

Lawyers, Legal Advice and Relationality in Sustainable Economy Initiatives

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Abstract

The context of this paper is that of legal professional support for sustainable economy initiatives. Practices that blur the line between law and non-law as a strategy are often viewed by those who found such initiatives as part of an important reframing of economic transactions. The central claim of this paper is that legal professional identities are challenged, and even undermined, by the relational work performed in constituting sustainable economy initiatives. Two distinct lines of argument are made. First, practices that stretch the boundary between law and not-law establish relationalities that challenge legal professional identity. Secondly, legal professional identity is challenged by the work of clarifying regulatory grey areas, typically where practices draw the boundary between personal and commercial in novel ways that undercut or are unforeseen by existing legal rules. The paper concludes by suggesting the constitutive implication of this boundary work is the emerging figure of the *community enterprise lawyer*.

Key words

Legal profession; community enterprise; transactional law

Resumen

El contexto de este artículo es el del apoyo jurídico profesional a iniciativas de sostenibilidad económica. La tesis central de este artículo es que el trabajo relacional que tiene lugar en la fase de constitución de dichas iniciativas pone en cuestión, e incluso mina, las identidades jurídicas profesionales. Se describen dos líneas argumentales. Primero, las prácticas que fuerzan el límite de lo legal y lo no legal establecen relaciones que cuestionan la identidad jurídica profesional. Segundo, la identidad jurídica profesional se pone en cuestión durante el trabajo de clarificar áreas grises de la regulación, normalmente aquellas donde las prácticas marcan el

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límite entre lo personal y lo profesional en formas que cortocircuitan las normas legales existentes. El artículo concluye con la hipótesis de que la implicación constitutiva de este trabajo en los límites es la figura emergente del *abogado de empresa comunitaria*.

Palabras clave

Profesión jurídica; empresa comunitaria; derecho transaccional

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1. Introduction

One classic image of a legal professional encompasses the following: an individual who has been immersed for many years in acquiring detailed technical knowledge of the law which he or she then deploys, at arms-length and guided by ethical commitments to the justice system as a whole, to advise particular individuals of the extent and limits of possible actions they may wish to take, including the resolution of disputes between them. This image, discussed by Parker and Rostain (2012), draws on a juxtaposition of professionalism as a set of institutional practices distinct from both market logic and bureaucratic rationality, "conceptualiz[ing] professionalism as an institution that cultivates ethical responsibility, and autonomy, in a way that these other forms of organizing work cannot do" (Parker and Rostain 2012, 2356).

This conceptualization has embedded within it an understanding of the parameters of what is understood as *legal*.

Only in relation to the deployment of *legal* advice can this individual claim the diverse privileges of income, status and information shared in confidence that accompany the giving of legal advice. It is true that lawyers often perform functions other than the giving of legal advice, including a range of what might otherwise be regarded as non-legal activities such as lobbying, law reform and negotiation. But the centrality of giving *legal* advice to the self-regulatory authority of the legal profession is illustrated by the literature on the "unauthorised practice of law", a U.S. practice (Christensen 1980) that is increasingly resonant in other jurisdictions (Terry 2014).

This article argues that the boundaries of *law* are constitutive of legal professional identity. Gieryn defined boundary-work as the "attribution of selected characteristics to [an] institution's (...) practitioners, methods, stock of knowledge, values and work organization for the purposes of constructing a social boundary that distinguishes some intellectual activities as [outside that boundary]" (Gieryn 1983). Although his original argument applied to scientists, he and others always acknowledged the value-laden character of drawing boundaries, and this is even more pronounced in the context of exploring the parameters of what is understood as legal and not-legal. It is particularly so in the empirical context taken up by this article, which focuses on legal professional support for sustainable economy initiatives. These initiatives are typically small-scale enterprises that place a high value on economic democracy, social relationships and community development in their organisational design and provide services that are directly relevant to environmental goals. In many cases, though not necessarily, they seek to radically rework the priority of social and environmental objectives in economic organizations. The central claim of this paper is that legal professional identities are challenged and even undermined by the relational work performed in constituting sustainable economy initiatives.

Practices that blur the line between law and non-law as a strategy are often viewed by those who found sustainable economy initiatives as part of an important reframing of economic transactions: a way of reinjecting *human* dimensions into a vision of commercial transactions that is increasingly arid in the ways it externalises social and environmental concerns as peripheral to *the economy*. But this blurring raises some challenging questions. How does humanizing relationality connect with professional expertise? How do trajectories of formalisation, and codification affect the revaluation of social and environmental objectives that sustainable economy initiatives seek to institutionalise? Stated as such, these questions alert us to a competing image of professionalism that sits uneasily with the classic image opening this discussion. In this competing image, "discourses of expertise, normative value, and autonomy around claims to professionalism are deployed to serve the goals of global capital and, more recently, neoliberal governance, and are in turn constituted and shaped by them" (Parker and Rostain 2012, 2366; see also Larson 1977). The aspirations of sustainable economy initiatives are directly in tension with this image of professionalism, and from this perspective, we might expect lawyers' work to be

marginal. Recognising the complex relationship between these different images of professionalism, this paper has the goal of both documenting the marginality of lawyers, and of exploring the boundary work lawyers need to enact for community enterprises when they do play a role. The embedded value conflicts underpinning boundary work account for the co-existence of these two parts of the paper.

This paper will explore the issues outlined above through two distinct lines of argument. First, practices that stretch the boundary between law and not-law establish relationalities that challenge *legal* professional identity. Second, legal *professional* identity is challenged by the work of clarifying regulatory grey areas, typically where practices draw the boundary between *personal* and *commercial* in novel ways that undercut or are unforeseen by existing legal rules. The paper concludes by suggesting that an emerging figure of a *community enterprise lawyer* points to a new kind of public interest law that challenges the sociology of the legal professions. This challenge emerges from the diverse ways in which sustainable economy initiatives seek to create systemic change. Both the challenge itself and the aspirations to systemic change underpinning it, are however constrained by the institutional stickiness of the Weberian law-economy bargain and the iron cage of formal-legal rationalization.

2. Small-scale sustainable economy initiatives

The paper builds on research that highlighted emerging patterns in relation to the provision of legal advice and support for small-scale sustainable economy initiatives. The primary data explored five types of community-based sustainability initiatives and grass-roots innovations that emerged in response to climate change challenges, across a continuum from social activism to social enterprise. Linked by their status as creative responses to resource depletion and climate change, the range of initiatives encompassed car-sharing, community-owned energy, community-supported agriculture, co-working and reuse/recycle projects.

Some of these, particularly car-sharing, co-working and many reuse projects, use web-based technology to enable *access rather than ownership*, and as such overlap with emerging mainstream notions of sharing economies. Others, especially in the energy and food sectors, focus much more centrally on renewed forms of collective urban life that respond to the local situation and the interests and values of the communities, connecting consumers much more closely with producers and stressing the social nature of those ties, even while they also use technology to sidestep intermediaries such as supermarkets or large energy companies.

The legal practices at the heart of this paper are not those typical in public interest or community legal centre work. On the other hand, neither do they resemble standard commercial law practice. Our empirical focus was on small-scale economy initiatives, understood as small-scale enterprises that place a high value on economic democracy, social relationships and community development in their organisational design and provide services that are directly relevant to environmental goals. These we sorted into case studies organized by *sector* rather than project. The papers draw on 50 interviews conducted with founders or leaders (and sometimes with others from the initiatives), as well as a further 10 interviews with support organizations (legal, financial, local government and business planning professionals). The interviews were conducted in 2013 and early 2014 in Australia (mostly Sydney) and the UK (mostly Bristol).

In addition to the interview data, the research drew on observational, survey, biographical and social media data. Participant observation in workshops, conferences and policy working groups or taskforces that addressed policy and support issues for social and sustainable business was carried out between 2013 and 2015. Survey data that supplemented approximately a quarter of the interview data was collected in 2015 as part of an international comparative social enterprise survey (Social Enterprise 2013). The biographical trajectories of founders and leaders were

tracked using data from a premium LinkedIn account: this was triangulated with the interview data and contextualised by comparison to LinkedIn trajectories of individuals in Sydney and in Bristol that had both the key phrases *social enterprise* and *climate change* in them. Finally, periodic network analysis of social media hashtags such as *sharing economy* or *social enterprise* identified clusters that helped articulate the conceptual and discursive domains of debate that shaped events and practices in this hybrid field.

An earlier account of this research (Morgan and Kuch 2015) interrogated the relationship between neoliberalism, sharing economies and diverse techniques of legality. A key point made there was to highlight how the legal techniques that underpin standard commercial transactions can be deployed in unexpectedly *politically* creative ways. More specifically, while lawyers in general deploy creative interpretations of law as part of their everyday professional work (Rostain and Regan 2013), the practice of business and transactional law in general typically reinforces the notion that *the economy* externalizes social and environmental goals. This is directly echoed in earlier work on lawyers' emerging entrepreneurial roles which were described as being a "willing[ness] to push the envelope in grey areas of the law. This is creative lawyering with a morally ambiguous edge (...) a construction by lawyers in response to the needs of business" (Nelson and Nielsen 2000). What is distinctive about the empirical context here being explored is the reframing of the nature of business itself: what in the earlier research called *radical transactionalism* was identified as helping to incrementally shift taken-for-granted boundaries between economic, social and environmental domains, via

the creative redeployment of legal techniques and practices relating to risk management, organisational form and the allocation of contractual and property rights in order to further the purpose of internalising social and ecological values into the heart of economic exchange. (Morgan and Kuch 2015, 565)

This boundary work, which is empirically at the heart of this article, reconfigures traditional understandings of legal professional identity through foregrounding and making explicit a series of relationships and a diverse array of *relational work* practices. In the next section, I use the work of Viviana Zelizer and Susan Silbey in complementary ways to articulate a framework for exploring relational work as it bears on legal professional identity.

3. Relationality and relational work

Viviana Zelizer's concept of "relational work" (Zelizer 2012) offers a fertile theoretical lens for mapping the complex shifting boundaries between legal and non-legal, commercial and personal, and the limits of detached, individual adversarialism. An economic sociologist, her research focuses on the economic practices of exchange, production and consumption. These may seem unlikely sites for exploring legal advice and support, but in the context of transactional legal advice relevant to sustainable economy initiatives, her work underpins a necessary shift of focus from a regulatory, rule-based focus, to the kinds of practices that sustainable economy initiatives seek to reimagine in the first place.

This point can be made more concrete by applying Zelizer's definition of relational work to the subject of this paper. Articulated as "the creative effort people make in establishing, maintaining, negotiating, transforming, and terminating interpersonal relations", she breaks down relational work analytically into a process of assembling viable matches among four elements of economic practices: a) distinctive interpersonal ties; b) economic transactions; c) media of exchange; and d) negotiated meanings.

Relational work in the context of economic exchange is not confined to narrow issues of efficient outcomes, risk reduction or economic performance. Rather, relational work creates viable matches among a diverse array of meaningful interpersonal relations, transactions and exchange media. Friends doing each other favours on a

gift basis are as much a part of economic transactions on a relational view as sellers compensated by customers paying money. And, Zelizer argues, “as people differentiate their social relations [through relational work, they] establish a boundary separating each relationship from others that resemble it” (Zelizer 2012, 8). These boundaries have significance consequences, especially in the context of legal regimes: for example, certain tax and minimum wages laws will apply to exchange but not to gifts.

These boundaries invoke, and sometimes become a proxy for, another boundary, which is that between the need for legal advice and the *permission* to constitute these relationships outside of law. Yet where that boundary lies is itself mediated by law. Anxieties around law documented in this paper are heightened by people’s sense that they need a lawyer to define where law *stops*. Any answers are always open to contestation, for law’s limits are constituted through a symbiotic relationship with the non-legal, and the boundary is leaky.

Here, Zelizer’s work is profitably extended by reference to the work of Susan Silbey and her colleagues on relational regulation, which creates a bridge to the legal infrastructure that makes such practices possible and meaningful. Huising and Silbey’s account of “relational regulation” argues for a conception of regulation that foregrounds dynamics of relational interdependence practised by what they call “sociological citizens” (Huising and Silbey 2011). In a regulatory context, sociological citizens reach beyond scripted responsibilities, formal organisational roles and the tasks of their immediate work groups. Instead of (or in addition to) these roles and practices, they bend rules, build surprising coalitions, and make their worlds up daily – they are “pragmatic, experimental and adaptive, going beyond and outside the prescribed rules and purposes with the goal, nonetheless, of actually achieving the ostensible public or organisational purpose” (Silbey 2011, 5).

While relational regulation literature to date has focused on the dynamics of enforcement and compliance, the approach opens up a very interesting perspective on new rule-making and the design of regulation. From this vantage point, relational regulation can illuminate the role of legal professionals and the crafting of regulatory frameworks for sustainable economies. As the detail of the paper will show, this role hinges on the legal infrastructure of the role that profit plays in economic enterprise, embodied by an often taken-for-granted binary between for-profit and not-for-profit legal structures. In recent times, an intricate dialogical dance is developing to challenge this binary, weaving between the language of social enterprise, commons-based governance and solidarity economies.

The practices of lawyers who have crafted new models of legal entity structures for social enterprise involve, as the paper demonstrates, surprising coalitions, “making things up daily” and even – from the point of view of established legal professionals – new rules that implicitly bend old rules regarding the boundaries between for profit and not-for-profit legal frameworks. But social enterprise is also viewed by some of these new coalitions as too constrained in its challenge to the underlying structures of mainstream economics. A broader example of sociological citizenship and relational regulation-making is the emerging network of commons-based governance initiatives (Bollier and Helfrich 2013). Particularly, recent linkages have been made between intellectuals, activists and philanthropic foundations in Europe (especially Germany, Switzerland and Spain) and San Francisco, U.S., who are interested in catalyzing radical system change (Krausz *et al.* 2016). References to commons-based governance (Commons Transition n.d.) and the creation of solidarity economies (Utting 2015) signal a set of commitments that go beyond visions of *social enterprise* and triple-bottom lines to embrace systemic and deeper cultural shifts in notions of ownership, exchange and production.

The question that binds relational work and relational regulation is this: what kind of relational work practices underpin the deployment of radical transactionalism as a relational regulation framework for sustainable economy enterprises? This question

is answered in this paper from three angles: the first from the point of view of the professional expertise relevant to the creation of sustainable economy initiatives; the second from the specific content of some key dimensions of legal expertise once deployed; and the third from the point of view of how such expertise might become routinized. All three angles show the limits of legal professional identity and the ways in which it is challenged by the collaborative, non-legal, technically-embedded nature of new ways to support sustainable economy initiatives. Though not explored in any detail by this paper, it should not be forgotten that the ongoing potential of traditional modes of deploying and instantiating legal professional identity to *stifle* sustainable economy initiatives remains strong (Morgan and Kuch 2017). But the intent of this paper is to demarcate the possibilities of boundary work more vividly than its constraints.

4. Biographical trajectories in sustainable economy initiatives and the limits of law

As the previous section indicates, the hybrid zone occupied by efforts to found sustainable economy initiatives engages the boundaries of state/market, public/private and profit/not-for-profit. The key contention of this section is that the contours of emerging notions of professionalism in relation to social enterprise and sustainable economies do not readily accommodate legal professionals, often encouraging interested participants with legal qualifications to participate *other than* in their capacity as lawyers. Articulating this has three steps. First, I briefly summarise findings from already published research on this data on the biographical trajectories of key participants in both the case studies and the larger-n LinkedIn data set that was used to contextualize case study biographical trajectories. Second, I discuss in more detail the (sparse) extent to which legal professionals featured in the dataset. Third, I consider the implications of this lacuna in light of data on the perspectives and orientation of non-legally qualified interviewees.

The biographical trajectories of the full range of participants in the sustainable economy initiatives were explored in our related research (Morgan and Kuch 2017) in order to open a nuanced window into the sometimes uneasy mix of discourses characteristic of the hybridity of sustainable economy initiatives, one that avoided ideological pigeonholes. The jostling and friction amongst claims to be doing good through the market, creating social enterprise, fostering sharing economy, enabling commons governance and supporting solidarity economies, is emblematic of the boundary work done in these sites, and in such a context, it was no accident we labelled the four main clusters of characteristics, skills, expertise and training that emerged with terms implying movement *away from*. These *everyday identities* of sustainable economy practitioners we summed up as corporate refugees, frustrated bureaucrats, millennial idealists, and left-leaning engineers. The labels depict a series of relatively identifiable set of practices, which can overlap and bleed into each other at times and do not imply actual individuals. The details of these clusters are less important for this paper than the shared fact that across all four clusters, participants were quite self-consciously departing, in Huising and Silbey's words, from their "scripted responsibilities, [and] formal organisational roles", forming "surprising coalitions" and "making things up daily" (Huising and Silbey 2011). This underpins the strong sense that their practices are departing from established boundaries, and primarily cohering around a desire to performatively rework the economy in less commercial ways.

But a second shared feature of the four clusters was the absence of legal professionals. There was a notably low proportion of lawyers in the cross-section of case study interviewees: of 50 interviewees who had directly founded or co-founded sustainable economy initiatives in total, only two had legal qualifications (both in the Australian context) and neither were using these skills in their sustainable economy work. Beyond the case studies, similar patterns obtained. In the LinkedIn data, of 77 biographies collected in 2014 by reference to simultaneous keyword searches of

climate change and *social activism*, only seven (two from UK and five from Australia) had legal qualifications and roughly half of those were relying in their current work on their *non-legal* experience and skills, mostly grounded in a liberal arts background and experience with a range of environmentally-motivated voluntary work.¹ It was clear that several had taken significant cuts in pay and job security to make this move. A workshop held in 2013 in Melbourne, Australia which was aimed solely at the legal profession, revealed many participants had extensive commitments to involvement in sustainable economy initiatives outside of their work, but saw these two as separate zones, often implying a wish to move from one (law) to the other (sustainable economy initiatives), expressed in language that underpinned the choice of the *corporate refugee* label: “coming from war-torn law firms, battered and wanting to reinvent things”.

The specific sustainable economy initiatives that were the subject of case studies had sometimes received legal support – but not across the board. Most of the 20 we studied were initially created with no or minimal legal assistance, and as they grew and became established, often received only highly episodic legal assistance (one even grew substantially with no formal legal advice at all). Some received support from professionals who had not only legal but also public policy or technology skills that were more salient for their involvement than their legal knowledge. There were as many *non-lawyers* who make significant contributions to shaping legal and organisational identity as there were lawyers, in both the UK and Australia – these were generally older men with backgrounds in organisational psychology, community development or corporate governance. Where formal episodic legal assistance was deployed, it was usually sourced from one-off grant-funded assistance from government or through personal networks, with the former more typically drawing in lawyers with standard expertise in commercial law, and the latter more likely to attract those with mixed skill-sets. *Pro bono* schemes of large law firms were the source of relatively little legal support in this area, in large part because the eligibility criteria of most *pro bono* schemes restricted assistance to pure not-for-profit or charitable endeavours.²

The one exception to this involves a small number of lawyers who have significantly shaped developments around legal entity structures for social enterprise. Three lawyers demonstrate the spectrum here. The first two are older legal professionals who demonstrate the stickiness of the border between for-profit/non-profit organisational structure, and the dependence of legal advice and legal career trajectories on this border: Stephen Lloyd, in the UK, initially a specialist in non-profit and charities law, was a key founder and creator of the community interest company form legislated in the UK in 2005 (Lloyd 2010); William Clark in the US, initially a general commercial lawyer, created the benefit corporation form in 2010 (Clark and Vranka 2013), which works in a complementary way with the voluntary B-Lab certification scheme (Steingard and Gilbert 2016). The third is Janelle Orsi (2012), a *millennial idealist* from the US and co-founder of the Sustainable Economies Law Centre, whose relative youth demonstrates a generational shift potentially occurring that goes well beyond reform of specific legal structures.

Before turning to a more detailed exploration of the boundary challenges that account for the empirical sparsity of legal professionals in the context of creating sustainable economy initiatives, the perspectives of non-legally qualified interviewees provide an interesting angle. The taken-for-granted background infrastructure of the law plays a significant constitutive role in marking out the boundaries between *economic* and

¹ A more recent update of this search in 2016 produced sixteen individuals with legal qualifications, five from the UK and 11 from Australia, though once again a considerable number were not working as lawyers currently.

² This is changing more recently, as both government and large law firms have started to develop ways to provide legal expertise specifically relevant to the hybrid zone of social enterprise; see Morgan *et al.* 2016. Notably, this is almost universally framed as *social enterprise* law rather than any of the other arguably less commercially inflected framings discussed in Chapter 5.

social or environmental. But in many ways, it is that very *constitutive* nature that makes law less of a direct site for forging new relationalities. Participants' focal site of energy and interest is the degree to which an economic initiative serves social or environmental goals, or promotes cooperation and community. Legal rules that indirectly make the pursuit of these goals more or less difficult typically appear as a background nuisance, rather than a site of engaging commitments to sustainable economy initiatives. At least for the founders and initiative leaders, this is broadly what emerged empirically, a reaction we labelled the *Eeyore effect*. The appellation references the almost physically palpable reaction (of deflation, frustration or negative affect) that many interviewees had when legal advice/support was raised as a direct question.³ We observed a similar effect in the eight different public workshops that were held over the course of the research project.

The frustration characteristic of the Eeyore effect typically emerged as anxiety but sometimes as insouciance. For example, in anxious mode was this community energy cooperative founder with an engineering background who initially wrote all the legal documents of the initiatives herself but in time turned to lawyers out of a sense of "responsibility to do that for the sake of our members" (Interview 1 2013).⁴ The process left her

in the hands of lawyers telling us we have to have this 50-page thing which for us doesn't add any value at all directly (...) just that there's something more weighty which gives you more security. But then it turns into a document which neither we nor they actually understand (...) and that's meant to be stronger somehow than the thing that we both understand. (Interview 1 2013)

For some founders, the frustration catalyzed reactive insouciance, as another community energy initiative commented:

I use the Nelson Strategy to deal with grey areas – you put the telescope up to the blind eye and you say, 'I see no ships (...) full speed ahead and damn the torpedoes'. (Interview 2 2013)

Another even expressed an outright challenge to the need for professional legal expertise altogether:

We just did the generic Pty Ltd structure. It took 6 minutes (...). Like, you don't even care! You just get the generic template. Sign it, don't even read it. D'yaknowwhatImean? I'm sure [the template] is fine. We don't even (...). We're 10 years old and don't even use lawyers now (...). It just doesn't matter!⁵

Even legally-qualified founders had to step back from their legal training in order to engage with the relationalities of starting a new venture animated primarily by social and environmental goals. The founder of a web-based reuse and recycling initiative experienced barriers in the founding stage "because I have a legal background and I read everyone else's terms and conditions and then freaked myself out about it". But in order to move forward she reminded herself, that "Well, most people have started from the basis of "We're going to create this system and we'll do it and see what happens" (Interview 3 2013). Ultimately, she went ahead almost against her own lawyerly instincts, albeit with a more elaborate system than might have otherwise been the case.

In short, the hybrid political economy zone occupied by sustainable economy initiatives was at one and the same time an attractive force for professionals generally in the area, but a detraction for lawyers specifically. It energized those who wanted to challenge the boundaries between economic, social and environmental, but in ways

³ Questions about legal support were only asked directly in one of 11 topics (and right near the end) in the semi-structured interview topic guide used for the research. This was a deliberate methodological decision taken in line with legal consciousness research epistemological commitments not to foreclose what counts as law.

⁴ All references for the interviewees are listed in the Appendix at the end of the references for this article.

⁵ This comment came from a medium-sized commercially successful and temporally stable venture who requested anonymity on this point specifically.

that decentred specifically legal knowledge. We can see the effects of this pressure on the boundary between law and non-law in the preference of the Sustainable Economies Law Centre for apprentice-based training; a preference aimed at enhancing the socialization of their members and workers in the ethos, atmosphere and non-legal everyday life of small-scale sustainable economy initiatives. In some ways, this extends earlier scholarly findings of the roles played by legal professionals employed inside large corporations. Nelson and Neilsen have observed the robust continuity from the 1960s (Donnell 1970) through the 1980s (Rosen 1989) and to their own study (Nelson and Nielsen 2000) of what we have here called the *Eeyore effect* and what they refer to as the *cop* role of legal professionals inside corporations. From the turn of the century, however, they observe the growing salience, in both incidence and prestige, of a new entrepreneurial role for lawyers (Nelson and Nielsen 2000).

In the emergent and as yet thinly institutionalised context of small-scale sustainable economy initiatives, the role of lawyers as *cops* resonates with the sense of burden, constraint and negativity conveyed by the Eeyore image we identified in our findings. But the entrepreneurial role would seem potentially relevant to those few lawyers involved in proactive and positive support of small-scale sustainable economy initiatives. However, although in formal terms, the entrepreneurial role identified in earlier research may seem to involve a similar blurring of boundaries between law and (in this case) business objectives, the substantive content is very different. Nelson and Nielsen describe it thus in relation to inside counsel in large law firms:

Entrepreneurial lawyers say law itself is not merely a necessary complement to corporate functions, law can itself be a source of profits, an instrument to be used aggressively in the marketplace. (Nelson and Nielsen 2000)

This is almost precisely the inverse commitment of those few lawyers professionally committed to the support of small-scale sustainable economy initiatives. The next section explores how the blurring of legal and business expertise in the context of a very different vision of economic success challenges understandings of what *professional advice* entails. Specifically, it will explore the ways in which *legal professional advice* encodes certain assumptions about commerciality that jar with the aspirations of many sustainable economy initiatives.

5. Humanising the economy: boundaries between commercial and personal

A core challenge for many sustainable economy initiatives is the way in which they seek to reframe the economic away from the purely commercial. A vivid illustration of this is the difficulty encountered by the Sustainable Economies Law Centre, co-founded by Janelle Orsi and mentioned above. The Centre enacts a distinctive professional vision of legal practice that combines business advice and public interest commitments, aiming for much greater affordability than big-firm comprehensive advice but a service that is both more socially and environmentally attuned than legal support for *tech start-ups*, and more holistic and experientially informed than low-cost *discrete task support* services offered by online (LegalVision 2017) and franchise *new law* providers (van Hoy 1997). The tensions involved in providing *transactional* legal professional advice that move away from standard understandings of commercial practice are illustrated by the Centre's initial difficulty in extending their professional liability insurance to cover the giving of *securities advice*, or advice to companies about raising finance, including through the issue of shares. The Centre is constituted as a not-for-profit public interest entity, but insurers who typically provided coverage for public interest legal practice viewed this as a *commercial* area of practice that carried a different array of risks from the kind of legal practice they were accustomed to insuring. Although the problem was solved in that instance after dialogue with one of the more creative providers, it illustrates the boundary challenge posed by legal practice which aspires to reframe core assumptions of economic practices. Public interest law was, by definition, *not* concerned directly with the

commercial infrastructure of creating economic entities, and was constituted in significant measure by that implicit boundary.

As we shall see in more detail below, the contested boundary of the commercial sphere is often linked discursively and at a relational level to what David Graeber (2011) pointed to as a differentiation between a commercial economy and a *human* economy. The language of *humanising* economic relations or making them *more human* was pervasive in our interview data. And correlating with the findings of the first section of this paper, the diverse trajectories of relationality in sustainable economy initiatives drew heavily on *non-legal* strategies, skills and practices. In particular, there was a preference for gift relations, the redressing of harm through personal relationships or informal dispute resolution, and a general reliance on trust and informality. This preference resonated with a sense that formal legal frameworks were antipathetic to the social bonds and ethos of relational embeddedness that was important to almost all of the initiatives we studied. For example, one founder of a community-supported agriculture initiative expressed a view held by many:

A lot of it's about breaking this connection between financial reward and work in a sense of encouraging people to work together as a community to do something. That's really what we're about, that's what we're about—a community of people growing our own veg. But government doesn't understand that, government understands you set up an enterprise which employs people under certain rules to deliver something for an anonymous set of people to whom they then sell it. And we're not that, and we're trying to be something entirely different, which is, as I say, a community working together to produce their own food (...) so I think our thinking doesn't quite fit the law. (Interview 4 2013)

This stance, the most common, suggested that face-to-face, contextually saturated relationalities are in tension with formal law. But another strand of data, particularly prevalent where technological platforms were integral to the enterprise design, implied formal law's irrelevance even when preferred relationalities are ones of arms-length anonymity. For example, a successful medium-sized sustainable economy initiative that had never used formal lawyers celebrated the way in which a technology platform allowed their company to minimize human interaction, analogizing the platform's role in dispute resolution and prevention to "the core principles of international diplomacy. You two [as user and service provider] are at war, we come in the middle – you guys aren't going to sort it out". Their language was quite literally transactional: "we're the transaction owner – we own the transaction between you two". Thus, there is a tension in and contestation around the social relations embedded in sustainable economy initiatives, a tension the conclusion will return to.

For the remainder of this section, the paper focuses on the practices at stake in efforts to create a humanized and sustainable commons-based economy, considering in particular where legal practices do or do not help match the relational elements expressed by the food initiative founder above. Janelle Orsi focuses in her work on lawyering in the sharing economy on boundaries between commercial and personal practices, stressing how law helps to constitute or challenge these boundaries (Orsi 2012). But in the case studies, the importance of relationality, community and notions of the commons often underpins a kind of deliberate diffuseness about law, a commitment to sidestepping legal precision about otherwise-legal objects or documents. Legality for these founders and key players in sustainable economy initiatives was typically not regarded consciously as constitutive of the interplay between commercial and personal – yet the salience of legality often emerged indirectly through the interview or participant observation data.

These data showed three important sites where legal tools played an important role in shaping boundaries between commercial and personal relations. These were: the creation of ownership frameworks for an initiative (including the legal entity structure, property rights and tax issues); the management of risk (including the use of contracts, leases and insurance); and relationships with the state (particularly

around planning and regulation). Each of these can be illustrated with brief examples of relevant data that illuminates a particular angle of Zelizer's relational work: the process of viable matches among meaningful relations, transactions and media as discussed earlier in the paper.

5.1. Ownership

The first of Zelizer's four elements of relational work packages is recognition of the distinctive social ties that connect individuals or groups involved in the economic activity. In the case studies, alternatives to corporate structures – and particularly those based on shared ownership – provided the most fertile site for connecting those involved in an initiative in ways that integrated the personal and the commercial. For example, a reuse and recycle initiative structured as a cooperative in Australia experienced strong commitments to living more lightly on the planet, to non-hierarchy and economic democracy, as infusing everything they do, and “despite inefficiencies and conflicts, engendering a real love of day to day working and an extraordinary camaraderie”.

This sense of holistic connection can also derive from aspects of a sustainable economy initiative other than the legal structure of the entity itself. In relation to property and ownership in grass-roots initiatives that support shared urban space, for example, a stress on simplicity and mutual understanding evokes a *sense of ownership* rather than land title defined in formal-legal terms – this is “something less formal, more akin to belonging or its richer French equivalent, *appurtenance*” (Thorpe 2016). Similar approaches to devices such as a contract, a lease or a company constitution in many ways position them as a kind of boundary object between professionals and non-professionals. For example, one of the non-lawyer governance professionals interviewed described the ideal community share offer document in terms that bracketed and even resisted its legal effects, instead positioning it as a communicative device for engaging and even constituting communities:

[O]ne of the reasons why [this initiative] so feted by everybody is that the offer document is lovely. It's written by this guy, the (...) manager, who also turns out to be a children's book author - the guy can write. When we were revising the offer document he said, 'Who's going to do that?' I said, 'I think you should do that', not knowing that this guy was an author. He said, 'Well, how do I do it?' I said, 'Here's 12 points you've got to cover and then tell a story. Just tell the story of what it's about and remember that the whole point's about community engagement. It's not about investment; it's about engagement, about why should I be part of this. What's it about? What am I trying to do here by parting with my money?' He told the story beautifully and that's correct. We're trying to go against a culture of it being very legalistic and regulated, to say no, it's about communicating with ordinary people and engaging them in what you do. So always see it an active engagement. We have campaigned tirelessly against getting legal gobbledy-gook out of these documents. (Interview 5 2013)

Whereas the social ties between individuals are much more collective and identity-encompassing than in mainstream economic initiatives, other elements of economic activity may not match so well where they involve third party dealings. The reuse and recycle cooperative, who operated on equal and capped wages, struggled to justify the on-selling of donated goods to their donors because they were not structured as a not-for-profit. Another initiative, a community co-working space in the UK that only charged rent as a proportion of a tenant's monthly earnings, walked a tightrope in relation to the business rates relief it was able to claim because of the diversity of legal structures and money flows housed within the building. And the reuse and recycle cooperative suffered the unintended effects of legislation that assumes top-down hierarchical control by a small board, requiring all directors to buy public liability and workers compensation insurance. This, in an entity where all were simultaneously members, workers and directors, inflated their costs many times over, showing how ownership choices predetermine, in the eyes of formal law, the

relational assumptions underpinning operational choices once the enterprise is established.

5.2. Risk

As this last example intimates, containing risk is the second key legal faultline that many sustainable economy initiatives must negotiate. Here, it is a blend of Zelizer's second and third elements that is most analytically relevant: the linked elements of transactions (the social practices conveying goods and services) and the media for these transactions (whether time, money, favours or in-kind goods). The most common viable match in many of the sustainable economy initiatives we studied was between in-kind media and gift transactions – for example, rewarding volunteers with in-kind food or goods, or relying on mutual help rather than formal legal insurance. The relational *package* catalyzed by risk issues also invokes the distinctive social ties discussed above, along with the fractures of incomplete matching. So, for example, some community-supported agriculture schemes use members' houses as food distribution points, raising the question of whether this makes the house a commercial distribution hub for the purposes of health and safety legislation. One of the Australian founder interviewees discovered through research that although US-based CSA schemes held insurance policies to cover this by law, none had in practice been utilised, and mutual informal help had been invoked in the rare instance where someone was hurt on the residential premises (Interview 6 2013).

A more extended discussion of the texture of social relations that emerges from the relational work of trying to match media and transactions can be accessed through the example of a second reuse and recycle initiative in Australia, this one structured as a for-profit company for the rental of household goods through a web-based platform. Notwithstanding the for-profit structure, the chief motivations of the founder, and of the users, were more community-focused than commercial, as a survey that ranked participation motivations showed:

Number one (...) it made [people] feel better about their stuff. Then (...) it was seen as being a community activity and (...) a nice way to meet people. Thirdly (...) it was seen as a green activity, sustainable. That was what people connected to and then fourth was an interesting way to maybe make a bit of extra money. (Interview 3 2013).

However, the pattern of activity and use of the initiative (as opposed to aspirations about joining it) turned out to prioritise convenience and price far more than the above list would have led one to expect:

[Users] are coming through Google and they're acting from 'What do I need?' convenience price point (...). They're not thinking about (...) people get it once you point out to them that an owner might like to know something about you before they rent to you. It intrigues me constantly that it's not an obvious thing to people (...) not to treat others like the person's a shop. (Interview 3 2013)

As with much of the data, there are fractures and constant testing of the boundaries, however, indicating underlying contested meaning. Despite the stress on smooth anonymous commercial exchange above, other aspects of participating in this initiative invoked challenging emotional dimensions:

There is all that emotional thing; 'I'm going to someone's house. I'm then going to get their thing. Now I'm going to (...) I've got to have a conversation with someone else I don't know'. There is a whole lot of stuff around it. The fact that even one person has used [the platform], when you really think about it from that way, is really quite exciting. (Interview 3 2013)

One implication of the tensions chronicled above is a disparity that typically emerges between the aesthetic and ethos of an initiative and the underlying detail of its terms of service. This is a common pattern in sustainable economy initiatives that experience significant growth: their surface ethos stresses informality, trust and face-to-face social relations even while a *thicket* of legal terms proliferate at the point of

confirming the relationality as an economic exchange. In the case of this particular initiative, the disparity was established early on (perhaps due to the legal qualifications of the founder). The business plan built in a bond, a guarantee and in-house insurance that interact in complex ways. Even when not drawn upon directly (in seven years no-one has ever claimed on the bond offered), these legal devices still create commercial relationalities as part of the social practices engendered, showing owners a particular calculus and giving them the opportunity “to choose to pass that on if they want (...) turn[ing] the individual into a mini-businessperson” (Interview 3 2013).

Overall, the micro-relational work taking place within a sustainable economy initiative is partially constituted by the background legal framework which constrains the scope of contesting boundaries between commercial and personal. On balance, formal-legal frameworks tend to reinforce relational patterns associated with commercial interactions in the context of mitigating risk. This seems to be at least partly because they operate at an institutional level that presumes financially-mediated arms-length relations between anonymous strangers. This brings them into direct tension with the efforts of sustainable economy initiatives to *humanise* economic relations through a more diverse range of transactions, media and social relations.

5.3. Relationships with the state

The third legal fault line with which sustainable economy initiatives inevitably engage concerns relationships with the state. In the context of law and legal effects, this is the most charged of all three sites. Even the particularized application of specific existing regulatory rules to these initiatives is often challenging, either because their use of technology reconfigures supply chains, business models and producer-consumer relationships in surprising ways, or because their small scale and informality means they effectively operate (or are able to operate) under the radar of legal regulation. But the implications go much deeper, to the heart of state legitimacy and conceptions of the rule of law.

We can understand these implications better if we first consider the issue from a perspective which brackets out the state, by drawing an analogy with work done on informal economies. Jane Winn's exploration of the contribution of small and medium-sized enterprise to economic development in Taiwan (Winn 1994) notes the paradox of defining informal economic practices as “unregulated activity in a legal and social environment where similar activities are regulated” (Castells and Portes 1989, 12) when what is at stake is the very salience of (formal) law in regulation in the first place. Winn's observation about Taiwan could apply equally to the very different empirical context of our research:

The unstated assumption that law is best suited to reprimand misconduct and that non-legal forms of social intercourse were better suited to enabling and facilitating voluntary interactions often underlay the distinctive manner in which local participants interpreted laws and decided whether to avail themselves of legal institutions. (Winn 1994)

This observation resonates with the findings traced in the first part of this article that relatively few legal personnel were drawn into the space of sustainable economy initiatives. The formal legal system's poor fit with the emerging new economic trajectories results in the marginalization of (formal) law and its displacement by fluid, highly contextual networks of human relationships. Interestingly, Winn's observation links this marginalisation specifically to another boundary: that between punishment and facilitation as different social purposes of the law.

One particularly pertinent example from the case studies of sustainable economy initiatives illustrates the implications of this, in ways which directly engage the state. Car-sharing initiatives raise difficult issues of the allocation of public space involving local government and planning law. Where cars are shared on a peer-to-peer basis between neighbours, there is ample opportunity for the details of space allocation to

be worked out informally without directly engaging the state. Indeed, such a context might be an apt one in which a well-known example of everyday legality originally described by Ewick and Silbey could apply – where the placing of a chair in the snow effectively marks out a socially acceptable and empirically enforceable rule of space allocation on a street (Ewick and Silbey 1990). But consider the situation were a professional sustainable economies lawyer asked to advise on such an issue: he or she is unlikely to propose such a match or strategy as a matter of professional advice – such an approach is likely to be regarded as “unprofessional” *per se*, and the lawyer would be much more likely to engage directly with the state.

In one of the research case studies of car sharing, a conflict did arise over such space, involving the question as to whether a neighbour’s car participating in a peer-to-peer scheme became as a result a *commercial vehicle*, a characterization which would have affected its right to obtain a local parking permit. In this case, the insurance issue which might also have arisen had been solved by creative reconfiguration, legally endorsed, of insurance policies by the sustainable economy initiative itself. But the ability to secure, or even experiment with, a similar creative reconfiguration in relation to local government law was far more constrained.

One key reason for this constraint is the political legitimacy at stake in adjusting regulatory responses that must necessarily apply on a general basis to other similar situations. Public power is legitimated in important measure by reference to rule-of-law commitments to universal and non-discriminatory application of law. This is particularly salient when the law in question exacts penalties rather than merely providing a facilitative framework (as transactional law does). The highly charged public debates over regulatory responses to large-scale sharing economy initiatives such as Uber and AirBnB are examples of just such stakes. Although small-scale sustainable economy initiatives might invoke a different political terrain, the risk of such damaging contestation may have underlain the decision in this context to solve the issue through judicious use of social media rather than turning to the courts for a solution. The capacity to address legitimacy more diffusely through social media was better suited to the relational work that needed to be done in this hybrid arena, more so than the bright lines that a formal legal decision would potentially have drawn.

In short, where boundaries are heavily contested and in flux, the shared meaning of the relational work involved in matching the various elements of economic life (Zelizer’s fourth element in Zelizer 2012) is particularly fragile. Moreover, where law and the state are concerned, the significant stakes for public legitimacy involved in such shared meaning heighten the difficulty of negotiating relational packages. Finally, in the context of economic transactions and the facilitation of voluntary interactions, the salience of formal law may seem less urgent: it is, at least for a time, possible to get by *without law*, or perhaps *alongside law*, as it were. Given the challenges to legal professional identity from the relational work performed in constituting sustainable economy initiatives, it is appropriate to reflect in conclusion upon the possible directions that could emerge in response.

6. Conclusion: Community enterprise lawyers of the future

Despite the challenges, the account in this paper has shown that at the margins of the work being done to reconfigure *business-as-usual* through grass-roots efforts to create sustainable economy initiatives, lawyers themselves are working the boundaries of both law and commerce. As the introduction intimated, that work shows how the boundaries of law are constitutive of legal professional identity, and in the interstices of the contested practices documented in this paper, a different kind of public interest lawyer is indeed emergent. This shadowy figure could be termed a

community enterprise lawyer:⁶ a transactional lawyer who reconfigures the taken-for-granted elements of economic transactions so as to build social, environmental and civic values into the heart of economic exchange. What has this paper shown about how *community enterprise lawyering* might reshape the boundaries of law and legal professional identity?

The strongest point to emerge is the importance of legal tools and practices that facilitate or enable collective action and the creation of formal collective entities. The implicit contrast here is dual. In part, this is a corrective to law seen as an institution of constraint in the sense of punishment – perhaps an image of law more likely to dominate in the other contributions to this special issue. But it also provides a foil to law that is perceived as a barrier or burden: a more unintended form of blockage associated with bureaucracy, red tape and paperwork hurdles. At a meta-theoretical level, these two are closely connected, since the earlier-mentioned presumption of financially mediated arms-length relations between anonymous strangers which underpins mainstream assumptions about economic relations links law and the market by invoking the punitive possibilities of law to forestall fraud: individuals from this perspective cannot be trusted to pursue anything except their own self-interest.⁷ At a practical level, this has many implications: a particularly exemplary one is the way in which law constructs and maintains a boundary between for-profit and not-for-profit institutions and practices. At an everyday level, this is a regulatory hurdle; at a meta-theoretical level, it embodies the assumption that where profits are made, self-interest will prevail absent legal compulsion. Community enterprise lawyering has the potential to challenge this boundary *through law*, even though these professionals often simultaneously experience existing formal legal tools as hurdle and blockage.

But this is where the potential of sociological citizenship is so important: the creative work done in forging unexpected coalitions, and bending existing rules can help create new spaces and possibilities for community enterprise. The emergence of the figure of a community enterprise lawyer in a way reverses the suspicion that the relational practices underpinning sustainable economies represent a backward trajectory, as recent critiques of *folk politics* have maintained (Srnicek and Williams 2016). Instead, this direction is seen as the cutting-edge. The founder of the reuse/recycle initiative who appeared in earlier pages illustrates this, commenting on her hope that by creating a sharing initiative based initially on monetary exchange, that users would over time become more open to immersing themselves in more commons-based initiatives using gift relations:

I would hope that for some people, using [this initiative] would be a gateway to something like the Sharehood [which shares things for free]; that it actually just is about people realising that there's another way they can do things then doing it in a quite (...) almost the next step over (...) [since] you know what to expect and how things work. At least the system tells you that. Then you realise that strangers are only strangers until you meet them.

This lawyer-founder saw an emergent future that opened the potentiality for a much wider uptake of economies based on a wider array of distinctive social ties, transactions and media than our current economic system. She is a potential bridge to the world of diverse economies documented by Gibson-Graham and her colleagues (Gibson-Graham *et al.* 2013): a legal ally of the community economy.

Over time, though, such creative work faces the challenge that is perhaps distinctive to the site of law of *stabilizing* alternative more hybrid sites of economic activity, and of helping to *routinize* more fertile, mixed practices relating to the formation of economic entities. While economic creativity arguably has more freedom to upend,

⁶ This term is increasingly in use in both the UK (Community enterprise n.d., Locality n.d.) and the USA (Sustainable Economies Law Center n.d., Columbia Law School n.d., Duke Law n.d.). For the gap in Australia, see Morgan *et al.* 2016.

⁷ My thanks to John Clarke for clarifying this point.

disrupt and recreate, legal creativity is, at least over time, necessarily corralled into the service of predictability, stability and routine. A flourishing trajectory for community enterprise lawyering needs to marry four key dimensions: affordability, access, a humanising touch and a creative approach to technical legal knowledge born of institutional imagination (Morgan *et al.* 2016). Entrenching this marriage raises a familiar dilemma created by the encroachment of power relations on the micro-practices of relational analysis. It is with this dilemma the paper concludes.

The dilemma lies in the following question: will developing the affordability and access dimensions of community enterprise lawyering overwhelm its humanising touch and creative approaches to technical legal knowledge? The more the former are prominent, the more lawyers trying to enter this space may turn to digital technology and to templates embedded within that, to routinize and lower the cost of their support. This is not necessarily incompatible with customised, nuanced face-to-face support. Sustainable economy initiatives in food in the UK, working with cooperative development associations, have modelled just such an amalgam. More broadly, the growing interest in commons-based solidarity and social enterprise in Europe and USA since the 2008 financial crisis is attracting digital experts keen to *hack business-as-usual* but grounded in commitments to sustainable economies and grass-roots innovations that seek to forge alternative economic trajectories (Scholz *et al.* 2016).

Granted, the potential impacts of automated advice based on machine learning in the future could just as easily *undermine* the possibility of humanistic, localized forms of collaboration that challenge expertise, technocratic language and mainstream conceptions of legal professional prestige. After all, an extractive and much critiqued version of economic innovation is already visible along one trajectory of digital disruption in the monopolistic tendencies of some prominent sharing economy platforms. The risk, then, is that community enterprise lawyers could be a new precariat operating in the shadow of this. But there is equally potential for multiple community enterprise lawyers to collaborate around shared templates in the spirit of open source organizational development (Irving 2016). Templates can routinize and deaden, or they can inspire communities of practice.

Ultimately, whether community enterprise lawyering fosters co-creation and egalitarian relationality or mutates into the bedrock of standardized industrial replication depends in no small part on ownership structures but also on the social relations afforded by collaborative shared ownership. Thus, in the end both formal law and informal social relations matter, and indeed are co-constitutive. If no-one *shows up* to carry out the relational work that brings shared ownership to life, formal legal ownership structures will not matter. In sum, radical transactionalism cannot emerge from relational regulation without the micro-practices of relational work at the sites of economic exchange reimaged by sustainable economy enterprises. Law and legal professional identity may be only a very partial part of the larger puzzle, but community enterprise lawyering is, this paper argues, a cornerstone piece of that puzzle.

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Appendix: Interviews

Interview 1 2013: Founder, UK community energy initiative 1, 13 June 2013.

Interview 2 2013: Founder, UK community energy initiative 2, 7 July 2013.

Interview 3 2013: Founder, Australian reuse/recycle initiative, 2 September 2013.

Interview 4 2013: Founder, UK community food initiative, 22 October 2013.

Interview 5 2013: Founder, UK research and development consultancy for community enterprise, 18 December 2013.

Interview 6 2013: Founder, Australian community food initiative, 7 May 2013.