law, is useful in describing the tension between movements towards certainty and uncertainty.¹³ However, the description of uncertainty from a distance is incomplete for the theory and praxis of lawyering. It is also inadequate in the prescriptive endeavour of helping lawyers develop professional competence and identity, especially at the beginning of their careers.

Abstract descriptions of uncertainty, especially when using the language of law itself, tend to heighten its depersonalised remoteness or threatening ‘otherness’, detached from its embodied presence in lawyers and other legal actors.¹⁴ Similarly, analyses of the function of uncertainty in professional and organisational systems describe the collision between the certainty and uncertainty-oriented motivations of law removed from the personal experiences of lawyers themselves.

Jamous and Peloille, for instance, identified that professional groups were characterised by a balance between indeterminacy (or uncertainty: a need for professional judgment and tacit knowledge) and technicality (explicit and complex rules and procedures).¹⁵ In particular, while ‘traditional’ professions (eg, medicine) tended to have higher levels of indeterminacy compared with technicality, maintaining this balance was a dynamic dilemma as too much of either aspect of practice threatened to undermine the legitimacy and status of the profession.¹⁶ Uncertainty management was therefore functional at a group level, as part of the collective maintenance and protection of a valued social identity.¹⁷ This level of analysis is different to that needed for understanding the development and regulation of an individual lawyer’s behaviour, expectations and experience.

13 See, eg, Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press, 2006); Richard A Posner, *How Judges Think* (Harvard University Press, 2008); Ralf Poscher, ‘Ambiguity and Vagueness in Legal Interpretation’ in Peter M Tiersma and Lawrence M Solan (eds), *The Oxford Handbook of Language and Law* (Oxford University Press, 2012) 128; Ward Farnsworth, Dustin F Guzior and Anup Malani, ‘Ambiguity about Ambiguity: An Empirical Inquiry into Legal Interpretation’ (2010) 2 *Journal of Legal Analysis* 257; cf Shawn J Bayern, ‘Against Certainty’ (2012) 41 *Hofstra Law Review* 53.

14 Even judicial definitions of certainty ambivalently recognise the presence of uncertainty:

There is no mathematical scale according to which degrees of certainty of intellectual conviction can be computed or valued. But there are differences in degree of certainty, which are real, and which can be intelligently stated, although it is impossible to draw precise lines, as upon a diagram, and to assign each case to a particular subdivision of certainty: *Briginshaw v Briginshaw* (1938) 60 CLR 336, 343 (Latham CJ).

15 H Jamous and B Peloille, ‘Professions or Self-perpetuating Systems? Changes in the French University–Hospital System’ in J A Jackson (ed), *Professions and Professionalization* (Cambridge University Press, 1970) 109.

16 *Ibid* 111–13.

17 See Michael Traynor, ‘Indeterminacy and Technicality Revisited: How Medicine and Nursing Have Responded to the Evidence Based Movement’ (2009) 31 *Sociology of Health and Illness* 494.

However, a person-centred view of uncertainty and the law has not been far away. Consider Sir William Blackstone's remarks about litigation from around the end of the eighteenth century:

Whatever instances therefore of contradiction or uncertainty have been gleaned from our records, or reports, must be imputed to the defects of human laws in general ... But is not (it will be asked) the multitude of law-suits, which we daily see and experience, an argument against the clearness and certainty of the law itself? By no means: for ... it is obvious to observe how few arise from obscurity in the rules or maxims of law. ... [T]he dubious points which are usually agitated in our courts, arise chiefly from the difficulty there is of ascertaining the intentions of individuals ... The law rarely hesitates in declaring its own meaning; but the judges are frequently puzzled to find out the meaning of others.¹⁸

Two things of interest can be extracted from these observations. First is Blackstone's comment that uncertainty is present in the legal system as a necessary cause and consequence of law's intervention in 'the meaning of others'. Related to this is the recognition that the human (rather than legal) origins of uncertainty are often overlooked.

Secondly, there is a higher-level question of how this uncertainty is appraised by the human actors themselves; the question of where it is located. At one level, there is a general recognition that uncertainty resides in the (objective) difficulty of understanding other people and their intentions, otherwise known as the psychological problem of intersubjectivity. More interesting, however, is when this realisation is subjectively lived out: in discovering or being reminded that making sense of other people and the world is a difficult, puzzling and surprising activity. It is where a lawyer encounters the limits of their own knowledge, or of the systems of rules. This is the experience of uncertainty, rather than the mere presence of uncertainty, which occurs not only in moments of high stress or conflict, but also in what Shaffer referred to as the 'ordinary, prosaic, Wednesday afternoon law practice'.¹⁹

In Holmes, Foley, Tang and Rowe's study of newly-admitted Australian lawyers, this felt and lived experience of uncertainty was often one of the most defining aspects of their everyday work.²⁰ A common theme was new lawyers' deep surprise and even shock at their unpreparedness for the uncertainties contained within ordinary practice. This uncertainty was often situated in the interpersonal, tacit or 'irrational' aspects of their roles and work as lawyers where the relative certainty of formal law and rules were absent or of little relevance.

18 Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–69) book 3, 328–9.

19 Thomas L Shaffer, 'Christian Jurisprudence of Robert E Rodes Jr' (1998) 73 *Notre Dame Law Review* 737, 748. See also Thomas L Shaffer, 'Legal Ethics of Radical Individualism' (1987) 65 *Texas Law Review* 963, 983.

20 Vivien Holmes et al, 'Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers' (2012) 15 *Legal Ethics* 29, 47.

Our object of inquiry therefore is not the social construction of uncertainty and its meaning, but the personal experience of uncertainty in the midst of professional legal practice.²¹ Accordingly, addressing lawyers' attitudes, emotions, expectations and behaviours around uncertainty itself requires a psychological lens.²² Uncertainty is therefore conceptualised as an experiential psychological state, rather than as an attribute of a legal decision, problem or system.

The relevant issue then is how this state is interpreted, which is a metacognitive or reflective question.²³ There is the option of responding mindfully to uncertainty,²⁴ by noticing its presence, its lived experience and its interpersonal dimensions, and choosing an appropriate response. Examples of active attention to uncertainty as a core legal professional skill are discussed further below. It is equally possible for the response to be mindless. Avoiding, ignoring or misplacing uncertainty as a default response is particularly easy given the dominance of legal thinking which contains a knowledge and certainty-seeking worldview. This is therefore the basis of the need for what we term an 'intolerance of certainty', in full recognition of the discordance of this phrase which functions like a double negative.

There are two components to such an intolerance, one transient and developmental, the other deeply engrained into the law and its practice. First, we consider that a conscious intolerance of certainty is a necessary movement in the developmental trajectory from law student to legal professional. Creating an intolerance of certainty is a deliberate reaction to the default certainty-based epistemology which permeates legal education and much of the current discourse about becoming a lawyer. As Holmes, Foley, Tang and Rowe discovered, such

21 Although sharing an overall realist view of the law, the *psychological* approach here is theoretically distinct from the *psychoanalytic* approach of Jerome Frank in its explanation of the motivations and roles of certainty and uncertainty. A psychoanalytic, Freudian reading views legal systems and the behaviour of its actors as an expression of the inaccessible unconscious and its dynamic conflicts. There is no suggestion here, for instance, that legal certainty is motivated by 'an infantile longing to find a father-substitute in the law': Jerome Frank, *Law and the Modern Mind* (Transaction Publishers, first published 1930, 2009 ed) 192.

22 A similar approach is being adopted in the new field of behavioural legal ethics: see, eg, Jennifer K Robbenolt and Jean R Sternlight, 'Behavioral Legal Ethics' (2013) 45 *Arizona State Law Journal* 1107; Andrew M Perlman, 'A Behavioral Theory of Legal Ethics' (2015) 19 *Indiana Law Journal* (forthcoming).

23 See Anthony S Niedwiecki, 'Lawyers and Learning: A Metacognitive Approach to Legal Education' (2006) 13 *Widener Law Review* 33. See also Leering's idea of the 'integrated reflective practitioner': Michele Leering, 'Conceptualizing Reflective Practice for Legal Professionals' (2014) 23 *Journal of Law and Social Policy* 83. See also Schön's idea of reflection-in-action: Donald A Schön, *Educating the Reflective Practitioner* (Jossey-Bass, 1987) 22–40.

24 This is applying Ellen Langer's minimalist psychological definition of mindfulness, which has nothing to do with meditation but is about drawing novel distinctions, oriented in the present moment and sensitive to context. See Ellen J Langer and Mihnea Moldoveanu, 'The Construct of Mindfulness' (2000) 56 *Journal of Social Issues* 1.

an encounter with uncertainty already happens with new lawyers, particularly in the ‘specific and often momentary events in which they struggled with gaps in their procedural knowledge ... which left them puzzling over their role’.²⁵

There is, however, a choice as to *how* this encounter takes place. For those involved in the education and professional development of lawyers, there is an opportunity to facilitate this exposure to uncertainty in a supported, gradual and reflective way. The alternative is to allow new lawyers to experience uncertainty during moments of uncontrolled ‘freefall’ or panic, which may instead impair the lawyer’s confidence, competence and wellbeing.²⁶ Either way, this is nonetheless a direct and blunt approach; it can be a discomfiting ‘reality check’ and reorientation to discover that certainty can be deceptive. However, such a step is only necessary because of the disjunction between how the practice of law is portrayed and how it is experienced. Our aim is for this gap to disappear through changing the narratives and applying the necessary corrective measures as early as possible in legal education and practice. Secondly, and more positively and permanently, a mindful intolerance of uncertainty can be used in service of developing an appreciative stance towards the limits of knowledge and the ubiquity of the unknown. This has the effect of resisting the pull towards the constraints of certainty and affirms a broader – and more human – notion of law and lawyering.²⁷

B Ignorance and Uncertainty: Working Definitions

This experiential and psychological view of uncertainty requires some working definitions. However, it is also worth noticing that the (western) sociocultural denial of uncertainty permeates not only theories of law but also the psychological theories about thinking, reasoning and decision-making.²⁸ Michael Smithson, for instance, has called attention to psychology’s own ambivalent view of uncertainty, with much of the discourse based on a consequentialist view of uncertainty in terms of probability assigned to outcomes of decisions. Uncertainty is almost always seen as something negative to be controlled or

25 Holmes et al, above n 20, 47–9.

26 Ibid 47.

27 See, eg, Fleur Johns, ‘The Law Isn’t Just a Set of Constraints – It Can Also Be a Site of Innovation’, *The Guardian* (online), 16 September 2014 <<http://www.theguardian.com/commentisfree/2014/sep/16/the-law-isnt-just-a-set-of-constraints-it-can-liberating-too>>.

28 Michael Smithson, ‘Psychology’s Ambivalent View of Uncertainty’ in Gabriele Bammer and Michael Smithson (eds), *Uncertainty and Risk: Multidisciplinary Perspectives* (Earthscan, 2008) 205.

reduced in order to maximise outcomes.²⁹ This is the basis of the traditional distinction between *risk* and *uncertainty*, which is not directly relevant here.³⁰

Defining uncertainty as a subjective experience is only possible by looking at a broader construct: *ignorance*. Ignorance is simply everything we do not know.³¹ It has been described as non-knowledge or negative knowledge.³² It is the inevitable and normal result of having finite knowledge in an unconstrained and ever-changing world. We are infinitely more ignorant than we are knowledgeable. ‘Ignorance’ is therefore not a pejorative label but can be used instead with humility.³³ To be ignorant is not to be against knowledge: ignorance and knowledge are different sides of the same coin.³⁴ The more we know, the more we know that we do not know,³⁵ and what we know we do not know often drives us to discover and learn. In contrast to the impossible rational actor assumption that perfect knowledge is attainable, being mindfully ignorant is a reassuring reminder that we can only ever know in part, and can only strive to know enough.³⁶

29 See, eg, Terry Connolly, ‘Uncertainty, Action, and Competence: Some Alternatives to Omniscience in Complex Problem-Solving’ in Seymour Fiddle (ed), *Uncertainty: Behavioral and Social Dimensions* (Praeger Publishers, 1980) 69, 70; Magda Osman, ‘Controlling Uncertainty: A Review of Human Behavior in Complex Dynamic Environments’ (2010) 136 *Psychological Bulletin* 65.

30 For example, where risk is where the outcome is unknown, but the distribution of outcomes is known (and therefore directly quantifiable). Uncertainty, conversely, is where both the outcome and the distribution of outcomes are unknown (and therefore not directly quantifiable). See, eg, Frank H Knight, *Risk, Uncertainty and Profit* (Houghton Mifflin, first published 1921, 1948 ed) 19–20.

31 Smithson, ‘The Many Faces and Masks of Uncertainty’, above n 8, 14–15.

32 Ibid.

33 Wendel Berry, ‘The Way of Ignorance’ in Bill Vitek and Wes Jackson (eds), *The Virtues of Ignorance: Complexity, Sustainability and the Limits of Knowledge* (University Press of Kentucky, 2008) 37, 45.

34 Anna L Peterson, ‘Ignorance and Ethics’ in Bill Vitek and Wes Jackson (eds), *The Virtues of Ignorance: Complexity, Sustainability and the Limits of Knowledge* (University Press of Kentucky, 2008) 119, 126.

35 Most famously stated by former US Secretary of Defense, Donald Rumsfeld: ‘There are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don’t know we don’t know’: Donald H Rumsfeld, ‘DoD News Briefing – Secretary Rumsfeld and Gen. Myers’ (Press Briefing, 12 February 2002) <<http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636>>. Note, however, that Ann Kerwin expressed much the same idea almost a decade earlier. Kerwin includes the missing piece in the quadrant of ignorance, ‘unknown knowns’ (or ‘tacit knowledge’); things we did not know that we knew: Ann Kerwin, ‘None Too Solid: Medical Ignorance’ (1993) 15 *Science Communication* 166, 166. See also Gabriele Bammer, Michael Smithson and the Goolabri Group, ‘The Nature of Uncertainty’ in Gabriele Bammer and Michael Smithson (eds), *Uncertainty and Risk: Multidisciplinary Perspectives* (Earthscan, 2008) 289, 293.

36 Scott S Wiltermuth and Margaret A Neale, ‘Too Much Information: The Perils of Nondiagnostic Information in Negotiations’ (2011) 96 *Journal of Applied Psychology* 192. See also Himanshu Mishra, Arul Mishra and Baba Shiv, ‘In Praise of Vagueness: Malleability of Vague Information as a Performance Booster’ (2011) 22 *Psychological Science* 733.

Uncertainty is then our individual response when we meet with objective ignorance.³⁷ Uncertainty is what ignorance looks like through our eyes. Because of the sheer extent of what we do not know, we have boundaries on our ability to predict, plan and explain the world around us. Uncertainty is experienced and felt, even if we may not consciously make this appraisal.³⁸ We respond to this feeling of uncertainty in different ways. This might be the immediate emotional and visceral reactions of fear, doubt, surprise or even excitement. It also includes the subtle but structured ways in which we try to foresee and mitigate ignorance in our predictions about the future, other people and even ourselves. Like ignorance, uncertainty is dimensional rather than categorical. It has the qualities of *more* and *less*, rather than *all* or *none*.

Uncertainty, as psychological experience, can also be purposefully created or manipulated. This is usually achieved by drawing attention to our own, or someone else's, ignorance: think of the criminal defence lawyer sowing the seeds of reasonable doubt in the jury's mind. In this example, notice that doubt – which is a discomfiting kind of uncertainty³⁹ – is something to be valued as central to the administration of justice. Such uncertainty, however, is then compressed into a binary state (doubt being either present or absent), apparently in the service of certain, clear-cut outcomes.

C Thinking about Thinking Like a Lawyer

At this point, we can revisit and reconsider the conventional approaches to legal practice and legal education. 'Thinking like a lawyer' has traditionally been seen as an *additive* set of skills. These skills go beyond and enhance ordinary thinking. Legal thinking may be seen as a pair of 'X-ray glasses' that give the

37 This, admittedly, is a somewhat arbitrary and simplified distinction. Some authors seem to treat ignorance like uncertainty: see, eg, Smithson, 'The Many Faces and Masks of Uncertainty', above n 8, 15. Others appear to distinguish between personal uncertainty and the non-knowledge of ignorance: see, eg, Dennis V Lindley, *Understanding Uncertainty* (Wiley, 2006) 3, 44. For a more detailed applied taxonomy, see Helen Pushkarskaya et al, 'Neuroeconomics of Environmental Uncertainty and the Theory of the Firm' in Angela A Stanton, Mellani Day and Isabell M Welpe (eds), *Neuroeconomics and the Firm* (Edward Elgar Publishing, 2010) 13, 13–19 (distinguishing between risk, ambiguity, conflict, sample space ignorance and unawareness). Another common distinction is between *aleatory* uncertainty (irreducible objective uncertainty due to inherent randomness) and *epistemic* uncertainty (reducible uncertainty from a lack of knowledge): see Elke U Weber and Eric J Johnson, 'Decisions under Uncertainty: Psychological, Economic, and Neuroeconomic Explanations of Risk Preference' in Paul W Glimcher et al (eds), *Neuroeconomics: Decision Making and the Brain* (Elsevier, 2009) 127, 131.

38 See, eg, George L Loewenstein et al, 'Risk as Feelings' (2001) 127 *Psychological Bulletin* 267.

39 See, eg, Adam L Alter and Daniel M Oppenheimer, 'Uniting the Tribes of Fluency to Form a Metacognitive Nation' (2009) 13 *Personality and Social Psychology Review* 219; Neal J Roese and Jeffrey W Sherman, 'Expectancy' in Arie W Kruglanski and E Tory Higgins (eds), *Social Psychology: Handbook of Basic Principles* (Guilford Press, 2nd ed, 2007) 91.

wearer special abilities not present in non-legally-trained people.⁴⁰ Skills like contractual drafting, negotiation, litigation and dispute resolution are prized for the way they enable lawyers to navigate through the confused darkness of human complexity and to identify issues, problems and solutions which are not ordinarily visible. The law is vast, confusing and ambiguous to outsiders, but skilled lawyers can move towards outcomes and create predictability, certainty and calmness in the process. The task for legal educators, traditionally, is then to enhance and develop these skills, despite knowing that at some level they are artificial. Not only can this operate to legitimate the law and its institutions, but legal education can then be considered ineffective to the extent that there are deficits of competence in this kind of rational and logical thought.⁴¹

While these are undeniably useful skills, this kind of ‘thinking like a lawyer’ typically carries with it an implicit ideology of attainable certainty, that there is an end-point where all the necessary knowledge and competence can be acquired and that it can be applied to any given problem. This furthers the belief that uncertainty in one’s role as a lawyer can one day be eliminated by learning more (or better) or practising more (or better). Moreover, there is also the side-effect that when this reasoning is extrapolated, the lawyer’s role can be largely reduced into rule and template-driven practices without needing discretion or professional acumen. Worse still, if legal practice is indeed rationally predictable and rule-driven, then much of the existing work of the legal profession could presumably be outsourced to technology. The attempt to eliminate uncertainty may bring with it, as Richard Susskind foresees, the end of lawyers – at least in their current roles.⁴² Even models of algorithmic lawyering as ‘quantitative prediction’, which explicitly incorporate probabilistic uncertainty in legal decision-making models, seek ultimately to create certainty in outcomes based on the accumulation of data with minimal human input.⁴³

However, with a less pejorative reading of ignorance and uncertainty it is possible to construct a different model which takes the opposite view of what ‘thinking like a lawyer’ seeks to achieve. It may be more accurate to see traditional lawyer skills as being subtractive, not additive. Perhaps ‘thinking like a lawyer’ is more like wearing a pair of sunglasses. It is a way of seeing other people, the law, and the interaction between the two, which operates to exclude

40 Stephen Tang and Tony Foley, ‘The Benefit of the Doubt: Integrating Uncertainty, Ignorance and “Thinking Like a Lawyer”’ (Paper presented at the 2013 Law and Society Annual Meeting, Boston, 31 May 2013) (copy on file with author).

41 See, eg, E Scott Fruehwald, *Think Like a Lawyer: Legal Reasoning for Law Students and Business Professionals* (ABA Publishing, 2013).

42 Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press, revised ed, 2010); Richard Susskind, *Tomorrow’s Lawyers: An Introduction to Your Future* (Oxford University Press, 2013).

43 Daniel Martin Katz, ‘Quantitative Legal Prediction – or – How I Learned to Stop Worrying and Start Preparing for the Data-Driven Future of the Legal Services Industry’ (2013) 62 *Emory Law Journal* 909.

and filter information. It intentionally changes what is seen, and what is hidden, through legal ‘tests’, rules and categories.

As Dvorkin, Himmelstein and Lesnick pointed out, legal thinking and the lawyer’s professional identity are shaped both by what is deemed to be appropriate and not appropriate, beginning in law school.⁴⁴ What is conventionally inappropriate is the recognition of uncertainty and unknowns which come from seeing the world in its raw state: unblinkerred, unfiltered, sometimes dazzling in its intricacy and at other times grotesque in its evil. Karl Llewellyn’s insightful observations from over eight decades ago have not diminished in relevance:

The hardest job of the first year [of law school] is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice – to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges. You are to acquire ability to think precisely, to analyze coldly, to work within a body of materials that is given, to see, and see only, and manipulate, the machinery of the law.⁴⁵

There is empirical evidence that this does in fact occur, and with destructive consequences. In a study of first-year law students, Townes O’Brien, Tang and Hall observed a significant increase in preferences for rational thinking and almost a mirror-image decline in experiential thinking. These changes, as we discovered in subsequent dialogue-based research, extended far beyond the law school classroom and into personal relationships and everyday activities in ways that many students wished had not occurred, and were also associated with elevated levels of psychological distress.⁴⁶ Learning to ‘think like a lawyer’ means not only the erasure or ‘cultural invisibility’ of social experiences, as Elizabeth Mertz identified,⁴⁷ but the consolidation of fictions about certainty and knowledge in ways which may be hazardous to one’s wellbeing.

There is, however, a proper place for subtractive thinking. Nassim Taleb describes this as a *via negativa*, the practice of intentional omission.⁴⁸ For professionals as much as in everyday life, it means knowing what to avoid, purposefully eliminating harmful things or obstacles, disconfirming and

44 Elizabeth Dvorkin, Jack Himmelstein and Howard Lesnick, *Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism* (West Publishing, 1981).

45 Karl N Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana Publications, first published 1930, 1951 ed), 101.

46 Molly Townes O’Brien, Stephen Tang and Kath Hall, ‘Changing Our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum’ (2011) 21 *Legal Education Review* 149, 180–1.

47 Mertz, above n 7, 1, 213.

48 Nassim Nicholas Taleb, *Antifragile: Things That Gain from Disorder* (Allen Lane, 2012) 301 (borrowing from the term as used in apophatic theology).

falsifying,⁴⁹ and knowing when to take mental shortcuts based on less rather than more (or complete) information.⁵⁰ However, this is very different to a mindless failure of wisdom and judgment through elaborate technical proficiency geared towards outcome-oriented certainty. The *via negativa* instead requires a stance of openness and comfort with uncertainty. Keats referred to this as ‘negative capability’, where a person is ‘capable of being in uncertainties, mysteries, doubts, without any irritable reaching after fact and reason’.⁵¹

The problem therefore is not so much that ‘thinking like a lawyer’ is reductionist and subtractive, but that it is still all too commonly seen and taught as additive despite its subtractive psychological function. As an attempt to cope with too much information (which is itself the result of law’s elevation of knowledge and rules), it also has the effect of avoiding uncertainty. Reducing this tension of not knowing by ‘squeezing life into crisp commoditized ideas, reductive categories, specific vocabularies and prepackaged narratives’, according to Taleb, can have profoundly limiting and dangerous consequences.⁵²

D Perilous Certainty

To be very clear, an aversion to uncertainty is justifiable and important in many situations. It must, however, not be the only perspective available in the practice of law. Our reliance on certainty as a psychological state – what neurologist Robert Burton calls the ‘feeling of certainty’⁵³ – may be volatile and misleading as a source of information in ways which Taleb predicts. Burton turns this experience of certainty on its head:

Despite how certainty feels, it is neither a conscious choice nor even a thought process. Certainty and similar states of ‘knowing what we know’ arise out of involuntary brain mechanisms that, like love or anger, function independently of reason.⁵⁴

Consider arguments with friends or clients where the response of ‘But, I just *know* that it’s true’ (or not true) repels any further attempt at dialogue, even in the face of clear evidence that the person is factually in error. In such a situation, it

49 See, eg, Joshua Klayman and Young-Won Ha, ‘Confirmation, Disconfirmation, and Information in Hypothesis Testing’ (1987) 94 *Psychological Review* 211; Laura J Kray and Adam D Galinsky, ‘The Debiasing Effect of Counterfactual Mind-Sets: Increasing the Search for Disconfirmatory Information in Group Decisions’ (2003) 91 *Organizational Behavior and Human Decision Processes* 69.

50 See generally Gerd Gigerenzer, *Rationality for Mortals: How People Cope with Uncertainty* (Oxford University Press, 2008).

51 Earle Vonard Weller (ed), *Autobiography of John Keats: Compiled from His Letters and Essays* (Stanford University Press, 1933) 62; Li Ou, *Keats and Negative Capability* (Bloomsbury Academic, 2009).

52 Nassim Nicholas Taleb, *The Bed of Procrustes* (Allen Lane, 2010) x. See also Susan R Bordo, *The Flight to Objectivity: Essays on Cartesianism and Culture* (SUNY Press, 1987) 17.

53 Robert A Burton, *On Being Certain: Believing You Are Right Even When You’re Not* (St Martin’s Press, 2008).

54 *Ibid* xiii.

is not knowledge which is invoked but the *feeling of knowing*.⁵⁵ This state of certainty can be dissociated from actual knowledge, particularly when any amount of knowledge will be shadowed by vast amounts of ignorance. We can feel certain for all the wrong reasons.

On the other hand, the extensive psychological literature on rationalisation and cognitive dissonance has shown how people can be highly certain about things which we also know to be wrong.⁵⁶ The feeling of uncertainty can be sufficient to shape ‘trains of thought’ away from creative, unstructured and open ways of thinking, and towards highly organised, structured, precedent-following ideas. Feeling uncertain can lead to a sharp opposing reflex to impose certainty through reasoning which promotes restrictive order and predictability.⁵⁷ Such motivated reasoning, however, may be highly biased. None of us, for example, are exempt from justifying our way into feeling more sure or certain about something despite knowing that it is objectively wrong. For lawyers, this can have devastating legal, ethical and personal consequences if left mindlessly unchecked.⁵⁸

The psychological dangers of avoiding or not being able to self-regulate in the presence of uncertainty are also clear. Such an intolerance of uncertainty is a dispositional propensity to react negatively to uncertain circumstances and to have a heightened sense of uncontrollability about the possibility of future threat, danger, or some other potentially negative event. An elevated level of this negative appraisal of uncertainty is associated with a wide range of potential psychological problems, including anxiety disorders, depression, worry, perfectionism, ‘choking under pressure’ in behavioural tasks, and even a gravitation towards paranormal beliefs and explanations.⁵⁹ The world is indeed infinitely unpredictable, perhaps more so now than before, but it is not the presence of uncertainty which is the problem. It is how we respond to it. If we see any uncertainty as too much uncertainty and struggle to control what is

55 Richard E Nisbett and Timothy DeCamp Wilson, ‘Telling More Than We Can Know: Verbal Reports on Mental Processes’ (1977) 84 *Psychological Review* 231.

56 See, eg, Raymond S Nickerson, ‘Confirmation Bias: A Ubiquitous Phenomenon in Many Guises’ (1998) 2 *Review of General Psychology* 175; Ziva Kunda, ‘The Case for Motivated Reasoning’ (1990) 108 *Psychological Bulletin* 480.

57 Matthijs Baas, Carsten De Dreu and Bernard A Nijstad, ‘Emotions That Associate with Uncertainty Lead to Structured Ideation’ (2012) 12 *Emotion* 1004, 1012.

58 Kath Hall and Vivien Holmes, ‘The Power of Rationalisation to Influence Lawyers’ Decisions to Act Unethically’ (2008) 11 *Legal Ethics* 137.

59 Emily L Gentes and Ayelet Meron Ruscio, ‘A Meta-analysis of the Relation of Intolerance of Uncertainty to Symptoms of Generalized Anxiety Disorder, Major Depressive Disorder, and Obsessive–Compulsive Disorder’ (2011) 31 *Clinical Psychology Review* 923; James F Boswell et al, ‘Intolerance of Uncertainty: A Common Factor in the Treatment of Emotional Disorders’ (2013) 69 *Journal of Clinical Psychology* 630.

uncontrollable, then the suffering and stress which follows should come as no surprise.⁶⁰

E Adaptive Uncertainty

If certainty is psychologically fragile and an intolerance of uncertainty is psychologically concerning, are there positive aspects to uncertainty? Smithson recognises that it can be difficult to see that uncertainty has any positive function at all, given the strength of the default certainty and knowledge worldview.⁶¹ However, peer beneath the surface and a rich source of possibilities awaits:

Readers having difficulty conceiving of positive aspects of uncertainty might wish to consider what freedom, discovery, creativity and opportunity really require, namely uncertainties about what the future will bring so that there actually are choices to be made. No uncertainty, no freedom.⁶²

Smithson connects uncertainty to agency, possibility and change. Anything which is a departure from tradition, precedent or the status quo is intrinsically uncertain. Anything that brings about a change of direction in an individual or in a system, no matter how small or subtle, necessarily involves uncertainty. Encountering such change and possibility can be either a positive or negative experience. The uncertainty of having a tightly-wrapped present under the Christmas tree is usually mildly pleasurable and exciting, often more so than the moments following the unwrapping.⁶³ This feeling of uncertainty is something which might wish to be prolonged,⁶⁴ often through social rituals and structures aimed at preserving uncertainty and delaying the ‘reveal’.

On the other hand, awaiting the results of a medical test is usually an experience of uncertainty often flooded with anxiety and anticipated catastrophe. Minimal uncertainty is desired here: no one wishes to hear from their doctor the words ‘I’m fairly certain that you’ll survive’. Yet even here, uncertainty can be constructive. Uncertainty in the form of hope – which is not necessarily hope for a cure, but a future-oriented state of ‘being’, ‘doing’ and ‘becoming’ – is an essential part of coping and continuing to live well in the midst of life-

60 This is a core premise of Acceptance and Commitment Therapy (‘ACT’): see, eg, Steven C Hayes et al, ‘Acceptance and Commitment Therapy and Contextual Behavioral Science: Examining the Progress of a Distinctive Model of Behavioral and Cognitive Therapy’ (2013) 44 *Behavior Therapy* 180.

61 Smithson, ‘The Many Faces and Masks of Uncertainty’, above n 8.

62 Ibid 13–18.

63 Timothy D Wilson et al, ‘The Pleasures of Uncertainty: Prolonging Positive Moods in Ways People Do Not Anticipate’ (2005) 88 *Journal of Personality and Social Psychology* 5.

64 Jaime L Kurtz, Timothy D Wilson and Daniel T Gilbert, ‘Quantity versus Uncertainty: When Winning One Prize Is Better Than Winning Two’ (2007) 43 *Journal of Experimental Social Psychology* 979, 980.

threatening illness or a poor prognosis.⁶⁵ Uncertainty is the voice of ‘but, maybe ...’ which drives the quest for novel possibilities which may be outside the original frame of reference. Sometimes such uncertainty can bring false expectations and ‘irrational’ behaviour driven by the countervailing need to impose certainty, as mentioned above, but few people would wish to live in a world where there was no possibility of the unexpected.

Uncertainty is thus a mixed-motive experience.⁶⁶ Afifi and Weiner’s Theory of Motivated Information Management (‘TMIM’) provides a helpful way to look at uncertainty as a value-neutral but motivating psychological force.⁶⁷ Instead of a categorical and black-and-white view of uncertainty (bad) and certainty (good), TMIM reintroduces the person into the picture. What does she or he want to know and not know? TMIM therefore looks at the match between the person’s subjective *desired* level of uncertainty and the amount of uncertainty perceived in the situation. Not only does a higher than desired level of uncertainty lead to anxiety and a motivation to decrease uncertainty, but a *lower* than desired level of uncertainty can also lead to anxiety, motivating the person to *increase* the amount of uncertainty to avoid boredom and to seek out new and interesting challenges.⁶⁸ Uncertainty, therefore, has a self-regulatory function: not only as a signal in itself, but something which can be generated as well as controlled and eliminated in service of other motivations and goals.⁶⁹

An adaptive view of uncertainty also extends beyond intrapersonal experiences and motivations. Smithson suggests that there are four commonplace challenges which necessarily involve identifying, inviting and interacting with uncertainty:

1. Dealing with unforeseen threats and solving problems;
2. Crafting good outcomes in a partially learnable world;
3. Benefiting from opportunities for exploration and discovery; and
4. Dealing intelligently and sociably with other people.⁷⁰

65 See, eg, Susan Folkman, ‘Stress, Coping, and Hope’ in Brian I Carr and Jennifer Steel (eds), *Psychological Aspects of Cancer* (Springer, 2013) 119; Gregory E Harris and Denise Larsen, ‘Understanding Hope in the Face of an HIV Diagnosis and High-Risk Behaviors’ (2008) 13 *Journal of Health Psychology* 401; Jane Boden, ‘The Ending of Treatment: The Ending of Hope?’ (2013) 16 *Human Fertility* 22.

66 Smithson, ‘The Many Faces and Masks of Uncertainty’, above n 8, 22.

67 Walid A Afifi and Judith L Weiner, ‘Toward a Theory of Motivated Information Management’ (2004) 14 *Communication Theory* 167.

68 See also Philip E Tetlock, ‘Social Functionalist Frameworks for Judgment and Choice: Intuitive Politicians, Theologians, and Prosecutors’ (2002) 198 *Psychological Review* 451. The outcome-based values and motivations associated with the ‘intuitive economist’ or ‘intuitive scientists’ are not the only applicable metaphors.

69 See also Helen Pushkarskaya et al, ‘Beyond Risk and Ambiguity: Deciding under Ignorance’ (2010) 10 *Cognitive, Affective, and Behavioral Neuroscience* 382.

70 Smithson, ‘The Many Faces and Masks of Uncertainty’, above n 8, 20.

It is not difficult to see how these four challenges can be directly applied to the everyday work of lawyers. Flood, for instance, has argued that the law in practice is far more than that which is portrayed in the neat and certain conclusions of appellate judicial decision-making. Instead, lawyers are managers of uncertainty, both for themselves and also for their clients.⁷¹

Professional and ethical practice also entails understanding the risks of uncertainty (as well as certainty), rather than pretending that it is non-existent or can be eliminated. Even better, as Smithson suggests, is to learn how to identify and make use of uncertainty when it arises naturally, and respond to it adaptively when it is used strategically by others.⁷² Denvir, for example, celebrates the aspects of legal practice which require nous, strategy, wit and guile.⁷³ These are all modes of thinking, doing and being which are dependent on the ability to engage with uncertainty consciously and productively. The ability to move adaptively between certainty and uncertainty, knowledge and ignorance may be a core ethical and professional skill for lawyers.⁷⁴

This goes beyond the point advocated by Judith Wegner, who encourages the process of ‘domesticating doubt’ in legal professionalism.⁷⁵ Wegner writes about ‘coming to be at peace with [uncertainty], not letting it frighten you, making it be interesting, and finally getting a kick out of it’.⁷⁶ This is indeed a positive start, but there is also a risk of complacency. Tamed, domesticated uncertainty may become a little too comfortable.⁷⁷ It could be compared to Bertrand Russell’s chicken, whose attempt to learn from uncertain experiences and external events (expecting to be fed upon seeing the farmer, inferring benevolence) only adds to the shock of the day when it was not fed but became food.⁷⁸

Lawyers must therefore remain open to the possibility of being surprised, and of creating positive surprises themselves. Lawyers should relish in the fact that things are not always predictable or stable, that few things remain truly

71 John Flood, ‘Doing Business: The Management of Uncertainty in Lawyers’ Work’ (1991) 25 *Law & Society Review* 41, 42–3. See also Sarat and Felstiner, above n 6.

72 Smithson, ‘The Many Faces and Masks of Uncertainty’, above n 8.

73 John Denvir, ‘Guile Is Good: The Lawyer as Trickster’ (2012) (forthcoming). See also Graham Ferris and Nick Johnson, ‘Practical Nous as the Aim of Legal Education?’ (2013) 19 *International Journal of Clinical Legal Education* 271.

74 New York State Bar Association, *Report of the Task Force on the Future of the Legal Profession* (2011) 54–5.

75 Judith Wegner, ‘Better Writing, Better Thinking: Thinking Like a Lawyer’ (2004) 10 *Journal of the Legal Writing Institute* 9, 13.

76 Ibid. For another example of this approach, see George Raitt, ‘Preparing Law Students for Legal Practice: Or, How I Learned to Stop Worrying and Embrace Uncertainty’ (2012) 37 *Alternative Law Journal* 264.

77 ‘Domestication is a major means for maintaining a culture’s coherence. Culture, after all, prescribes our notions of ordinariness’: Jerome Bruner, *Making Stories: Law, Literature, Life* (Harvard University Press, 2002) 90.

78 ‘[M]ore refined views as to the uniformity of nature would have been useful to the chicken’: Bertrand Russell, *The Problems of Philosophy* (Indo-European Publishing, first published 1912, 2010 ed) 44.

inevitable.⁷⁹ The lives and careers of many lawyers throughout history provide numerous case studies of devoted professionals who struggled against seemingly impossible odds and in apparently closed, rigid systems of injustice and oppression to bring about radical change and justice.⁸⁰ Uncertainty carries with it the possibility that things could be different, and, to that extent, one ignored part of the epistemic dialectic of legal practice necessarily involves an intolerance of the certainty of the way things are.

III TOWARDS BEING AN UNCERTAIN LAWYER

We have claimed that the successful practice of law is contingent on not only the presence of uncertainty but also the ability to recognise and make use of this as a psychological state. In the same way, there is also a limit to the value of certainty. Moreover, effective legal professional practice requires knowing the difference between actual certainty and the mere feeling of certainty. To that end, encouraging a functional intolerance of certainty is aimed at developing the psychological flexibility needed first to acknowledge and then to move between unknowns and knowns. In turn, we suggest that this may help lawyers to resist, where appropriate, some of the unhelpfully knowledge- and certainty-biased default attitudes in legal education and in the expectations of lawyers.

To do this in practice may not necessarily be to do anything new: good lawyers already work adaptively with uncertainty, even if this remains at the level of an ‘unknown known’.⁸¹ However, to prepare competent and capable future lawyers, and adequately describe and understand the legal profession, a closer look at this tacit knowledge is required. With this in mind, we can now move towards two aspects of everyday legal practice which illustrate the importance of uncertainty and a healthy intolerance of certainty. The two illustrations are the self-organising nature of legal practice, and the centrality of narrative in the work of lawyers.

A Self-Organisation in Legal Practice

James Boyd White considers that the law

is not at heart an abstract system or scheme of rules ... nor is it a set of institutional arrangements ... rather, it is an inherently unstable structure of thought and expression, built upon a distinct set of dynamic and dialogic tensions.

79 See, eg, Archibald MacLeish, *Freedom Is the Right to Choose* (Bodley Head, 1952) 128–9.

80 Molly Townes O’Brien and Stephen Tang, ‘Stop Struggling for the Struggle’s Sake: Make it Meaningful’ (Paper presented at the 2013 International First Year in Higher Education Conference, Wellington, 8 July 2013) <http://fyhe.com.au/past_papers/papers13/5A.pdf>.

81 See Kerwin, above n 35.

It is not a set of rules at all, but a form of life. It is a process by which the old is made new, over and over again.⁸²

Although White seems to refer to law in its entirety, his remarks also reflect the scope of legal practice. He reconceptualises the law as an evolving and profoundly human system which is constantly in motion and moves away from seeing law as an elevated set of rules outside of time. The tension and instability which this brings also mean the presence of uncertainty, an uncertainty which gives law its source of vitality. A legal system which was completely predictable for legal actors would not be alive. Absolute certainty in the practice of law, therefore, is death.

How does this living system of law operate at the level of lawyers in their daily work? Top-down models of formal institutional regulation have only limited explanatory power at the level of lawyers interacting and going about the business of the law. It is a seriously misplaced assumption that lawyers' professional work could be codified or taught as a fixed and finite set of skills and practices.⁸³

The activity of lawyers often occurs, much more than expected, at a social and cognitive level where formal rules have no reach. Lawyering takes place during informal and spontaneous learning, mirroring and modelling of other lawyers, in ongoing multi-party communication, in trial and error, in tacit negotiations of content and process, and in the iterative adjustment of expectations. Over time and through repeated interactions, a pattern of coherence and robust norms can emerge out of the background noise. What is 'normal' now is assembled through seemingly random and inconsequential interactions in the past, but the norms are also being continually reconstructed in ways that cannot yet be explained.

This is known as 'self-organisation', where autonomous entities (in the present context, primarily lawyers, but also other legal actors) within a system (the legal profession) work together to create purposeful systems and practices without, or in the gaps of, formal top-down intervention or direction.⁸⁴ Self-organisation is commonly found in fundamental biological and physical processes, but is increasingly being identified in complex social systems such as economics, linguistics, crowd behaviour and business practices.⁸⁵ Two examples from nature and physics are the way in which fireflies synchronise their flashing

82 James Boyd White, 'An Old-Fashioned View of the Nature of Law' (2011) 12 *Theoretical Inquiries in Law* 381, 382.

83 There is some change to traditional pedagogies, including an emphasis on experiential ways of teaching and learning which explicitly simulate aspects of professional practice, including the presence of uncertainty: see Stephen Tang and Aneka Ferguson, 'The Possibility of Wellbeing: Preliminary Results from Surveys of Australian Professional Legal Education Students' (2014) 14 *QUT Law Review* 27.

84 Steven Strogatz, *Sync: The Emerging Science of Spontaneous Order* (Hyperion, 2003).

85 Ibid; Donella H Meadows, *Thinking in Systems: A Primer* (Earthscan, 2009).

behaviour,⁸⁶ and how multiple randomly out-of-phase metronomes placed on a movable plane will eventually beat in perfect unison.⁸⁷ In each case, each individual unit is influenced by every other unit, and each unit influences every other unit to produce a higher-order pattern.

Self-organising patterns occur throughout nature to produce a form of social cooperation and interaction.⁸⁸ Self-organised behaviour is therefore often purposeful in that it achieves something which individual units cannot achieve by themselves. For instance, the brighter flashes of the swarm help each firefly attract potential mates from further away. Similarly, it is only through many concurrent activations of individual cardiac cells that a single heartbeat is triggered.⁸⁹

This concept is counterintuitive and antithetical to rational models of planning, leadership and regulation which are commonly found in the law. A core premise of self-organisation is that entities can become *more* organised over time if left to themselves.⁹⁰ By deferring to the authority of coercive power and compliance, lawyers may expect entropy instead: that things would become increasingly messy, anarchic and unpredictable without some kind of external control or direction.

Self-organisation therefore carries with it considerable uncertainty, especially through the lens of legal certainty and knowledge. Systems which self-assemble and in which norms emerge are difficult to explain. Consider the fact that it took more than three centuries for scientists to account for the synchronous flashing of fireflies.⁹¹ Moreover, they are difficult to describe in terms of simple causal rules, which is confronting for lawyers who have an expectation of clear and prescriptive explanations of behaviour. Perhaps most difficult is that self-organising systems can only be described over time, not as a static snapshot. Each unit within the system is always in motion, and even seemingly discordant actions may be contributing to overall patterns. In the case of fireflies, certainty is not found in where, when or for how long this particular swarm is in sync, but only *that* a coordinated pattern will appear then disappear, within certain parameters. While a rule and certainty-based view of legal practice attempts to make general statements fixed in time, the self-organising world of the profession

86 See, eg, *Fireflies Flash to Find Mate* (8 July 2010) YouTube <<https://www.youtube.com/watch?v=qss5-fq4fDU>>.

87 See, eg, Ikeguchi Laboratory, *Synchronization of Thirty Two Metronomes* (14 September 2012) YouTube <<https://www.youtube.com/watch?v=JWToUATLGzs>>.

88 Dirk Helbing, Wenjian Yu and Heiko Rauhut, 'Self-organization and Emergence in Social Systems: Modelling the Coevolution of Social Environments and Cooperative Behavior' (2011) 35 *Journal of Mathematical Sociology* 177.

89 Strogatz, above n 84, 16.

90 Cosma Rohilla Shalizi, *Self-organization* (3 December 2010) Centre for the Study of Complex Systems <<http://cscs.umich.edu/~crshalizi/notabene/self-organization.html>>.

91 Strogatz, above n 84, ch 1.

means that things are always changing and being renewed, as White says, over and over again.⁹²

Legal practice, in all its complexity, is an excellent environment in which to see self-organisation at work.⁹³ There are countless ways in which lawyers both send and receive cues from others in their professional work. While some of these cues are readily observable (eg, a new lawyer being corrected by a partner for writing a letter to a client in the ‘wrong’ way), most of this occurs at a hidden level which would appear almost insignificant or unnoticeable.⁹⁴ The apparent inconsequentiality of these momentary cues, however, is balanced by their pervasiveness and cumulative effect. As Sommerlad observed in her analysis of professional identity formation in UK Legal Practice Course (‘LPC’) students, this ‘habitus’ of the profession (to use Bourdieu’s concept in his field theory) – the ‘habitual, patterned and thus pre-reflexive way of understanding and enacting the social field’⁹⁵ – can be used not only to legitimise and maintain, but also to subvert and contest the cultural practices and assumptions of the profession. From a psychological perspective, the lawyer – even as an outsider or freshly-minted graduate – is not necessarily a passive recipient of these norms and patterns, but can have an active influence even by her or his mere presence.

Kimberly Kirkland provides a good example of self-organisation in practice in her empirical study of large United States law firms. She describes how lawyers employ a ‘choice of norm rule’ to determine their everyday conduct. She defines this as

the appropriate norms to apply in a given situation are those of the people the lawyer is working for and with at the time. Because this choice of norm rule makes the partner or coterie a lawyer is working for at the time the source of norms, the lawyer asks, ‘What norms would the partner or coterie I am working with follow in this situation?’⁹⁶

92 For a broader legal example, consider the way in which criminal law is continually changing in the way it is constructed, interpreted and enforced – in ways which cannot be adequately formalised: see Celia Wells and Oliver Quick, *Lacey, Wells and Quick: Reconstructing Criminal Law* (Cambridge University Press, 4th ed, 2010) ch 2.

93 See also Ronit Dinovitzer and Bryant G Garth, ‘Lawyer Satisfaction in the Process of Structuring Legal Careers’ (2007) 41 *Law and Society Review* 1. Cf Judith A McMorrow, ‘Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY’ (2007) 30 *Boston College International and Comparative Law Review* 139. For self-organisation in law as an institutional system, see Gunther Teubner, Richard Nobles and David Schiff, ‘The Autonomy of Law: An Introduction to Legal Autopoiesis’ in James Penner, David Schiff and Richard Nobles (eds), *Introduction to Jurisprudence and Legal Theory* (Butterworths, 2002) 897.

94 Paul D Carrington draws some fascinating parallels between Mark Twain’s experience of learning to become a steamboat pilot and the many informal but important influences in becoming a legal professional: Paul D Carrington, ‘Of Law and the River’ (1984) 34 *Journal of Legal Education* 222.

95 Sommerlad, above n 5, 194. See Pierre Bourdieu, ‘The Force of Law: Towards a Sociology of the Juridical Field’ (1987) 38 *Hastings Law Journal* 805, 811.

96 Kimberly Kirkland, ‘Ethics in Large Law Firms’ (2005) 35 *University of Memphis Law Review* 631, 638.

The choice of norm rule is imitative, but it is not mere deference to one's superiors – which would be the opposite of self-organisation. While self-organisation is not incompatible with the formation of hierarchy,⁹⁷ emergent behaviour occurs at all levels and within multiple subsystems. Lazega, and Burk and McGowan, for example, separately pointed out ways in which law firm partners have their own self-organising and non-linear systems which establish local norms and practices.⁹⁸ Self-organising norms have influences in all directions. In other words, it is not possible to pinpoint one particular person or event as the cause for the subsequent formation of norms and behaviour.⁹⁹ To that extent, it is uncertain because of its unpredictability, but this uncertainty is the basis of forming effective work practices in a highly complex, multiple-party and multiple-motive environment.

Kirkland goes on to argue that the choice of norm rule arises because of the lack of normative homogeneity in large firms (and in legal practice generally), which requires lawyers to assess and adjust their practice style on a continual basis depending on who they are currently working for. Kirkland says that one troubling side-effect of this rule is that ethical standards can become overly relativistic and diluted. This occurs because of the perception that differences in lawyering are simply a matter of personal 'style' and 'taste' rather than an internal sense of ethical propriety.¹⁰⁰ The rule thus perpetuates the behavioural heterogeneity of lawyers, which in turn reinforces the strength of the choice of norm rule itself as an uncertainty-management strategy. This shows the dynamic interplay between certainty and uncertainty and the need for lawyers to be constantly aware of their epistemological frame as ethical professionals.

Consistent with the properties of a self-organising system, the only truly stable behavioural rule in Kirkland's example is the choice of norm itself. The specific actions which this rule produces are fluid, and likely to be rewritten and overwritten according to the prevailing norms of a particular time in a particular practice area. In other words, the choice of norm rule is quite certain and robust, while the content of the norms themselves may remain unknown and

97 Meadows notes that the formation of hierarchies are not inconsistent with the self-organisation of complex systems: Meadows, above n 85. See generally above nn 86–93. See also Donde Ashmos Plowman et al, 'The Role of Leadership in Emergent, Self-organization' (2007) 18 *Leadership Quarterly* 341.

98 See especially Emmanuel Lazega, *The Collegial Phenomenon: The Social Mechanisms of Cooperation Among Peers in a Corporate Law Partnership* (Oxford University Press, 2001) ch 3; Bernard A Burk and David McGowan, 'Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy' [2011] *Columbia Business Law Review* 1.

99 Francis Heylighen, 'Complexity and Self-organization' in Marcia J Bates and Mary Niles Maack (eds), *Encyclopedia of Library and Information Sciences* (CRC Press, 3rd ed, 2008), 6–7.

100 Kirkland, above n 96, 639.

unforeseeable even in light of accumulated knowledge.¹⁰¹ As such, adaptive responses to uncertainty are needed for lawyers to survive and thrive in such an environment. Attempts to explain away the uncertainty through clear, predictable principles would only generate escalating inaccuracies and contribute substantially to personal confusion and stress.

Looking beyond the law firm itself, Oren Bar-Gill presents empirical evidence to suggest that lawyers have developed a norm of being systematically optimistic of success in litigation, even though the vast majority of all cases are settled pre-trial. That is, optimism persists even though it is not strictly 'rational'.¹⁰² Optimistic lawyers, by credibly threatening to resort to litigation, succeed in extracting more favourable settlements even though this same optimism would be detrimental to successful settlement. The norm of optimism is replicated through cultural transmission, like the choice of norm rule. However, this norm is contingent on determining the 'right' level of optimism. Bar-Gill explains that this varies depending on the legal environment at any given moment in time, which depends on the lawyer's, and the opposing lawyer's, previous experiences in setting levels of optimism.

There is a fragile equilibrium at work. Seemingly random individual behaviour of lawyers can shape legal norms, self-organising into a coherent pattern of behaviour. These self-organised norms then continue to shape individual lawyers' behaviour, while all the variables in between remain constantly in a state of flux and uncertainty. Psychologically, however, the critical message is that good litigators already work effectively within this space of uncertainty. They are sensitive to evolving norms and are responsive to them. For lawyers new to this field, there is much to be gained in observing and learning from this tacit knowledge contained in self-organising practice, without reducing this behaviour to fixed rules and certainty-seeking practices. Indeed, imposing certainty in this space, through the 'rational', would impair the judgment and capability of litigators by taking away degrees of freedom which enable creative and responsive problem solving.

Self-organisation occurs because of inescapable normative uncertainty, but even attempts to regulate away any ambiguity (for instance, through professional

101 T S Eliot says it better in *East Coker*, from *The Four Quartets* (Harcourt Brace, first published 1943, 1968 ed) 26:

... There is, it seems to us,
At best, only a limited value
In the knowledge derived from experience.
The knowledge imposes a pattern, and falsifies,
For the pattern is new in every moment
And every moment is a new and shocking
Valuation of all we have been.

102 Oren Bar-Gill, 'The Evolution and Persistence of Optimism in Litigation' (2006) 22 *Journal of Law, Economics, & Organization* 490, 491.

and ethical conduct rules) leave gaps in which self-organising norms can develop. This is not an undesirable outcome which needs to be quashed through further regulation. Instead, some degree of ongoing creation, interpretation and revision is necessary for the professional dimension of the law. Likewise, the professionalism of lawyers depends on the ability to participate in this kind of system. It may also require, for the sake of ethical conduct, justice or wellbeing, destabilising and challenging self-organised norms which are maladaptive and harmful. To be an effective lawyer means to acknowledge both the uncertainty and freedom of mutual influence in ways which remain unpredictable but ultimately create a flexible kind of coherence.

B Stories and Strangeness

In addition to the dispassionate rule technician, there is another image of the lawyer which is often celebrated: the lawyer as a master storyteller.¹⁰³ This is the trial lawyer who can weave together stories of immense pathos and rhetorical flair for the jury, or the empathic charm and persuasion of the lawyer who works towards a negotiated outcome through the crafting of a mutually acceptable story. These kinds of images of lawyers abound in literature, film, television, as well as in real-life courtrooms and meeting rooms, sometimes with a positive slant and sometimes a negative one.

This idea that narrative lawyering is so celebrated, despite its apparently sharp inconsistency with the analytical, interrogative and rational stereotype, is not entirely surprising. The human inclination towards narrative is far stronger than we may realise: stories absorb and define us at all levels, from grand cultural mythologies to the processing of event-based information at a neuronal level.¹⁰⁴ As Heider and Simmel demonstrated with compelling simplicity in 1944, we have an innate tendency to construct narratives and infer intention and human states of mind to even the most rudimentary stimuli, such as two-dimensional black-and-white lines moving on a screen.¹⁰⁵

As the work of Jerome Bruner has made clear over many decades, the differences between narrative thinking on one hand, and 'paradigmatic' (or 'logico-scientific') modes of thought on the other, are striking. The former is situated in time, dependent on context, searching for conjunctions and

103 Sandra Craig McKenzie, 'Storytelling: A Different Voice for Legal Education' (1992) 41 *University of Kansas Law Review* 251; Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87 *Michigan Law Review* 2411; Anthony G Amsterdam and Jerome Bruner, *Minding the Law* (Harvard University Press, 2002); Sullivan et al, above n 7, 97.

104 Raymond A Mar, 'The Neural Bases of Social Cognition and Story Comprehension' (2011) 62 *Annual Review of Psychology* 103; Katherine Nelson, 'Self and Social Functions: Individual Autobiographical Memory and Collective Narrative' (2003) 11 *Memory* 125.

105 Fritz Heider and Marianne Simmel, 'An Experimental Study of Apparent Behavior' (1944) 57 *American Journal of Psychology* 243. A reconstruction of the animation they used is available: Translating Nature, *Heider and Simmel Animation (1944)* (2012) Vimeo <<http://vimeo.com/48908599>>.

connections, and seeks to make meaning. The latter is based on formal logic, rationality, rules, categories and settled certainties, and declares meaning. While we have vast knowledge (especially as lawyers) about the paradigmatic, narrative thought as well as the distinction between the paradigmatic and the narrative, still remain overlooked.¹⁰⁶

Our identities are also engrained much more in narrative than in the paradigmatic, as any obituary column will show.¹⁰⁷ The narrative voice also remains an essential part of the legal system. For instance, despite the technical commoditisation of law, attempts to restrict parties from the ability to tell ‘their side of the story’ are still frowned upon as being inconsistent with principles of natural justice.¹⁰⁸ So it is with the issues which bring people to lawyers: they are first human stories before they are legal problems.¹⁰⁹ This is the case even for corporate legal matters (such as advising on the acquisition of one corporate behemoth by another). The collective memory and identity of an organisation is often embedded into its traditions and legends, both constructed and self-organised.¹¹⁰ Being able to identify and listen critically to these narratives as narratives, as well as legal ‘data’, is crucial for a lawyer’s work in a complex world of many concurrent stories.

More importantly, narrative depends on the presence of uncertainty. Some of this uncertainty comes from the acceptance of divergent opinions and perspectives in legal structures. For example, the accepted and valued presence of multiple judges on appellate courts, each with the opportunity to write their own judgment, has the effect of introducing multiple narratives through the potential retelling of the same in slightly different ways. There is also the uncertainty in the elements of narrative itself. David Wilkins, for instance, in reflecting on the storytelling prowess of former United States Supreme Court

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- 106 Jerome Bruner, *Actual Minds, Possible Worlds* (Harvard University Press, 1986) 11–14. See also J Christopher Rideout, ‘Storytelling, Narrative Rationality, and Legal Persuasion’ (2008) 14 *Journal of the Legal Writing Institute* 53; Jennifer Sheppard, ‘Once upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda’ (2009) 46 *Willamette Law Review* 255.
- 107 Dan P McAdams, Ruthellen Josselson and Amia Lieblich, *Identity and Story: Creating Self in Narrative* (American Psychological Association, 2006); Dan P McAdams, ‘The Psychology of Life Stories’ (2001) 5 *Review of General Psychology* 100; Amsterdam and Bruner, above n 103.
- 108 Chief Justice Robert S French, ‘Procedural Fairness – Indispensable to Justice?’ (Speech delivered at the Sir Anthony Mason Lecture, University of Melbourne Law School, 7 October 2010). See also Stephen B Hawkins, ‘Narrative Discourse and the Evil Perspective: Must We Always Listen to Both Sides of the Story?’ in Shilinka Smith and Shona Hill (eds), *Against Doing Nothing: Evil and its Manifestations* (Inter-disciplinary Press, 2010) 81.
- 109 Robert Granfield and Thomas Koenig, ‘“It’s Hard to Be a Human Being and a Lawyer”’: Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice’ (2003) 105 *West Virginia Law Review* 495.
- 110 Benjamin D Golant and John A A Sillince, ‘The Constitution of Organizational Legitimacy: A Narrative Perspective’ (2007) 28 *Organization Studies* 1149, 1150.

Justice Thurgood Marshall, observes that telling a good story is no easy task.¹¹¹ One must choose the beginning and end of the story, and one must make many choices in order to sequence the journey from one to the other over time. The storyteller must also choose a vantage point, the situated perspective from which the story is narrated.

Moreover, storytelling requires the construction of a possible world,¹¹² one which is simultaneously self-contained within the story but is also nested within a bigger narrative, just as each element of the story can be opened up, even as an infinite universe of self-contained sub-stories.¹¹³

It is never possible to create or define a ‘perfect’ narrative, as if it were a mathematical proof. Each element of narrative brings with it the considerable uncertainty of having to make exclusive and often irreversible choices from a potentially infinite pool of possibilities. An adaptive use and embrace of uncertainty and an intolerance of certainty helps prevent the lawyer either being paralysed by choice in the process of narrative construction, or striving for the impossibility and inappropriateness of watertight certainty within this very different mode of thought.

On top of the uncertainty in construction, there is also uncertainty in the interpersonal dimension of narratives. Narratives are a shared experience between the narrator and the audience. The story which is told may not necessarily resemble the story which is heard. For lawyers, anticipating and accepting how information and stories are interpreted and unintentionally but inevitably distorted is a professional skill steeped in the awareness and management of uncertainty.

Yet for all this intrinsic uncertainty, there is a twist in what narratives do. Stories – including legal stories – create a sense of certainty. Narratives, according to Bruner, ‘render the unexpected less surprising, less uncanny’.¹¹⁴ They allow us to read stories of mythical creatures, aliens, and talking animals and say to ourselves ‘[t]hat’s odd, that story, but it makes sense, doesn’t it’.¹¹⁵ This is the art of the defence lawyer, who must retell the story of even the most heinous crime in a way which makes it less surprising, explainable, even ordinary and redeemable.

Narrative certainty is evaluated not according to objective truth but to the standard of verisimilitude and ‘lifelikeness’. This is what Stephen Colbert calls

111 David B Wilkins, ‘Justice as Narrative: Some Personal Reflections on a Master Storyteller’ (1989) 6 *Harvard BlackLetter Journal* 68, 70.

112 Bruner, *Actual Minds*, above n 106.

113 Jonathan Butner, Monisha Pasupathi and Vanessa Vallejos, ‘When the Facts Just Don’t Add Up: The Fractal Nature of Conversational Stories’ (2008) 26 *Social Cognition* 670.

114 Bruner, *Making Stories*, above n 77, 90.

115 *Ibid.*

‘truthiness’: that something *feels* right and is therefore persuasive.¹¹⁶ At the same time, each narrative invites a complementary or competing version, each introducing more sources of uncertainty. Narrative conflict, however, is resolved not through the competitive attrition of argument but through the construction of a new narrative which can accommodate different, even contradictory, points of view.

As such, this is a very different kind of certainty to the epistemic certainty imposed by following a logical flowchart of rules and precedent. This kind of narrative certainty contains a kind of deep appreciation for and comfort with uncertainty. Narrative is a vehicle by which complexity and uncertainty can be held and expressed together in a way that is not frightening or overwhelming. Stories are capable of holding and wrestling with gaps, inconsistencies and unknowns where the certainty-oriented language of law as rules cannot do so. In the same way, lawyers must also be capable of holding and wrestling with the narrative mode as much as the paradigmatic mode of legal rules and reasoning.

Stories are not only able to make the strange familiar, but they can also make the familiar strange.¹¹⁷ Narrative is also used in the practice of law not only as a flexible container for the complex and uncertain, but also to strive for the change and possibility which attends uncertainty. Legal narratives, rather than disembodied facts, are much more effective in explaining why a particular matter being agitated is unique and warrants particular attention or a different outcome. Narrative, like the practice of law itself, is not so much grounded in the past but is instead future-oriented. Stories move towards anticipated futures, striving against both formal precedent and informal precedent (eg, overfamiliarity, implicit prejudices, stereotypes, and cognitive categorisation on the part of the decision-maker). For literary stories to be engaging and worthwhile, there must be a recognisable and expected script, but also some violation of script which ventures into the unknown. The engaging and worthwhile practice of law is no different.

Ferris and Johnson argue that to have ‘practical nous’ as a lawyer, and to engage in what they term ‘rule entrepreneurship’ (engaging with rules in order to change the rules), lawyers cannot situate themselves only in the objectivity of law or in the subjectivity of personal experience.¹¹⁸ The practice of law must take

116 Ibid 14; Bruner, *Actual Minds*, above n 106, 11. Stephen Colbert first used this term on *The Colbert Report* in 2005: Comedy Central, ‘The Word’, *The Colbert Report*, 17 October 2005 (Stephen Colbert). While this resembles the ‘feeling of certainty’, which can be problematic, it does not necessarily have a sinister function but instead may be an inextricable part of narrative reasoning. See also Hugo Mercier and Dan Sperber, ‘Why Do Humans Reason? Arguments for an Argumentative Theory’ (2011) 34 *Behavioral and Brain Sciences* 57.

117 Bruner, *Making Stories*, above n 77, 12.

118 Ferris and Johnson, above n 73, 276–7, 278.

place in what Bruner termed the ‘subjunctive’ space, a place where lawyers can be ‘trafficking in human possibilities rather than actual certainties’.¹¹⁹

The certainty of the rule(s) of law may be useful in setting out what was expected, but the lawyer’s skill is to transcend this by creating something unexpected, making room for what ‘might be or might have been’.¹²⁰ This may be provocative and uncomfortable,¹²¹ but less confronting than a legal environment in which such change is not possible. Lawyers must therefore be careful of the other kind of story: a destructive re-narration of legal practice which erases the presence of narrative and uncertainty and thereby also erases its potential.¹²² This applies not only to the law itself, but also to themselves as professionals, humans and as narrative (and narrated) agents.

IV CONCLUSION

Almost a quarter of a century ago, the counselling psychologist H B Gelatt made the observation that ‘[c]hanging one’s mind will be an essential skill in the future’.¹²³ He reached this conclusion after changing his own mind away from a prescriptive view of rational choice in counselling. Instead of advising people to make decisions based on consequentialist reason and certainty, he advocated an approach based on ‘positive uncertainty’. This uncertainty was not something to be feared and avoided, but embraced so as to make good enough decisions in a complex and changing world.

Lawyers also practice in a complex and changing environment saturated with uncertainty. They encounter the incompleteness and ambiguity of knowledge frequently, whether it is the lawyer’s personal ignorance, in the intricacies of their work on behalf of clients, or in the institutional and collective gaps and unknowns within the legal profession. Yet at the same time, lawyers find themselves part of an institution which is imbued with the language of certainty, rules, precedents and clear-cut results. These are two very dissimilar ways of looking at the practice of law.

It is time for the legal profession to change its mind about certainty and uncertainty. It means recognising that one’s life story as a lawyer is still incomplete and is malleable and can be retold in many different ways. It means being awake to the ways in which being a lawyer and the law itself are continually being shaped, including by the lawyer’s own actions and presence. The first step towards this can be one of curious awareness and discovery of what

119 Ibid 277; Bruner, *Actual Minds*, above n 106, 26.

120 Bruner, *Making Stories*, above n 77, 51.

121 Ibid.

122 Mertz, above n 7.

123 H B Gelatt, ‘Positive Uncertainty: A New Decision-Making Framework for Counseling’ (1989) 36 *Journal of Counseling Psychology* 252, 252.

is already known. It may be merely to observe and explore the attitudes, functions and responses to ignorance and uncertainty, including within the sphere of professional legal work.

Such an adaptive attitude towards uncertainty complements, and is therefore not incompatible, with a legal education which involves reason, analysis and technicality. Helping lawyers and law students to have a flexible intolerance of certainty may help correct this imbalance through a conscious awareness of how they engage with the law and its practice. In doing so, lawyers would only be catching up to other professions in their development of a willing stance towards the unknown.¹²⁴

The lawyer who is mindfully apprised of uncertainty and who can make use of it in the best way possible is free to wage war, not against the exaggerated peril of the unknown, but against the stubborn certainties which sustain injustice, hopelessness and lifeless constraint. Archibald MacLeish once compared the life of the jurist with the life of a poet. He concluded that there was little difference, remarking that '[t]he business of the law is to make sense of the confusion of what we call human life – to reduce it to order but at the same time to give it possibility, scope, even dignity'.¹²⁵

It is an awareness and embrace of this ongoing tension between certainty and uncertainty which gives the practice of law its heartbeat.

124 The Curriculum on Medical Ignorance at the University of Arizona is a groundbreaking example: see Marlys Hearst Witte et al, 'Lessons Learned from Ignorance: The Curriculum on Medical (and Other) Ignorance' in Bill Vitek and Wes Jackson (eds), *The Virtues of Ignorance: Complexity, Sustainability and the Limits of Knowledge* (University Press of Kentucky, 2008) 251. For inchoate steps towards a 'curriculum on legal ignorance', see Tang and Foley, above n 40.

125 Archibald MacLeish, 'Apologia' (1972) 85 *Harvard Law Review* 1505, 1508.