

### ***Introduction***

In this article I attend to a key incarnation of law: writing itself. I do so by examining how a professional regulator engages with misconduct by doctors, focusing on research as an area of practice. In order to explore problems within regulatory responses to professional misconduct, the article uses a specific calligraphic practice shared by both medical researchers and regulators: the strikethrough. The article shows that taking the strikethrough as an analytical focus in its own right can offer surprising dividends to students of regulation across fields. Via the deceptively mundane practice of strikethrough, the General Medical Council (GMC) effectuates certain gestures as it engages with the research activities of registered medics. In this paper I consider three: display, authentication and isolation. Understanding these gestures and their relevance to law and regulation studies beyond the domain of responses to research misconduct, will require us to ask what literal and metaphorical meanings travel in the practice of strikethrough.

Despite the explosion of self-directed guidance on research by scientific organisations and research funders, the GMC<sup>1</sup> is currently the sole locus of regulatory oversight for research misconduct.<sup>2</sup> The GMC, by waving the specter of true deterrents for registered doctors such as suspension and even erasure, is thought to demonstrate that state-supervised medical

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<sup>1</sup> In 2013 the GMC set up the Medical Practitioners Tribunal Service (MPTS) to provide a separation between complaints and investigation functions and adjudication of fitness to practise cases.

<sup>2</sup> HoC Science & Technology Committee, *Report on Peer-review in Scientific Publications*, 28 July 2011 at 83-4; A Alghrani and S Chan, 'Scientists on the dock': regulating science,' in A Alghrani, R Bennett and S Ost, eds, *The Criminal Law and Bioethical Conflict: Walking the Tightrope* (Cambridge University Press, 2013) 121-139, at 132; J Barrett, 'Conduct of an inquiry into alleged misconduct', in F Wells and M Farthing (eds), *Fraud and Misconduct in Biomedical Research*, (4th edn, RSM Press 2008) p. 267; and see: C Hodges, 'Investigating, reporting and pursuing fraud in clinical research: legal aspects and options', in Lock and Wells (eds) *Fraud and Misconduct in Medical Research*, (2nd edn, BMJ publishing, 1996) 74-88 at 75 .

self-regulation has a role to play in sanctioning some research misconduct. More generally, the GMC's powers have been described as the "teeth" by which all other monitoring processes can ultimately be enforced.<sup>3</sup> The professional regulation of medics is an area whose complexity and scale have been expanding at a tremendous rate in the last twenty years. Surprisingly, the aesthetic and material dimensions of this expansion have remained under-examined. **In what follows, I bring to light how a writing practice epitomises specific material aspects of a professional regulator's apprehension of problems of research conduct, hopefully with fruitful theoretical payoffs for scholars of regulation generally.**

Medical practitioners' activities as researchers are considered integral to what constitutes their 'medical calling,'<sup>4</sup> and thus fall within the GMC's regulatory remit. Practically, scientific research has become a routine part of the work lives of many doctors. Indeed, Harrington refers to doctors' obligations to not only provide healthcare whilst adapt their care to the changes produced by science, but 'contribute to the scientific enterprise' in various ways: by recording their own experiences and feeding them back into the scientific system through medical records and publications.<sup>5</sup> In this article, the research activities of doctors exemplify the difficulty, but not the variety, of behaviors scrutinised by the GMC. Research was chosen for a number of reasons: methodologically speaking, as a delimited area it made the dataset's time range (1990-2013) manageable for the present study. Moreover, being under acute public scrutiny and of topical relevance to legal scholarship more generally, research has added benefits as an object of study.<sup>6</sup> Doctors' participation and investment in research have become so significant that the government recently proposed that doctors declare their

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<sup>3</sup> J Smith *Fifth Report of the Shipman Inquiry: Safeguarding Patients, Lessons from the Past, Proposals for the Future*, London, Stationery Office, 2004 at 1, as cited in M Davies, *Medical Self-Regulation: Crisis and Change* (Ashgate 2007) at 359.

<sup>4</sup> *General Medical Council v Meadow* [2006] EWCA Civ 1390; *Remedy UK Ltd, R (on the application of) v The General Medical Council* [2010] EWHC 1245 (Admin).

<sup>5</sup> J Harrington, 'Red in Tooth and Claw: the Idea of Progress in Medicine and the Common Law' (2002) 11:2 *Social and Legal Studies* 211-232.

<sup>6</sup> See for example: E Jackson, *Law and the Regulation of Medicines* (Hart 2012); A Alghrani and S Chan, "Scientists on the dock": regulating science' (n 2).

participation in research and related interests in a public register maintained by the GMC.<sup>7</sup> Further, and of particular interest in the context of this article, is the fact that medical researchers share a writing pattern with their regulators: in research, both regulator and regulated strike through text.

The article first locates this study within legal scholarship concerned with textual analysis and explains my use of striking through/off as a way to understand the GMC's engagement with cases. I then turn to methodological points, before framing my discussion within the regulatory frameworks on fitness to practise and research governance. The main part of the article then pays close attention to three features of the GMC's casework. We will first see that the practice of visibly striking through text in determinations evokes the performance of incremental transparency by the GMC. The second substantive pattern found in determinations is a recurring tension between assessing research integrity and resisting assessments of scientific validity and risks of doctors' research. Here the strikethrough represents the authenticating of technique and conduct, which the GMC appears most interested in when overseeing research conduct. The third pattern can be found in switches between individual and institutional understandings of research conduct. Here the strikethrough effectively signifies erasure from the Medical Register, and is also used as a metaphor for the singling out and detaching of 'bad apple' doctors from the institutional work under scrutiny. To conclude, I reiterate how a writing form can be both a recurring pattern worthy of attention and a good device to think about regulatory gestures more generally, and point towards avenues of further inquiry.

#### *Law's materiality, and doing things with strikethrough*

So why is the examination of calligraphic techniques pertinent to contemporary legal studies? In legal and socio-legal scholarship, law is often conceived as a system of ideas, an apparatus shaped by and shaping social practice, a tool for the powerful. But, given that legal discourse is almost entirely based on the written word and that 'paper and print' is the main carrier of law, it is remarkable that until recently legal and socio-legal scholars have reflected

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<sup>7</sup> House of Commons Health Committee, *2013 Accountability Hearing with the General Medical Council*, Tenth Report of Session 2013-4, HC 897 (The Stationery Office, 2014), at 37-9.

very little on writing itself.<sup>8</sup> Considered as a merely 'technical' and instrumental aspect of law, writing has often been left under the radar of critical scrutiny. This itself is a reason why it deserves scholarly attention. And, practically speaking, law cannot be imagined, activated or studied unless it is embodied in some kind of material, inscribed form.

In recent years, the material ways (files, forms, lists and grids, signatures, typed texts)<sup>9</sup> in which law gets animated have increasingly sparked the imagination of scholars in law and the humanities. It is now better understood that the performance of documentary work –including the minute work of calligraphy<sup>10</sup> - influences how legal and regulatory decisions exert knowledge and allow or disallow certain meanings to emerge.<sup>11</sup>

In this context, this article demonstrates that the seemingly rudimentary textual technique of the strikethrough (~~like this~~) can be used doubly -- as both object of study and analytical tool -- with fruitful payoffs for broader analyses of law and regulation. As an object of study, it is a meaningful trait of expression as it provides a visible and temporal trace of the writer's thought process, thus giving access to law's and research records' making-of. It also merits attention for its metaphorical grip when examining sanctions: it hits, crosses, erases. In turn, the strikethrough can be a tool for analysis, providing a fresh, oblique outlook when legal critique becomes too predictable or interchangeable with policy recommendations.<sup>12</sup> For example, when looking at the GMC's efforts to be a transparent regulator, one can reactivate the critique of these efforts as damaging professional autonomy or as counterproductive, like

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<sup>8</sup> For an exception see: B Messick, *The Calligraphic State* (University of California Press), 1992.

<sup>9</sup> B. Latour, *La fabrique du droit : une ethnographie du Conseil d'état* (Paris : La découverte, 2003), T. Scheffer, *Adversarial case-making : An Ethnography of English Crown Court Procedure*, (Leiden: Brill, 2010); A Riles 'Introduction: in response' in A Riles, ed, *Documents : artefacts of modern knowledge* (Ann Arbor: Michigan University Press), B Fraenkel and D Pontille, *La signature électronique en droit*, 2003, 83-122; C Vissman, *Files*; M Hull, *Government of Paper: The Materiality of Bureaucracy in Urban Pakistan*, University of California Press, 2012; Reference removed.

<sup>10</sup> Messick (n 8).

<sup>11</sup> C Trundle and C Kaplonski 'Tracing the Political Lives of Archival Documents' (2011) 22 (4) *History and Anthropology* 407.

<sup>12</sup> J Halley and W Brown, 'Introduction', in J Halley and W Brown, eds, *Left Legalism/Left Critique* (Duke University Press, 2002) at 28; A Riles, 'Introduction: in response', in A Riles ed, *Documents: Artefacts of Modern Knowledge*, Michigan University Press, 2007, at 24-26.

what commentators hostile to state oversight of self-regulation have done.<sup>13</sup> But alternatively one can engage the field within a different register, by examining in detail how transparency itself gets materialised through the handling of text itself. The strikethrough has potential as a resource to crack open what is taken-for-granted in law, the textual stuff that intervenes before analysis gets under way.<sup>14</sup>

In focusing on the forms of writing itself, I deliberately obviate familiar debates and focus instead on tangential issues. However, what I hope to show is that what is perceived at the outset as tangential, might become relevant and insightful in other ways, and feed perhaps more unpredictable, broader debates within socio-legal studies.

Striking through divulges at once the process of erasing, the state of affairs prior to the erasure, and the result of the erasure. It does this by overprinting, in a way that explicitly reminds us of the material, paper and print quality of adjudication itself.<sup>15</sup> The strikethrough technique thus epitomises several patterns in the contemporary regulation of research conduct and in GMC adjudication. It erases text but does this transparently. Below, I will examine in turn three instantiations of this form of erasure that emerge literally and metaphorically in the dataset: display/hide, authenticate/disproof, and isolate/contextualise.

My point is that, in our respective legal fields, found objects, even the most technical, can be turned into analytical devices and used as a 'way in' to think about problems. Here, I interpret a 'found object' belonging to my field itself -- the GMC adjudication process and medical research practices alike -- in order to better understand this field and approach cognate ones. As aforementioned, I do not claim that the practice of 'striking off' and 'striking through' offers an overarching theory to approach the subject. Instead, here I try to think about the adjudication of the GMC as a problem of regulation, by appealing to another cultural form regulation can take. For instance, Barrera has done similar things with the form of restoration

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<sup>13</sup> See for example: McGivern & Fischer, 'Medical regulation, spectacular transparency and the blame business' (2011) 24 JHOM 597-610.

<sup>14</sup> A Pottage, 'The materiality of what?' (2011) Journal of Law and Society (1), 167-183 at 169.

<sup>15</sup> D Crowley, 'Strikethrough' (2008) 69: 18 Eye 1.

in her work on judiciary reforms in Argentina,<sup>16</sup> Latour has reflected on the passage of the law via the signature,<sup>17</sup> and Riles' examination of [brackets] that gather possible alternative formulation in a text in international law making, has helped elucidate how human rights activists constrain or activate knowledge.<sup>18</sup>

*Reading GMC determinations: methods and constraints*

Here I query the ways the British medical professional regulator writes up cases of research misconduct, not the extent to which doctors engage in fraudulent research.<sup>19</sup> I refer to the Professional Conduct Committee (PCC), Fitness to Practise Panel (FtPP) and Medical Practitioners Tribunal Service (MPTS) decisions themselves, and leave out, for practical and analytical reasons, the notoriously 'opaque'<sup>20</sup> triage process performed by the GMC case examiners prior to hearings.<sup>21</sup> The present analysis does not deny that GMC determinations could be helpfully interpreted against their social context – the complaint process, triage, and live hearings. Yet, when they study court cases, historians and socio-legal scholars are very aware that the pre-hearing screening process eludes their gaze,<sup>22</sup> and understand that documents craft a narrative in their own right.<sup>23</sup> Regardless of their social contexts, legal texts

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<sup>16</sup> L Barrera, 'Relocalizing the Judicial Space: Place, Access and Mobilization in Judicial Practice in Post-crisis Argentina' (2012) 8: 2 *Law Culture and Humanities* 350-373.

<sup>17</sup> B Latour, *La fabrique du droit: une ethnographie du Conseil d'État*, Paris: La découverte, 2003...

<sup>18</sup> A Riles, 'Infinity within the brackets' (1998) 25:3 *American Ethnologist* 378-98.

<sup>19</sup> Only a small portion of cases of research misconduct are reported, or complained about to the GMC, and only a fraction of complaints ends up with a hearing of the GMC disciplinary panels. On the uses and limitations of data held by the GMC to research risk factors, see S Lloyd-Bostock, 'The creation of risk-related information: The UK General Medical Council's electronic database' (2010) 24 *Journal of Health Organization and Management* 584.

<sup>20</sup> M Davies (n 3), at 26.

<sup>21</sup> *Medical Act* 1983, as amended. The GMC can also take steps to deal with concerns (e.g. agree undertakings or issue a warning) without the case needing to go to a panel.

<sup>22</sup> J Conley and W O'Bar, *Just Words: Law Language and Power*, (2nd edn, Chicago, University of Chicago Press 2005).

<sup>23</sup> N Zemon Davis, *Fiction in the Archives* (Stanford: Stanford University Press, 1990); M Constable, *Just Silences: The Limits and Possibilities of Modern Law* (Princeton: Princeton University Press, 2007).

'that seem frozen can be thawed and made to yield unsuspected insights',<sup>24</sup> revealing 'certain regularities that point to specific rules programming what people can say and write.'<sup>25</sup> The strikethrough displays this explicitly: this, and not that, can be written.<sup>26</sup>

I use cases from 1990 onwards because the nineties mark the first major investigations of scientific misconduct in the UK.<sup>27</sup> Decisions of the Professional Conduct Committee (1990-2004), Fitness to Practise Panels (2004-2014) related to research conduct have been located in GMC Minutes held at the British Library (for 1990-3) and via *Freedom of Information Act* requests to the GMC (for 1994-2014).<sup>28</sup> The analysis of this casework draws on the close reading of decisions of the PCC, FtPP and (since 2013) MPTS, as well as related appeals from the Privy Council and the High Court. The dataset comprises 86 determinations and 8 appeals, as of August 2014), totaling 1124 A2-format pages. 24 determinations were published in the period 1990-2000; 40 during 2000-2010; and 14 between 2010 and 2014. The relative evenness in number of determinations across time does not necessarily indicate

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<sup>24</sup> J Conley and W O'Barr, *Just Words: Law, Language and Power*, 2<sup>nd</sup> ed, (University of Chicago Press, 2005), at 128.

<sup>25</sup> G Winthrop-Young and M Wutz, Translators' Introduction, in F. Kittler, *Gramophone, Film Typewriter* (Stanford: Stanford University Press, 1999), at xxii.

<sup>26</sup> This relates to a broader methodological point: with the archive used here, the aim is not to offer a 'representative' or 'exhaustive' picture, or to demonstrate 'what happened.' I rather attempt to put forward a recurring pattern in order to provide the reader with a connection to the casework. See: M Strathern, *Partial Connections*, Updated Edition, (Oxford: Alta Mira 2004) at 7.

<sup>27</sup> Lock has identified the 'first' reported GMC medical research misconduct case in 1975, which is also the only one before 1990. Lock's research was interested in case histories and in discussing their settings, motives, and identifying the disciplines particularly at risk: S Lock, 'Research misconduct: a resume of recent events' in S Lock and F Wells (eds), *Fraud and Scientific Misconduct in Medical Research* (2nd edn, BMJ Publishing Group 1996).

<sup>28</sup> Data related to year of registration, gender, age, as well ethnic identification are not part of the present focus: Reference removed. Scholars have used freedom of information policies to study research misconduct. See for example: M Shapiro and R Charrow 'The role of data audits in detecting scientific misconduct' (1989) 261 *JAMA* 2505; Lock (n 27) at 38. For the present article, the following keywords have been used by the GMC access to information team to locate decisions: 'research'; 'dishonesty'; 'research misconduct'; 'probity - research'; 'experiment'; 'principal investigator'; 'dishonesty - false claims to qualification/experience'; 'dishonesty - false certification/false reporting'; 'dishonesty/criminality - clinical drugs trials and research'; 'clinical trial'; and 'clinical study'.

a stable occurrence of research misconduct; rather, it shows that the GMC has been consistent in conveying the message that it concerns itself with this form of misconduct.<sup>29</sup>

The 'paper and print' texture of the determinations was very much part of how I engaged with the data and researched the dataset, since some decisions were only available in paper version at the British Library, and others only on paper at the GMC facilities and thus had to be photographed (instead of downloaded) by the GMC's Information Access officers. Information compiled related to: dates of proceedings; types of misconduct; the terms used by the GMC to describe the conduct; finding of serious professional misconduct (SPM) or lack thereof; sanction or lack thereof; as well as the rationale for the decision (including the use of precedent) when provided in the determination.<sup>30</sup> Decisions are not uniform in length; most decisions from the early 1990s consist of one or two pages each, whereas many cases from the late 2000s are between twenty and thirty pages long, with some decisions having more than sixty pages. I will look at the increasing length and wordiness of determinations, both as analytical matters in their own right and as a lynchpin for my discussion on the GMC's 'government in writing,' to use Vismann's term.<sup>31</sup> In order to locate the casework in the context of the large variety of practices that govern *les écrits de travail* ('writing at work'<sup>32</sup>), the written presence of the decisions ought to be examined. I make use of specific cases to illustrate specific elements and, to reiterate, do not attempt to derive generalizable claims about the substantive occurrence of research misconduct amongst medics.

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<sup>29</sup> See: C Tittle, 'Two Empirical Regularities (Maybe) in Search of an Explanation: Commentary on the Age/Crime Debate' (1988) 26 *Criminology* 75-86, at 76, as cited in: B Arnold and J Hagan, 'Careers of Misconduct: The Structure of Prosecuted Professional Deviance Among Lawyers' (1992) 57:6 *American Sociological Review* 771-780, at 771.

<sup>30</sup> Reference removed for anonymisation

<sup>31</sup> Vismann (n 15) at 126.

<sup>32</sup> D Barton and U Papen, 'What is the Anthropology of Writing?' in D Baron and U Papen eds, *The Anthropology of Writing : Understanding Textually Mediated Worlds* (London : Continuum 2010), at 22; S Équoy-Hutin, 'Présentation: valeurs et enjeux des écrits de travail' (2009) 28 *Semen* <<http://semen.revues.org/8687>> accessed 18 January 2016 ; B Fraenkel, 'La résistible ascension de l'écrit au travail', in A Borzeix and B Fraenkel (co-ord), *Langage et Travail, Communication, cognition, action* (Paris, CNRS Éditions, 2005), 113-142.



### ***Research conduct and doctors' fitness to practise***

Research on Research Integrity (RRI) literature conceives of research conducts as ranging from best practice to acceptable, careless, questionable and fraudulent conduct.<sup>33</sup> The narrow definition of research misconduct initially focused on fabrication, falsification, and plagiarism.<sup>34</sup> In the more recent aspirational science policy publications, research misconduct is more 'conceptually open,' including 'any potential breach of integrity,'<sup>35</sup> and 'unethical behaviors'.<sup>36</sup> In this study I included the GMC's discussion about research ethics violations in order to give an account of the broadest range possible of research-related misconduct as a form of serious professional misconduct.

Nowadays researchers, in particular medical researchers, are increasingly regulated and to some extent 'professionalised.'<sup>37</sup> Despite proposals towards uniformisation, state-based regulatory frameworks governing research remain fragmented, with certain areas more tightly regulated (eg research on animals, embryos and human tissue) than others.<sup>38</sup> Professional

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<sup>33</sup> M LaFollette, *Stealing into Print: Fraud, Plagiarism and Misconduct in Scientific Publishing* (University of California Press 1996); A Marusic et al, 'Interventions to prevent misconduct and promote integrity in research and publication' (2013) 2 *The Cochrane Library* 1-11.

<sup>34</sup> National Academy of Science, Committee on Science, Engineering, and Public Policy, Panel on Scientific Responsibility and the Conduct of Research, *Responsible science, Volume I: Ensuring the integrity of the research process*, (Washington, D.C: National Academy of Science, 1992). See: A Oliver and K Montgomery, 'Shifts in guidelines for ethical scientific conduct: how public and private organizations create and change norms of research integrity', (2009) *Soc Stud Sci* 39(1), 137-55.

<sup>35</sup> D Fanelli, 'The black, the white and the grey areas – towards an international and interdisciplinary definition of scientific misconduct,' in N Steneck and T Meyer (eds), *Promoting Research Integrity in a Global Environment* (Singapore: World Scientific Publishing, 2011) at 79. For a history of the shifts in policy about research integrity and misconduct see: A Oliver and Montgomery, above (n 34).

<sup>36</sup> Ibid, at 80.

<sup>37</sup> Marcel LaFollette, *Stealing into Print: Fraud, Plagiarism and Misconduct in Scientific Publishing*, Berkeley, University of California Press, 1992, at 60. Mary Dixon-Woods, 'Regulating research, regulating professionals' (2010) *J R Soc Med* 103(4): 125–126.

<sup>38</sup> A Alghrani and S Chan, "Scientists on the dock": Regulating science', (n 2) at 125-6; Reference removed.

scientific organisations have been created, and soft law instruments have emerged – such as codes of ethics, guidelines and best practices. Whilst this soft law is being tailored to a great extent in-house by researchers' institutions and sponsors, it often gets accused by researchers of hampering science.<sup>39</sup> In turn, research and research governance are areas where writing practices have become remarkably scrutinised.<sup>40</sup>

As to the regulation of British medical doctors, it remains a beloved object of scholarly interest. Socio-legal scholars have inquired how medics who face complaints have managed their interactions with their employers and regulators, and how in turn the latter have crafted institutional responses to these interactions.<sup>41</sup> Others have mapped the complex meta-regulation that populates healthcare systems and identified its actors and strategies - public inquiries, systematic reviews of patients' records, metrics -- but also the specifics of the more internal professional sites of registration, development, and discipline.<sup>42</sup> Sociologists and regulation scholars have also traced the important shifts within 'medical discipline' in Britain, and documented the gradual move from a 'state-sanctioned, collegial, self-regulatory system' to ... state directed bureaucratic regulation'.<sup>43</sup> The oft-told story would go like this: following a crisis of confidence in the aftermath of the Harold Shipman scandal, medical regulation and self-regulation in Britain have undergone numerous changes in alignment with new forms of

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<sup>39</sup> See for example the AMS report: Academy of Medical Sciences, *A new pathway for the regulation and governance of health research*, London, AMS, 2011.

<sup>40</sup> Reference removed for anonymisation.

<sup>41</sup> L Mulcahy, *Disputing Doctors. The socio-legal dynamics of complaints about medical care* (Open University Press, 2003); M Stacey, *Regulating British Medicine: The General Medical Council* (London: Wiley, 1992); O Quick, 'Patient safety and the problem and potential of law' (2012) 28:2 *Journal of Professional Negligence* 78-99.

<sup>42</sup> M Henaghan, *Health Professionals and Trust*, (London: Routledge, 2012); McGivern and Fischer (n 13); M Dixon-Woods, K Yeung and C Bosk, 'Why is UK medicine no longer a self-regulating profession? The role of scandals involving 'bad apple' doctors (2011) *Social Science & Medicine* 1-8.

<sup>43</sup> J Waring, M Dixon-Woods and K Yeung, 'Modernising medical regulation: where are we now?' (2010) 24: 6 *Journal of Health Organization and Management* 540-55.

governance, including papered audit cultures and new public management (NPM) replacing regulation by peers.<sup>44</sup>

Others have paid attention to the effects of transformation of the GMC as a professional regulatory body working in relative isolation, yet whose casework is under increasing state oversight.<sup>45</sup> The 2007 White Paper *Trust, Assurance and Safety* and the short-lived Office of Healthcare Professions Adjudicator (OHPA) have prompted the GMC to make the adjudication of complaints against doctors more independent and transparent.<sup>46</sup> The state (via first the Council for Healthcare Regulatory Excellence (CHRE) and then the Professional Standard Authority) now supervises the regulatory functions of the GMC.<sup>47</sup> In this context, transparency has been framed as a key procedural justice issue but also as a legal device, a form of intervention correcting the 'democratic deficits'<sup>48</sup> of existing GMC adjudication.<sup>49</sup> Under scrutiny for regulatory compliance, the casework's written expression exemplifies this transparency ethos.

A doctor's 'fitness to practise' is the criterion that determines whether s/he can be listed on the Medical Register. According to the Medical Act 1983 as amended, such fitness to practise medicine will be considered 'impaired' by reason only of: misconduct, deficient professional performance, a conviction for criminal offence, adverse physical or mental health, or a finding

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<sup>44</sup> McGivern and Fischer (n 13); ACL Davies, "'Don't Trust Me, I'm a Doctor – Medical Regulation and the NHS 1999 Reforms'" (2000) 20: 3 *Oxford Journal of Legal Studies* 437-456; Roger Cooter, "'Framing" the End of the Social History of Medicine', in F Huisman and J H Warner (eds), *Locating Medical History*, John Hopkins University Press, 2004, 309-337. Brazier notes that this seemingly natural progression can obscure the fact that deference to medical professionals' autonomy might have been a historical anomaly, rather than a longstanding tradition only recently unsettled: M Brazier, 'The age of deference -- a historical anomaly' in Michael Freeman (ed), *Law and Bioethics*, Oxford University Press, 2008 464-475.

<sup>45</sup> Davies (n 3); Dixon-Woods, Yeung & Bosk (n 43).

<sup>46</sup> *Reform of the Fitness to Practise Procedures at the GMC: Changes to the Way we Deal with Cases at the End of an Investigation* (GMC, 2011).

<sup>47</sup> The CHRE oversight applies to disciplinary decisions that it considers 'unduly lenient.' In 2012 the adjudication of FtP has moved to the Medical Professional Tribunal Services, under the scrutiny of the Professional Standards Authority.

<sup>48</sup> A Ballesterio, 'Transparency Triads' (2011) *Political and Legal Anthropology Review* 35(2), 160-166 at 161.

<sup>49</sup> Ways to concretise these procedural reforms include changes in the composition of panels to include parity between lay and professional members, and the transfer the adjudication of fitness to practise to the Medical Professional Tribunal Service.

of impaired fitness to practise from another health or social care body.<sup>50</sup> To Smith's *Shipman Inquiry Fifth Report*, a doctor's fitness to practise is 'impaired' when she either is a risk to patients, or has brought the profession into disrepute; or has breached one of the fundamental tenets of the profession; or her integrity cannot be relied upon.<sup>51</sup> In addition, regulatory law sees fitness to practise as having to be 'judged by reference to past misconduct and, looking to the future, whether the misconduct has been remedied and whether it is likely to be repeated in the future.'<sup>52</sup> Fundamental considerations include the need to protect the individual patient, the protection of the public, and of the public interest, the latter of which encompasses the need to maintain public confidence in the medical profession, and declaring and upholding proper standards of conduct and behaviour.<sup>53</sup>

The *Indicative Sanctions Guidance* (ISG 2009), published in 2004 as part of the procedural reforms of the GMC, highlights that research misconduct is particularly serious and could lead to erasure. The definition clarifies that an individual doctor's intention to mislead, ie 'dishonesty,' is necessary for research misconduct to constitute serious professional misconduct, and to be grave enough to amount to impairment of fitness to practise.<sup>54</sup>

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<sup>50</sup> *Medical Act* 1983, as amended. GMC Rules Order of Council 2004.

<sup>51</sup> Smith 2004 (n 3); General Medical Council, *Reform of the Fitness to Practise Procedures at the GMC: Changes to the Way we Deal with Cases at the End of an Investigation* (London GMC 2011) at 25-50.

<sup>52</sup> *Council for Healthcare Regulatory Excellence (CHRE) v NMC and Grant* [2011] EWHC 927 (Admin), [71],[74], and [76] (referring to a decision from the Nursing and Midwifery Council); *General Medical Council v Meadow* [2006] EWCA Civ 1390. I will return to this forward-looking approach below.

<sup>53</sup> *Cohen v GMC* [2008] EWHC 581 (Admin); Davies (n 3); J Glynn and D Gomez, *The Regulation of Healthcare Professionals: Law, Principle and Process* (London: Sweet & Maxwell 2012).

<sup>54</sup> '110. Research misconduct is a further example. The term is used to describe a range of misconduct from presenting misleading information in publications to dishonesty in clinical drugs trials. Such behaviour undermines the trust that both the public and the profession have in medicine as a science, regardless of whether this leads to direct harm to patients. Because it has the potential to have far reaching consequences, this type of dishonesty is particularly serious.' GMC, *Indicative Sanctions Guidance for the Fitness to Practise Panel*, April 2009 (with 7 August 2009 revisions, March 2012 revisions and March 2013 revisions), para 110, at p 29.

GMC guidance documents<sup>55</sup> tend to address the issue of ‘research integrity’ instead of misconduct. Smith has strongly criticised the use of aspirational glossy publications in lieu of the establishment of clear standards and benchmarks for practitioners.<sup>56</sup> The fact that self-regulation has eroded and that regulation has become increasingly supervised and bureaucratised via state oversight, stimulates the expansion of such good practice documents that provide generic descriptions of one’s own activities and take their subject as a self-evident good. These documents can be useful under cultures of transparency, by showing publics how a body maintains standards and educates its members by the very fact of the publication of such documents.<sup>57</sup>

But within what particular modalities does the apprehension of research misconduct by professional regulation takes place?

### ***Displaying***

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<sup>55</sup> The GMC’s *Good medical practice* states that: ‘You must act with honesty and integrity when designing, organising or carrying out research, and follow national research governance guidelines and our guidance.’: GMC, *Good medical practice*, updated March 2013, para 67. The GMC thus refers explicitly to additional norms that govern the conduct of those who do scientific research: the rules of scientific community, formal and informal, produced and distributed by employers (research institutions), research funders and sponsors, and academic journals. Research guidance outlines principles governing research and their applications into practice: GMC, *Good practice in research and Consent to research*, 2010; GMC, *Research: the role and responsibilities of doctors*, 2005. The areas covered by the guidance are: law and governance; good research design and practice; protecting participants from harm; honesty and integrity; avoiding conflicts of interest; consent to research; respecting confidentiality. The 2005 version of the guidance included two additional areas: funding and payments, and teaching, supervision and managerial responsibilities for research.

<sup>56</sup> Smith (n 3), as cited in Glynn & Gomez (n 54) at 1-078. Scholars have picked up on how such stylized aspirational publications get crafted mainly for outside consumption: A Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press 2011) at 13. Indeed, we should not overrate the influence of these statements on practitioners, since they most often do not have time to read through them: A Chisholm, L Cairncross and J Askham, *Setting Standards. Final Report: The views of members of the public and of doctors on the standard of care and practice they expect of doctors*, London, Picker Institute, 2006.

<sup>57</sup> M Strathern, ed., *Audit Cultures: Anthropological Studies in Accountability, Ethics and the Academy*, Routledge, 2000; Reference removed for anonymisation.

Striking through parts of a text manages something worthy of analytical attention: it puts on display the text before the deletion, the deletion itself, and the text after the deletion. I argue that this displaying technique denotes the shifts taking place since the early 1990s between the staging of opacity and increased staging of transparency of the GMC casework material. Generally, under transparency governance the production of documentary accounts describing what one does is considered ethical in and of itself.<sup>58</sup> In other words, what we have is the production of self-descriptive documents as evidence of normative behaviour, and this elicits specific documentary effects.

*Self-regulation in the nineties:*

In 1995 the GMC discussed the case of Malcolm Pearce, a doctor who had published papers in the reputable *British Journal of Obstetrics and Gynaecology*, including one describing the first ever intrauterine relocation of an ectopic pregnancy followed by a healthy term delivery. The paper turned out to be based on 'false data and misleading data.'<sup>59</sup> The GMC charged the doctor for committing 'scientific fraud' and erased him from its Register,<sup>60</sup> and St George's Hospital sacked him from his job as senior consultant. Doubtlessly to speed up acceptance and publication, Pearce had assigned honorary authorship of the papers to his head of department Geoffrey Chamberlain, who was also the editor of *BJOG*. The GMC determination did not sanction this fact, but mentioned in veiled terms its awareness of the 'rush to publication,' and that, despite 'pressures upon researchers,' 'total integrity is

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<sup>58</sup> A Giri, 'Audited accountability and the imperative of responsibility' in M Strathern (ed), *Audit cultures: anthropological studies in accountability, ethics, and the academy*, Routledge, 2000.

M Strathern, 'A Community of Critics: Thoughts on New Knowledge', *Journal of the Royal Anthropological Institute* 12 (2006): 191-209.

<sup>59</sup> That same year Pearce published in the same journal a Randomised Controlled Trial involving 191 women with recurring miscarriages, a trial which never took place.

<sup>60</sup> Professional Conduct Committee, 7 June 1995. The PCC stated: 'Mr Pearce not only sought personally to mislead others, but implicated colleagues, including junior doctors, in a web of deceit which has had incalculable consequences for public confidence in the integrity of research.' After having decided on the erasure of Pearce, the PCC expressed in more general language its concerns about the dangers of scientific fraud for future medical researchers who could follow in good faith 'techniques and treatments described in published papers which are fraudulent', and for future safe treatment of patients.

paramount.’<sup>61</sup> Attention around the case led to Chamberlain’s resignation from the Royal College of Gynaecologists, though he did not himself have to face GMC proceedings.<sup>62</sup> *Pearce* is perceived to be the first ‘real’ major research misconduct case in the UK.<sup>63</sup>

One of the most salient patterns in the shifting forms of GMC determinations relates to the dramatic change in the length and writing style of the decisions. These two elements are intimately connected and of course not unique to research misconduct cases, as they characterise the evolution of much of the GMC casework since the 1990s. As we shall see below, the use of strikethrough sustains these changes in the documentary forms of determinations. Together, these forms can be construed as ‘disclosure devices’ staged by the GMC to produce more of the much sought-after transparency.

In the nineties, following a high level of media attention on sponsor bias and conflicts of interests in research – including the infamous *Pearce* case<sup>64</sup> -- the Association of British Pharmaceutical Industries (ABPI) brought a number falsification and fabrication cases to the attention of the GMC following complaints.<sup>65</sup> Most of the cases related to falsification and fabrication of data in post-marketing surveillance activities of medicines, not clinical trials or other high-risk interventionist research as such. The cases mostly concerned General Practitioners (rather than Consultants or Principal Investigators) wrongly entering data in surveys and thus ‘failing to conduct the study in accordance with protocols.’ I did not have access to the complainants’ accounts of the events and do not know how detailed these were,

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<sup>61</sup> In generic terms, the PPC said that ‘the responsibility for published work rests on every participant – the main author, any co-authors, all others involved in the research, assessors, referees and the editorial board’. PCC, 7 June 1995.

<sup>62</sup> R Smith, *Research Misconduct: the poisoning of the well* (May 2006) 99: 5 *J R Soc Med* 232–237; S Lock, ‘Fraud and the editor’ in S Lock and F Wells, above (n 23), at 252-4.

<sup>63</sup> My research in the GMC Minutes and secondary material indicates that the prior to *Pearce*, 13 research misconduct cases had been dealt with by the PCC, all to do with falsification and/or fabrication of data. 12 cases took place between 1990 and 1995, and Lock identifies one additional PCC decision on research misconduct from 1975. See: S. Lock, ‘Research Misconduct: a résumé of recent events’ in Lock and Wells, eds above (n 23), at 17.

<sup>64</sup> P Wilmshurst, ‘Dishonesty in medical research’ (2007) 75 *Medico-Legal Journal* 3.

<sup>65</sup> C Dyer, ‘The fraud squad’ (2011) 342 *British Medical Journal* 4017.

but published determinations during that decade contain heads of charge often phrased in vague language, and sometimes no further detail is provided in the decision itself. Many decisions during that decade are no longer than one and a half to two A4 pages. The Pearce determination, itself regarding a case of flagrant clinical trial research fraud that had received high media coverage, is only four pages long. Because the majority of decisions from the 1990s do not provide specific information about the content, form, and scale of the misconduct, one is left musing about the sometimes unspoken private mitigating factors that may have been put forward to the hearing.<sup>66</sup> The broad and not yet standardised approach to mitigation might explain the lack of consistency in determinations; for instance, why the same heads of charge have led in different cases to admonishment, or six months' suspension, or erasure.

*'Spectacular transparency' and GMC reforms:*

Following the 2002 and 2004 reforms of fitness to practise procedures, in particular the enactment of the 2004 *Indicative Sanctions Guidance*, the GMC decisions became more methodical, wordy, and fit for judicial scrutiny. The MMR trilogy of decisions exemplifies this trend.

In January 2010, the Fitness to Practise Panel – which replaced the Professional Conduct Committee in 2004 -- erased Andrew Wakefield from the Register,<sup>67</sup> at the end of what constituted the longest case in the history of the GMC (217 days). In the scientific community 'the MMR-autism case' is discussed as a story of research fraud,<sup>68</sup> even though the FtPP made a determination on three researchers<sup>69</sup> because their work was unethical rather than

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<sup>66</sup> See N Zemon Davis, *Fiction in the Archives. Pardon Tales and their Tellers in Sixteenth Century France* (Stanford University Press 1987).

<sup>67</sup> FtPP, 28 January 2010 and 24 May 2010.

<sup>68</sup> *The Lancet* retracted the infamous 12-authors article – notably only after the GMC decision came out -- on the basis that the research was fraudulent. See:

[http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(97\)11096-0/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(97)11096-0/abstract); See Dyer (n 52).

<sup>69</sup> What is known as the 'Wakefield decision' is in fact a trilogy (Wakefield, Walker-Smith and another), and the three decisions are not discussing fraudulent research processes strictly speaking. The determination on Andrew Wakefield catalogues the numerous breaches in detail: carrying out a programme of investigations of research on 12 children without REC approval; misleading and dishonest description of the patient population; the irresponsible and misleading description of the



fraudulent.<sup>70</sup> Unlike what had happened in 1994, when Pearce's superior had been let off the hook in proceedings, here the senior investigator Walker-Smith, who had a supervisory role towards Wakefield, also faced disciplinary proceedings. The three decisions<sup>71</sup> examine the conduct of medical researchers in the MMR study. The GMC eventually erased Wakefield and Walker-Smith, and exonerated their more junior colleague. In the case of Walker-Smith, which also led to erasure, the SPM was not dishonesty, as he 'did not write or see the paper'. Instead he had been 'naïve' and 'irresponsible by lack of thoroughness.' Walker-Smith appealed individually to the High Court, which quashed the GMC finding and his erasure.<sup>72</sup> Note that following both the Pearce and MMR cases the related scientific articles were retracted. Retraction constitutes not only a way to correct the research record but a considerable sanction in its own right.

Following the publication of the *Indicative Sanctions Guidance* in 2004 the GMC's writing style has also changed to become more technical and legalistic. This shift indicates critical changes in how the GMC investigates, adjudicates and writes about research misconduct, and misconduct in general. According to the GMC staff, '(H)istorically, less information was given on the reasoning behind outcomes – and it was for this reason that cases were occasionally overturned in the high court (ie this was more a result of how outcomes were reported rather than a reflection of the strength of the evidence). Thus, there is now a much

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project and of the referral process in correspondence with journal and funders, contrary to the duty to ensure that information in the paper is accurate; dishonest statement about REC approval; breach of 'fundamental principles of research medicine'; and the use of invasive procedures when not clinically indicated. The FtPP carefully describes the funding arrangements in relation to the research, indicating how the misconduct also included the non-disclosure of conflicts of interests.

<sup>70</sup> Dyer (n 52). MP Graham Stringer confirmed this point during evidence-gathering meetings of the HoC Science and Technology Committee: 'the General Medical Council did not deal with whether his research was fraudulent or not': *HoC Report on peer-review in scientific publications* (n 2) at Q275; but see A Kirkland, 'The Legitimacy of Vaccine Critics: What Is Left after the Autism Hypothesis?' (2012) 37 *Journal of Health Politics, Policy and Law* 69-97.

<sup>71</sup> FtP, 24 May 2010.

<sup>72</sup> *Walker-Smith v GMC* [2012] EWHC 503 (Admin).

stronger emphasis on providing evidence of the reasoning behind particular decisions'.<sup>73</sup> The Panel begins to mention that it has 'borne in mind legal authority from previous Privy Council decisions.' It makes use of precedents and attempts to make its decisions more consistent, thus making casework grow more and more like case law.

Decisions have thus got significantly longer. Although it is commonplace to say that scientific research has become more complex to unpack, forms of research misconduct have become neither more sophisticated nor deserving of longer explanations. In fact, some argue that misconduct has become much simpler, as it responds to the game of metrics and aims for the authors to look good 'on paper'.<sup>74</sup> Inquiring about the increasing length, but also the form, style and recurring patterns of decisions, means looking at the questions of who are the audiences or publics of these decisions (apart from the individual registered practitioners hailed in the determinations), to whom the GMC imagines it speaks, and what these audiences (real and imagined) concern themselves with.

Apart from colleagues of practitioners facing hearings, the GMC's audience includes what the GMC imagines as the 'public.' In the aftermath of GMC reforms, fitness to practise adjudication has been revised and made more transparent. Under the transparency frameworks aforementioned, the decisions ought to be decided with input from the public (the reforms included lay members in the FtPP), but also shared with the public so that they can be assessed and questioned; hence the need for clarity in the written expression of the decisions.<sup>75</sup> The public cannot be there, but can nevertheless witness the adjudication virtually through detailed descriptions. This way the GMC can maintain and enhance its authority by getting the assent of the public, or its imagined assent. After the Liverpool Alder Hey organ retention scandal (to which I will return below), the GMC seemingly felt it had to

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<sup>73</sup> Personal communication with the author, 2013

<sup>74</sup> M Biagioli, 'Gaming the Game: Misconduct after Metrics', conference call for papers (University of California at Davis, 2015); Committee on Publication Ethics (COPE), 'Weighed and measured: how metrics shape publication (mis)behaviour' (COPE European Seminar 16-7 April 2015, Brussels).

<sup>75</sup> As in other documented contexts, the intended effect is that which is similar to 'virtual witnessing': S Shapin and S Schaffer, *Leviathan and the Air Pump* (Princeton University Press 1985).

show documentary vigilance and paperwork reassurance<sup>76</sup> and to crack down on research misconduct as a mark of its own regulatory and institutional public virtue.

Like other elite organisations, the GMC also writes for itself,<sup>77</sup> as a body that is distinct from the sum of its registered members. Indeed, 'files' are notorious for being replete with self-descriptions that are there to be read mainly by those who produce them.<sup>78</sup> In the context of professionalisation, these self-descriptions produce more of the much sought-after ethicality,<sup>79</sup> with the ensuing result that the authors can persuade themselves that they are ethical. In addition, since its procedural reforms the GMC needs to write with higher regulatory bodies and courts in mind.<sup>80</sup> As highlighted above, the audience of disciplinary proceedings has broadened in light of the increasingly important supervisory role of the state over medical self-regulation. To prevent its decisions from being considered 'unduly lenient' or 'insufficiently protecting the public'<sup>81</sup> by state regulator the Council for Healthcare Regulatory Excellence (CHRE), the GMC had to adopt a legalistic style that fulfils the requirements of regulatory oversight. Being legally conscientious, it also writes to potential judges who may have to scrutinise its rulings. The writing practices post-2002 employ what Halliday has termed as 'information bingeing'<sup>82</sup> in administrative law, a form of creative, very alert compliance to potential judiciary oversight or state supervision.

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<sup>76</sup> M. Power, *The audit society*, (OUP 1997).

<sup>77</sup> On how the Académie, which indulged in writing to itself (not only to its individual members) in contrast to the Royal Society who toiled very hard to obtain the assent of the 'public' see M Biagioli, 'Etiquette, Interdependence, and Sociability in Seventeenth-Century Science' (1996) 22 (2) *Critical Inquiry* 193.

<sup>78</sup> Vismann (n 15).

<sup>79</sup> M Thomson, 'Abortion Law and Professional Boundaries' (2013) 22 (2) *Social and Legal Studies* 191.

<sup>80</sup> S Pattinson, *Medical Law and Ethics*, 2nd ed, (London: Sweet & Maxwell 2006).

<sup>81</sup> Until the transfer to MPTS in 2012, these were the two grounds for a Section 29 case meeting to discuss court referral of FtPP decision: CHRE, Section 29 Process and Guidelines, 17 July 2009, see: <<http://www.professionalstandards.org.uk/docs/s29-general/s29-process-and-guidelines.pdf?sfvrsn=0>> (accessed 18 January 2016).

<sup>82</sup> S Halliday, *Judicial Review and Compliance with Administrative Law* (Hart, 2004), at 64.

Finally, whereas the 1990s cases are very general and not informative about what research probity and integrity mean for registered doctors, cases rendered after the publication of the *ISG* reveal in more detail the GMC's perception and construction of norms of science. The GMC demonstrates how it makes use of these shared norms in order to oversee the professionalism of individual practitioners, but equally to show its knowledge of and openness towards the particularist, tailored laws -- codes of ethics, guidelines and best practices -- that populate the world of scientific research.<sup>83</sup>

*Striking through as a transparency marker:*

Within administrative contexts, different 'technologies of visualization' can be activated in order to maximise transparency effects.<sup>84</sup> Vismann refers to Luhmann, who noted that letterheads, and especially the use of written bureaucratise, would possess a significant symbolic value for the presentation of such administrative work.<sup>85</sup> These 'effects' identified by Vismann point to the performativity of writing and echo the anthropological insight that texts are not addressing only those who can decode them.<sup>86</sup> Written texts can be used in multiple ways, which are not limited to reading and understanding. Audiences engage with texts by inventing, distorting, disseminating, reproducing them. That is why we need to pay attention to their physical effects.<sup>87</sup>

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<sup>83</sup> Reference removed.

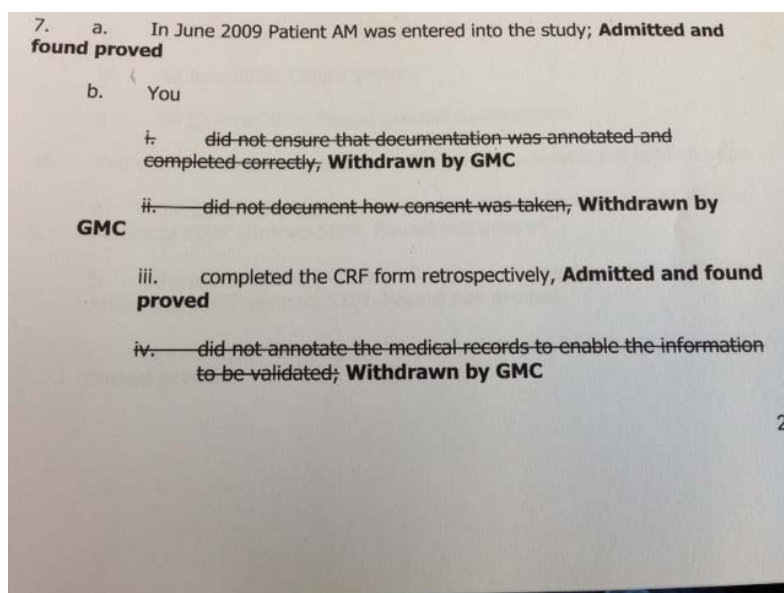
<sup>84</sup> Vismann (n 15) at 146.

<sup>85</sup> Luhmann 1994, as cited in Vismann (n 15) at 146; and see R Kinross, 'The Rhetoric of Neutrality' in Victor Margolin (ed), *Design Discourse: History, Theory, Criticism* (Chicago: University of Chicago Press 1989) at 131.

<sup>86</sup> R Bélisle, 'Socialisation a l'écrit et pluralité du rapport a l'écrit d'acteurs du communautaire' in R Bélisle et S. Bourdon (eds), *Pratiques et apprentissage de l'écrit dans les sociétés éducatives*, Saint-Nicolas, (Les Presses de l'Université Laval 2006) 1-31, as cited in D Barton and Uta Papen, 'What Is the Anthropology of Writing?' in D Barton and Uta Papen, *The Anthropology of Writing* (London, Bloomsbury, 2010), 3-32.

<sup>87</sup> R. Chartier, *Lectures et lecteurs dans la France de l'Ancien Régime* (Paris, Seuil 1987) as cited in Barton and Papen (n 72).

Fig.1: An example of strikethrough on text in a GMC determination



The use of strikethrough within the text of determinations itself, in order to obliterate heads of charge that are no longer relevant, illustrate what 'technologies of visualization' look like and do. In the GMC and other tribunals' determinations, striking through text effectively erases heads of charges at the last minute, and in doing so produces new knowledge, by making evident relations, networks, evidence rules and negotiations at play in the background of the decisions. It thus shows how provisional and not inevitable the determinations are. Like the 'brackets' that enclose alternative formulation of a draft text during international law making negotiations, the strikethrough is an inscription, a shared code that marks time. But whereas 'brackets' in international documents format a possibility towards a potentially infinite realm of other topics or reformulations whose entry in or exit from the official 'clean' text is suspended,<sup>88</sup> the strikethrough points to a closure. Unlike bracketed language, text under strikethrough has already been disqualified, and contains no hope. Instead it captures time by materializing a certain kind of professional reflexivity, which already happened.

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<sup>88</sup> Riles (n 28).

The strikethrough also conveys peculiar relationships and shows a history that is literally 'cut on the pattern of mutilated documents', to use Veyne's phrase.<sup>89</sup> In this sense, it resonates with historical anthropologists' preoccupations with treating archives not as storehouses of true facts, but *for themselves*, as 'complexly constituted instances of discourses that produce their objects, that is, as existing prior to and outside of discourse'.<sup>90</sup> By letting us 'see through' the labour of writing, scrapping and rewriting, the strikethrough effectuates quite a remarkable aesthetics. With the strikethrough, the so-called neutrality and objectivity of documentary sources, which had collapsed following the debunking work of historical anthropologists,<sup>91</sup> get re-performed literally as sub-products of transparency.

The efficient repairing of texts most often entails that the process for doing so does not leave traces. Broken, obsolete or invalid elements get obliterated (sometimes after having been bracketed) and the thing is restored, but the various operations to get to this result are not made visible.<sup>92</sup> The digital age not only allows but suggests by default that deletions and other edits occur behind the opaque curtain of the final version of a document. Here, in contrast, the inscribed reparation and correction in the text are themselves made visible, thus creating the above-mentioned transparency effects.<sup>93</sup> The appeal of the strikethrough might reside in that it seems to emphasise the materiality of the GMC determination. As Crowley suggests, it allows 'designers,' here the drafters of the determination, 'to go against the grain of the digital age. Unlike the dematerialisation effected by the screen, overprinting stresses

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<sup>89</sup> P Veyne, *Writing History: Essay on Epistemology*, (Wesleyan University Press 1984) at 13.

<sup>90</sup> B Axel, 'Historical Anthropology and its Vicissitudes', in B Axel, ed *From the Margins: Historical Anthropology and Its Futures*, (Duke University Press 2002) 1-4, at 14.

<sup>91</sup> C Kaplonski, 'Archived Relations: Repression, Rehabilitation and the Secret Life of Documents in Mongolia' (2011) 22 (4) *History and Anthropology* 431.

<sup>92</sup> S Graham and N Thrift, 'Out of Order: Understanding Repair and Maintenance' (2007) 24 *Theory, Culture & Society* 1-25.

<sup>93</sup> D Pontille, 'Écriture et action juridique: Portrait de l'huissier de justice en réparateur' (2009) 28 *Semen* 15.

the textures of paper and ink'.<sup>94</sup> The paper on which the strikethrough is printed acts as a surface with a depth of sorts, with the capacity to retain, accumulate layers of scripts, a bit like a palimpsest.<sup>95</sup> Whereas traditional palimpsests ultimately enmesh these layers, the page frame of the GMC determination is only a reduced version of such palimpsests, as it has a limited number of layers -- two at most -- and retains clarity between layers: the adjudicator has made a decision, one formulation has been discarded.

Why is this important? The strikethrough highlights and thus keeps visible alterations to substantive heads of charge, or to details of how these charges were redacted by the GMC, because these alterations were effectuated at the time of the hearing itself. It thus indicates that the allegations are flexible and open to change at different junctures. It makes the document a live entity of sort, and this serves as a reminder that many other changes have or could have occurred in the triage and adjudication and decision-making process. Within the surface of the page, whose perimeter provides a frame to the text in the sense meant by de Certeau,<sup>96</sup> there could be other readable possibilities.

In addition, examining what happens and might possibly happen under the practices of striking through texts is an occasion for grasping what gets foregrounded and what gets lost in adjudication. As mentioned above, striking through texts displays more than it hides, and can thus be contrasted with other forms of erasure like sanitization, blackout, shredding and with simply leaving things out of the written determinations. What is left out of the determinations – the cases that do not reach the panel, the kinds of breach of conduct that are not seen as significant enough to be spelled out, in other words what is not there -- serves as a reminder of the contingency of what *is* there. The strikethrough is a visible erasure that makes its own process visible, but it also signals an operationalisation of legal and bureaucratic process that is tentative, non-systematic, and transitory.

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<sup>94</sup> Crowley (n 22) at 8; and see R Walker, 'Highlight Your Errors: The Paradox of the 'Strike Through' Mode' *The Christian Science Monitor*, July 9, 2010; N Cohen, 'Crossing Out, for Emphasis', *New York Times*, 23 July 2007.

<sup>95</sup> M Graham, 'Neogeography and the Palimpsests of Place: Web 2.0. and the Construction of a Virtual Earth' (2010) 101:4 *Tijdschrift voor Economische en Sociale Geografie* 422-36.

<sup>96</sup> M de Certeau, *The Practice of Everyday Life* (Berkeley: UCP, 1984) at 134-5.

### ***Authenticating***

The GMC made clear at the outset of its decision about Wakefield that ‘this case is not concerned with whether there is or might be any link between the MMR vaccination and autism’.<sup>97</sup> In other words, the case was not about whether Wakefield’s findings were right or wrong. The issue was Wakefield’s honesty and integrity in the way he conducted his work. This is not exceptional: the GMC consistently makes explicit that it wishes to avoid discussing the reliability, quality or rigour of the medical research about which there is an allegation of misconduct, provided that it is within the remit of conventional medicine (I will return to this proviso below). Questions as to whether the researcher is right or wrong, or whether the device, medicine or treatment under research actually bettered or harmed patients’ health, are left out of the GMC’s disciplinary remit. Instead, the GMC claims to restrict itself to the individual conduct and obedience to legal and regulatory authenticating norms -- such as good record-keeping norms -- and to whether the individual practitioner has ‘slowed down’ her route a little, for instance by taking the appropriate detour such as a research ethics committee, or by accepting interruptions like the consent of research participants or co-authors in the appropriate form. The question is often whether the practitioner has produced enough of the required hesitation<sup>98</sup> or due diligence before or whilst acting, and whether this hesitation is made visible in the records. What these matters for concern have in common is that they verify, authenticate the conduct of the practitioners in the eyes of the GMC, and writing practices such as the strikethrough fit squarely in this category.

For example, in a 1999 case, a doctor was erased from the GMC Register for breaking a trial code designed to prevent bias in RCT.<sup>99</sup> Colleagues had questioned the validity of the doctor’s measure for obtaining results. Again, the PCC carefully mentioned that they were

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<sup>97</sup> GMC Fitness to Practise Panel, 28 January 2010.

<sup>98</sup> B Latour, ‘Morality and Technology: the end of the means’ (2002) 19:5-6 *Culture Theory and Society* 247.

<sup>99</sup> PCC, 4 October 1999.



'not directly concerned with the scientific argument relating to this validity, which remains unresolved my experts, but consider that [the colleagues'] concerns were reasonable.' The PCC told the doctor: 'You had a duty to give them adequate consideration and failed to do so,' and took note of his 'dishonest attempts to mislead those enquiring into the matters.' In other cases, doctors were able to refute or mitigate charges of misconduct by pleading integrity, good faith and benevolent motives.<sup>100</sup>

A remarkable case from 1992 confirms this unspoken norm but clarifies that it operates as long as it is within the confines of conventional medicine. Almost twenty years before the MMR case, two doctors had to stand before the PCC following their dissemination of Ayurvedic medicine information amongst the HIV population in the late 1980s and early 90s. In the conclusion of its brief determination about the two doctors, the PCC clarified as usual that 'it was not the function of the Committee to assess the relative merits of differing forms of treatment or approaches to medicine adopted and practised by doctors in good faith.'<sup>101</sup> However, here the PCC also noted that the doctors, despite being of 'good faith', did not follow GMC guidance of good medical practice, eg to refrain from publicising in the popular press positive results for new therapies which had not yet undergone approved clinical trials, and to refrain from promising unproven results for experimental therapies. 'Faith' in a therapy is thus not interpreted as necessarily conducive to good medical practice. If clinical trial approval can be conceived of as a proxy for good medical practice, impeccable integrity and 'good faith' in themselves cannot replace the rigour of an approved clinical trial.

This GMC discourse about the importance of not engaging in evaluating the scientific validity of the medics' research has remained generally consistent in the last two decades. However, the GMC's practice of ascribing normative value to authenticating aspects of the medical research has shifted considerably, as the contrast between the following two cases shows. By authenticating, I mean the aspects of the research that pertain to conduct and form, and

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<sup>100</sup> FtPP, 7 April 2008.

<sup>101</sup> Report of the Professional Conduct Committee, GMC 1992 Minutes, at 23.

whose demonstration verifies but also signals the integrity of the research, the visible fact that it is unimpaired or uncorrupted.<sup>102</sup>

One 2001 case dealt with the very act of signing forms, a staple activity in medical research.<sup>103</sup> A doctor was alleged to have misleadingly signed forms about a patient/participant he had not himself conducted physical examination on. The PCC was satisfied that the doctor had no intention to mislead, that he believed the examination had been conducted by other doctors and thus signed the form in good faith without intention to convey false information. Amongst other things, this case includes a most interesting reference to form-filling customs in the context of research.<sup>104</sup> The PCC is attuned to the particular character and function of the forms in question:

‘These forms, which were more appropriate for use in general practice than in a hospital setting, have to be read in the context of a clinical trial where the procedures adopted by the research team were known to the MRC and where the forms referred as much to an assessment as to an examination. In these circumstances your signature did not convey a misleading impression.’<sup>105</sup>

Here the signing of forms is conceived as a ‘mere’ technicality that did not authenticate the integrity of the research. The way forms are signed amongst members of the research team is rather seen as a neutral matter of pertaining to the organisation of work and the hierarchy of professions. Accordingly, the fact that the individual researcher who signs an examination form has not personally examined the patient in question would say very little about the integrity, or lack thereof, of this researcher.

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<sup>102</sup> S Haack (2007) ‘The Integrity of Science: What It Means, Why It Matters’ in *Ética e Investigação nas Ciências da Vida – Actas do 10 Seminário do CNEV*, (Lisboa: CNEV 2007) 9-28.

<sup>103</sup> PCC, 6 July 2001.

<sup>104</sup> Reference removed.

<sup>105</sup> PCC 6 July 2001.

In contrast, a more recent case involved the destruction of research records and ‘setting the record straight’ which the FtPP termed as ‘wholly inappropriate and clandestine,’ as well as forgeries of signatures, dual recruitment and its disguising.<sup>106</sup> Again, keeping away from assessing scientific validity, in this 2012 determination the FtPP highlighted the standards on the conduct of research as required by the GMC’s *Good Medical Practice* 2006 on ‘probity’ (paras 56-7) and ‘research’ (paras 70-1), and engaged with a misleadingly technical rule of good research practice: the proper way to make a correction. The FtPP made it clear: ‘[P]utting a line through the original record and adding correction is the appropriate way to correct so that it remained available for all to see.’ In this case the doctor had initially forged data and colleagues’ initials on a vaccination log sheet. After being confronted by a nurse whose signature had been forged, and in order to wipe away his forgeries and ‘set the record straight,’ he had destroyed records and replaced them with new ones of his own invention. Correcting one’s mistake, here, would have demanded a visible amendment, via striking through the forged data and signatures. The visible technique of striking through text encapsulates an ethical conduct and in turn authenticates the research, in contrast to the ‘clandestine’ amendment to one’s conduct by destroying records and starting all over again.

What the above highlights is not that the strikethrough is deceptively technical, but rather that technical things like striking through are deceptively innocent or unimportant. As anesthesiologist and lawyer Wendy Kang remarks, in medicine ‘it used to be near-impossible to change paper documentation without some obvious trace. One marked through the original entry with a single line and initialed the strikethrough’.<sup>107</sup> To Kang, this preserved the integrity of the records, but also of ‘the progression of thoughts’.<sup>108</sup> By increasing the ease of cutting, copying and pasting, electronic medical records have made information more legible but also more changeable. Making alterations visible requires an effort that, to quote Crowley again, ‘goes against the grain of the digital age of documents’.<sup>109</sup> Striking through texts to make a

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<sup>106</sup> FtPP, 13 January 2012.

<sup>107</sup> WB Kang, ‘WLN: ‘Within Normal Limits or ‘We Never Listened’?’ (2014) 78(3) *American Society of Anesthesiologists Newsletter* 16-8, at 16.

<sup>108</sup> *Ibid*, at 17.

<sup>109</sup> Crowley (n 22).

correction undeniably speaks of a certain ethical conduct or effort -- since going against the grain requires an effort. This potentially strengthens the claim that ethics has an increasingly strong bureaucratic essence<sup>110</sup> because here the bureaucratic rule of conduct is not only a rule that governs research *ex ante* but one that takes the front stage in disciplinary proceedings.

It also shows how the GMC is interested in authenticating visible conduct as a marker of ethicality, that is, a claim on trust.<sup>111</sup> The FtPP addressed the doctor in these terms: '... the nature of your research fraud and its potential damage to the integrity of research as an important arm of medical science is such that public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.'<sup>112</sup> After considering mitigation, it sanctioned this transgression by a senior researcher with a 4-month suspension.

A legitimate question is whether the tendency to refrain from judging the validity of science, and conjure instead the conduct of actors, could be explained by the mixed level of expertise of members of the panels. Since the 2003 procedural reforms, panels include lay and professional members, and the former may be more competent to assess conduct than substantive science. However, the literature on peer-review and other modes of self-regulation<sup>113</sup> suggest that a deliberate focus on conduct, rather than on the substantive component of science, stems from something far more intense than just decision-making shaped by one's knowledge or knowledge deficit. In other words, even if the panels had scientific knowledge to assess scientific validity it is very unlikely that they would do so. This has something to do with the remit: the assessment of misconduct in the form of individuals, and the sanctioning of these individually shaped misconducts by striking them one at a time.

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<sup>110</sup> Reference removed.

<sup>111</sup> Thomson (n 79); E Freidson, *Profession of Medicine: A Study of the Sociology of Applied Knowledge* (University of Chicago Press 1988).

<sup>112</sup> FtPP, 12 January 2012

<sup>113</sup> Schaffer & Shapin (n 62).

So far, as a motif of display and authentication, the strikethrough literally made writing and recording more visible. In the next section, the strikethrough becomes evocative: it can be used to understand something else. In other words, it becomes a metaphor. The names of practitioners found impaired do not literally have a line through them, but they are similarly struck through when they are sanctioned, because their name is singled out and hit accordingly. The next section elaborates on this shared aesthetic of striking through text and striking off an individual practitioner.

### *Isolating*

A third pattern of determinations is the incongruity between increasingly recognised conceptions of systemic research misconduct, and the persistent individualising of conduct that underpins GMC determinations. A close look at the GMC's engagement with the Liverpool Alder Hey organ retention scandal allows me to explore how an individualised version of misconduct almost unavoidably leads to the isolation of practitioners, and to the striking out that such isolation permits. The striking off of practitioners thus illustrates my third found characteristic of regulatory gestures towards misconduct.

The 'organ retention scandal' has become well known for exposing various ethical breaches in foetal and infant pathology research in Britain. For example, the retention and poor storage of organs from foetuses and infants, obtained without parental consent under the programme on sudden infant death syndrome, ran at the Liverpool Alder Hey hospital between 1988 and 1994.<sup>114</sup> The Redfern *Inquiry Report*<sup>115</sup> on the organ retention scandal highlighted that the legal framework regulating human tissue research at the time (the *Human Tissue Act 1961*)

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<sup>114</sup> The FtP Panel determination described numerous breaches: examination of research material (organs of infants) carried without the authority of the person legally in possession of the body by reason of the Human Tissue Act 1961, and examination carried in breach of the limited consent obtained (for a 'small incision'), and having 'knowingly disregarded parents' wishes and expectations'; failure to complete post-mortem reports within proper and reasonable time; misleading or false post-mortem reports with respect to weight and sections of organs.

<sup>115</sup> M Redfern, and J Keeling, *The Royal Liverpool Children's Inquiry: Report* (January 2001): <<http://webarchive.nationalarchives.gov.uk/20111202162649/http://www.rlcinquiry.org.uk/download/index.htm>> Accessed 18 January 2016.

was 'obscure,' 'weak' and 'poor', and had encouraged bad practice to flourish.<sup>116</sup> The *Report* also spoke of managerial inadequacy.<sup>117</sup> Nevertheless, and even though the *Report's* main objective was 'to examine the long history of organ retention following post-mortem examination', almost half of it was 'devoted to the research practices of a single doctor'.<sup>118</sup> The scandal provided an opportunity for the GMC to show --- a year after the enactment of its new fitness to practise procedures -- how it could, if not crack down on research misconduct *per se*, strike off a dysfunctional individual who had practised 'outside the boundaries of acceptability' and was 'out of touch with people's feelings'.<sup>119</sup> Following the events, seventeen doctors were referred to the GMC, three had a full hearing, and one, van Velzen, was found guilty of SPM and erased from the Register. Note that, despite the extreme nature of his misconduct, van Velzen escaped criminal conviction. In this case the GMC was the only locus of individual sanctioning. It is the gesture of going for the individual practitioner that interests me analytically, whilst I am conscious of the GMC's limited regulatory remit. Indeed, I see these limits and their application to Liverpool Alder Hey, as yet another instantiation of my figure of the strikethrough.

Given that the existing regulatory remit of the GMC is to focus on whether an individual practitioner's future fitness to practise is impaired (and depending on the outcome, to take appropriate action to protect the public), the institutional and systemic aspects of research misconduct do not get discussed in hearings. I argue that the individualised version of misconduct is captured by the metaphor of strikethrough, as it is also a metaphorical extension of the literal erasure of the practitioner from the Medical Register.

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<sup>116</sup> ET Hurren, 'Patients' rights: From Alder Hey to the Nuremberg Code' (2002) *History & Policy: Policy Papers*, available at: <<http://www.historyandpolicy.org/papers/policy-paper-03.html#further>> Accessed 18 January 2016.

<sup>117</sup> H Pennington, 'Myrtle Street' (2001) 23: 5 *London Review of Books* 21.

<sup>118</sup> id.

<sup>119</sup> Id.

Apart from indicating a mistake, highlighting change, or excluding data, the strikethrough can also signify erasure, crucially so in the context of the GMC's regulation of doctors. Here the metaphor 'strike' contains a violence that is much more forceful than 'remove,' 'delete,' or 'withdraw,' as of course it resonates and cites the 'struck' in 'being struck off' from the Register. Erasure is an essential component of professional conduct and fitness to practise casework. It means that the name of the doctor is literally erased from the List of Registered Medical Practitioners (LRMP), commonly known as the Register. The Register is made of names of doctors and include information about the doctors' reference numbers, gender and any former names, the year and place of doctors' primary medical degrees, and of course their status on the Register, including whether doctors hold a licence to practise, the date of their registration, entry on the GP and Specialist Registers, as well as any publicly available fitness to practise history post-2005. The provision of such a single register has had an immense impact in consolidating the unity of the medical profession. Stacey noted that the control of who can be entered and temporarily or permanently removed from the Register, as well as the maintenance and publication of the Register, together constitute nothing less than the 'essence' of the GMC's power.<sup>120</sup> After being published in book form between 1859 and 2004, the Register has since been kept online and updated daily on the GMC website. Its publication and physical availability enhance its potential to protect the public.<sup>121</sup>

To have one's name crossed out from the List is the ultimate disciplinary sanction an individual registered practitioner can possibly receive. The Privy Council has repeatedly described erasure as a draconian measure, reserved for the most severe cases.<sup>122</sup> Note the inherent violence in terms: to be struck off, to be hit. As highlighted above, erasure, but also suspension and conditional registration, operationalise a perspective that isolates the individual and his/her fitness to conduct research. Time and again this approach has been

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<sup>120</sup> M Stacey, *Regulating British Medicine: The General Medical Council* (London: Wiley, 1992) at 11.

<sup>121</sup> C Davies, 'Registering a difference: Changes in the regulation of nursing', in J Allsop and M Saks (eds), *Regulating the Health Professions* (London: Sage 2002) at 100.

<sup>122</sup> R Smith, *Medical Discipline: The Professional Conduct Jurisdiction of the General Medical Council, 1858-1990* (Oxford: Clarendon Oxford Socio-Legal Studies, 1994) at 183.

criticised by commentators for using 'scapegoats' as a proxy for institutional self-scrutiny.<sup>123</sup> The idea is that the regulator identifies the individual who fits the figure of the 'bad apple' at the time, and removes this bad apple from the barrel, as opposed to examining institutional aspects of research misconduct. Dr van Velzen, pictured as 'pathological' during the Public Inquiry, was made strange and foreign to the barrel of good apples. The narration of his biography in the media completed the portrait of isolation and otherness effectuated by his striking off: van Velzen had trained as a medic in the Netherlands and came to England after a career on the Continent.

As a technique of exclusion, erasure is distinct from the ban. The 1858 Act never envisioned a ban on those who are unregistered (or that the Council were not prepared to register). Such practitioners are still not banned today as they can practise in an unregulated manner. Registration does not restrict practice itself but restricts the use of titles, and thus confers advantages of registration (advertising as registered medical practitioners, ability to work in public institutions). Because erasure does not ban, practitioners who have been struck off can continue their activities without using their protected title.<sup>124</sup> This is particularly relevant in cases where some specific activities can be separated in time and space from other professional activities, as academic and research related tasks could.

If examined with the evocative metaphor of the strikethrough, erasure suggests that the names of the culpable ones have a black line running through them. We can understand this better by looking at just how this removal materialises. The Register does not display the names of those erased with a black line through them. The striking off of practitioners used to take the form of the removal of the name from the papered list. Today, the on-line Register mimics the aesthetic of the strikethrough, as it keeps the name of practitioner in the on-line database – in other words it is not just removed from the text of the list, as this would

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<sup>123</sup> A Kerr, 'Are the media manipulating the GMC?' (1998) 316 *BMJ* 1607; M Fitzpatrick, 'Roy Meadow: the GMC's shame' (2005) 55: 517 *Br J Gen Pract* 647.

<sup>124</sup> Council for Healthcare Regulatory Excellence, *Protecting the public from unregistered practitioners: tackling misuse of protected title* (London, CHRE 2010) at 17.



somewhat hide the stigma of sanction. Instead the Register contains a notification that the practitioner is erased: this is the visible alteration to the text. The same aesthetic of isolated erasure remains.

Further, when sanctioned practitioners are erased from the Register in the paper or electronic forms, they are not removed from the profession *per se*, so their names still appear somehow in the broader, lasting 'social' list (of medical school graduates, for example). When a sanction is inscribed on the Register, the strikethrough is a metaphor for what it means to have a name that now comes with a line through it.

Here, the strikethrough can be linked to the concept of *sous rature*,<sup>125</sup> 'under erasure,' as it gives us a key to grasp what striking off does in terms of isolating one element of an otherwise intact structure. In critical theory, being 'under erasure' has a temporary, in-the-meantimeness about it.<sup>126</sup> In our context, the striking off of a doctor might be a 'temporarily adequate (but only just)' measure that gets handed over as a single, unified response to the complex challenges that the complaints and ensuing decisions foreground. The striking off can be construed as a cosmetic remedy to the symptom rather than the cause. Or, in the face of public scandal like that Liverpool Alder Hey, striking off a practitioner acts like 'chunks of flesh that keep the great beast calm'<sup>127</sup> whilst structures and the dissatisfaction with them remain intact.

In addition, the erasure of a doctor signifies that the Register is a divisible aggregate of parts, that the doctor is thus detachable from it without this affecting the integrity of the Register.

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<sup>125</sup> In this article I do not use the *sous rature* in the way it has been developed by Heidegger and then Derrida. For Derrida, *sous rature* is used to problematize/challenge/rethink the choice of words. Putting a word *sous rature* (~~like this~~) means to mark and thus recognize that something is potentially unresolvable about that term: since the term is inadequate, it is erased; since it is necessary, it remains legible: G Spivak, 'Translator's Preface', *Derrida's Of Grammatology*, (John Hopkins University Press 1976), at xviii.

<sup>126</sup> Note that for Derrida, the strikethrough is thought to mark both 'untenability' and 'for-the-moment-at-least necessity.' F Orton, *Figuring Jasper Johns* (Reaktion, 1994), at 227.

<sup>127</sup> A Phillipoulos-Mihalopoulos, *Niklas Luhmann: Law Justice Society* (London: Routledge 2009) at 66.

This aligns with the idea of the list as technique, which according to Belknap, manages to join and separate at the same time.<sup>128</sup> Alike the strikethrough it effortlessly co-habits with, the list is far from being innocuous. Apart from embodying concerns about efficiency and transparency, lists can be highly political.<sup>129</sup> The unified, non-hierarchical ordering of all practitioners in an alphabetically ordered list, for instance, stirred controversy for College of Physicians members who faced the 'awful prospect that in law the activities of the physician might be seen in the same light as those of a common tradesman'.<sup>130</sup>

To justify its approach to adjudication the GMC makes explicit its remit, which is to uphold standards of the medical profession and uphold confidence in the medical profession. This large remit *could* allow for discussing issues beyond those pertaining to the conduct of single individuals. For instance, the Solicitors Regulation Authority (SRA) and the Solicitors Disciplinary Tribunal (SDT) often do investigate at the firm/institutional level as opposed to just individuals.<sup>131</sup> Instead, as captured above by the modality of isolation, the narratives of my dataset are all hyper-individualised accounts of research misconduct. They leave untouched what *British Medical Journal* editor-in-chief Fiona Godlee calls 'institutional research misconduct',<sup>132</sup> risky environments, as well as the toxic 'old boys' culture' of the kind that led to a similar scandal prior to Alder Hey's.<sup>133</sup> The reluctance to stray beyond an assessment of individual fitness to practise is a distinctive feature of the GMC's regulatory

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<sup>128</sup> In the list, 'separate units cohere to form some function as a combined whole' whilst 'the individuality of each unit is maintained as a particular instance, a particular attribute, a particular person or object': R Belknap, *The List: uses and pleasures of cataloguing* (New Haven: Yale University Press 2004) at 15.

<sup>129</sup> M Valverde, *The Law's Dream of a Common Knowledge* (Princeton: PUP 2003) at 160.

<sup>130</sup> I Waddington, *The medical profession in the industrial revolution* (Dublin: Gill & Macmillan, 1984), at 100, as cited in Stacey (n 106) at 18.

<sup>131</sup> Thanks go to Paula Case for this interesting pointer. See: <<http://www.sra.org.uk/solicitors/enforcement/we-are-investigating-you/good-practice.page>> Accessed 18 January 2016.

<sup>132</sup> F Godlee, 'Institutional research misconduct' (2011) 343 *BMJ* d7284.

<sup>133</sup> P Butler, 'The Bristol Royal Infirmary Inquiry: the issues explained' *The Guardian*, 17 January 2002; D Irvine, *A Doctors' Tale: Professionalism and Public Policy* (Oxford, Radcliffe, 2003).

approach – particularly given that institutional culture, broadly speaking, is at the forefront of recent concerns over the conduct of biomedical research<sup>134</sup> and of patient safety in healthcare.<sup>135</sup>

The above focus on the sanction as strikethrough might give the impression that the GMC determinations are oblivious to contextual factors of an individual misconduct case. That is not the case. Let me clarify: context is indeed essential to the assessment and sanctioning of doctors and in a remarkable way, precisely as it cohabits with the technical logic of the list and the aesthetic of the strikethrough. In cases where misconduct is established, the working out of mitigating circumstances puts the sociality of the doctor to the foreground. Yet during the consideration of mitigating factors, the figure of the individual doctor can swiftly recede back, as his or her work pressures, stress, interpersonal relationships (with family members, peers, or with patients to whom he or she apologises) are put to the foreground. Fitness in the future is intimately connected to fitness to operate with others, with peers, colleagues, patients or research participants. So context is brought back powerfully to the foreground in the context of mitigation: ‘context of the time’ or family, work pressures etc.

The resulting insight is neither an acclaim nor an activated critique of ‘context’ as a contrast to isolation. Instead, I note the highly temporal nature of fitness to practise. Individual medics are made (and kept) fit to practise, and at times seen as temporarily removable from the site - - the Register. When suspended, the doctor -- who, remember, is detachable from the list -- is ‘on hold’. Depending on the circumstances, fitness is something that can be lost and regained in time. Fitness is future oriented, and in this sense has an essentially contextual quality. Scholars have considered how apologies and insight, for instance, have been used by medical practitioners to look at past conduct in order to send helpful signals about their projected fitness to practise.<sup>136</sup>

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<sup>134</sup> Jackson (n 4).

<sup>135</sup> Mid-Staffordshire NHS Foundation Trust (Chair Robert Francis), *Report on the Mid-Staffordshire Foundation Trust Public Inquiry*, (London: The Stationery Office, 2013).

<sup>136</sup> Case (n 44).

Further, the doctor can also be removed from certain settings only. In cases of research misconduct the doctor can have conditions placed on them, such as not to conduct research activities. This depicts the individual professional as divisible, an aggregate of a Principal Investigator, an administrator, a good citizen in the community, someone who cares for patients. Accordingly, certain components of the individual can be singled out whilst others remain intact, in which case the individual remains on the Register but is forbidden from conducting certain activities for a fixed period of time.

### ***Conclusions***

I hope the above has provided helpful illustrations of the contemporary style and scale of regulatory responses to research misconduct. The pattern of the strikethrough has been used as an evocative motif for the three sorts of gestures the GMC makes when it writes about misconduct in research.

First, the GMC has been incrementally displaying its own regulatory integrity. Instead of reactivating a critique of this effort as a form of 'spectacular transparency'<sup>137</sup> I have examined the materialisation of the professional reflexivity of the GMC via its handling of text itself, in particular its use of the strikethrough. Second, the GMC's scrutiny of the conduct, instead of substantial soundness of certain potentially risky research activities, denotes a firm concern with upholding the autonomy and discrete expertise of professionals. As a consequence, the writing practices a doctor uses to amend oneself -- either by striking through the error or starting from scratch -- get under scrutiny, and are translated in the language of probity, diligence and, in turn, of ethicality. Here, the strikethrough literally captures the kind of authenticating practice that the GMC is after. Third, by isolating specific individuals and sanctioning them one at a time, the GMC metaphorically strikes out with a black line the names of certain practitioners. The strikethrough is used metaphorically to reflect on the confines but also capabilities of the GMC's mode of sanctioning.

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<sup>137</sup> McGivern & Fischer (n 30).

The above should also show, implicitly, the limits of regulatory adjudication. The total absence of any discussion of risk in this article is telling. Amongst the regulatory deficits of the GMC, one can certainly note the lack of a risk-based or harm-based approach to research activities of doctors. 'Seriously deficient performance,' as one of the grounds for impairment according to the Smith test, can include for instance, 'poor record-keeping, poor maintenance of professional obligations of confidentiality'.<sup>138</sup> This could be crucially relevant when describing poor research practices or 'bad science'. However, neither 'seriously deficient performance' nor 'posing a risk to patients' has been invoked as grounds for impairment in the cases I reviewed.

Even if an organisation such as the GMC attempts to minimise, repress, conceal or control something, it does not mean that it will go away. The striking off of individual doctors in the aftermath of disasters or public scandals indeed resembles 'chunks of flesh thrown to keep the great beast calm,' and is simply not enough. This form of meagre repression may even subtly amplify the problem it aims to address.

What else is going on here? With the sort of archival material used here, the point is worth reiterating: here I did not aim to provide a 'representative' or 'exhaustive' picture. I hope the article conveys a more general point: that legal and socio-legal scholars do not have to put themselves in an epistemological and methodological position where they have to 'cope' with the constraints of working with the archive, but that they might instead 'celebrate[s] the constraints'<sup>139</sup> of archives. One way of doing this is by attending to forms and visualising what they evoke. Scholars might wish to provide readers with a connection to the material<sup>140</sup> as a possible alternative to working towards representation and demonstration. Calligraphy can provide that kind of evocative connection. It does not offer an overarching approach, but offers access to what is taken-for-granted in law, the textual stuff that precedes legal

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<sup>138</sup> *Sadler v GMC* [2003] UKPC 59; [2003] 1 WLR 2259.

<sup>139</sup> C Steedman, *Dust* (Manchester: Manchester University Press 2001), at xi.

<sup>140</sup> M Strathern, *Partial Connections* (Oxford: Alta Mira 2004) 7-11.

arguments. Amongst calligraphic forms, the strikethrough is particularly telling, as it lets us peep into the writer's process before the final product, rendering visible the making-of of law.

In this sense, my aim was also to unpack the deceptively mundane calligraphy of the strikethrough in law, so that we might acquaint ourselves with it as a tool that powerfully points to ethical problems 'furtively,' by way other than demonstration by argument.<sup>141</sup> The above shows how the strikethrough-as-device helps us to critically understand medical professional regulation of research *and* aspects of the regulatory process more elaborately, and perhaps with more nuance, than denunciatory critique or normative endorsement. By way of furtive interference, the strikethrough activates a critique of the process of regulating professionals. It does so even more fittingly here, in the current climate, where it is medical research practices and their written expression that get watched over.

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<sup>141</sup> R Storr, 'Fait et fiction: Sophie Calle. La femme qui n'était pas là,' M Groves trans (2003) 295 *Art Press* 23-28.