THE HAMLYN LECTURES

RICHARD MOORHEAD

Frail Professionalism?

Lawyers' Ethics after the Post Office and Other Cases

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FRAIL PROFESSIONALISM?

Bad lawyering has come under increasing focus though NDAs, SLAPPs, the banking crisis, and latterly the UK's Post Office scandal, an extraordinary legal scandal spanning more than 20 years that ruined thousands of lives. This book examines the commercial, cultural, legal, and psychological drivers of ethical failure weaving them together with case studies in a compelling account of what is wrong with lawyers' ethics. Rather than concentrating on a few bad apples, it shows how deep-seated traditions, psychological frailties, the complacency and aggression of well-paid lawyers, and the pragmatism, cynicism, and hubris of organisations combines to pollute decision-making and weaken the rule of law. Be it through awful orthodoxies or legality illusions, it shows how a lawyer's naturally uncomfortable relationship with truth and justice can become improper or even criminal. This title is also available as Open Access on Cambridge Core.

RICHARD MOORHEAD is Professor of Law and Professional Ethics at the University of Exeter and Professor of Law at Monash University. He sits on the UK Government's Horizon Compensation Advisory Board advising on Post Office compensation schemes. In 2024, he led the Post Office Project Team to the ESRC's Outstanding Societal Impact Prize for work on the Post Office scandal. He was awarded an OBE for services to legal ethics in the Birthday Honours list 2026.

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CAMBRIDGE
UNIVERSITY PRESS

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Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre,
New Delhi – 110025, India

Cambridge University Press is part of Cambridge University Press & Assessment,
a department of the University of Cambridge.

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www.cambridge.org
Information on this title: www.cambridge.org/9781009695220

DOI: 10.1017/9781009695190

First published 2026

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging-in-Publication Data
NAMES: Moorhead, Richard author
TITLE: Frail professionalism? : lawyers ethics after the post office and other cases / Richard Moorhead.
DESCRIPTION: Cambridge, United Kingdom ; New York, NY : Cambridge University Press, 2026. | Series: The Hamlyn Lectures (HAML)
IDENTIFIERS: LCCN 2025052174 | ISBN 9781009695220 hardback | ISBN 9781009695176 paperback | ISBN 9781009695190 ebook
SUBJECTS: LCSH: Judicial error – Great Britain | Great Britain. Post Office | Scandals – Great Britain – History | Legal ethics – Great Britain
CLASSIFICATION: LCC KD8464 .M66 2026
LC record available at https://lccn.loc.gov/2025052174

ISBN 978-1-009-69522-0 Hardback
ISBN 978-1-009-69517-6 Paperback

For the victims of the Post Office scandal
and those who have done or will now
do something about it.

CONTENTS

The Hamlyn Trust owes its existence today to the will of the late Miss Emma Warburton Hamlyn of Torquay, who died in 1941 at the age of eighty. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor and JP for many years, and it seems likely that Miss Hamlyn founded the trust in his memory. Emma Hamlyn was a woman of strong character, intelligent and cultured, well-versed in literature, music and art, and a lover of her country. She travelled extensively in Europe and Egypt, and apparently took considerable interest in the law and ethnology of the countries and cultures that she visited. An account of Miss Hamlyn by Professor Chantal Stebbings of the University of Exeter may be found, under the title 'The Hamlyn Legacy', in volume 42 of the published lectures. Miss Hamlyn bequeathed the residue of her estate on trust in terms which it seems were her own. The wording was thought to be vague, and the will was taken to the Chancery Division of the High Court, which in November 1948 approved a scheme for the administration of the trust. Paragraph 3 of the scheme, which follows Miss Hamlyn's own wording, is as follows:

> The object of the charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the

> knowledge of the Comparative Jurisprudence and Ethnology of the Chief European countries including the United Kingdom, and the circumstances of the growth of such jurisprudence to the Intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them.

At present there are eight Trustees:

From the outset it was decided that the objects of the Trust could be best achieved by means of an annual course of public lectures of outstanding interest and quality by eminent lecturers, and by their subsequent publication and distribution to a wider audience. The first of the Lectures were delivered by the Rt Hon. Lord Justice Denning (as he then was) in 1949. Since then there has been an unbroken series of annual Lectures published until 2005 by Sweet & Maxwell and from 2006 by Cambridge University Press. A complete list of the Lectures may be found on pages xi–xv. Recent lecture series may also be found care/of the Hamlyn Trust website at the University of Exeter, after a 5 year interim, courtesy of the CUP. Between 2005 and 2019 the Trustees decided to supplement the Lectures with an annual Hamlyn Seminar, which was normally held at the Institute of Advanced Legal Studies in the University of London, to mark the publication of the Lectures in printed book form. The Trustees have also, from time to time, provided financial support for a variety of projects which, in various ways, have disseminated knowledge or have promoted a wider public understanding of the law. This, the seventy-sixth series of lectures, was delivered by Professor Richard Moorhead at the University of Exeter on 30th October 2025 Chaired by Baroness Brenda Hale of Richmond, at the University of Leeds on 6th November 2025 Chaired by Paul Gilbert and at University College London on 13th November 2025 Chaired by Baron Arbuthnot of Edrom. The Board of Trustees would like to record its appreciation to Richard Moorhead, the three Chairs and also to the three institutions which generously hosted these Lectures, together with the Trust.

Professor Avrom Sherr
Chair, Hamlyn Trust

1949 Freedom under the Law by the Rt Hon. Lord Denning
1950 The Inheritance of the Common Law by Richard O'Sullivan
1951 The Rational Strength of English Law by Professor F. H. Lawson
1952 English Law and the Moral Law by Professor A. L. Goodhart
1953 The Queen's Peace by Sir Carleton Kemp Allen
1954 Executive Discretion and Judicial Control by Professor C. J. Hamson
1955 The Proof of Guilt by Professor Glanville Williams
1956 Trial by Jury by the Rt Hon. Lord Devlin
1957 Protection from Power under English Law by the Rt Hon. Lord MacDermott
1958 The Sanctity of Contracts in English Law by Professor Sir David Hughes Parry
1959 Judge and Jurist in the Reign of Victoria by C. H. S. Fifoot
1960 The Common Law in India by M. C. Setalvad
1961 British Justice: The Scottish Contribution by Professor Sir Thomas Smith
1962 Lawyer and Litigant in England by the Rt Hon. Sir Robert Megarry

1963 Crime and the Criminal Law by the Baroness Wootton of Abinger
1964 Law and Lawyers in the United States by Dean Erwin N. Griswold
1965 New Law for a New World? by the Rt Hon. Lord Tangley
1966 Other People's Law by the Rt Hon. Lord Kilbrandon
1967 The Contribution of English Law to South African Law and the Rule of Law in South Africa by the Hon. O. D. Schreiner
1968 Justice in the Welfare State by Professor H. Street
1969 The British Tradition in Canadian Law by the Hon. Bora Laskin
1970 The English Judge by Henry Cecil
1971 Punishment, Prison and the Public by Professor Sir Rupert Cross
1972 Labour and the Law by Professor Sir Otto Kahn-Freund
1973 Maladministration and Its Remedies by Sir Kenneth Wheare
1974 English Law – the New Dimension by the Rt Hon. Lord Scarman
1975 The Land and the Development; or, The Turmoil and the Torment by Sir Desmond Heap
1976 The National Insurance Commissioners by Sir Robert Micklethwait
1977 The European Communities and the Rule of Law by Lord Mackenzie Stuart
1978 Liberty, Law and Justice by Professor Sir Norman Anderson

1979 Social History and Law Reform by Professor Lord McGregor of Durris
1980 Constitutional Fundamentals by Professor Sir William Wade
1981 Intolerable Inquisition? Reflections on the Law of Tax by Hubert Monroe
1982 The Quest for Security: Employees, Tenants, Wives by Professor Tony Honoré
1983 Hamlyn Revisited: The British Legal System Today by Lord Hailsham of St Marylebone
1984 The Development of Consumer Law and Policy – Bold Spirits and Timorous Souls by Sir Gordon Borrie
1985 Law and Order by Professor Ralf Dahrendorf
1986 The Fabric of English Civil Justice by Sir Jack Jacob
1987 Pragmatism and Theory in English Law by Professor P. S. Atiyah
1988 Justification and Excuse in the Criminal Law by Professor J. C. Smith
1989 Protection of the Public – A New Challenge by the Rt Hon. Lord Justice Woolf
1990 The United Kingdom and Human Rights by Dr Claire Palley
1991 Introducing a European Legal Order by Gordon Slynn
1992 Speech and Respect by Professor Richard Abel
1993 The Administration of Justice by Lord Mackay of Clashfern
1994 Blackstone's Tower: The English Law School by Professor William Twining

1995 From the Test Tube to the Coffin: Choice and Regulation in Private Life by the Hon. Mrs Justice Hale
1996 Turning Points of the Common Law by the Rt Hon. the Lord Cooke of Thorndon
1997 Commercial Law in the Next Millennium by Professor Roy Goode
1998 Freedom, Law and Justice by the Rt Hon. Lord Justice Sedley
1999 The State of Justice by Professor Michael Zander QC
2000 Does the United Kingdom still have a Constitution? by Professor Anthony King
2001 Human Rights, Serious Crime and Criminal Procedure by Professor Andrew Ashworth QC
2002 Legal Conundrums in Our Brave New World by Baroness Kennedy of the Shaws
2003 Judicial Activism by the Hon. Justice Michael Kirby AC CMG
2004 Rights at Work: Global, European and British Perspectives by Sir Bob Hepple QC, FBA
2005 Can Human Rights Survive? by Professor Conor Gearty
2006 The Sovereignty of Law: The European Way by Sir Francis Jacobs KCMG, QC
2007 The Prisoners' Dilemma by Professor Nicola Lacey
2008 Judging Civil Justice by Dame Hazel Genn
2009 Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law by Lord Bingham

2010 Lawyers and the Public Good: Democracy in Action? by Alan Paterson
2011 The Rule of Law and the Measure of Property by Jeremy Waldron
2012 Aspects of Law Reform: An Insider's Perspective by Jack Straw
2013 The Common Law Constitution by Sir John Laws
2014 UK, EU and Global Administrative Law by Paul Craig
2015 A 'Magna Carta' for Children? – Rethinking Children's Rights by Professor Michael Freeman
2016 Fairness in Criminal Justice: Golden Threads and Pragmatic Patches by Dame Sian Elias
2017 Thinking about Statutes: Interpretation, Interaction, Improvement by Professor Andrew Burrows QC
2018 Making Comparisons in Equality Law by Robin Allen
2019 English Law under Two Elizabeths by Sir John Baker
2020 The Great Experiment: Constructing a European Union under the Rule of Law from a Group of Diverse Sovereign States by Eleanor Sharpston QC
2021 Advocacy by Lord Pannick QC
2024 Courts and the Body Politic by Professor Catherine O'Regan
2025 Laws for a Nation and Laws for Transnational Commerce by Lord John Thomas
2025 Frail Professionalism? Lawyers' Ethics after the Post Office and Other Cases by Richard Moorhead

For me, it was the perfect moment, personally and professionally, to be asked to give the Hamlyn lectures. More than once, I Googled the list of those who have given the lectures before me with unseemly pride. A sort of cup final for legal academics, I was – and remain – over the moon about it.

The lectures were both an honour and a fantastic experience. I would like to thank the Hamlyn Trust and their trustees for the invitation and support, as well as all those in the three universities – Leeds, University College London, and Exeter – who hosted and organised the evenings with aplomb.

When the invitation was made, none of us knew how big the Post Office story would become. The ITV drama *Mr Bates vs the Post Office* made for a rollercoaster year in 2024. As I had become heavily involved in work on compensation as well as research on the scandal, it was not the best time to be trying to write what I wanted to be the three best lectures I could manage, but it was the most propitious moment for them. The Post Office scandal, and the intense public and professional interest in it, helped guarantee an audience I could not have dreamed of otherwise. To everyone who came or who has watched lectures online: thank you. It means an enormous amount to me. To those who wrote to tell me what you thought, it is the sort of kindness that really does make a difference.

I reserve some special thanks to the three chairs of the lectures: Lady Hale, Lord Arbuthnot, and Paul Gilbert. Lady Hale has always been a keen supporter of legal scholars engaging with the real world; after lecture one, she was the first to ask a question and, of course, it was a telling one; James Arbuthnot is one of the heroes of the Post Office scandal and I have been proud to work alongside him on the Horizon Compensation Advisory Board; and Paul Gilbert has for many years provided intelligent and passionate support to me and the work that we do together with the in-house community. He has nourished the thoughts in this book.

A lot of people commented on the original text, and many have offered friendship, argument, support, and some helpful disagreement along the way. The arguments I set out here have been brewing for a long time. Steven Vaughan, Crispin Passmore, Iain Miller, Patricia Robertson KC, Sarah De Gay, Stephen Mayson, Lisa Webley, Joan Loughrey, Alan Paterson, Chris Hodges, Graeme Johnston, Jenifer Swallow, Juliet Oliver, Vanessa Davies, and the entirety of the LBC Faculty: thank you. The Post Office Project team (Karen Nokes, Rebecca Helm, Paul Gilbert, and Sally Day) are now taking this work further and you will be hearing more from us soon.

I have had a great deal of help but, if faults there be, let me blame the system or the SRA (not really) or ChatGPT – or, in the manner of ex–Post Office CEO Paula Vennells, let me blame myself for being too trusting or some such excuse. Typos persist despite Grammarly's best efforts to save me.

I should acknowledge too that the work you see in this book has often built on the work of lawyers in the Post

Office inquiry. Core participant and Inquiry lawyers have shown extraordinary diligence in sifting through mountains of (often late) disclosure. Their forensic skill in examining witnesses is something to be admired. They have, as you will see if you comb through the footnotes, offered those with an interest in legal ethics mountains of evidence. Invidious as it is, I am going to single out Julian Blake, who dealt incisively with much of the lawyer-related questioning, and of course Jason Beer KC, on whom so much ink has been spilt for being a consummate professional. Jason is a fellow graduate of Warwick Law School, which allows me to bask in glory by association, but also leads me on to two almost final thanks.

Professors Avrom Sherr and Roger Burridge were lecturers at Warwick Law when I joined as a gauche teenager. They taught a clinical course on legal practice and started me thinking about what lawyering was really about. It was a course that literally opened my eyes and brought law to life. They set me on this path and gave me some of the essential tools for it.

Finally, I have to say a few words about the subpostmasters and subpostmistresses, those employed in branches, and all the families who have suffered at the hands of the Post Office for what is no longer seen as a mere computer malfunction. I have had the privilege of meeting many now. They are the epitome of what we, perhaps patronisingly, think of as everyday folk, but they are not everyday: they are extraordinary. Whilst I naturally think what I have to say in these pages has merit, I cannot escape the concern that the interest in what I have to say is built on their pain. As a result, I feel both pride and guilt in working on this astonishing story.

We only see the men and women who feel able to sit before a TV camera or engage with the thrust of a journalist's microphone, but there are many also who cannot. Even now there are subpostmasters coming forward who no one knew about. There is so much pain, and it has spread through so many families, that my heart still thumps and my stomach churns whenever I think about it. They have been so badly wronged, and not just by the lawyers highlighted here. Sometimes, the courts failed them. Sometimes, their own lawyers failed them. Sometimes, their communities and families deserted them. The abuse of law often divided them from their own. Now people stand up for them – but for how long, I wonder?

Their stories are the most vivid lessons in the serious flaws in our justice system. I believe they show how lawyers need to change the way they think and act. This book is designed to help stimulate that change. It is dedicated to them.

This work was supported by the Economic and Social Research Council grant number ES/X005453/1.

1

Introduction

This book, and the Hamlyn lectures on which it is based, come at a time of unparalleled interest in lawyers' ethics. Several phenomena drive this interest. There has been growing political concern about the role of lawyers in enabling grand corruption by kleptocrats and oligarchs. Putin's invasion of Ukraine forced many law firms to rethink their business interests in Moscow and question whether there were wealthy clients for whom they will not act. This sort of client relationship, and the challenge to law firms representing businesses said to engage in the destruction of the environment, called into question lawyer claims to be simply promoting the rule of law through their representation.

As I write these words, Donald Trump has begun a campaign as president, using executive orders to punish law firms for cases they have brought for their clients, including for Trump's opponents, or their support for diversity, equity, and exclusion (DEI) policies.

The tactics of the wealthy and powerful when faced with investigative journalists, academics, and NGOs, often involving lawyers threatening what are labelled strategic litigation against public participation (SLAPPs), have suggested further concerns about the abuse of law, whilst the rise of the #MeToo movement has focused minds on the abuse of non-disclosure agreements (NDAs).

The book touches on many of these examples, and others. It was also written at a critical juncture: a moment of calamity for the legal profession and the legal system. That moment of calamity was the Post Office (PO) scandal. This has been described as the most widespread miscarriage of justice in England and Wales.[1] It is a story that is set out in the rest of this book. Hundreds and hundreds of ordinary men and women, as well as their families, had their lives ruined by legal action conducted for the PO. That legal action, and what followed it, involves questionable conduct by a great many lawyers across many years and many cases. The scandal is emblematic of how individual ethics and system failures can lead to profound injustice. It also speaks, I would say, to a significant problem of honesty and responsibility in political, commercial, and legal life. That problem is encapsulated in broader concerns about a cover-up culture but also a sense, amongst so many of the scandal's victims, that there is one law for them and another for the powerful: two-tier legality driven by what I define later as aggressive lawyering (see Chapter 6). I will argue that such two-tier legality and aggressive lawyering pose a risk to the rule of law.[2]

[1] 'The CCRC and Post Office/ Horizon Cases', *Criminal Cases Review Commission* (blog), 3 January 2024, https://ccrc.gov.uk/news/the-ccrc-and-post-office-horizon-cases/.

[2] Building on Richard Moorhead, Steven Vaughan, and Kenta Tsuda, 'What Does It Mean for Lawyers to Uphold the Rule of Law?' (Legal Services Board, London, 1 October 2023), https://bit.ly/4iZwd7F.

What Do I Mean by Unethical Lawyering?

The word 'ethics' has an interesting cadence in the consciousness of lawyers. It can provoke terror and resentment or the superior disregard of someone convinced that lawyers rise above the mere fluff of morality. It can trigger the hostility prompted by a personal challenge. If I raise a question about your ethics, I may appear to be challenging your decency as a person. That typically causes a reaction: a fight or flight reflex. The fight reflex is a response to the bristling fear of being labelled disreputable. The flight reflex helps the lawyer dismiss such an argument as irrelevant. Either the writer does not understand what lawyers *really* do or they are talking about bad-apple lawyers, and very few of us think of ourselves as bad apples. If we did, we would be unlikely to pick up the book in the first place.

To the reader that thinks, not unreasonably, that ethics is about other people lacking in moral fibre, the answer is straightforward: ethical misconduct is rarely about bad apples. It is not uncommonly a product of a difficult situation and bad decision-making in the moment. Ethical failure can happen to us all. Indeed, for many of us, it will already have done so.

This book seeks to explain what it is that might encourage such bad decision-making in the world of law and suggests ways of changing that. Understanding that is important to the proper functioning of a justice system worthy of the name and to keeping lawyers from sliding down the slippery slope presented by those difficult situations.

The flight reflex is joined by another idea: that of superior disdain. Under this way of thinking, ethics is a matter of personal morality. Law and lawyers are about something different to – perhaps superior to – that because, it is sometimes said, lawyers do 'law', not 'morality'. To that idea I would say: lawyers *do* do morality (sometimes well., sometimes badly) but this is not a book chastising lawyers for the morally questionable but otherwise lawful things they do for their clients. As interesting, and important, as the conflict between professionally permitted conduct and common morality is, this is a book about what professional principles require and why lawyers sometimes fail to adhere to those requirements.

It follows that the reasons why lawyers breach their professional conduct rules, and the ideologies or philosophies that underlie that, is what I mean when I talk about lawyers' ethics here. That does not mean I agree that lawyers do law and not morality, or that morality is not relevant. Indeed, I will argue that moral sensitivity about 'bad' decisions can be an important prophylactic against professional misconduct, but it is professional misconduct that I am primarily focused on.

There is a respectable line of argument that professional misconduct is not about 'ethics' at all, or that focusing on rules risks abandoning the richer values and motivations guiding a lawyer,[3] or that professional *ethics* should be

[3] Christine Parker, 'Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics, A', *Monash University Law Review* 30, no. 1 (2004): 49–74.

focused on what can be memorably described as the 'lawful but awful' actions of lawyers for their clients.[4]

I do not adhere to that view, for several reasons. One is that the line between what is lawfully or unlawfully awful is not uncommonly drawn by lawyers in ways that should bring professional misconduct questions to the fore but do not. In other words, awfulness often raises questions of lawfulness. Those questions are either ignored or fumbled in the kinds of decisions that we read about in this book. What lawyers think of in the moment as awful but lawful, or sharp but not illegal, turns out to be unlawful after all. A second, related reason is that I do not think that the central challenge to the profession's claim to be professional,[5] the central problem they face in upholding public trust and confidence, is a capacity for lawful awfulness. Lawful awfulness may diminish trust in the profession; I do not discount its significance, but to my mind, *un*lawful awfulness is the central (or, at least, the first) concern that any student or practitioner of the law should concentrate on when thinking of, or learning about, ethics.

[4] Steven Vaughan, 'Existential Ethics: Thinking Hard About Lawyer Responsibility for Clients' Environmental Harms', *Current Legal Problems* 76, no. 1 (2023): 1–34, drawing on Nikos Passas, 'Lawful but Awful: "Legal Corporate Crimes"', *The Journal of Socio-Economics,* Control *F*raud and *E*conomic *C*riminology 34, no. 6 (1 December 2005): 771–86.

[5] The profession is of course made up of multiple professions: Andrew Boon, 'Professionalism under the Legal Services Act 2007', *International Journal of the Legal Profession* 17, no. 3 (November 2010): 195–232. For elegance, I am going to refer to the singular save when emphasising differences between the different professions.

Thus, I agree that lawyers that choose to specialise in acting for oligarchs, kleptocrats, or climate destroyers often deserve criticism, not least when insinuating that they do such work to protect the rule of law rather than for business reasons. Their disingenuous rationale is properly the subject of moral criticism. It may also lead them to complicity in illegality that is more profoundly worrying, but the act of representing such people in and of itself is not ordinarily misconduct. Accepting that lawyers who clothe themselves in the rule of law as a flag of convenience can be properly criticised, does not justify criticism of criminal defence lawyers who do lawfully defend anyone accused of a crime, for instance.

Just as association with awful clients may weaken trust in the profession, so may the association of lawyers with acts 'generally' regarded as 'wrong', but I would distinguish between awful but lawful actions and professional misconduct. Sometimes, that distinction requires proper thought: NDAs that govern sexual misconduct allegations are a now famous example. At least until recently, the profession would implement NDAs without any thought; now there is greater awareness that real professional and legal issues depend on *how* lawyers have assisted with their execution.

So, I do not discount the importance of moral questions to professional legitimacy, still less exclude them from a notion of professional ethics, but I think it is important to concentrate on professional misconduct because it is fundamental; it is a *basic* expectation that lawyers adhere to their professional rules. Those rules are part of their law; they cannot be dismissed as the ethics of personal, idiosyncratic value judgments. Moreover, a failure to follow professional obligations can lead to even more serious problems. To stick with NDAs as an example, questions have been raised about whether lawyers may have perverted the course of justice and breached their professional conduct rules when drafting draconian gagging clauses.[6] Such (alleged) examples suggest that lawyers too often discount problems with the legality of their actions, if they think about them at all, and, as I will explore, use inadequate notions of professional ethics to ignore, discount, or excuse professional misconduct. This points towards one of my central concerns: professional misconduct is bound up in an ideology, a marriage of convenience between, philosophy, psychological identity, and economics that is itself flawed in ways I will explore.

There is a final element to defining the book's focus on professional misconduct in contradistinction to ethics as morality. As we will see, professional ethics can and often does overlap with ordinary morality.[7] Whilst I focus on the unethical decisions that offend against professional standards rather than decisions which are simply distasteful or offend broader social norms, understanding whether professional norms have been broken can involve attention to moral and social norms, both general and specific to legal contexts: fairness, honesty, integrity, and proportionality are four examples of moral tests that are instantiated within the rules. So, even

[6] Richard Moorhead, 'Professional Ethics and NDAs: Contracts as Lies and Abuse?', in *Contents of Commercial Contracts: Terms Affecting Freedoms* (Oxford: Hart Bloomsbury, 2020), 339–61.

[7] David Luban, *Lawyers and Justice: An Ethical Study* (Princeton: Princeton University Press, 1988).

a narrower professional misconduct focus suggests morality is an important element.

The Post Office and Other Case Studies

I have drawn heavily on the PO scandal and used other examples as case studies in the book. Many of these case studies are incomplete, including the PO cases, and have not been subject to disciplinary proceedings.

In the PO examples, for instance, we wait to see which lawyers will be investigated and disciplined. Many (but not all) of the lawyers involved have given an account of their actions to the PO inquiry by witness statement and often by examination at a public session by counsel. We have heard their side of the story, at least up to a point, but they have done so in the glare of publicity and in response to the agenda of the inquiry, where professional conduct issues were important but not the sole focus of questioning. Their positions may become clearer as further information emerges or disciplinary proceedings or prosecutions progress.

In other cases that I discuss, lawyers have been subject to formal criticism – for example, in court judgments – but there has been no decision by a disciplinary tribunal. In one of the cases that did proceed to disciplinary sanction, the Alistair Brett case, the solicitor concerned maintained his innocence throughout (but lost).

As such, the case studies are not a complete record of what happened; such an account is impossible, of course. What I offer here is an attempt to write a fair account of events, but focused on potential breaches of professional ethics, on what we know now. The case studies are not intended to indicate that any individual *has* committed professional misconduct but will sometimes suggest that the evidence, as is known, suggests they might have done so. Sometimes, that evidence looks strong, other times the position is more balanced, but even where the evidence looks strong, we should withhold judgement on the individuals. We do not know the truth.

On the other hand, it is important to populate our stories and understandings with real people; this is central to our understanding of and taking seriously the reality of ethics issues in practice. Several of these stories involve well-known members of the profession, a doubly important fact. Their fame and association with the scandal does not necessarily make them villains, but it would also be quite wrong to subject them to less attention simply by reason of their esteemed position in the profession's ranks. The involvement of professional high-flyers suggests that the profession's (or the system's) ethical problems are not confined to the margins of practice.

Through all this, we need to keep in mind two truths. One is that we do not yet know the full story. The second is that ethics is rarely about bad apples. The case studies are not about whether X is a 'wrong 'un' or did something awful and unlawful. In telling the stories in the way I have, and partly to keep the book within manageable length, I do not look at every twist and turn in the evidence. The point is whether, overall, the case studies are, taken together, evidence of a problem with lawyers' ethics and what the nature of that problem is.

The 'bad apple' metaphor is often contrasted by saying that ethics is not about bad apples but about bad barrels and cellars. The cultures, systems, and practices of clients, lawyers, law firms, the Bar, and courts are all relevant. In truth, it is about barrels, apples, and cellars, but we cannot be sure of who the bad apples are simply from reading this book, nor am I insinuating who they probably are.

The Central Arguments of the Book

This book is an attempt to build a practical, realist legal ethics:[8] it concentrates on how ideas about ethics really play out in practice, rather than how the professions and courts would like to pretend they play out. It looks at these events through academic and practical lenses influenced by interdisciplinary theory and empirical data and pays attention to power and other social dynamics, but it has an ultimately pragmatic focus on answering one valuable question: what might improve what happens in practice?

As we will see, it emphasises that ethical misconduct is not best understood as creative compliance,[9] with lawyers as canny untouchables just working the clients' angles, but as the incompetent, deliberate, or reckless sponsoring of legality

[8] See Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse, and David Wilkins, 'Is It Time for a New Legal Realism New Legal Realism Symposium: Is It Time for a New Legal Realism: Foreword', *Wisconsin Law Review* 2005, no. 2 (2005): 335–64.

[9] Doreen McBarnet and Christopher Whelan, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control', *The Modern Law Review* 54, no. 6 (1 November 1991): 848–73.

illusions that take place within systems that allow, or even encourage, mutual irresponsibilities. These ethical problems are individual and systemic. They can be tackled if taken seriously enough. The theory and practice of legal ethics should focus sufficiently on guarding lawyers against the palpable injustices they may commit, and it should lead to the development of better systems. This requires ethicists and practitioners to prioritise integrity and, especially, honesty in context to guard against overemphasising abstractions about rights and moral philosophy. It also needs us to think carefully about the importance of practicality and whole systems in our conception of lawyers' ethics.

The Structure of the Book

Chapters 2 to 5 explore the huge, interlocking story of the ethical, human, and legal tragedy that is the PO scandal. It serves as an introduction to and illustration of the problems explored later.

Chapter 6 discusses how lawyers are individually and systemically prone to ethical risk-taking. I suggest this occurs through a combination of psychological frailties and inadequate professional logics. Psychological frailties include complacent self-regard for one's sense of professionalism. This, plus other frailties, gives rise to decision-making vulnerabilities, some general to humans and some (perhaps) particularly manifest in lawyering.

The combination of professional logics and professional frailties led me to label lawyers, somewhat tongue-in-cheek, as 'unreliable gods' relying on 'fearless logics' when

I gave the first of the Hamlyn lectures. I slightly regret the 'gods' label now. With notable exceptions, lawyers can be circumspect about their talents, knowing how unpredictable the practice of law can be. Most do not really think of themselves as gods. That does not, though, undermine the central point that the metaphor was reaching for: complacency about professional ethics is, I would say, high.[10] They can also be God-like in the influence they have on people's lives.

The professional logics that are the target of my analysis spring from conventional but unbalanced ideas about professional partisanship. The language of logics comes from sociology.[11] Ideologies or philosophies might be more familiar analogues. For current purposes, we can think of logics as the ways in which a philosophy of lawyering manifests in the thinking and practices of the lawyers. They come from the rules, and from the habits, scripts, and practices that I label later orthodoxies. They are influenced by money, secrecy, and a degree of moral sophistry. The logics

[10] For the most recent evidence on this subject, see SRA, 'Professional Obligations Thematic Review', 13 December 2024, https://bit.ly/4s4RGQX; see also Richard Moorhead and Victoria Hinchly, 'Professional Minimalism? The Ethical Consciousness of Commercial Lawyers', *Journal of Law and Society* 42, no. 3 (1 September 2015): 387–412.

[11] Patricia H. Thornton, William Ocasio, and Michael Lounsbury, *The Institutional Logics Perspective: A New Approach to Culture, Structure, and Process* (Oxford: Oxford University Press, 2012); Richard Moorhead, 'Corporate Lawyers: Values, Institutional Logics and Ethics', *CEPLER Working Paper*. University of Birmingham, 2015; Richard Moorhead, Steven Vaughan, and Cristina Godhino, *In-House Lawyers' Ethics: Institutional Logics, Legal Risk and the Tournament of Influence* (Oxford: Hart Bloomsbury, 2018).

are partial in both senses of the word: they are incomplete, and they are slanted. The logics are amplified by, or amplify, the human frailties that shape unethical decision-making. They establish and interact with practical routines or justifications that simplify or efface ethical complexity. Non-disclosure agreements are 'always' part of a settlement, and so NDAs are 'acceptable'; this would be one such example of a practical routine. The idea that NDAs are the product of a freedom to contract is an example of a flawed justification.

Chapter 7 explores how professional and psychological frailties reinforce each other, and how amoral lawyering and unbalanced organisations combine to pollute institutional decisions and behaviours. In this chapter, I identify several practical routines that operate as irresponsible orthodoxies: patterns of orthodox practice that can drive deeply problematic behaviour. I aim to show how what Sir Brian Langstaff developed as a definition for cover-ups – 'deliberate concealment', 'a lack of candour', 'the retelling of half-truths', and the massaging of risk[12] – is practised through such orthodoxies. I suggest that we should not see that as 'creative compliance' or just 'lawyers being lawyers', but as the deliberate creation of legality illusions. Legality illusions are pretences of legality or justness manifest in the inappropriate exploitation of law. In advancing the idea of legality illusions, I suggest that where the purpose of such lawyering is to mislead, that is professionally improper.[13]

[12] The definition is taken from Sir Brian Langstaff, 'Infected Blood Inquiry, The Report: Overview and Recommendations, HC 569-I' (2024), 189.

[13] See Dan Davies, *The Unaccountability Machine: Why Big Systems Make Terrible Decisions – and How the World Lost Its Mind* (Profile Books,

The idea of legality illusions and professional orthodoxies suggests a complex interplay between ethical problems for which lawyers can be individually accountable and the systemic forces influencing, and sometimes excusing or masking, individual behaviours. This theme is developed in Chapter 8 to suggest the need to think systemically (as well as individually) about improving professional ethics. Systemic influences manifest in the layering up of legal rules and philosophies (ideologies), the interactions of individual and organisational psychologies, and the systemic vulnerabilities in practice represented by irresponsible orthodoxies, legality illusions, and mutual irresponsibility.

The systemic problems suggest that legal ethics is not solely a problem of individual lawyers, or unbalanced organisations, or legal and regulatory failure. They suggest that ethics is both an individual *and* a systemic problem requiring change in corporate governance, court practice, legal education, professional leadership, and better regulation. If a central lesson of the PO scandal is that we need to change the way lawyers think and act, then a whole systems approach to reform will be needed.

2024) for his illuminating discussion of systems theory and accountability sinks.

2

The Post Office Scandal

As noted in the first chapter, interest in lawyers' ethics has climbed in recent years. The #MeToo movement highlighted how lawyers had helped silence victims of sexual misconduct. There is a continuing and vigorous debate about SLAPPs:[1] the use of legal threats to silence, slow, or neuter journalists, NGOs, and academics investigating wrongdoing. Parliament's Intelligence and Security Committee warned that professional enabling by lawyers (and others) posed a national security threat.[2] Russia's invasion of Ukraine prompted soul-searching by UK firms with offices in Russia.[3] Parliament has become increasingly interested in these areas, seeing a sometimes fundamental tension between 'professional enablers', 'lawfare', and democratic institutions.[4]

[1] Strategic Litigation against Public Participation. See Susan Coughtrie, '"London Calling": The Issue of Legal Intimidation and SLAPPs against Media Emanating from the United Kingdom' (London: Foreign Policy Centre, 2022), https://bit.ly/4s2sjiI.

[2] Intelligence and Security Committee, 'HC 632 – Intelligence and Security Committee of Parliament – Russia', 21 July 2020, https://bit.ly/44v4aHk.

[3] 'Taskforce on Business Ethics and the Legal Profession', www.ibe.org.uk/legal-profession-taskforce.html.

[4] 'Lawfare and UK Court System – Hansard – UK Parliament', 20 January 2025, https://bit.ly/48SLgeR; 'Lawfare: "An Industry That Hides Evil in Plain Sight"? – Lawyer Watch', https://bit.ly/3MGZXdp.

Such concerns are not new, but they are gaining more political traction. Independent regulation has also increased the focus on lawyer misconduct. The Solicitors Regulation Authority (SRA) has issued guidance and warning notices on SLAPPs and NDAs, for example.[5] The Legal Services Board, which oversees all legal services regulators, has decided to make professional ethics a strategic priority:[6]

> Behaviours which have the potential to undermine professional ethics and the rule of law have been brought into sharp focus in recent years through several high-profile examples, including the misuse of non-disclosure agreements (NDAs), and Strategic Lawsuits against Public Participation (SLAPPs). The conduct of solicitors and barristers related to the Post Office Horizon IT scandal has also been heavily scrutinised during a lengthy and ongoing Public Inquiry.

It is the PO scandal that produces the central examples used in this book. It does so for many reasons. One is that the scandal has had an enormous impact on public consciousness, as well as on the lives of those involved. That has partly been the function of a television drama: *Mr Bates vs the Post Office*. This four-part TV series, cannily timed to run on New

[5] 'Warning Notice: Strategic Lawsuits against Public Participation (SLAPPs)', 28 November 2022, www.sra.org.uk/solicitors/guidance/slapps-warning-notice/; 'Warning Notice: Use of Non-Disclosure Agreements (NDAs). Updated 12 November 2020' (Birmingham: SRA, 12 November 2020), www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/.

[6] LSB, 'Professional Ethics and Rule of Law – Draft Policy Statement', 21 January 2025, https://bit.ly/4aQhx8S.

Year's day, catapulted extraordinary subpostmaster stories into the nation's living rooms. A deluge of media and political activity ensued. Interest spread to other parts of the globe. A statutory public inquiry – the Post Office Horizon IT Inquiry, chaired by a retired and senior judge, Sir Wyn Williams – was already underway. The inquiry fed the political and news narratives as a succession of lawyers and former and current PO executives were forced to discuss a host of unedifying events. Some (including lawyers) were given incrimination warnings because they now risk prosecution.

Through these means, the understanding that the PO ruined thousands of lives is now widespread. Subpostmasters and postmistresses (SPMs[7]) who ran post offices as franchises were thrown out of their businesses and homes, sued, and bankrupted; they (or sometimes their employees) were prosecuted and imprisoned. The cost has been extraordinary in scale and scope.[8] Minds and bodies are scarred.[9] People have

[7] I use SPMs to refer to subpostmasters/mistresses, who run PO branches as owners of a franchised business, but also for employees working in Post Office branches.

[8] For data on compensation claims, see 'Post Office Horizon Financial Redress Data' on the GOV.UK website: at the time of writing the numbers were continuing to increase, https://bit.ly/44NDAcH; evidence to the inquiry on impact is found at 'Post Office Inquiry | Human Impact Hearings', Post Office Horizon IT Inquiry, 19 May 2022, www.postofficehorizoninquiry.org.uk/hearings/listing.

[9] Beth Growns, Jeff Kukucka, Richard Moorhead, and Rebecca K. Helm, 'The Post Office Scandal in the United Kingdom: Mental Health and Social Experiences of Wrongly Convicted and Wrongly Accused Individuals', *Legal and Criminological Psychology* 29, no. 1 (28 August 2024): 17–31; Beth Growns, Jeff Kukucka, Richard Moorhead, and Rebecca K. Helm, 'Brief Report: Mental Health Outcomes and Social Experiences

ended their lives; many victims live on, but with their lives in pieces and their families brutally impacted.[10]

There is a public outcry at the PO's conduct, but also at the inadequacy of legal responses to it. Many SPMs cases passed through the courts (civil and, particularly, criminal), over a long period of time, and many (though not all) of those SPMs had legal representation, yet glaring problems in the PO's cases were not addressed. The pivotal *Bates* litigation was settled on terms that left SPMs undercompensated because funding ran out. The compensation mechanisms set up, eventually, to correct that problem have been mired in complaints about delay and excessive adversarialism. Concerns about the capacity of the Court of Appeal to deal fairly and expeditiously with hundreds of cases led to a wholly exceptional statutory scheme for quashing of criminal convictions en masse without involvement of the courts. More appeals wait in the wings for cases not dealt with by the statutory scheme. The compensation bill is expected to reach £1.5 billion.

The public inquiry has shown how the normal mechanisms of law, the court cases and the appeals, failed to expose the full truth of the scandal. That failure is epitomised by the Court of Appeal excoriating the PO for past wrongs in the *Hamilton* judgment, whilst praising its handling of disclosure

of Subpostmasters and Subpostmistresses in the British Post Office Scandal', 2023, https://bit.ly/457u04g.

10 Sally Day, Emily Spearing, Rebecca Helm, Karen Nokes, and Richard Moorhead, 'WP8, Exploring the Mental Health and Wellbeing of the Families of Those Wrongly Accused in the Post Office Scandal', 6 December 2024, https://bit.ly/3N6rUeS.

in 2020/1.[11] That position looked suspect then. It looks ludicrous now. Late disclosure has dogged the inquiry.

The levels of harm and causes of such widespread and repeated failure in the legal system's handling of these cases is reason enough to focus on it. It has multiple causes.

The second reason to focus on the PO scandal is that whilst these causes include faulty accounting software, inept or dishonest managers, and failures of corporate governance more broadly, work done by lawyers has been central: unfair contracts, questionable civil litigation, dubious prosecutions brought 'privately' and by public prosecutors (especially, but not solely, in Scotland and Northern Ireland); and the covering up of problems in heavily lawyer-dependent ways.

It is important to note that, whilst the extent and nature of the harms visited on SPMs is extraordinary, and the use of private prosecutions at scale for commercial ends highly unusual, the underlying legal work and the problems associated with it are not. What is more, problems occur and reoccur on separate cases, across many years, involving in-house lawyers, private practice lawyers, and several Kings Counsel and General Counsel.

That problems occurred so often, across time, and across different lawyers suggests a broader and deeper problem for law and the legal profession than a 'Post Office problem'. One reason for including case studies beyond the PO story in later chapters is to underline that those problems are far from confined to this one organisation.

[11] *Hamilton & Others* v *Post Office Ltd* [2021] EWCA Crim 21 (hereafter *Hamilton*).

The third reason for focusing on the PO is a 'small p' one. Not political exactly – it is about persuasion. Recognising that lawyers – sometimes rather well-known lawyers – are involved in the story, some (perhaps many) practitioners have taken a particular interest in the scandal. The PO story and the harms we all know about mean that lawyers are more interested than usual in this story, and perhaps more willing to listen to what the stories might tell us about lawyers' ethics. Getting past an understandable reluctance to listen to bad news about one's own kind is not easy, and the PO is one of those rare stories that breaks the carapace for some.

That said, it is not uncommon for self-protective denial to manifest in other ways. I have been told many times that the PO is all about 'in-house lawyers' or 'private prosecution', by those who do not work in-house or do not prosecute. Both views are seriously flawed as explanations. One further self-denial merits emphasis. A typical response to concerns about the abuse of law is that it is almost always the client's fault, not the lawyers. There is a very respectable case to be made that here it was the opposite: lawyers, not their clients, were the architects of the problems that both are responsible for. And sometimes, there is a case for saying it was private practitioners, as much if not more than in-house lawyers, that led the PO astray.

The Three Central Issues of the Scandal

Horizon was an electronic point-of-sale and accounting system introduced by the PO from 1999 onwards. It was supposed to help modernise the network and increase financial control, including the reduction of fraud. It was built and maintained first by the British computer company ICL, and then by Fujitsu (when ICL was subsumed within the Japanese corporate). The system was designed to produce weekly accounts that SPMs were required to sign off each week and allow the PO to monitor the business and manage its finances. It was a system that had problems from the beginning. Those problems have reappeared, unpredictably, over the course of its life. In particular, it created 'shortfalls'. These were indications that money might be missing in the subpostmaster branch accounts. Rather than investigate all those shortfalls fully, the PO tended to simply require the SPM to repay the money POL thought they were owed as a debt.

I write, throughout the book, about POL: 'Post Office Limited'. This is the appropriately cold acronym most often used for the Post Office as an organisation. The POL was originally part of the Royal Mail Group (RMG) and dependent on its legal team (including for conducting prosecutions) until it formally separated in 2012 prior to RMG being floated in 2013. POL remains a government-owned corporation to this day.

For our purposes, POL's precise legal identity is not that important, save perhaps in one respect. In 2013, POL's CEO, Paula Vennells, sought to remove a reference to Horizon risks from the RMG prospectus as it was about to float.[12] A flotation prospectus is an important, heavily regulated document in which the seller of a business is required to be candid

[12] Paula Vennells, 'Email Thread from Paula Vennells to Alice Perkins CB RE: Fwd: Prospectus®, POL00146462', 22 September 2013, https://bit.ly/3MuYiYB.

about any risks in the company it is selling. Such risks impact the business's price – and even its ability to be sold at all. At the point of flotation, it has been suggested during the inquiry, both POL management and the government had an incentive to keep Horizon's failings under wraps.[13] If the suggestion proved correct, it would provide a motive for organising what looks, with the benefit of hindsight, like a cover-up of Horizon's problems.

This book is not about proving or disproving a conspiracy of that sort. It is about examining how lawyers may have contributed to the issues arising from the use of the Horizon system in legal proceedings. From that perspective, the underlying story in the cases concentrates on three issues. It will help to have these in mind from the start.

The first is *whether Horizon was a robust system* and whether errors could be said with confidence to be due to careless users or dishonesty rather than bugs, errors, or defects (BEDs) which could create phantom shortfalls. A related question was whether errors were properly investigated to determine whether user error, dishonesty, BEDs, or some combination of these was at fault. It has become clear that POL and Fujitsu sought to assert user error or theft without having sufficient evidence to support this claim. They failed to properly investigate and concealed or failed to disclose evidence of problems with BEDs that suggested that shortfalls were, or could have been, problems with the system and not user fault, let alone dishonesty.

[13] 'Transcript – Paula Vennells 22 May 2024', www.postofficehorizoninquiry.org.uk/hearings/phases-56-22-may-2024.

The second is whether *Horizon was subject to 'remote access'*: that is, whether it was possible for Fujitsu engineers to access the system remotely, without SPMs knowing, to correct software bugs and change SPM accounts in the process (ostensibly to correct errors). Not only was this possible, but remote access could also make errors worse, and could be done without being controlled or its use traced. As a result, neither Fujitsu nor POL could say the system was secure. An insecure, untraceable, secret backdoor into an accounting system was kryptonite to claims that the system was reliable and any legal action that relied on it. A key issue in the case is how well this was understood by POL, given that remote access was a massive risk to prosecution safety.

This leads us to the third issue: *whether POL's handling of prosecutions was proper*. There are two levels to this: whether POL prosecuted the case properly in the first place, and whether their reviews of these prosecutions were sound once they became aware of evidence suggesting convictions might be unsafe. It transpires that the prosecutions were not safe and their review of the prosecutions was not sound. *Miscarriages of justice were caused and then contained by inadequate or improper legal work*.

At the heart of this tale are stories like Pamela Lock's.

Pamela Lock

January 2000 is the date when it appears that Horizon was installed in the PO run by Pamela Lock and her husband.[14]

[14] Hamilton (see n.11), paras 353–6.

SPMs were required to conduct a balancing exercise each week with the system to confirm to POL that stock, cash, and reported sales matched. In the summer of 2000, Horizon started to indicate 'shortfalls' in her branch, an indication to POL that money was missing.

She was interviewed about these shortfalls and suspended without pay before her contract was terminated.[15] A forensic accountant's report, which showed no evidence that she had taken any money, did not dissuade the PO from prosecuting her for theft and false accounting. Advised to plead guilty to theft, she did not; instead, she pleaded guilty to false accounting. She did so, accepting that she had inflated the figures to make the accounts balance. SPMs were required to balance their accounts weekly to keep trading. Many SPMs did similarly whilst they tried to work out what had gone wrong when Horizon showed a shortfall. Mr Justice Fraser (now Lord Justice Fraser, but he is referred to herein as Mr Justice Fraser, given his role at the time) later decided, in the *Bates* group litigation (discussed later in the chapter), that finding out what had gone wrong was an impossible task, given how the system worked and POL's refusal to provide evidence that would have enabled Horizon to be checked.

SPMs were habitually told (and advised by their own lawyers) that stalling for time in this way (which could involve inflating cash figures, for example) was dishonesty. Such advice was pragmatically understandable, but debatable; it is certainly possible to argue that this was not dishonesty at all. Often, SPMs

[15] This account is taken from 'First Witness Statement of Ms Pamela Lock', 14 January 2022, https://bit.ly/3MXItda.

thought that they had 'lied', even if for good reason, and so usually accepted such advice. Not uncommonly, the notion that they were dishonest was further undermined by other evidence such as voluminous calls to the helpline and area managers reporting there were inexplicable shortfalls in their accounts, thus undermining any claim to dishonesty against them.

Pamela Lock was given a community service sentence and ordered to repay a shortfall of just over £26,000. She had already cashed in an ISA to pay part of what POL said she owed, and was given time to sell the shop that contained her old branch in order raise further funds. She ended up selling the family home to avoid it being repossessed.

Ms Lock is an early but sadly typical example of those thirty-nine cases quashed in the *Hamilton* case in 2021.[16] The Court of Appeal found her prosecution was unfair and an affront to justice.

Legal affront and unfairness were not confined to Ms Lock's case, or even to criminal cases. As we will see, they likely extended to:

1. The unfairness of the contract that underpinned SPM mistreatment.
2. The handling of civil litigation and enforcement against SPMs. We concentrate on two cases: Julie Wolstenholme's case, which settled in 2004, and Lee Castleton's, in 2005/6.
3. The handling of hundreds of criminal cases.
4. The ways in which Horizon was and was not investigated, and the role of lawyers in that.

[16] Hamilton (see n.11).

5. The review of prosecution safety that began in 2013.
6. The mediation scheme established in 2013 that aimed to reduce the role of Second Sight and settle complaints for minimal compensation.
7. The *Bates* case, run aggressively under a Group Litigation Order (GLO), that was settled in 2019.
8. A culture in POL and amongst its advisers of accentuating the positive and eliminating the negative in the handling of evidence and arguments on Horizon and the safety of prosecutions that led to politicians, the press, and even the courts being misled.

That the story emerged over several phases is also important. Chapter 3 discusses the revelations from the *Bates* cases. *Bates* led to the *Hamiton* case and the quashing of many cases by the Court of Appeal for the egregious conduct of private prosecutions at first instance. The judgment in *Hamilton* also led to the public inquiry becoming statutory.

That inquiry was persuaded to lift legal professional privilege. I had argued that without lifting privilege, their work would have been like 'Watergate without the tapes'.[17] The inquiry has revealed conduct consistent with a cover-up and chilling details about *Bates* and the subject matter of *Hamilton*, of which the High Court and Court of Appeal were blissfully unaware. In effect, it has revealed a legally

[17] See Moorhead's submissions to 'Public Hearing Session: Preliminary Hearing on List of Issues 8 November 2021 Transcript', 63, https://bit.ly/48V26tx; Richard Moorhead, Karen Nokes, and Rebecca Helm, 'Working Paper 4 Submission on Four Themes', 29 October 2021, https://bit.ly/3XZ1Vs6.

orchestrated cover-up. Chapter 4 covers what we now know about the problems with first-instance proceedings as a result, and Chapter 5 reflects on the mechanisms that were deployed to conceal the truth. They tell a story of an aggressive legal offence and then an aggressive legal defence conducted to protect a computer system and the reputation of the PO itself. By seeking to exploit the law's power for its clients, their lawyers created the legality illusions that have ruined many, many lives.

3

What the *Bates* Case Suggested

Although we now know that POL lost or abandoned many cases, it was the *Bates* litigation that began the comprehensive deconstruction of POL's legal practices.

The *Bates* GLO[1] claim was brought by 555 claimants seeking damages for compensation for harm and losses caused by POL, including for wrongful prosecution. It was issued in 2017. In 2019, two substantial trials were conducted to progress the group action. The Common Issues Trial (CIT) looked at how POL's contract with the SPMs should be interpreted, and the Horizon Issues trial (HIT) examined Horizon's fitness for purpose. After two judgments devastating to POL's case and reputation, the case was settled.

The settlement itself is a source of controversy. The claimants were forced to settle when their litigation funding ran out. The group received a settlement of £57m, but approximately £46m of that amount went towards the costs associated with bringing the legal action, even though the funder and the claimant lawyers are reported to have accepted less in fees and costs than they were entitled to. Claimants entitled to the settlement also took less than they could have, allowing some of the money to be shared with those in the claimant group who were subject to convictions and had been excluded from the settlement.

[1] So-called because it was conducted under a Group Litigation Order.

That settlement came shortly after the HIT judgment. That was a judgment that excoriated POL for their 'institutional obstinacy or refusal' to countenance the possibility Horizon was flawed, despite considerable evidence to the contrary. In Mr Justice Fraser's judgment:[2]

> This approach by the Post Office has amounted, in reality, to bare assertions and denials that ignore what has actually occurred, at least so far as the witnesses called before me in the Horizon Issues trial are concerned. It amounts to the 21st century equivalent of maintaining that the earth is flat.

The obstinacy and the inability to face, still less speak, the truth to the court and to POL's opponents is central to Fraser's assessment of their conduct.

Excesses of Argument

Mr Justice Fraser made many criticisms of POL's 'attritional approach' to the litigation.[3] Arguments and applications were excessive, inconsistent, circular, and overly intricate. They obscured key issues, on occasion were 'wholly' incorrect legally, illogical, or factually inaccurate. They were absurdly 'one-sided' in their tactics, along the lines that 'any evidence that is unfavourable to the Post Office is not relevant' and

[2] *Bates* v *Post Office Limited* Judgment (No. 6) 'Horizon Issues' [2019] EWHC 3408 (*Bates No. 6*), para. 929.

[3] For a detailed analysis of this and subsequent sections describing lessons from the *Bates* case, see Richard Moorhead, Karen Nokes, and Rebecca Helm, 'Issues Arising in the Conduct of the Bates Litigation, Post Office Project: Working Paper 1' (University of Exeter, 2021).

should be struck out. They resisted 'timely resolution', re-opened settled issues, and challenged the judge's neutrality in ways designed to intimidate him.

Misleading Submissions and Pleading

The case, as pleaded and argued, diverged from POL's own evidence in multiple ways. Some of the fundamentals of their case were contradicted by their witnesses and documents or lacked a basis in reality.[4] Counsel asserted facts (on their client's instructions) that were proven to be 'completely wrong', unsubstantiated, and 'unwittingly misleading'.[5] Fraud allegations were put to witnesses without supporting evidence, which is a potential breach of Bar rules.[6] Submissions on witnesses were 'bold', paid 'no attention to the actual evidence', and seemed to 'have their origin in a parallel world'.[7]

Pleadings on remote access were factually incorrect. The true position only emerged gradually during the HIT. Mr Justice Fraser thought Fujitsu might be the primary culprit, but we now know that the 2015 Swift report had warned the PO that its public positions on remote access were false. The Swift report was a report by a leading silk, Jonathan Swift KC (now Mr Justice Swift), and his colleague, Christopher

4 *Bates* v *Post Office* Judgment No. 3 'Common Issues' [2019] EWHC 606 (QB) (*Bates No. 3*).

5 *Bates No. 6*, paras 378, 379, 382, and 565.2.

6 Bar Standards Board, 'BSB Handbook, Version 4.3', 21 May 2024 ('BSB Handbook') r.C9.2c, https://bit.ly/453AYaz.

7 *Bates No. 3*, para. 138.

Knight. Jane Macleod – POL's General Counsel at the time of the *Bates* litigation, and therefore formally responsible for it – had advised on the Swift Review report.[8]

Secrecy and Evidence Destruction

Mr Justice Fraser condemned the PO's secrecy, excessive redaction of documents, and handling of privilege and data protection. He suspected internal suppression of material. SPMs were barred from retaining records, and those taking over PO branches after the SPMs were fired were ordered 'to destroy all paperwork'. A Second Sight witness, who had begun investigating Horizon in 2012, was contractually restricted in what he could say, potentially compromising the evidence he could give.[9]

Disclosure Problems

Both sides faced disclosure issues, but criticism of the PO and Fujitsu was severe. Mr Justice Fraser found POL's behaviour was 'the antithesis of cooperation' required under the rules.[10] They resisted disclosure with illogical and unsupportable arguments, and falsely claimed key documents didn't exist or were irrelevant. Late disclosure of over 2,000 documents was, he said, unjustifiable. Critical records were withheld, and lawyers provided inaccurate and misleading information

[8] 'Jane Macleod Witness Statement, WITN10010100', 30 April 2024, https://bit.ly/3L2bEef.

[9] *Bates No. 6*, para. 199. [10] *Bates No. 6*, para. 625.

(including, in particular, about the crucial Key Error Logs, KELs). Solicitor Andy Parson's witness statement explaining what had gone wrong with one disclosure failure was 'extraordinarily opaque' and 'puzzling'.[11] Fraser noted Fujitsu's role, citing a crucial spreadsheet disclosed just before trial, saying the PO's own legal team could not have known about it, whereas evidence subsequently suggested some in POL legal did or ought to have known.

Evasive, Unreliable, or Misleading Evidence

Fraser found several POL witnesses and witness statements misleading or otherwise unreliable. Their evidence was 'slanted more towards public relations consumption rather than factual accuracy'.[12] It said what they wanted to say had happened rather than what had actually happened. Witnesses lacked first-hand knowledge of actual events and systems, omitted key facts, and relied on incorrect information from others, including, in particular, a Fujitsu engineer called Gareth Jenkins. Oral evidence not infrequently contradicted written statements or omitted critical details. Statements contained things the witness had 'no knowledge [of] whatsoever'; documents they had never seen; and plainly incorrect data, 'almost all of' which came from others.

Angela Van Den Bogerd, POL's most senior witness, was perceived as being entrenched and partisan, and provided misleading evidence in the CIT.[13] After these criticisms, her

[11] *Bates No. 6*, para. 619. [12] *Bates No. 6*, para. 375.

[13] E.g. *Bates No. 3*, 418.

testimony improved in the second trial but was still heavily criticised.

Fraser's analysis suggests witness statements were either badly prepared or deliberately slanted. Of Angela Van Den Bogerd's, for instance, Fraser said 'Either the team of ten people assisting her with her evidence had the aim of producing entirely one-sided evidence in chief, or they were unaware of all the documents relied upon by the claimants. Either alternative is highly regrettable.'[14] His comment seems to suggest that either incompetence or impropriety was at work here.

POL's independent expert, Dr Worden, used flawed methodology, circular reasoning, and biased assumptions. He relied on tainted evidence from Mr Jenkins, whose full involvement in the provision of information to Worden was 'simply hidden'.[15] Mr Jenkins played a key role in the evidence presented by several witnesses before Fraser, but he was not called to testify himself. This meant he could not be cross-examined. Fraser and POL's opponents questioned this decision, with POL later justifying it by citing concerns about keeping the number of witnesses manageable, and that they were 'concerned that the Horizon Issues trial could become an investigation of his role in this and other criminal cases'.[16] They did not disclose why they were so concerned about this.

Mr Jenkins is a central figure in the PO story. Although a Fujitsu employee who worked on Horizon, he was relied on as an expert witness in criminal cases. What was not revealed in

[14] *Bates No. 6*, para. 251. [15] *Bates No. 6*, para. 880.
[16] *Bates No. 6*, paras 77 and 510.

Bates was that Jenkins was regarded by POL's own lawyers as a tainted witness.[17] The lawyers in *Bates* knew this, and it was this reason, hinted at, perhaps, in the concern I have just noted but not candidly disclosed, that was their reason for not calling him. There is also evidence that the claimants' lawyers were given a false explanation for not calling Jenkins.[18]

When leading counsel for POL at the time tells leading counsel to the inquiry that saying that they wanted to avoid the Horizon Issues trial becoming an investigation of Jenkins role in criminal cases signals the problem sufficiently to the judge so as not to be misleading, Jason Beer KC sounds incredulous:[19]

> MR BEER: Really? You think that signals quite clearly?
> ANTHONY ROBINSON: Yes, I do.
> MR BEER: Is that really what you're saying?

The Recusal Application Made by Lord Grabiner

Mr Justice Fraser's draft judgment in the CIT indicating POL had lost badly led POL to consider an appeal and, perhaps less

[17] Brian Altman KC, '"General Review" of PO Prosecutions POL00006581', 15 October 2013, para. 148, https://bit.ly/48SNKdf; 'Transcript – Brian Altman', 8 May 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-8-may-2024.

[18] Richard Moorhead, 'The Secrets Peril', https://richardmoorhead.substack.com/p/the-secrets-peril; 'Transcript – Anthony Robinson', 11 June 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-11-june-2024.

[19] 'Transcript – Anthony Robinson', 11 June 2024 (*ADG Robinson Transcript*).

orthodoxly, a recusal application to try and remove the judge midway through the HIT. Probably coincidentally, by the time the application was made, the HIT was also going badly: a witness was revealing a clear and damaging picture of remote access.

Lord Grabiner QC led the unsuccessful recusal bid, which they lost and sought to appeal. In rejecting their request for leave on the papers, Coulson LJ dismissed the recusal application they had made as 'misconceived', 'egregious', and 'wholly unjustified', criticising its misrepresentation of the case and poor timing.[20] Grabiner stating midway through the original recusal hearing that POL had taken advice from a 'very senior person', Coulson said, may have been designed to intimidate the judge.

If the recusal application had succeeded, the *Hamilton* case and extended inquiry powers may not have materialised. The scandal would have abated and possibly disappeared.

The 'very senior person' was Lord Neuberger, former president of the Supreme Court and a member of the same chambers as POL's counsel team (Lord Grabiner was head of chambers). Neuberger and Grabiner advised that a recusal application had good prospects of success. They did so, it seems, based on the draft judgment and a note from their colleagues who had handled the trial. Lord Grabiner agreed at the inquiry that the note was an 'advocate's document'[21] from his colleagues in chambers who had lost that first trial.

20 Nick Wallis, 'Fraser J Is Going Nowhere', www.postofficetrial.com/2019/05/j-fraser-is-going-nowhere.html.

21 'Transcript – Lord Antony Grabiner KC', 11 June 2024, https://bit.ly/4aO4apB.

The Bar regards itself as capable of advising independently in cases involving other members of their chambers and Lords Grabiner and Neuberger maintain their advice was proper and correct.[22] The main question focused on by the inquiry was the suggestion that Lord Grabiner appeared to advise POL's board that they had a duty to try to recuse the judge in *Bates*. Grabiner told the inquiry he didn't mean a *legal* duty. It was 'a piece of advice given by a lawyer to a Board of directors as to how he thinks, as the adviser, they should proceed, and it was firmly expressed'.[23] That the board decided by a vote suggests the board perceived they had some choice. POL subsequently submitted to the inquiry that 'when presented with the clear advice of two such eminent barristers (one the ex-President of the Supreme Court), realistically it would be unfair to criticise POL for accepting it'.[24]

Some Perspective on *Bates*

Fraser's judgment is best understood as a criticism of the handling of the case rather than a definitive criticism of the lawyers involved. He tends to blame POL and Fujitsu for most problems, with some carefully expressed implicit concern

[22] Grabiner Transcript (see n.51); Lord Neuberger, 'Witness Statement of Lord Neuberger of Abbotsbury to the PO Horizon IT Inquiry WITN10650100', https://bit.ly/3N22Vt2.

[23] Grabiner Transcript (see n.51).

[24] POL Legal Team, 'In the Matter of the Post Office Horizon IT Inquiry, Closing Submissions: Phases 5,6 & 7, On Behalf of Post Office Limited, SUBS0000064' ('POL Final Submissions'), 9 December 2024, para. 253, https://bit.ly/48STu6J.

about the lawyering on occasion. As has already been noted, some of those concerns have been crystallised by subsequent developments in the *Hamilton* case and the inquiry.

Before coming on to look at the other stages of the scandal, we should note some of POL's general submissions to the inquiry.

A general point is that they suggest the *Bates* strategy was not attritional but perhaps, in hindsight, 'bullish'.[25] Some tactics they were criticised for were founded on the advice of their counsel, whom they greatly relied on. Strategy was 'heavily influenced by the counsel team, upon whom POL reasonably relied and some of whose advice was trenchant'.[26] Indeed, Rodric Williams was said to have been asked to brief the barristers, 'not to character assassinate the judge', as lead counsel had already gone 'a bit too far', even though 'we have repeatedly been through this issue before and Im [sic] not sure why it does not land with the counsel team'.[27] POL also reported that even after the failed recusal application, the lawyers they had instructed did not believe they needed to change strategy.[28]

POL replaced their solicitors and counsel after the HIT to adjust their approach when they settled the case.

POL reserved their strongest criticism for Womble Bond Dickinson (WBD) solicitor Andy Parsons. He became involved in early 2013 when instructed to advise on letters

[25] POL Final Submissions (see n.54), para. 250.
[26] POL Final Submissions (see n.54), para. 252.
[27] POL Final Submissions (see n.54), para. 252.
[28] POL Final Submissions (see n.54), para. 254.

before claim from SPMs about Horizon. Rather pointedly, Parsons is described by POL as 'a 5 years PQE associate at WBD' who advised:[29]

> [on disclosure] despite the fact that he 'didn't understand the nature of the error in hardly any detail', and advised on crucial wording in correspondence based on his understanding that it was normal for lawyers to 'soften wording'. He made 'recommendations' to POL on his own initiative without instructions or without the 'level of thought' required to understand the impact on disclosure in other matters.
>
> 237. He remained POL's main external legal adviser in civil matters to POL until 2019 during which period he played a substantial role in shaping POL's strategy in relation to key responses to the emerging scandal (including the response to [Second Sight's interim report] and the [Independent Mediation Scheme])

By May 2016 he was a partner and[30]

> had principal responsibility for the conduct of POL's defence in the GLO . . . [D]espite having no previous experience of group litigation [Andy Parsons] in turn delegated a number of tasks to a colleague, Amy Prime ('APr'), including the instruction of [Brian Altman KC] in relation to the criminal appeals', and liaising with POL to provide background to the pleading in the GLO. At this time APr was less than one year PQE.

[29] POL Final Submissions (see n.54), para. 236.
[30] POL Final Submissions (see n.54), para. 237.

They accept they should have been more careful in who they instructed and how they were supervised, but seem to want to suggest that Parsons rather than Jane Macleod (General Counsel) or Rodric Williams (the main in-house lawyer liaising on matters at this time) was responsible for much of the legal work from 2013 onwards:

> 238. It was obviously a mistake for POL to rely on such an inexperienced legal adviser in [Parsons], and, in turn, for him in turn to rely on such a junior colleague, in a matter of such significance to POL. . . . It is now clear (and ought to have been clear to POL at the time) that [Andy Parsons] had neither the experience nor the judgement to provide POL with the depth of advice that the GLO required. Moreover, his involvement from a very junior stage of his career appears to have led [Andy Parsons] to overidentify with his client in litigation and to lose his ability clearly to assess issues of disclosure, evidence, strategy and costs. As a result, POL was deprived of legal advice which was truly objective.

For example, they say POL had not instructed a hard-line approach to disclosure, but Parsons advised on an approach 'designed to avoid or delay disclosure of relevant information'.[31] Advice he is said to have given on disclosure that 'if it's not written down it's not disclosable' was '(at best) naïve as to how non-lawyers would understand it'.[32] Parsons disputes giving this advice.

[31] POL Final Submissions (see n.54), para. 239.

[32] POL Final Submissions (see n.54), para. 239.

An email from his newly qualified assistant solicitor, Amy Prime,[33] that Mr Parsons helped draft suggested suppressing relevant and, at the time, WBD advised, disclosable material.[34] POL accepted Rodric Williams should have challenged that but did not.[35] Parsons's advice to not disclose 14,000 KELs (Known Error Logs) to avoid uncovering material that would point to other bugs is also highlighted. He is said to have drafted letters without detailed instructions, removed admissions from letters, and failed to include crucial (and so material) information when updating POL.[36] He regularly strayed into territory beyond his competence, criminal law in particular.[37] POL say he explained Gareth Jenkins's involvement in *Bates* to the inquiry in a way inconsistent with Mr Justice Fraser's conclusions in *Bates* and the evidence before the inquiry.[38] Mr Parsons maintained in his inquiry evidence that his decisions were taken in the proper defence of his client's rights in hard-fought commercial litigation.[39]

[33] She was supervised by Andrew Parsons, who made suggestions to be added to the text of the email before it was sent.

[34] 'POL00038852 – Email from Amy Prime to Rodric Williams, Andrew Parsons and Others RE: Disclosure of Security Investigations Guidelines', 10 May 2016, https://bit.ly/48REExg.

[35] POL Final Submissions (see n.54), para. 239b.

[36] POL Final Submissions (see n.54), para. 240.

[37] POL Final Submissions (see n.54), para. 242.

[38] POL Final Submissions (see n.54), para. 243.

[39] Andrew Parsons Transcript, 13 June 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-13-june-2024; Parsons Transcript, 14 June 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-14-june-2024.

4

A History of Aggressive Legal Offence

By the time of *Bates*'s collapsing litigation, the size and the shape of the problems were clear, if still contested by POL. Unreliable evidence from Horizon had been used to take money from SPMs. Hundreds – perhaps thousands – of people had paid money that POL had, in effect, extorted under a pretence of legitimacy. As many as 1,000 prosecutions had taken place, often for fraud, theft, and/or false accounting, leading to over 200 people being imprisoned. Others were removed from the PO branches they had run and often invested their life savings in. The knock-on effects of debt, conviction, and social stigma were often profound. Stress-related illness, death by suicide, and profound mental health problems often followed.

Bates was bad, but in terms of questionable lawyering, it can also be seen as an example of history repeating itself. The first problem, and not one on which lawyers are often challenged, is the drafting of unfair contracts.

Unfairness Contracts and SPM Mistreatment

In *Bates*, Mr Justice Fraser found POL contracts unfair in various ways. POL granted itself very broad powers to suspend or terminate SPMs without compensation or clear justification. Some SPMs, including Alan Bates, were allegedly targeted for challenging shortfalls using these very discretions. The contract was also wrongly interpreted within the business as requiring payment without fault. Whether lawyers contributed to this or the threatening letters that misstated liability is not known. It would be hard to prove professional misconduct for drafting unfair contracts, not least because identifying the lawyers who did the drafting would be difficult. Nonetheless, lawyers who knowingly drafted or enforced unfair contracts may have misled or taken unfair advantage of SPMs.[1]

The significance of the contractual terms is that they provided the leverage for the belligerent process that SPMs endured when faced with unexplained shortfalls: they were told to pay up or face immediate suspension, debt proceedings, or prosecution. The contracts were treated as stating that they were at fault even though the facts suggested otherwise. This legal underpinning was accompanied by a lack of any mechanism to challenge discrepancies; in essence, SPMs had to call the helpline and hope a queried transaction might be corrected weeks or even months later. The Horizon system did not provide records sufficient to allow SPMs to check whether and how errors might have occurred. It was a debt trap locked tight by contract and bureaucracy.

Civil Litigation and Enforcement

The inquiry concentrated on two crucial civil cases to illustrate POL's approach to enforcement.

[1] Moorhead (see n.6).

Julie Wolstenholme: The Cleveleys Case

Like Pamela Lock, Julie Wolstenholme was an early casualty of Horizon. She became SPM of the Cleveleys branch just before Horizon was introduced and soon encountered problems that led to her refusing to use Horizon. Her refusal meant she was suspended and then had her contract terminated.[2] POL issued proceedings against her in April 2001 for the return of equipment from the branch. Her defence and counter-claim alleged that Horizon was not fit for purpose.

The inquiry focused on three problems suggested by the handling of this case.

The first witness statement from Elaine Cottam gave the impression that Ms Wolstenholme's complaints were due to user error rather than faults with Horizon. Various records supported Ms Wolstenholme's case but were not referred to in Cottam's statement. This was accepted as a 'serious omission' by POL at the inquiry.[3] Cottam suggested the statement had been drafted for her.[4] This is the first example of evidence being polished to appear helpful to the POL case, deliberately or through casual prejudice against SPMs, at the coalface by POL managers or lawyers.

The second was how POL reacted to expert evidence. Jason Coyne, a court-directed joint expert, provided

[2] This paragraph is derived from POL Legal Team, 'In the Matter of the Post Office Horizon IT Inquiry "Phase End" Closing Submissions: Phase 4 on Behalf of Post Office Limited (SUBS0000028)', ('POL Phase IV Submissions'), 29 February 2024, paras 55–70, https://bit.ly/4ayyTaj.

[3] POL Final Submissions (see n.54), para. 60.

[4] 'Transcript – Elaine Cottam', 7 November 2023, www.postofficehorizoninquiry.org.uk/hearings/phase-4-7-november-2023.

a preliminary analysis of POL call logs. He said 'the technology installed ... was clearly defective .... The majority of the errors ... could not be attributed to being of Mrs Wolstenholme's making.'[5] He also indicated that POL's help-desk seemed 'to be more focused on "closing calls" than attempting to get to the bottom of the continual recurrence'.[6]

Rather than investigating the concerns Coyne raised, as POL accepts they should have done,[7] Fujitsu were asked for a response that might change Coyne's mind. Rather than deal with the fundamentals, Fujitsu concentrated instead on criticising Coyne, unfairly, for 'a very one-sided view of life'.[8] They tried to shoot the messenger.

Unsurprisingly, Coyne's mind was unchanged, and POL, in a weak position, without evidence to rebut him, set about trying to settle the case. POL in-house lawyer, Mandy Talbot, is recorded as having wanted to '"throw money" at [Ms Wolstenholme], to keep Mr Coyne's expert report out of the public domain if possible, and to "keep [Ms Wolstenholme's] mouth shut"'.[9] There is a suggestion that Ms. Wolstenholme received a substantial settlement as a result.[10]

5 Jason Coyne, 'WITN00210101 – Letter from Jason Coyne, Best Practice Group PLC to Susanne Helliwell at Weightman Vizards with Opinion (20.01.04) in the Matter of POL v Wolstenholme CR101947', 20 January 2004, https://bit.ly/4iWdhXk.

6 Coyne (see n.74). 7 POL Phase IV (see n.71), para. 69.

8 Fujitsu, 'FUJ00080715 – Fujitsu Services Report on Cleveleys Post Office (V.1.0)', 1 September 2004, www.postofficehorizoninquiry.org.uk/evidence/fuj00080715-fujitsu-services-report-cleveleys-post-office-v10.

9 POL Phase IV (see n.71), para. 84.1.1.

10 POL Phase IV (see n.71), para. 27 (fn 121).

POL maintains that the settlement 'did not mean that POL realised that [Ms Wolstenholme's] allegations were true, only that there was insufficient evidence to contradict them'.[11] There is an alternative view. Faced with expert evidence that, as one core participant lawyer suggested, 'the whole estate was suffering from problems',[12] they realised Fujitsu did not have a good answer and buried the case.

Lee Castleton: The Marine Drive Branch

In 2005, SPM Lee Castleton experienced shortfalls that led him to make made ninety-one calls to the helpline over twelve weeks.[13] Frustrated with the lack of support, he requested an audit hoping that might sort the problem out. Instead, that audit led to his suspension and the termination of his contract.

POL sued Mr Castleton for nearly £27,000 in shortfalls. He counterclaimed for £250,000 to cover the effects of losing his business, raising the stakes in POL's eyes considerably. Shortly before trial, he was forced to represent himself when legal funds ran out. He lost, was ordered to pay £320,000 in costs, and was then bankrupted in enforcement proceedings.

The first issue the inquiry focused on in this case was POL's motives in bringing the case. Castleton says POL's external solicitor (in what is now WBD), had told him POL

[11] POL Phase IV (see n.71), para. 69.7.

[12] 'Transcript – Closing Statement by Mr Stein', 2 February 2024, www.postofficehorizoninquiry.org.uk/hearings/phase-4-2-february-2024.

[13] See, for example, to learn more of his story 'Transcript – Summary of Lee Castleton's Statement', 19 May 2022, https://bit.ly/3L29sn6.

would destroy him. That solicitor, Stephen Dilley, denies that. Conversely, we know that POL's external counsel had said the case was 'commercial madness' and should be dropped,[14] but the organisation persisted, seemingly to defend Horizon's reputation and discourage other SPMs from challenging the system by using the Castleton case to set an example. As Dilley is recorded as saying at the time, 'the Post Office driver had been getting a judgment against Mr Castleton to show that the computer system wasn't wrong and deter other subpostmasters from bringing a claim'.[15] Various other questions are raised about whether the tactics were excessive and unreasonable.[16] POL argued that the tactics Dilley deployed for them were normal for commercial litigation.[17]

The second issue is how the case was put to the court by POL's Counsel, Richard Morgan. Counsel to the inquiry,

[14] 'Transcript – Richard Morgan', 22 September 2023, 20 and 121, www.postofficehorizoninquiry.org.uk/hearings/phase-4-22-september-2023.

[15] 'Transcript – Stephen Dilley', 22 September 2023, www.postofficehorizoninquiry.org.uk/hearings/phase-4-22-september-2023.

[16] Edward Henry, Flora Page, and Hodge Jones & Allen, 'On Behalf of Core Participants Represented by Hodge Jones & Allen: Teju Adedayo, Nichola Arch, Lee Castleton, Tracy Felstead, Parmod Kalia, Mhairi McDougall, Seema Misra, Vijay Parekh, Vipin Patel, Colin Savage, Sathyan Shiju and Janet Skinner: Closing Statement Phase 4 – Action against Subpostmasters and Others: Policy Making, Audits and Investigations, Civil and Criminal Proceedings, Knowledge of and Responsibility for Failures in Investigation and Disclosure', 16 February 2024 (HJA Phase IV Submissions), www.postofficehorizoninquiry.org.uk/sites/default/files/2024-02/SUBS0000027.pdf.

[17] POL Phase IV (see n.71), paras 75–7.

Jason Beer KC, called this his 'nice little legal point'. Castleton's counsel called it a legal 'sleight of hand'.[18]

In essence, Mr Morgan relied on a legal rule that says an agent signing a statement of account bears the burden of proving that the account he has signed is false. It was an argument that looks very weak in hindsight: SPMs were required to sign the statements, they had no means of formally disputing the accounts, Castleton had disputed them via the helpline, and the Horizon system did not provide evidence that enabled SPMs to conduct proper checks – points that, as a litigant in person, Mr Castleton tried to make at his trial.

Richard Morgan, presumably unwittingly, reinforced the problem with his framing when he defended the strategy before the inquiry: 'I was asked to prove the case that I did on the basis of documents signed by Mr Castleton, whose truth were not challenged by Mr Castleton.'[19] Beer reminds him elsewhere in his testimony that, on the contrary, their truth *was* challenged:[20]

> But that was his case, wasn't it? It wasn't only something that emerged years later before Mr Justice Fraser and it

[18] Edward Henry, Flora Page, and Hodge Jones & Allen, 'On Behalf of Core Participants Represented by Hodge Jones & Allen: Teju Adedayo, Nichola Arch, Lee Castleton, Kathleen Crane, Tracy Felstead, Gowri Jayakanthan, Parmod Kalia, Sharon Kerrigan, Mhairi McDougall, Seema Misra, Vijay Parekh, Vipin Patel, Colin Savage, Janet Skinner, Sathyan Shiju, & 2 Others | Closing Statement – Phases 5 to 7', 9 December 2024, https://bit.ly/48X8tMX.

[19] Morgan (see n.83), 187.

[20] Morgan (see n.83), 67, 81, 105–6, 119, and 156–60.

> may be that it wasn't very well articulated by Mr Castleton, being a litigant in person, but showing you the two things I have, the opening and the evidence, the evidence and the point were there, weren't they?

Morgan suggests he did not understand or appreciate this at the time. Castleton's lawyers suggest in submissions to the inquiry at the end of Phase IV:[21]

> This answer identifies why Morgan did not want to remember the truth: he did not have the evidence to support the contention that Horizon was reliable, and so if proving that contention was POL's purpose in running the litigation, it was a collateral purpose, tactically unworthy, and an abuse of the process of the court.

Whatever the background to Morgan's handling of the case, his central claim about the case strategy he develops is that it was simply a clean way to prove a debt.

The agency argument was accepted by the judge in Mr Castleton's case but was de facto rejected when more thoroughly tested in *Bates*. One of the reasons Mr Justice Fraser deploys against the idea that Horizon provided a statement of account in legal terms is that 'the Post Office argue for a construction that would impose an impossible burden upon SPMs'.[22]

The third point is that the strategy was developed against a background of uncertainty about, and potentially damaging evidence on, Horizon. There is evidence suggesting

[21] HJA (see n.85), para. 11. [22] *Bates No. 3*, para. 852.

that the case was issued prematurely:[23] Mandy Talbot blamed solicitors Bond Pearce (as was) for issuing a claim 'when reliability was unclear'.[24] Talbot is also documented as pointing out that losing the Castleton case would mean that 'the ability of POL to rely on Horizon for data will be compromised and the future prosperity of the network compromised'.[25] And she apparently told POL's external solicitor, Stephen Dilley, that[26] PO must not show any weakness and even if this case will cost a lot, there are broader issues at stake other than just Castleton's claim: if the PO are seen to compromise on Castleton, then 'the whole system will come crashing down'.

Mr Morgan also asked questions about the Horizon system and the 'integrity of the Fujitsu product', but 'didn't get answers' and 'the issue seemed to fall away'.[27] He received general assurances that there was a firm *belief* that Horizon was robust and that there were no problems with Lee Castleton's system.[28]

At one stage during the inquiry, Mr Morgan indicated his general approach to exploring adverse evidence:[29]

> I'm trying to find out what's going on. I'm saying what – you know, without being so crude as to say 'Give me full and frank disclosure', I want to know are there any

[23] POL Phase IV (see n.71), para. 71.2.

[24] 'Transcript – Mandy Talbot', 28 September 2023, www.postofficehorizoninquiry.org.uk/hearings/phase-4-28-september-2023.

[25] 'Transcript – Roderick Ismay (3rd)', 12 May 2023, www.postofficehorizoninquiry.org.uk/hearings/phase-3-12-may-2023.

[26] Talbot (see n.93).

[27] Morgan (see n.83), pp. 73, 87, and 177.

[28] Morgan (see n.83), p. 110.

[29] Morgan (see n.83), p. 97.

> unexploded landmines that I'm going to step on if I go down a particular course? Is there anything that's going to come out that I should know about now? Generally, with sophisticated firms of solicitors, they know that that's what you're asking them when you say, 'What's out there?'
> I think I would have assumed that with Mr Beezer and Mr Dilley.

The inquiry also focused on disclosure issues in the case. Helpdesk call logs indicating widespread problems were withheld from disclosure. POL's legal team persuaded the judge to exclude testimony from other SPMs, knowing that they held evidence about problems in other SPMs' branches that might otherwise be disclosable. Fujitsu engineer Anne Chambers revealed concerns about the trial to her employers.[30]

Lee Castleton's lawyers submitted to the inquiry that pursing Mr Castleton knowing 'there was [undisclosed] expert evidence as to [Horizon's] unreliability' from Jason Coyne in the Marine Drive case was 'conduct which had a tendency to pervert the course of justice'.[31] POL indicated that the inquiry may find Mandy Talbot's evidence on the failure to disclose here 'unconvincing'.[32]

Instead, POL pursued the case as Castleton's health suffered and he was financially ruined. After winning, POL sought to maximise the case's impact, hoping it would deter future claims. Morgan later advised POL on how to defend

[30] Anne Chambers, 'Afterthoughts on the Castleton Case', 29 January 2007, www.postofficehorizoninquiry.org.uk/sites/default/files/2023-10/fuj00152299.pdf.

[31] HJA (see n.85). [32] POL Phase IV (see n.71), para. 84.2.3.

against growing concerns about Horizon's accuracy, reinforcing the same flawed legal strategy. The case was not just about recovering debt – it was a battle to protect a faulty system, indifferent to the consequences for those affected. It provided a legal and evidential framework for a 'flat earth' strategy and enforceable debt without the need to prove it, and in a way that denied its opponents the evidence they were entitled to. Against Lee Castleton, it had succeeded.

Criminal Investigation and Prosecutions

It is a bleak irony that Lee Castleton may have escaped an even worse fate. Audits, which were limited and largely ignored Horizon reliability questions, typically led to investigatory interviews often conducted on the same day. These could lead to suspensions, and they could also then lead to interviews under caution and prosecution.

This process was carried out by the POL investigation team. This team was incentivised by performance-based bonuses to maximise recovery of shortfall debts. The team handled the initial probes before passing on investigation files for decisions on charging SPMs with criminal offences. In England, PO lawyers – both in-house and external – conducted most prosecutions, though public prosecutors were involved in some cases, particularly in Scotland (via the Crown Office) and in England and Wales, via the Department for Work and Pensions and the Crown Prosecution Service.

Prosecutions using Horizon data began in 2000 and ended in 2013. Charges included theft, fraud, and false accounting. They were often based solely on Horizon data, sometimes accompanied by questionable admissions from interviews. POL frequently accepted guilty pleas to false accounting while dropping more serious charges, particularly where SPMs agreed to pay alleged shortfalls to POL. Some had to agree not to criticise Horizon or say that they had had the allegedly missing money when they had not. This was a strategy that minimised criticism of Horizon and maximised shortfall recovery. It also inhibited proper pleas in mitigation on behalf of the defendants.

It is now common ground that the process of prosecutions involved multiple failures, including flawed interviews, poor investigative practices, wrongful charges, inadequate disclosure, misuse of expert evidence, and improperly requiring defendants to avoid criticising Horizon as a plea condition.[33]

Interviews Not Conducted Fairly or Properly

There were various problems with POL investigations. POL excluded independent legal representation at the initial disciplinary interview,[34] though interviews under caution were supposed to be PACE compliant.[35] Some SPMs were

[33] See, in particular, Duncan Atkinson, 'Prosecution in England and Wales and Investigations and Prosecutions by the Post Office 2000–2013 Expert Report Volumes1, 1A, 2 and 2A EXPG0000002 – EXPG0000005', 5 October 2023, https://bit.ly/48Jo2ZS; *Hamilton*; POL Final Submissions (see n.54).

[34] POL Final Submissions (see n.54), para. 256.

[35] 'FOI Request FOI2018/00566, POL Response 10 December 2018', Paula Vennells, 'Paula Vennells to Darren Jones MP, Chairman of the Business, Energy and Industrial Strategy Select Committee', 24 June 2020, https://committees.parliament.uk/publications/1621/docu

dissuaded from bringing support people or legal representation to interviews. The contract forbade it at disciplinary interviews. Some were told it would be an admission of guilt if they brought legal representation. Interviews could last hours, and some SPMs were interviewed multiple times. The trauma from all this runs deep with them.

Dubious and improper tactics were deployed. Interviewers relied on misleading or inaccurate information to pressurise SPMs.[36] Many SPMs were told by a variety of PO personnel, including investigators, that they were the only ones experiencing Horizon problems.[37] Admissions were extracted under pressure. SPMs were told to admit to errors or face charges of theft.[38, 39] David Blakey was asked about an adulterous relationship and gambling debts (both imagined by the investigator) before being encouraged to confess or have them investigate his ill wife (who would then be asked about his fabricated adultery and gambling problem).[40] 'Time and again, subpostmasters

ments/15462/default/; Justice Select Committee, 'Oral Evidence: Private Prosecutions: Safeguards, HC 248 Tuesday 25 May 2021 Ordered by the House of Commons to Be Published on Tuesday 25 May 2021', https://committees.parliament.uk/oralevidence/2245/pdf/.

36 *Bates No. 3*, para. 258.

37 Sam Stein, Christopher Jacobs, and David Enright, 'In the Post Office Horizon IT Inquiry, Closing Submissions on Behalf of Core Participants Represented by Howe & Co. SUBS0000079', 9 December 2024, https://bit.ly/4s0ElJd, para. 157.

38 *Bates No. 3*, para. 260.

39 *Bates No. 3*, para. 260.

40 'WITN01530100 David Blakey – Witness Statement', 14 January 2022, https://bit.ly/4pL2SR8.

were aggressively accused of lying, simply because they could not explain where the money had gone.'[41]

POL now accepts that some interviews were inappropriate, but says that others 'may have been firm rather than oppressive'.[42] They still maintain that some admissions are reliable.[43]

Charging and Prosecuting

Investigations were reviewed by a lawyer prior to charge. This key protection was flawed. Evidence suggested the reviews were cursory. Cases were charged where there was no proof of actual loss beyond Horizon data. Investigators sometimes explicitly noted a lack of evidence of dishonesty, yet the lawyers charged anyway. Where SPMs or red-flag events raised concerns about Horizon that should have been investigated, explicitly or implicitly, those other lines of defence were ignored.[44] No effort was made to track missing funds or investigate alternative explanations for shortfalls.[45]

Defended cases were seen as existential risks to the organisation. One attendance note records that 'it is absolutely vital that we win as a failure could bring the whole of the

[41] 'Transcript – Closing Statement by Mr Moloney, Phase IV', 2 February 2024, www.postofficehorizoninquiry.org.uk/hearings/phase-4-2-february-2024.

[42] POL Phase IV (see n.71), para. 31.

[43] POL Phase IV (see n.71), para. 38.4.

[44] See, for example, the discussions of Mr Wilson, Mr Abdulla, Mrs Howard's case in *Hamilton*.

[45] *Hamilton*, para. 159.

Royal Mail system down'.[46] An infamous memo from POL's criminal lawyer, Jarnail Singh, crowed about the successful prosecution of Seema Misra as 'an unprecedented attack on the Horizon system' which had been destroyed, and hoped that 'the case will set a marker to dissuade other defendants from jumping on the Horizon bashing bandwagon'.[47]

Attacks on Horizon were not unprecedented in civil or criminal cases. Misra's case was unusual in its use of expert evidence to try and mount a robust defence. Moreover, the inquiry has started to expose a significant number of acquittals in cases that the evidence suggests POL criminal lawyers either ignored or failed to learn lessons from.[48]

Failures to Disclose

Prosecutors must disclose material that comes to light if it casts doubt upon the safety of the conviction, and all criminal investigators and prosecutors are obliged to properly maintain and retain disclosure records.[49] These obligations, the Court of Appeal decided in the *Hamilton* case, were not met, and on occasion were not met deliberately.[50]

Disclosure of Horizon audit data was resisted or limited improperly.[51] Specific evidence of problems with Horizon material at the defendant's branch were not

[46] *Hamilton*, para. 93. [47] *Hamilton*, para. 91.iii.

[48] Howe & Co. (see n.106), paras 77–8.

[49] *Hamilton*, 60 and 61. See also Criminal Procedure and Investigations Act 1996, as amended by the Criminal Justice Act 2003.

[50] *Hamilton*, para. 129.

[51] *Hamilton*, paras 144, 151, 166, 207, 219, 251, 253, 260, 264, and 298.

disclosed.[52, 53] Critical records of Horizon errors (so-called PEAKs, a databased of product errors issues in Horizon that required attention) and KELs ('Known Error Logs') were not disclosed.[54] Remote access was not disclosed.[55, 56] Objections to disclosure were made on improper grounds of cost and convenience, not law.[57]

POL systems seemed to encourage the recording of sensitive information in ways designed to reduce chances of disclosure to SPMs. 'Significant failures' in POL systems, some of which might also pose risks to POL's security, were confined to a 'confidential offender report' rather than appearing in 'disciplinary reports'.[58] Contrary to much evidence before the inquiry, POL said this was to ensure such concerns were properly reviewed for disclosure in criminal cases, rather than the opposite.[59] If that was the intention, it does not appear to have worked.

Disclosure problems were general and persistent, but there was a particularly concerning episode about a receipt and payment mismatch (RPM) bug just before Seema Misra's trial in 2010. Mrs Misra's trial took place at a sensitive time. Press and political interest in Horizon was growing. A note of a meeting days before the Misra trial discussed an RPM bug which 'if widely known could cause a loss of confidence in the Horizon System by branches', as well as having

52 *Hamilton*, para. 316. 53 *Hamilton*, para. 326. 54 *Hamilton*, para. 18.

55 *Hamilton*, para. 16. 56 *Bates No. 3*, para. 542.

57 *Hamilton*, para. 91.

58 'Closing Statement by Ms Watt, Phase IV', 2 February 2024, www.postofficehorizoninquiry.org.uk/hearings/phase-4-2-february-2024.

59 POL Phase IV (see n.71), para. 30.

a 'potential impact upon ongoing legal cases where branches are disputing the integrity of Horizon Data'; additionally, 'it could provide branches ammunition to blame Horizon for future discrepancies.'[60] The attendees at the meeting discussed using covert remote access to cover up the bug that had been discovered, but we are told they decided against it.

It is clear this note came to the attention of the criminal law team within POL, Rob Wilson (head of the criminal team at the time) and Jamail Singh, who were sent an email about 'repercussions in future prosecuted cases and on the integrity of Horizon on our system'.[61] The email was printed out from Singh's computer immediately before Mrs Misra's trial, but Singh denies seeing it.[62]

It was not disclosed in the Misra case. The expert witness in the Misra trial for the PO was Gareth Jenkins. He had been involved in the RPM meeting shortly before the trial. On the day of the trial the defence applied for the trial to be stayed because of inadequate disclosure of Horizon data to their expert.[63] The court dismissed that application and Mrs Misra's expert was encouraged to try and resolve matters through discussion with Gareth Jenkins instead. The RPM bug related to the version of Horizon (sometimes called legacy

[60] *Bates No. 6*, para. 429.

[61] 'Transcript – Robert Wilson (2nd)', 12 December 2023, www.postofficehorizoninquiry.org.uk/hearings/phase-4-12-december-2023.

[62] See, 'Transcript – Jarnail Singh (Third)', 3 May 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-3-may-2024, and the discussion of POL00055410.

[63] 'Warwick Tatford – Witness Statement WITN09610100', 25 October 2023, https://bit.ly/40ZsLLS.

Horizon) that pre-dated the one being used in Seema Misra's case (Horizon Online, brought in in 2010). By the time of the *Hamilton* case they had conceded it ought to have been disclosed.[64] Whether it was Horizon Online or legacy Horizon, it showed the potential for serious bugs that caused phantom shortfalls.

On disclosure more generally, the Court of Appeal concluded that:[65]

> It was POL's clear duty to investigate all reasonable lines of enquiry, to consider disclosure and to make disclosure to the appellants of anything which might reasonably be considered to undermine its case. Yet it does not appear that POL adequately considered or made relevant disclosure of problems with or concerns about Horizon in any of the cases at any point during that period. On the contrary, it consistently asserted that Horizon was robust and reliable. Nor does it appear that any attempt was made to investigate the assertions of SPMs that there must be a problem with Horizon. The consistent failure of POL to be open and honest about the issues affecting Horizon can in our view only be explained by a strong reluctance to say or do anything which might lead to other SPMs knowing about those issues. Those concerned with prosecutions of SPMs clearly wished to be able to maintain the assertion that Horizon data was accurate, and effectively steamrolled over any SPM who sought to challenge its accuracy.

The court agreed this went further than '"simple" non-disclosure'; it indicated 'institutional reluctance . . . to

[64] *Hamilton*, para. 206. [65] *Hamilton*, para. 122.

investigate and disclose anything which would or could compromise the perceived integrity of Horizon'.[66] The court comes close to suggesting that the decisions were made in bad faith.[67]

Plea Bargaining

Inadequate investigation and disclosure was central to POL's reversal of the burden of proof on SPMs in criminal cases. In criminal cases, the rules against such an approach are clear. And, the Court of Appeal noted, 'many may well have felt that they had no real alternative but to plead guilty on the most favourable basis which could be agreed with POL'.[68]

This led to coercive plea deals influenced by what the Court of Appeal, perhaps naively at the time, was 'not persuaded . . . [was] an *improper* financial motivation for pursuing prosecutions'.[69] A mixture of POL concessions and Court of Appeal's findings showed 'unacceptable', 'irrational', and 'improper' approaches to prosecution and plea with evidence of undue pressure.[70] Keeping 'open the threat of the theft charge' was leverage in plea deals.[71] It was often dropped for a plea to false accounting. Plea deals required defendants to forego criticism of Horizon when making pleas in mitigation in ways sometimes improper and designed to enforce repayment.[72] In essence, plea deals stifled

[66] *Hamilton*, para. 95. [67] *Hamilton*, para. 135.
[68] *Hamilton*, para. 125. [69] *Hamilton*, para. 136.
[70] *Hamilton*, para. 115. [71] *Hamilton*, para. 114.
[72] *Hamilton*, paras 114, 116, 117, 146, and 162.

the public airing of computer errors and sought to maximise commercial recoveries for the PO.

Gareth Jenkins

Fujitsu engineer Gareth Jenkins provided expert evidence in criminal cases, usually in writing, and sometimes engaging in less formal discussion with an opposing expert. In Seema Misra's trial, he gave oral evidence. In July 2013, Simon Clarke, a barrister working for Cartwright King, had given POL written advice on what I am going to call 'the Gareth Jenkins Problems'.[73] He gave several written pieces of advice. This is the one typically called 'the Clarke Advice'. This advice was first disclosed to SPM lawyers in the *Hamilton* proceedings in November 2020.[74]

The Clarke Advice began to reveal why the lawyers in *Bates* had been anxious not to call Jenkins, still less have him cross-examined. Clarke said Mr Jenkins had failed to comply with his duties as an expert witness and that this had profound implications for POL prosecutions past, present, and future. He had failed to disclose evidence of bugs that he was aware of and had made statements that could be said to be misleading. In quashing Seema Misra's conviction, the Court of Appeal highlighted the fact that 'Mr Jenkins gave sworn evidence to the jury' as one reason they saw this as a 'compelling case of

73 Simon Clarke, 'Advice on the Use of Expert Evidence Relating to the Integrity of the Fujitsu Services Ltd Horizon System (POL00006357)', 15 July 2013, (*Jenkins Advice*) https://bit.ly/3MIbM34.

74 *Hamilton*, para. 82.

the sort of prosecutorial misconduct that undermines public confidence in the criminal justice system'.[75] Clarke had said: Dr Jenkins' credibility as an expert witness is fatally undermined. He should not be asked to provide expert evidence in any current or future prosecution.[76]

Mr Clarke was praised for his robust advice on the Jenkins problem and other advice dealing with suggestions of shredding disclosure documents by POL's Director of Security, John Scott, which is discussed in the next section. For now, let us focus on what was revealed in the inquiry about why Jenkins' evidence may not have been complete. What becomes clear is that POL's legal team had fundamentally mismanaged expert evidence, using Fujitsu technicians to avoid disclosing technical details. Lawyers shaped expert reports, encouraged partisanship, and suggested changes to strengthen POL's case – without disclosing those alterations as they were required to.

In Misra's case, the counsel instructed by POL, Warwick Tatford, was examined in the inquiry on his apparent failure to ensure Jenkins was properly advised of his obligations of independence and his duty to the court. Tatford's own comments on Jenkins' draft report show he actively influenced the language; the suggestion being put by counsel to the inquiry was that this was to harden evidence against defendants. POL's final submissions said that whilst it was not 'inherently improper' to suggest changes to the expert report, one would need to make such changes available for

[75] *Hamilton*, para. 209. [76] Clarke Advice (see n.142).

disclosure, which was not done, and conceded that:[77] "the partisan way that Mr Jenkins was instructed to attack or discredit a defendant's case, as opposed to reviewing the evidence and forming an independent expert opinion, represented a regrettable and improper understanding of the role of an expert on the part of POL's criminal law team."

Expert reports are supposed to comply with a set of requirements that demonstrate their independence, such as clear statements of the material they have relied on and assessments of the limits of their own opinions. Jenkins' witness statements showed none (or very few) of these essential hallmarks of expert evidence. Tatford admits compliance with these rules was 'nowhere near' satisfactory. Asked at one stage whether advice given to Jenkins on his role was 'risible', Mr Tatford described it as 'disastrous'.[78] It leads to one of the more meaningful apologies given to the inquiry:

> I've actually found – I've actually found the exercise – and it's been quite a demanding exercise to do witness statement and go through matters – I have found that's clarified my mind as to what happened and, when I said I felt ashamed, I do. I actually feel worse because it's become quite clear in the way that the evidence is properly been put before me that there are many failings that I had ignored on my part and I perhaps created a rosier version in my memory that wasn't really there.
>
> I apologise unreservedly for what happened. . . .

[77] POL Phase IV (see n.71), paras 29.5–29.6.

[78] Transcript – Warwick Tatford, 15 November 2023, www.postofficehorizoninquiry.org.uk/hearings/phase-4-15-november-2023.

> I have changed my view. It's taken me a long time. I suspect I was in denial for a long time, perhaps in a self-justificatory way, and I apologise for that.

Conclusions

Lawyers like to say, particularly when they come in for criticism, that they simply advise on the law. In reality, it is not just the law that they trade on. Uncertainty is what lawyers deal in. They advise on it, and they help their clients act on (or despite) it. Sometimes they manufacture it or exploit it.

Not all of this is illegitimate. A defence lawyer's role is to focus on any reasonable doubt in the prosecution case against their client, for instance. Their handling of uncertainty is, though, subject to rules. We speak of lawyers' ethics, but they are also properly understood as rules. Laws.

In the PO case alarm bells began to ring when Mr Justice Fraser said the *Bates* group litigation was based on a 'flat earth case' involving unreliable witnesses and dubious tactics. The Court of Appeal's *Hamilton* judgment captures the PO's 'failures of investigation and disclosure', as:[79] so egregious as to make the prosecution of any of the 'Horizon cases' an affront to the conscience of the court. By representing Horizon as reliable, and refusing to countenance any suggestion to the contrary, POL effectively sought to reverse the burden of proof.

Understanding how the reversal of the burden of proof is a multi-layered phenomenon often involving lawyers

[79] *Hamilton*, para. 171.

is an important part of understanding the deep-seated nature of the ethical problems revealed in the cases. At multiple stages of preparation and action against SPMs they were prejudiced by the presumption of their guilt. At root, what we see is lawyers seeing their job as taking maximum advantage of any factual or legal uncertainty for their clients, paying scant regard to any other obligations and sometimes disregarding what the facts are or the law quite plainly required of them. They created illusions of probity, propriety, and legality where none existed.

5

The Post Office's Aggressive Legal Defence

In the story so far, we have seen various red flags that might have prompted POL to pause for thought about Horizon and potential miscarriages of justice and legal difficulties. These include Jason Coyne's report in the Cleveleys case; Anne Chambers raising causes for concern in an 'afterthoughts' document she wrote after giving evidence in the Castleton case;[1] and the RPM note in the Misra case. In 2009, Rebecca Thompson published a story for Computer Weekly critical of Horizon. (Sir) Alan Bates created the Justice for Subpostmasters Alliance (JFSA) in 2009 and political pressure built up, with James (now Lord) Arbuthnot MP leading the charge. In 2011, Nick Wallis reported for BBC's *Inside Out South* on Jo Hamilton's and Seema Misra's stories (while the latter was still behind bars), and *Private Eye* picked up the story for the first time.

In 2010, POL had considered an independent review of Horizon, but Rob Wilson, head of POL's criminal lawyers, reacted adversely to the suggestion: 'An investigation will be disclosable as undermining evidence,' he wrote. Horizon would be seen as 'a compromised system with untold damage to the business', and 'the reputation of my team' might

[1] Chambers (see n.99).

be compromised if they were thought to be pursuing cases improperly.[2]

Instead, Rod Ismay, POL's Head of Product and Branch Accounting, produced an internal report on Horizon. Largely, it was a collation of evidence and arguments in support of Horizon. He agreed it presented 'one side of the coin' when cross-examined about it at the inquiry, but rejected the Chairman to the Inquiry's suggestion it was a whitewash.[3] The report blamed shortfalls on theft and cited successful prosecutions as proof of Horizon's reliability.[4]

The Ismay report reiterated concerns about carrying out a more independent investigation: it would be disclosable in court, potentially halting prosecutions and prompting appeals, a view attributed to Wilson, whose stance was perhaps best summed up in this exchange during his inquiry testimony:[5]

> MR BEER: Was it your view that the Post Office should just grit its teeth and get on with prosecuting people?
>
> MR WILSON: 'I think so, yes.'

2 'Transcript – Robert Wilson (1st)', 12 October 2023, www.postofficehorizoninquiry.org.uk/hearings/phase-4-12-october-2023.

3 'Transcript – Roderick Ismay (2nd)', 11 May 2023, www.postofficehorizoninquiry.org.uk/hearings/phase-3-11-may-2023.

4 Rod Ismay, 'Report from Rod Ismay to Dave Smith, Mike Moores and Mike Young CC Others RE: Horizon – Response to Challenges Regarding Systems Integrity – POL00179521', 2 August 2010, https://bit.ly/48XVDhA.

5 Wilson (see n.150).

Second Sight

Despite this resistance, a more independent review was conducted. POL acquired a new Chair, Alice Perkins, in July 2011, and the (then) MP James Arbuthnot approached her in early 2012 about problems with Horizon.[6] Paula Vennels was also a new CEO, having already held a senior role in the business for several years. Consideration was given to asking one of the Big Four accountants, Deloitte, to conduct a system-wide review but POL opted instead for case-by-case investigations that would focus on individual complaints conducted by forensic accountants Second Sight.

It was Second Sight that first uncovered prosecution flaws, including reports showing no evidence of dishonesty in cases like Jo Hamilton's. And it was Second Sight that learned from Gareth Jenkins that Horizon had known bugs that had not been disclosed. It was this discovery that led to the Clarke Advice, as we will see.

Second Sight produced an interim report in July 2013. Its preliminary conclusions 'found no evidence of system wide (systemic) problems with the Horizon software', but also '2 incidents where defects or "bugs" in the Horizon software gave rise to 76 branches being affected by incorrect balances or transactions'. They found that 'POL's response [to SPM problems] can appear to be unhelpful, unsympathetic or simply fail to solve the underlying problem', and noted a 'lack of an effective "outreach" investigations function within POL

6 'Transcript – Alice Perkins', 5 June 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-5-june-2024.

that results in POL failing to identify the root cause of problems and missing opportunities for process improvements', as well as other problems.

POL amplified the claim about not finding systemic defects in the software into a positive claim of Horizon reliability, downplayed the significant problems surrounding the management of the system, and sought to undermine Second Sight. But by the time of the inquiry, POL admitted that it was defensive and closed-minded about Horizon's faults, had constrained Second Sight's remit, and had withheld key information. While accepting some responsibility, POL also blamed external voices, including reproach for Andy Parsons and another solicitors' firm, Linklaters, as well as Fujitsu, for also criticising Second Sight.

After the interim report, the evidence suggests POL shifted from allowing Second Sight access to legal files to obstructing them. Second Sight stated that they were routinely denied access to the files as they were considered legally privileged. POL lawyers also referred them to the non-disclosure and confidentiality requirements outlined in their contract to inhibit them in their work.[7] The time of this shift coincided with the departure of Susan Crichton, the then General Counsel, from POL, and her replacement with Chris Aujard as Acting General Counsel.

[7] 'Ian Henderson – Transcript', 18 June 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-18-june-2024.

The Independent Mediation Scheme

At around this time, POL created a mediation scheme. The scheme appears partly to have been an attempt to manage Second Sight by making them operate within the context of a working group, on which POL sat, and creating a mechanism for resolving cases without a definitive investigation. POL's expectation was that most cases would be resolved without any compensation paid or with minimal token payments (following advice from the solicitors' firm Linklaters).[8] In their final submissions to the inquiry, they recognised that they were likely to be criticised for persisting with a lengthy and costly scheme 'outwardly stated' to be about resolving complaints that prioritised complaint resolution 'over truth seeking'. They claimed a 'not insignificant portion' of cases settled, though the actual figures – 24 out of 136 cases, just short of one in five – were mediated and we do not know how many of them gave rise to agreements within which SPMs were properly compensated.[9] They concede the scheme was run in a way inconsistent with their original commitments to Sir Alan Bates and the JFSA.[10] SPMs would say the complaints mediation scheme was run with the hallmarks of obstruction and attrition.[11]

8 POL Phase IV (see n.71), para. 171.
9 POL Phase IV (see n.71), para. 176.
10 POL Phase IV (see n.71), para. 174.
11 See, for example, 'Transcript – Alan Bates', 9 April 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-9-april-2024.

Importantly, Sir Anthony Hooper, who chaired the scheme's working group, says he told POL that it was Horizon, not the SPMs, that was probably the problem:[12]

> I tried to make it clear to Paula Vennells and to the Chairman that the Post Office case didn't make sense, and I felt that throughout, and no doubt Second Sight did. It didn't make sense that reputable SPMs appointed by the Post Office, after an examination of their characters, would be stealing these sums of money.
>
> It didn't make sense, in particular because within a matter of days of any alleged theft, they had to balance the books. It just never made sense. I made that point over and over again.

POL kept that quiet for years. It seems likely that Hooper was subject to a confidentiality agreement until POL agreed to lift the obligation on him, which enabled him to speak to the journalist Nick Wallis in 2021.[13]

Arguments persist as to why the scheme was ended, but one issue was POL's eventual decision to exclude all criminal cases from the mediation. Lord Arbuthnot, who had helped broker the Second Sight investigation, regarded this as antithetical to the scheme, which had been set up to help SPMs with convictions, such as his constituent, Jo Hamilton.[14] POL said they had formed the view that the criminal convictions

[12] 'Transcript – Sir Anthony Hooper', 10 April 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-10-april-2024.

[13] Richard Moorhead, 'Breaking Silence . . . ', Substack newsletter, *Richard Moorhead Thoughts on the Post Office Scandal* (blog), 11 April 2024, https://richardmoorhead.substack.com/p/breaking-silence.

[14] 'Transcript – James Arbuthnot of Edrom', 10 April 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-10-april-2024.

were safe and there was no evidence Horizon was at fault for losses and so convicted claimants should be excluded.[15] The basis of the judgment that convictions were safe lies in a process that remained in the shadows until the *Hamilton* case in 2021. We now turn to that work on prosecution safety.

Reviews Relevant to Prosecution Safety

Simon Clarke, a barrister with Cartwright King solicitors in 2013, told the inquiry that towards the end of June 2013, either Jarnail Singh or Rodric Williams contacted his colleague, Martin Smith, who told Clarke that 'Second Sight are going to say there are two bugs'. His initial reaction was 'Who told them?'[16] Suspecting Gareth Jenkins, he and Martin Smith contacted Jenkins about a live case with which Jenkins was involved to determine if they were correct. Interestingly, they covertly recorded the conversation. Jenkins informed them about the bugs and mentioned that he had discussed them with Second Sight. Clarke writes a written note on the live case on 1 July saying (amongst other things) 'in any event I require a face-to-face conference with Gareth Jenkins upon publication of the Second Sight report'.[17] That conference never took place.

Clarke needed to assess what advice to give for POL to meet its obligations as a prosecutor under *R (Nunn)* v *Chief*

[15] POL Final Submissions (see n.54), para. 183.

[16] 'Transcript – Simon Clarke', 9 May 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-9-may-2024.

[17] 'Transcript – Simon Clarke' (see n.164).

Constable of Suffolk Constabulary [2015] AC 225: that case says 'There can be no doubt that if the police or prosecution come into possession, after the appellate process is exhausted of something new which might afford arguable grounds for contending that the conviction was unsafe, it is their duty to disclose it to the convicted defendant.' Rather than meeting Jenkins and determining the extent and cause of the problems, Clarke decided to review Jenkins' witness statements on past cases and compare them with what he had recently said about bugs in the system. He then wrote the July advice criticising Jenkins's failure to disclose such bugs in his evidence.

Mr Clarke could not explain to the inquiry why he did not speak to Jenkins as he had first indicated he thought he should, saying he had probably decided by then 'to look forwards rather than back'.[18] The last two sentences of his July advice on Jenkins, given around the time he had decided to look forward and not back, read:[19] 'In an appropriate case the Court of Appeal will consider whether or not any conviction is unsafe. In so doing, they may well inquire into the reasons for Dr Jenkins' failure to refer to the existence of bugs in his expert witness statements and evidence.' A vulnerability that he knows the Court of Appeal might want to explore lay unexamined.

The inquiry also probed another possible explanation for not asking Jenkins what had gone wrong. Cartwright King had prosecuted a good many cases for POL from 2012 that had not involved Mr Clarke personally, including cases involving evidence from Gareth Jenkins. The evidence suggests that like

[18] 'Transcript – Simon Clarke' (see n.164). [19] Clarke Advice (see n.142).

Warwick Tatford, they too handled him inadequately, and perhaps on occasion improperly.[20] There was evidence before the inquiry that Martin Smith and Rodric Williams may have discussed on 2 September 2013 that they 'don't think he's ever been advised of his duties'.[21] Cartwright King lawyers claimed either not to have known about the problem with instructing Jenkins or not to have appreciated that there was a conflict of interest.

Clarke's advice on Jenkins led to his firm conducting a review of all prosecutions from 2010 onwards. It was confined to cases from 2010 onwards on the basis only Horizon Online had been identified as producing undisclosed errors and considered the need to disclose two documents only. One was Second Sight's interim report and the second was a report from Helen Rose. That Gareth Jenkins' evidence had been found to be tainted was not considered for disclosure.[22]

POL suggests the inquiry evidence shows that Cartwright King was a poor choice to conduct both prosecution work and the review work. One of their lawyers had 'accepted that by 2013 [Cartwright King] was "not covered in glory, as far as their role as independent lawyers [was] concerned"', key staff 'had limited prosecution experience, which, "plainly wasn't a safe state of things"', and their approach was 'somewhat disjointed' in ways 'plainly unsatisfactory'.[23] They

[20] POL Final Submissions (see n.54), para. 205; see also the evidence of Martin Smith and Harry Bowyer.

[21] See, for example, Jenkins and HJA Submissions.

[22] Transcript – Brian Altman 8 May 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-8-may-2024; Clarke (see n.164).

[23] POL Final Submissions (see n.54), para. 204.

say too that 'POL was an "enormous" client for Cartwright King and that this factor "must have" played a part (whether consciously or unconsciously) into how Cartwright King approached its advice and its ability to advise impartially and independently.'[24] POL concede that it is 'very clear' Cartwright King should not have been instructed, 'given [Cartwright King]'s lack of relevant expertise and management of the POL account, and the devastating consequences of such'.[25] And they accept that they failed to supervise and monitor their work properly, pointing the finger at Jarnail Singh, POL's in-house criminal lawyer at that time.[26]

They might have thought about pointing the finger elsewhere. When the Cartwright King review was first suggested, POL General Counsel (GC) Susan Crichton said she 'feels as if there is a conflict here which I am not sure I understand'.[27] The problem was Cartwright King was being asked to mark their own homework. That led to the involvement of Brian Altman KC.

The Altman Review

The response to Crichton's concern about a conflict was to instruct Brian Altman KC to review Cartwright King's review. What might properly be described as a solicitor–own client conflict that prevented them from acting, Altman described in

[24] POL Legal Team, para. 204.

[25] POL Final Submissions (see n.54), para. 206.

[26] POL Final Submissions (see n.54), para. 206, Singh quote in n.461.

[27] 'Transcript – Susan Crichton', 24 April 2024, www.postofficehorizoninquiry.org.uk/hearings/phases-56-24-april-2024.

less serious terms as 'the possibility of the suggestion of a commercial conflict of interest. Given CK's professional' approach to the review, he rejected 'any suggestion' that were not or could not act with 'an independent and professional approach to the Horizon issues'.[28]

This is one of many potential problems with the Altman review.[29] Two points merit particular mention. Similar to Mr Clarke, Mr Altman began his work by thinking he might need to talk to Jenkins to avoid criticism of his report but persuaded himself he did not. He denies the suggestion put to him by Jason Beer KC that this was 'loading the dice by excising him in this way',[30] but accepts that he should have looked at the process by which Jenkins was instructed 'with the clarity of hindsight'.[31] He also accepts he should have disclosed his and Simon Clarke's assessment that Jenkins was a tainted witness.[32] Altman tells the inquiry he would have done things differently if it had been a CPS case; his failures were simply a mistake:[33]

> I'm human, like the rest of us, Mr Stein. Probably including you and I make mistakes and we all make mistakes and, as I said earlier, I would like to say was misjudgement. I don't think I made the judgement about it, it passed me by,

[28] Altman (see n.47), para. 99.

[29] Richard Moorhead, Karen Nokes, and Rebecca Helm, 'Working Paper 6 | Brian Altman's General Review', 2023, https://bit.ly/44BjrXc.

[30] See, Richard Moorhead, 'Gareth Jenkins and the Incurious Prosecutor?', Substack newsletter, *Richard Moorhead Thoughts on the Post Office Scandal* (blog), 12 May 2024, https://richardmoorhead.substack.com/p/gareth-jenkins-and-the-incurious, for a fuller discussion.

[31] Altman (see n.170). [32] Altman (see n.170). [33] Altman (see n.170).

> I don't know why I didn't see it. It's regrettable and I regret that I didn't.

Submissions from one of the SPM legal teams, led by Ed Henry KC, suggested:[34]

> Neither Mr Altman KC nor Mr Clarke has offered a compelling or even clear explanation for their mutual failure to provide the Criminal Cases Review Commission (CCRC) and Mrs Misra with disclosure of the Gareth Jenkins' 'taint'. We submit that the explanation for this is simple but alarming: the Altman General Review and the Cartwright King sift review were 'optic pieces' (akin to Hugh Flemington's strategy 'to give off the signals that we are proactive, doing all the right things'). They were designed to make it appear as if the Post Office was complying with its duties of disclosure, in order to keep the CCRC and claims for compensation at bay. It is therefore unsurprising that their sifts and reviews did not lead to the Post Office swiftly restoring matters to the Court, and providing the CCRC with a clear and comprehensive appraisal of Gareth Jenkins' misleading evidence, and the Post Office's abject failure to instruct him.

In their submissions to the inquiry, POL acknowledged that limiting the review to 2010 became 'difficult to sustain' and should have been recognised as such by Cartwright King.[35] Patterns in the cases being reviewed by Cartwright King lawyers 'ought to have put them on notice' of

[34] HJA (see n.85), para. 271.

[35] POL Final Submissions (see n.54), para. 194.

significant problems.[36] Furthermore, their own guidance was flawed, and there was 'significant inconsistency' in advice on cases, which was sometimes wrong.[37]

Despite these problems, Brian Altman's General Review concluded in 2013 that Cartwright King's sift review was 'fundamentally sound'.[38]

Throughout the life of this story, Altman advised on many occasions. On 2 August 2013, he provided an 'Interim Review of Cartwright King's Current Processes'. Beer KC tells the inquiry in his opening that 'Mr Altman considered two copy prosecution files, something that does not appear later to have been reflected in a submission to the Court of Appeal in *Hamilton*, namely that this advice considered a review of the process, though not the individual decisions in reviewed cases.'[39]

He advised on risks in the mediation (9 September 2013), warning that 'lawyers acting for those individuals may be using the scheme to obtain information which they would not normally be entitled to to pursue an appeal.' His General Review was dated 15 October 2013, and on 19 December, in a review of the PO's role as a prosecutor, he concluded that there was no good reason to recommend that the PO should discontinue its prosecution role. Counsel to the inquiry suggests POL at this stage was leaning significantly on Altman's reputation as a former 'First Treasury Counsel', and in

[36] POL Final Submissions (see n.54), para. 195.

[37] POL Final Submissions (see n.54), paras 196–203.

[38] Altman (see n.47), para. 5 (xii).

[39] The following description and quotes are taken from Jason Beer KC, *Opening Statement to PO Horizon IT Inquiry, 12 October 2022*, 2022, https://bit.ly/48Ztzuo.

March 2015 Mr Altman gave 'important advice' on the charging of theft and false accounting. That sought to ensure a questionable statement made to Second Sight that theft and false accounting were equivalent charges was 'defensible' when it (arguably) was not. Second Sight was concerned that theft charges were being used to leverage false accounting pleas. Had the two charges been equivalent, their concern would make no sense. Mr Altman advised in July 2016, having reviewed eight cases, that 'the allegation that [the] Post Office had operated a deliberate policy to charge theft, when there was no or no sufficient evidence to support it, just to encourage or influence pleas of guilty to charges of false accounting is fundamentally misplaced'.

Mr Altman also provided an 'Advice on settlement', dated 17 July 2019, advising against 'any public apology that risks misinterpretation or the implication of an admission of fault' because it might lead to a greater risk that convictions would be seen as unsafe. Advice on the *Bates* judgments noted that 'the apparent late concession' on remote access was a 'startling concession' and requested further information in that regard. Evidence before the inquiry suggests other incidences of perhaps less formal advice. POL notes one example in its final submission to the inquiry: a letter sent to the CCRC and reviewed by Altman, which he accepted had omitted 'important information'.[40]

Brian Altman represented the PO before the Court of Appeal in 2020 and was part of the team that resisted the arguments that POL's conduct of prosecutions was an affront

[40] POL Final Submissions (see n.54), para. 210.

to justice.[41] Without suggesting this was the intention, there is some indication that, had the team succeeded, the Clarke Advices on Gareth Jenkins and shredding may not have become public knowledge. One could speculate, too, on whether the inquiry would have been granted statutory powers.

Filtering Out and Up

Evidence before the inquiry suggests various ways in which detailed, troubling information was sanitised at source or when it was passed up the corporate chain. Early in Cartwright King's review, allegations of shredding disclosure records surfaced. Simon Clarke advised this could amount to perverting the course of justice.[42] It was then referred to only crypitcally as 'cultural issues' in POL documents, and there is no evidence of any substantial investigation into what happened.[43] Altman's review was used to advocate to the CCRC that their post-conviction disclosure was being properly handled.[44] Paula Vennells wrote to a government minister in 2015 to say that 'Through our own work, and that of Second Sight, we have found nothing to suggest that, in criminal cases, any conviction is unsafe.'[45] She had

41 See Richard Moorhead, Karen Nokes, and Rebecca Helm, 'The Conduct of Horizon Prosecutions and Appeals, Post Office Project: Working Paper 3', 2021, pp. 37–40.

42 Simon Clarke, 'Advice on Disclosure and the Duty to Record and Retain Material – POL00006799', 2 August 2013, https://bit.ly/4aS8ZOK.

43 Clarke (see n.164).

44 POL Final Submissions (see n.54), para. 208 onwards.

45 Paula Vennells, 'Letter to George Freeman MP, Adjournment Debate: Postmasters and the Horizon System', 26 June 2015, https://bit.ly/49tKwOJ.

similarly defended the propriety of POL prosecutions before a Parliamentary Select Committee.[46]

Neither the Second Sight interim report nor the Jenkins Problems were properly canvassed with the board. They did not see Clarke's Jenkins advice or a summary of it. They had Second Sight's interim report and a cover paper on it from Susan Crichton, but failed to properly scrutinise it, focusing instead on what positive news there was in the report and on concerns about the management of the review by Crichton.[47] POL Chair Alice Perkins appeared to be concerned that Susan Crichton had not sufficiently 'marked' Second Sight when they produced their interim report.[48] Both POL's Chair and CEO (Vennells) criticised Crichton, and she was humiliatingly excluded from the board meeting and left POL not long afterwards. Her exclusion prevented her from discussing matters further. Her paper 'did not highlight the critical findings which needed to be discussed'.[49] However, it has been suggested that the board might (and could) have put two and two together from a significant litigation report that Susan Crichton also prepared for it.[50] Under her watch, the POL legal team failed to take adequate steps to investigate the shredding allegations and apparently

[46] 'Paula Vennells, Business, Innovation and Skills Committee, Oral Evidence: Post Office Mediation, HC 935', 3 February 2015.

[47] POL Final Submissions (see n.54), para. 157 and onwards.

[48] Perkins denied she meant the suggestion that Crichton should have had someone 'marking' Second Sight implied anything problematic. Perkins (see n.154).

[49] POL Final Submissions (see n.54), paras 163–165.

[50] POL Final Submissions (see n.54), para. 64.

either minimised or failed to draw it to the attention of Paula Vennells; POL submitted to the inquiry that this might represent a 'serious downplaying of the issue'.[51] Crichton relayed incorrect information about an internal audit having been reviewed by Deloitte and sought to give it privileged status when it should not have had it.[52] She was also noted to have said that all prosecutions had been successful, a false narrative likely derived from the Ismay report or a briefing from one of her criminal law colleagues.[53]

A summary of a report from Deloitte (the Project Zebra Report of May 2014) disclosed critical information on the vexed issue of remote access. The Board were not told. Acting GC Chris Aujard said Roderick Williams had carriage of the issue but accepted that the board report which he had co-authored was too brief and should have included information on remote access.[54] He blamed pressure from Paula Vennells and his workload. Failure to disclose this 'highly relevant information' was not deliberate, POL say, but arose from a failure to understand the report.[55]

After Vennells' uncomfortable appearance before the Select Committee in 2015, incoming POL Chairman Tim Parker was encouraged to get on top of any problems with POL prosecutions by the PO Minister. It was decided to instruct Jonathan Swift QC (now a judge) to conduct another

51 POL Final Submissions (see n.54), para. 63 fn.111.
52 POL Final Submissions (see n.54), para. 73.
53 POL Final Submissions (see n.54), para. 73.
54 POL Final Submissions (see n.54), para. 67.
55 POL Phase IV (see n.71), para. 67.

review. His report had problems[56] but put its finger on many of the key issues, including the POL having publicly stated incorrect positions on remote access. It may have been a not so subtly coded way of wondering if POL had been lying.

The full report was kept from the board and the minister, a move which was at least partly influenced by advice on the risks of losing legal privilege, advice that could be criticised as wrong or incomplete.[57] A letter reporting the summarising of the Swift Review to the Post Office Minister, drafted with the help of Jane Macleod (GC until the *Bates* litigation went pear-shaped), similarly failed to include information from Swift's review on this that POL had 'failed to give the full picture as to Horizon's remote access'.[58] Swift himself, though, had reviewed a draft. Macleod signed the *Bates* defence, which stated an incorrect position on remote access as GC on its submission to the court, saying she had taken comfort that the 'fact heavy section of the defence . . . had been appropriately reviewed by those with relevant expertise'.[59]

Assertions of Horizon's reliability and the propriety of convictions were not confined to the courts or Parliament. Notably, journalists have reported being threatened with costly libel proceedings for suggesting problems.

56 Richard Moorhead, Karen Nokes, and Rebecca Helm, 'The Perils of Independent Review. The Swift and Knight Review: Working Paper 5', https://bit.ly/48TlUgU.

57 'Letter from Sarah Munby (Permanent Secretary, BEIS) to Tim Parker, "Post Office"', 7 October 2020, https://bit.ly/3Yw5Uwr.

58 POL Final Submissions (see n.54), para. 90.

59 MacLeod Statement, para. 291.

The 'do not investigate' approach ran deep. In 2012, Richard Morgan advised at a conference, where, according to a note from that conference, advice was given against POL commissioning an independent report and suggesting a PR-focused approach. Morgan accepts he might well have advised against conducting an investigation (whilst saying this was a preliminary discussion, and not considered advice).

It is not suggested that the PR strategy was his idea. Yet, in that note we see the kernel of POL's strategy during the Second Sight investigation and subsequent mediation.

> Whatever the findings of the expert report it will not resolve the problem. POL will be 'damned if they do and damned if they don't'. If the findings are that there are no issues with Horizon people will see that as a 'whitewash' whereas if the findings are negative that will open the floodgates to damages claims by SPM's who were imprisoned for false accounting and Access Legal will start to pursue all the civil cases they are currently sitting on.
>
> POL will always have this problem – some people will never trust computers and will always believe they have an inherent problem.
>
> A less risky approach is to agree to take the relevant MP's privately through particular cases in which they are interested.
>
> POL needs to engage with its stakeholders by perhaps sending out a questionnaire about Horizon to SPM's getting their views and seeking to address the more sensible ones. This is more a PR exercise.

Between this conference in 2012 and the *Bates* litigation that we began this account with in Chapter 3 lay the Second Sight review, the Cartwright King review, the Altman and Swift reviews, and the abandoned mediation scheme. No less a figure than a retired Court of Appeal judge had told POL that their idea that SPMs were stealing money that was highly likely to be picked up in the weekly balancing of accounts made little sense, and that it was much more likely that Horizon was to blame. Still POL and their cohort of helpful lawyers ploughed on. We turn now to consider how lawyers help their clients to see the world in such flawed ways.

6

How Unreliable Gods and Their Fearless Logics Drive Ethical Failure

The PO cases, spanning two decades, multiple lawyers, barristers and solicitors, senior and junior, in-house and in private practice, are extraordinary in their scale and the harms wrought on ordinary people. In the chapters that follow, I suggest that these extraordinary harms flow not from extraordinary malice or self-conscious immorality but from something more ordinary and insidious in its awfulness. Ethical failure stems from complacency and an ideology of lawyering that makes ethical failure likely and cover-ups normal through an adversarial dislocation with truth.

Legal Aggression Harms the Rule of Law

Lawyers like to treat what they do as synonymous with the rule of law. Challenges to NDAs and SLAPPs, for instance, have been met with sometimes fierce resistance on the basis that they inhibit rights. The beneficiary of an NDA that silences a complainant in a misconduct case is taking advantage of contract law. The progenitor of what their detractors would call a SLAPP suit is protecting their privacy, or data protection rights, or rights to protect their reputation. The defenders of NDAs and SLAPPs make rights claims in ways that can create a hefty tension between legality and what I call legal aggression.

I define legal aggression as positions taken through legal phenomena that are *arguably* legal but understood (by the lawyers and/or their clients) to be *probably* unlawful or misleading. Put another way, there is deliberate (or reckless) risk-taking with legality. Legal phenomena can include the interpretation of legal obligations (can I legitimately do act X? does act X give rise to a liability against me?), the creation of legal instruments (is this contract valid in its particulars or does this instrument accurately represent the legal relations it purports to describe?), or investigations that draw on legal norms (did person X do anything wrong and by which standards?).

Such aggression can be permissible (I may act in a way that is more likely than not to amount to a breach of contract, although I may put myself at risk subsequently by so doing) or impermissible (I am prohibited from knowingly or recklessly misleading anyone as a lawyer). The boundaries between the permissible and the impermissible are not necessarily clearly drawn and can depend heavily on the context.

Aggression is driven by the rules, systems, and culture of the profession and its clients. Steven Vaughan, Kenta Tsuda, and I have already shown how aggressive lawyering and the rule of law can conflict in the work we did for the Legal Services Board. There, we argued that:[1]

> Precisely because, as we will show, the debate about the preferred meaning of the rule of law is not settled, we urge scepticism of claims that the rule of law demands any particular response to a regulatory issue or that it ascribes

[1] Moorhead, Vaughan, and Tsuda (n.2), 3.

> to lawyers freedom from restraint or scrutiny. A lawyer's behaviour is not necessarily consistent with the rule of law merely because a superficial claim can be made that they are exercising a right for a client. For example, that I have a right to bring a claim does not necessarily mean I have a right to bring a particular claim in a particular way. Other questions have to be asked and answered.
>
> There is a narrow view of the rule of law which says that professional regulators may not inhibit the 'rights' of clients to access zealous advocacy, and there is a broader view which says that overly zealous advocacy jeopardises and sometimes breaches the rule of law. These debates are reflected in much discussion of NDAs and SLAPPs, for example.
>
> What our analysis of ethical risks in this Report suggests is that lawyers are sometimes too inclined to engage in professionally questionable, and potentially even illegal, actions without fully reflecting on the legal rules and interests engaged. Equally, the examples that we discuss in Section 2 of this Report are not chosen as clear-cut, black-and-white examples of unlawfulness or professional misconduct. They are chosen as examples where there are legitimate questions that might be asked about professional conduct, and which are therefore legitimately the concern of regulators.

Aggression is why we have questions about lawyers enabling oligarchs. It is why the Intelligence and Security Committee, one of Parliament's more sober committees, suggested that professional enabling threatens national security. The committee said it was 'highly probable' that the resources oligarchs could devote to lawyers, as 'a key group of professional enablers', were used to circumvent controls on illicit finance, alongside 'a large private security industry . . . developed in the UK to service the needs of the Russian elite, in which British companies protect the oligarchs and their families, seek kompromat on competitors, and on occasion help launder money through offshore shell companies and fabricate "due diligence" reports, while lawyers provide litigation support.'[2]

Legal aggression is part of the explanation for how Harvey Weinstein, Mohammed Al Fayed, and Philip Green were able to silence complaints of misconduct against them. Weinstein deployed an NDA against Zelda Perkins and a colleague that inhibited their ability to talk to the police – or, indeed, anyone – about the harassment and sexual assault they had experienced. They were even prevented from keeping a copy of the agreement or seeking advice on it without permission.[3] Philip Green's conduct was not on the same scale or seriousness as Weinstein's, but his lawyers deployed NDAs with large clawback clauses, which were said to have intimidated the subjects of those NDAs from speaking out about his conduct.[4] Mohammed Al Fayed's lawyers are reported to have stifled the reporting of sexual crimes using NDAs in settlements alleged to have required the shredding of evidence.[5]

2 Intelligence and Security Committee (see n.15), pp. 15–16.

3 Moorhead (see n.6). 4 Moorhead (see n.6).

5 'Ex-Harrods Employees Accuse Its Late Owner, Mohamed Al Fayed, of Rape', *BBC News*, 19 September 2024, www.bbc.com/news/articles/cz6x635wpjxo.

If one scrutinises such agreements, myriad problems can emerge. The agreements may contain clauses that are likely to be unenforceable as unfair or contrary to public policy. Or they may claim clawbacks of damages that are likely to be penalty clauses. Or they may assert unsupportable claims to confidentiality over serious crimes. They may also require warranties that cannot or should not be given. Asking a victim of harassment to warrant (promise) that the claims they made were not crimes or misconduct can be a device to undermine the claimant should they subsequently report the same conduct.[6] It is legal gaslighting. Arguably unfair clauses hold sway unless a victim decides to break or challenge the agreement. Aggression layers up in legal form, legitimised by claims that freedom of contract trumps the exposure of misconduct,[7] as powerful men and their lawyers draft menace and silence into the lives of their victims through NDAs and non-disparagement clauses.[8]

6 *ABC & others* v *Telegraph Media Group Limited* [2018] EWCA Civ 2329; Richard Moorhead, 'In the Public Interest? NDAs after ABC', *Lawyer Watch* (blog), 25 October 2018, https://lawyerwatch.wordpress.com/2018/10/25/in-the-public-interest-ndas-after-abc/.

7 Jonathan Cohen QC, 'Non-Disclosure Agreements: The Truth behind the Headlines', *Counsel Magazine*, 21 January 2019, www.counselmagazine.co.uk/articles/non-disclosure-agreements-the-truth-behind-the-headlines.

8 'Ex-Harrods Employees Accuse Its Late Owner, Mohamed Al Fayed, of Rape'; Hayley Dixon and Claire Newell, 'Lawyers Investigated over Sir Philip Green's Gagging Orders', *The Telegraph*, 11 February 2019, www.telegraph.co.uk/news/2019/02/11/lawyers-investigated-sir-philip-greens-gagging-orders/; *Arcadia Group Limited and others* v *Telegraph Media Group Ltd* [2019] EWHC 223 (QB); Moorhead (see n.6).

Lawyers have helped banks with off-balance sheet accounting,[9] systemic risk-taking,[10] and disguising commissions on share deals,[11] or have designed lax money laundering controls.[12] In each of these cases, the choices made by the lawyers can be presented as arguably legal even where the approach in question is likely to be improper or even criminal.

What Is Missing from the Definition of Aggression?

Whilst I have defined legal aggression as choices based on arguably legal but probably unlawful or misleading positions,

[9] The argument about legal aggression in this example is a subtle one: whether a lawyer's limited instructions protect them if they knew or ought to know that their advice would likely be misused. David Kershaw and Richard Moorhead, 'Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession', *The Modern Law Review* 76, no. 1 (2013): 26–61.

[10] Joanna Gray, 'Lawyers and Systemic Risk in Finance: Could (and Should) the Legal Profession Contribute to Macroprudential Regulation?', *Legal Ethics* 19, no. 1 (20 June 2016): 122–44; Trevor Clark, 'Ethically Dysfunctional: The Problem with Designation in Leveraged Finance – The Lawyer | Legal Insight, Benchmarking Data and Jobs', 18 October 2022, https://bit.ly/3MK719k.

[11] *PCP Capital Partners* v *Barclays Bank* [2021] EWHC 307 (Comm) ('PCP v Barclays') which is also discussed in Richard Moorhead, 'Something Smelly at Barclays . . . ', *Lawyer Watch* (blog), 4 March 2021, https://bit.ly/3YpuRdb; Trevor Clark, 'PCP v Barclays: The Dirty Work of Lawyering?', *Lawyer Watch* (blog), 5 March 2021, https://bit.ly/495gUGc.

[12] Richard Moorhead, 'On the Wire', *New Law Journal*, no. 17 August (2012): 1080–81; 'Standard Chartered: UK Bank Accused of Helping to Fund Terrorists', BBC News, 4 June 2024, www.bbc.com/news/articles/cd11j09q2llo.

additional problems mark the problematic cases. SLAPPs are a good example. Aggression there involves making a claim that *arguably* a client has been defamed when *probably* they have not been, where the claim is also asserted in ways that do, and may be designed to, inhibit others' rights to freedom of expression. A judgement on what constitutes inappropriate aggression depends on assessing how probable it is that the aggression is wrong, how inappropriate its practical manifestation and impacts are, and perhaps what the purpose of the aggression is.

Secrecy and rule of law rhetoric often shroud legal aggression from scrutiny. Those subject to arguably nefarious NDAs had to break them for them to be challenged and face down claims that they had freely contracted into their own subjugation. SLAPPs can be based on a simple, unverified assertion that a defamation claim is legitimate or that other rights have been breached.

It is how such aggression degrades legality, integrity, and honesty that concerns me most when discussing lawyers' ethics problems, and this is the focus of this book. That is not to say that other questions of lawyers' ethics are not important and of interest, but I aim to emphasise two things. One is that critical elements of lawyers' ethics challenge the rule of law, even when purporting to rely on it. In this sense core elements or priority aspect of lawyers' conduct are concerned with integrity, honesty, and fairness, as legality depends on them. That leads me to the second emphasis: if lawyers' ethics is central to legality, we should reject the rather straw-man notion, offered by rather too many practising lawyers, that ethics is the trumping of law with 'subjective' morality and to be deprecated.

As will become apparent, I see overlaps between common morality and sound legal and ethical judgements, but my focus on professional ethics in relation to legality means I leave interesting questions such as whether lawyers should represent awful clients (such as petrochemical companies or oligarchs) to others or another time.[13] My concern is with how what lawyers do for those clients (arguably) breaches professional ethical rules and the ideology that underpins such behaviour. In particular, the dominant approach to lawyers' ethics, the standard conception (discussed in the section on "The Dangerous Logics of Zealous Advocacy"), operates at the level of cynical positivism, partly because legality is treated as separate from ethicality when it is not. To practice law professionally and ethically, one must interpret facts and laws accurately and act on those interpretations in good faith with integrity. And whilst my dominant focus is lawyers doing things they should not, they do so because of the interaction between the rules and their ideology, which creates its own flawed morality.

In my description of the PO scandal in earlier chapters, I argue that we have seen lawyers responsible for unfair contracts, aggressive collection of debts and enforcement of (sometimes unfair) contractual rights, and making examples of litigants (potentially an abuse, although the courts are wary of such arguments and more likely to see excess as a problem

[13] See, for example, W. Bradley Wendel, *Canceling Lawyers: Case Studies of Accountability, Toleration, and Regret* (Oxford University Press, 2024); Some of my own, more casual thoughts are here: Richard Moorhead, 'Lights out at the Rank?' (*Lawyer Watch*, 24 March 2023), https://lawyerwatch.wordpress.com/2023/03/24/lights-out-at-the-rank/.

of disproportionality[14]). We have seen prosecutions flowing from charges tendered when key evidence was missing, outrageous plea bargaining, the improper handling of expert evidence, and disclosure failures that range from unreasonable resistance to indefensible suppression. And we have seen the exploitation of legal professional privilege, the use of flawed and conflicted 'independent' investigations and reviews to legitimise POL's own view of itself as having acted properly, the undermining of Second Sight's investigation through aggressive handling by lawyers, as well as sanitised reporting of problems to the board and beyond (when the lawyer's obligation is to ensure the client has all material information before it). The creation of an attritional mediation scheme; scorched-earth and flat-earth litigation deploying misleading arguments and evidence; a questionable recusal application; and the use of NDAs, libel, and guilty pleas used to silence people all protected Horizon and the litany of legal failures from scrutiny for many years.

Each of these points raises questions about the lawyers involved: lawyers senior and junior, in-house and in private practice, GCs and KCs, even a senior, retired judge (although he is not bound by professional rules, having retired from the Bar and not rejoined once he left the bench). All are linked by two things: working for the PO and thinking like lawyers. Their failures include questionable judgements about what is arguable or justified in the circumstances, negligence, cynicism,

[14] Richard Moorhead, Sally Day, and Karen Nokes, 'Working Paper 7 | The First Flat Earther: How "Clever" Strategy Might Drive Professional Error', 2024, 8.

recklessness, and, perhaps, even more deliberate wrongdoing. Many (but not all) of the problems may be professional misconduct. Some may even be subject to criminal investigation for perverting the course of justice. Several lawyers were given self-incrimination warnings in the inquiry.

What do I think is driving ethical failure of this breadth and scale, across so many people, so many different cases, and so many stages of the saga? How is it that lawyers can lead themselves astray in the ways that appear to have occurred here?

1 Frail Gods

My first reason is a play on the idea of lawyers as frail gods. 'Frail gods' is my crude metaphor for highlighting what psychologists refer to as the professional 'self-concept' – a belief that, as a professional, I am ethically better than non-professionals.

Having a high self-concept feels like an unfair criticism. As professionals, we are expected to hold higher standards than mere employees; however, there is a problem with this elevated self-concept. Maryam Kouchaki has demonstrated that perceiving oneself as a professional increases the likelihood of engaging in dishonest behaviour, such as lying and cheating. In one experiment, she found that students primed to think of themselves as professionals lied and cheated for money 41 per cent of the time, while those who were not primed to think of themselves as professionals did so only 6 per cent of the time.[15] Both groups got paid, in effect, to

[15] Maryam Kouchaki, 'Professionalism and Moral Behavior: Does a Professional Self-Conception Make One More Unethical?', SSRN

lie more, but the 'professionals' lies were more frequent and much bigger.[16] Professor Kouchaki explains that we give ourselves a moral licence to flex *because* we think of ourselves as better: because I think of myself as a professional, I cut myself some slack.

Sunitah Sah shows that what matters is whether a 'high self-concept' coexists with 'a shallow understanding and practice of professionalism' and 'a belief that one's ability to self-regulate is sufficient'.[17] Her work shows how managers who considered themselves *more* professional were *more prone* to conflicts of interest. There is a similar stream of work around objectivity bias:[18] those believing themselves to be more objective are often the least objective.

Might such an elevated professional concept be a problem for lawyers?

As we saw in Chapters 3–5, the PO scandal has several examples of lawyers claiming they had acted entirely properly and then being shown evidence that they probably had not. Sometimes, these appeared to be accepted by the subtlest

Scholarly Paper (Rochester, NY: Social Science Research Network, 4 April 2013).

16 Kouchaki (see n.222).

17 Sunita Sah, 'Conflicts of Interest and Your Physician: Psychological Processes That Cause Unexpected Changes in Behavior', *The Journal of Law, Medicine & Ethics* 40, no. 3 (2012): 482–87.

18 Emily Pronin, Thomas Gilovich, and Lee Ross, 'Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others', *Psychological Review* 111 (2004): 781–99; Katherine Hansen, Margaret Gerbasi, Alexander Todorov, Elliott Kruse, and Emily Pronin, 'People Claim Objectivity After Knowingly Using Biased Strategies', *Personality and Social Psychology Bulletin* 40, no. 6 (June 2014): 691–99.

expressions of doubt[19] or acknowledged only with the benefit of hindsight.

To illustrate this professional self-concept, I want to focus on an example where the rights and wrongs of what happened could be debated. Indeed, the central figure I concentrate on is not subject to professional rules that are likely to have been breached. It is nonetheless an example, I think, of how professional complacency can blend with another problem: the distancing associated with moral disengagement. It relates to Lord Neuberger's role in the application to have Mr Justice Fraser recused from the *Bates* litigation.

Patrick O'Brien and Ben Yong demonstrate that most retired judges believe they do not need to be regulated after retirement. The judges they dealt with were confident that they would know right from wrong when deciding what to do.[20] Although most retired judges, they found, did not engage directly in litigation, they also took different views on what judges were permitted to properly do post-retirement. I suggest this is consistent with a strong self-concept (we believe we would do the right thing) and weak scaffolding (we have no, and need no, rules).[21] The lack of consensus on what should be done post-retirement might may suggest that judges have a shallow understanding of post-retirement professionalism, to echo Professor Sah, or that judgements about appropriateness are very specific.

[19] One example is Richard Morgan saying advice not to investigate Horizon he likely gave was probably correct, but 'I might be wrong in that . . .'; Morgan (see n.83).

[20] Patrick O'Brien and Ben Yong, 'Work in Judicial Retirement: A Policy Report', 2023.

[21] O'Brien and Yong (see n.227), p. 3.

If the latter, they legitimately depend on personal tastes and the specifics of each case.

As we discussed in outline in Chapter 3, the recusal application was a pivotal moment in the *Bates* case. Lord Neuberger, a former president of the Supreme Court until 2017, was asked to engage with the *Bates* litigation: to advise, at short notice, after the CIT on a recusal application. That application involved saying Mr Justice Fraser should remove himself from the case for actual or apparent bias. As post-retirement advisory cases go for a former judge, this was at the more controversial end of the spectrum.

The application flowed from the first major trial of this group litigation. It had been conducted by colleagues in Lord Neuberger's chambers. The draft judgment for that trial showed they had lost badly.[22] Lord Neuberger advised that the recusal had reasonable prospects of success and should be brought.[23] As a former senior judge, Neuberger recognised he should not appear before the court. Lord Grabiner, at the time the Head of Lord Neuberger's chambers, handled the application. As we have seen, Mr Justice Fraser declined it. POL sought leave to appeal on the papers; Lord Justice Coulson criticised the application in excoriating terms.[24]

To the chagrin of many SPMs and lawyers, Lord Neuberger was not called to give oral evidence to the PO inquiry. He explained his role in written evidence, saying he felt 'uneasy when I think, read or talk about the Horizon

[22] This was the draft of *Bates No. 3*. [23] Neuberger (see n.52).

[24] 'Court of Appeal Recusal Decision', www.postofficetrial.com/2019/05/court-of-appeal-recusal-decision.html.

scandal', but that 'the topics on which I advised POL were not connected, at least in any direct way, with the appalling history of mistreatment of so many postmasters and postmistresses'.[25]

I think there are reasons to question that assessment. If we assume that the draft judgment that prompted the recusal application contained the same words that appeared in paragraph 10 of the eventual judgment, then the relevance of the case to alleged miscarriages of justice would have been apparent, as would some of the allegations of mistreatment. Paragraph 10 said:[26]

> These Claimants claim malicious prosecution against the Defendant, and also claim that there was a 'cover up' at the Post Office over the shortcomings in Horizon. Some Claimants were made bankrupt. There are claims for damages for financial loss, personal injury, deceit, duress, unconscionable dealing, harassment and unjust enrichment brought against the Post Office. There is currently a Criminal Cases Review Commission ('CCRC') review underway in respect of the convictions of a significant number of the Claimants. These are being dealt with together by the CCRC and are, effectively, awaiting the outcome of the technical aspects of this litigation.

It would be unfair to say that Lord Neuberger would have had in his mind that, had the recusal prevailed, prospects of a successful CCRC referral might have diminished significantly. But that passage suggests he might have had some appreciation of the serious, public interest issues lurking in this case. When Coulson LJ considers POL's leave to appeal

[25] Neuberger (see n.52). [26] *Bates No. 3*, para. 10.

application on the recusal, he perhaps gives some cautious credence to the idea that the application was a purely tactical (and potentially therefore illegitimate) move: 'Indeed, the mere making of these applications could have led to the collapse of that sub-trial altogether. Although I can reach no concluded view on the matter, I can at least understand why the SPMs originally submitted on 21 March that that was its purpose.'[27] The *Hamilton* appeals, based significantly on the *Bates* case,[28] might never have been brought or may have been brought later and on significantly weaker grounds. The scandal might have been contained forever.

Lord Neuberger continued in his witness statement to the inquiry: 'Although as matters turned out my advice did not accord with the view taken by the courts, I was called on to advise in accordance with my opinions at the time, and that is what I did.'[29]

It is worth considering whether Lord Neuberger is distancing himself here from what had happened, describing his role in the narrowest of terms, cutting himself some slack. His role *was* a minor one in some ways; he advised on limited papers on a narrow question. There is no suggestion that I have seen that his advice was wrong, and his awareness of POL's (or their legal teams') tactical proclivities would probably have been limited.

Nonetheless, a more contextualised assessment of his role might be more on point. There used to be, and some judges still believe there is, a judicial convention against

[27] Court of Appeal (see n. 231). [28] CCRC application and *Hamilton*.
[29] Neuberger (see n.52).

retired judges advising on cases, particularly on live cases before the courts.[30] Neuberger – not unreasonably, but also debatably – thinks the convention has been abandoned and has told me that many former senior judges have advised on live cases before the courts.[31] This was, of course, a case about a judge's bias or the appearance of it. It is, as a result, a degree more sensitive than advice on ordinary litigation.

More importantly, whilst I do not suggest this was his intention, it gives the *appearance* that this was an attempt to aid members of his own chambers. In a situation of great haste, with limited and partial instructions, the risks of giving erroneous advice were also heightened. His observations 'were to a substantial extent based', he has told me, on a note from his colleagues on reasons to recuse Mr Justice Fraser. Lord Grabiner conceded at the inquiry that this note was an advocates' document; it was partisan.[32] However, Lord Neuberger has said he did not think it was inaccurate or unfair, then or subsequently.[33]

One of the reasons POL went to Neuberger was ostensibly to get a more independent view than that provided by the team who ran the case in court. A solicitors' firm would struggle to say they had independently advised here. Barristers, however, take cases on the basis that they are completely independent of

[30] O'Brien and Yong (see n.227) spoke to judges and 'Almost everyone we spoke to agreed that there was some form of convention restricting judges from returning to practise at the bar', but there was no agreement on what the convention was (p. 16). They regarded the convention as ineffective.

[31] Correspondence on file with the author.

[32] Grabiner (see n.51).

[33] Correspondence on file with the author.

each other and are used to opposing each other even if in the same chambers. There is some debate in the oral evidence of Lord Grabiner questioning whether they arrived at their views independently of each other, but in broad terms the idea that they could and would have advised independently is consistent with the Bar's normal approach.

Underlining the suggestion in evidence that they coordinated their advice, the difficulty with the normal approach is, in my view, problematic. There is the problem of team loyalty bias, which is subtle and likely subconscious.[34] However independent-minded I am, I would struggle to comment totally independently on a colleague. Put at its gentlest, someone from another chambers would have been *more* independent when advising on the recusal.

One does not have to think, as Lord Justice Pill and his colleagues did when writing for a Judicial Council working party, that 'The track record of being a judge is commercially saleable but should not be on the market' to see the risks here.[35] Lord Neuberger's name no doubt influenced the board. Through no fault of Neuberger's, Lord Grabiner deployed his status anonymously when making the fateful recusal application by saying in defence of his position.[36] 'And I am not the only judicial figure or barrister that has looked at this with a view to reaching that conclusion. It has also been looked at by

[34] Andrew M. Perlman, 'A Behavioral Theory of Legal Ethics', *Indiana Law Journal* 90 (2015): 1639.

[35] Judges' Council Working Party, 'Response of the Judges' Council to the Right Honourable Lord Falconer of Thoroton, Judicial Diversity: Return to Practice by Former Judges', January 2006, https://bit.ly/4p3g1DS.

[36] Court of Appeal Recusal Decision.

another very senior person before the decision was taken to make this application.'

I should make clear, lest anyone thinks I am nodding or winking, that I am not suggesting anything professionally improper by Lord Neuberger, still less anything sinister or criminal.[37] As a former judge who has not returned to the Bar he is not bound by the Bar's rules in any event, but the story suggests the kind of problems that an elevated self-concept might lead to. His evidence to the inquiry paints, rather technocratically, in language of role morality. He was, he seems to suggest, merely advising on the papers before him. That he says this is not surprising, not just because he wants to avoid unseemly criticism but also because his representation of the role fits with the dominant ideology of lawyers: narrow, amoral, and notionally independent.

This leads to my second underlying problem.

2 The Dangerous Logics of Zealous Advocacy

Role morality is the idea that the morality of my acts is determined by my role: surgeons can cut, soldiers can kill, and so on. The kind of role morality most often associated with lawyers is that of zeal. In the legal ethics literature it has a rich lineage, usually rooted in moral and political philosophy. Moral philosophers call it the *standard* conception partly because it is assumed – probably correctly, although it has not been properly tested empirically – to be the model that dominates practitioner thinking.

[37] O'Brien and Yong, 'Work in Judicial Retirement: A Policy Report'.

The idea is in essence that a lawyer may – or, in more zealous versions, *must* – do anything that assists their client's case unless it is prohibited, or, in stronger versions, *clearly* prohibited by law. There are moderate and strong versions of the standard conception,[38] with some nuance and divergence, around when zeal should be restrained by notions of truth or legality or some other notion of the lawyer's proper role.[39] So, for example, some proponents of zeal even suggest lying is justified in certain circumstances, whereas others distinguish between hyper-zeal and mere-zeal.[40]

Zeal is only part of the standard conception. There are three elements:

1. zealous partisanship (you must do all you can to maximise your client's interests);

[38] Contrast D. Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton University Press, 2009), Stephen L. Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities', *American Bar Foundation Research Journal* (1986): 24; Tim Dare, 'Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers Tim Dare', *Legal Ethics* 7 (2004): 24–38; W. Bradley Wendel, *Lawyers and Fidelity to Law*, reprint edition (Princeton University Press, 2012).

[39] Charles Fried, 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation', *Yale Law Journal* 85 (1975): 1060; Michael H. Moore, 'Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions', *Michigan Law Review* 64, no. 1 (1965): 16; Pepper, 'Lawyer Amoral Ethical'; Markovits, *A Modern Legal Ethics*; Tim Dare, *The Counsel of Rogues?: A Defence of the Standard Conception of the Lawyer's Role*, new edn (Routledge, 2016); Dare (see n.245); Fried (see n.246); Wendel (see n.245).

[40] Dare (see n.245).

2. neutrality (your own morality should not prevent you doing what they want); and
3. non-accountability (you are not responsible for what your client wants you to do).

The idea is that the system gives the client rights. Partisanship requires lawyers to *maximise* exploitation of those rights, and the professional role serves the system by serving clients in the manner the client would choose for themselves if they were not represented but knew how to use the legal system. The three limbs serve to constitute and reinforce the idea that there is a virtue in zeal, in and of itself, that is (or should be) impervious to other influences, such as the lawyer's own moral qualms about a client or their desired outcomes.

Competitor theories of lawyers' ethics emphasise doing what justice requires, what common morality dictates, or more relational and virtue-based approaches; they tend to recognise a place for zeal (especially in the context of criminal defence) but are less doctrinaire in excluding or prioritising the relevance of other influences.[41] My main concern with the standard conception is really one about balance and descriptive accuracy. In thinking zealously, the tendency is to erase the restraint that it depends on for legitimacy.

[41] Luban (see n.7); William H. Simon, *The Practice of Justice: A Theory of Legal Ethics* (Harvard University Press, 1998); Parker (see n.3); Eli Wald and Russell G. Pearce, 'Being Good Lawyers: A Relational Approach to Law Practice', *Georgetown Journal of Legal Ethics* 29 (2016): 601; Donald Nicolson and Julian S. Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, 1999).

Lawyers heading towards ethical failure are probably operating on a standard conception-type model. They persuade themselves that they may or must do anything that advances the client's interests unless it is *clearly* prohibited by law or rules of professional conduct, and spend little or no time thinking about the restraints that operate upon them. They do so because they can quickly find a way of persuading themselves that any restraint does not apply to them in the particular situation they find themselves in.

A second problem with the standard conception is that the professional rules that bind lawyers in England and Wales are not, if neutrally interpreted, consistent with the standard conception. There are restraints on acting in the client's best interests: a lawyer cannot assist criminal conduct; prosecutors are expected to be fair in various ways;[42] a lawyer should not bring claims abusively (although the courts define abuse narrowly[43]); a lawyer cannot mislead anyone,[44] and must not take unfair advantage as a solicitor[45] or abuse their role as advocate.[46] I said 'neutrally interpreted' because it is possible to interpret such restraints zealously so as to minimise their application. To take one example, one could try and interpret restraints on zeal so that they only apply in the

42 BSB Handbook, rC3.2.

43 See *Kings Security Systems Ltd* v *King & Anor* [2021] EWHC 325 (Ch), for example.

44 SRA Code of Conduct for Solicitors, RELs and RFLs, 4 May 2023, www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/, r1.4; BSB Handbook, rC6 and rC9.

45 SRA Code of Conduct for Solicitors, RELs and RFLs, r.1.2.

46 BSB Handbook, rC3.2.

clearest of circumstances, but it leeches the obligation of much – perhaps all – of its meaning.

Moreover, there are general statements as to the priority of core obligations inconsistent with the standard conception. The Bar's Code of Conduct emphasises the need to prioritise 'your duty to the court in the administration of justice' (CD1). It overrides 'any other core duty, if and to the extent the two are inconsistent'.[47] And, 'Your duty to act in the best interests of each *client* (CD2) is subject to your duty to the *court* (CD1) and to your obligations to act with honesty, and with integrity (CD3) and to maintain your independence (CD4).'[48] Similar principles bind solicitors: 'Should the Principles come into conflict, those which safeguard the wider public interest (such as the rule of law, and public confidence in a trustworthy solicitors' profession and a safe and effective market for regulated legal services) take precedence over an individual client's interests.'[49]

That the rules have both general statements that prioritise the public interest in the administration of justice over clients' interests and specific limitations on excessive zeal does not significantly dim the appetite of either the philosophers or practitioners for zeal, and in so doing they can sometimes rush past legitimate restraints. It is a relatively simple matter to find that a client has a right they can call on which the lawyer must then not surrender in the interests of justice, however feeble that claim may appear, or an arguable interpretation of the facts

[47] BSB Handbook, gC1. [48] BSB Handbook, rC16.

[49] SRA Principles, n.d., www.sra.org.uk/solicitors/standards-regulations/principles/.

to advance that is at odds with any reasonable interpretation of the situation. And, as already noted, lawyers have a good many incentives for convincing themselves that only if *clearly* restrained do they *need* to be restrained (to the extent that they think about restraints at all).

The argument, then, is that the standard conception does not encourage a *balanced* description of lawyers' *actual* ethical obligations. There are various ways in which the evidence supports that position. There is a body of empirical literature that suggests, for instance, that lawyers tend to think (wrongly) that their ethical obligations require them to put their client's interests first.[50] We should not be surprised: there is evidence that practitioners lack a basic understanding of their own rules and how to apply them.[51]

Let me illustrate how zeal can push lawyers in the opposite direction to that which integrity requires with an example centred on a rule that even lawyers less well acquainted with their own rulebook should recognise: the obligation not to mislead the court.[52]

The Story of Alistair Brett

Alistair Brett was an experienced in-house solicitor working for *The Times* newspaper. He helped journalist Patrick Foster

[50] Moorhead and Hinchly (see n.10).

[51] SRA (see n.10); Richard Moorhead, Catrina Denvir, Mark Sefton, and Nigel Balmer, 'The Ethical Capacities of New Advocates' (London: Inns of Court College of Advocacy, 2016), www.icca.ac.uk/ethical-capacities/.

[52] 'Wingate & Anor v The Solicitors Regulation Authority [2018] EWCA Civ 366 (07 March 2018)', https://bit.ly/3MM8qw8.

run a story for the paper about Detective Constable Richard Horton.[53] DC Horton anonymously wrote an acclaimed blog about the police service, under the pseudonym 'Nightjack'. It won the Orwell prize for its 'insight into the everyday life of the police'.[54] Horton was not leaking details of cases, but he was shining a light on how the service was run.

Some at *The Times* thought Nightjack deserved to be exposed for breaching confidentiality and embarrassing his employers. The journalist, Foster, got his story by hacking Horton's email account. That was a criminal offence. His editor brought him to Brett for off-the-record advice. Alistair Brett then advised Foster how to get his story out, and that led to him recklessly misleading the court, as we shall see.

The first thing to understand about how this happened is this: Brett felt able to regard Foster's confession of criminal hacking as confidential and privileged.[55] That meant he could keep it secret without worrying about the need to disclose it at some point. Secrecy allowed him the freedom to create a different story so Foster could get his scoop.

He tells Foster off for his conduct and then tells him that if he can identify Nightjack 'legitimately' from public

[53] See *Alistair Brett's Evidence to the Leveson Inquiry*, 2012, https://discovery.nationalarchives.gov.uk/VideoPlayer/?url=LEV/1/2012-03-15pm; *Alastair Brett* v *Solicitors Regulation Authority* (SRA) [2014] EWHC 2974 (Admin) ('*Brett v SRA*').

[54] Sam Jones, 'A Fair Cop: Policeman's "perfect" Blog Wins Orwell Prize', *The Guardian*, 23 April 2009, sec. Books, www.theguardian.com/books/2009/apr/24/orwell-prize-jack-night-winner-blog.

[55] Whether he was right or wrong to do so, and on what basis, is an interesting question but we do not need to answer that here.

sources, they can run the story, provided Foster then 'fronts him up': that is, gives Horton an opportunity to confirm or deny he is Nightjack.

Brett was cross-examined on all this during the Leveson Inquiry into hacking in the British media. Lord Justice Leveson suggested that what Brett regarded as 'legitimate identification' was a phoney process. 'The map to the maze [is]', he said, 'already laid out.' In other words, how could you claim to have identified Horton legitimately if you already knew who he was by illegitimate means?

The legitimacy, as presented, was an illusion. It was the start of a slippery slope down which Brett's handling of the matter slides.

More explicit problems manifest as the slope gets slippier. The strategy runs into difficulty when Foster fronts up Horton. Rather than cave in, as Brett expected, Horton goes to solicitors' firm Olswangs and seeks an injunction. *The Times* must fight to publish the story or fold. Brett chooses to fight. Olswangs ask Patrick Foster to swear an affidavit saying he did not hack DC Horton's account. They also allege he has a history of hacking emails accounts, having been punished for it at university. Brett advises Foster not to respond to the request for an affidavit but writes this to Olswangs by return: 'As regards the suggestion that Mr Foster might have accessed your client's email address because he has a history of making unauthorised access into email accounts, I regard this as a baseless allegation with the sole purpose of prejudicing TNL's defence of this action.'

Brett found sufficient excuse, in his own mind, if he thought about it clearly at all, to write this. It's an example of how zeal can distort one's grasp of reality. Perhaps one can convince oneself to argue that Foster does not have a history of hacking. After all, Foster had only done it twice before – once at university and once here – and Olswangs are only speculating on it having occurred here. Perhaps one can argue that it is baseless because Olswangs might not have evidence for the claim that Foster has a history of hacking. One might describe it archly as 'clever', or wonder at how weak an argument has to be to be arguable, but sadly for Mr Brett there is worse to come.

When the case is presented to the court, Foster is asked to explain how he identified Horton in a sworn statement. Brett's most fatal failure edges into view. Foster's statement, which Brett helps draft, explains how the 'legitimate' searches were conducted. Not only were they conducted legitimately, but the statement also indicates that the search for Horton's identity began in this manner. Brett ignored the privileged information about hacking but also asserted something that was not true. Foster had *not* begun that way.

In his questioning leading up to Brett's denouement, Leveson started to wonder about Brett being too close to the situation and challenged him on it. In this passage, we see Brett in the thickets of his own subjective strategy, mired in his legal reasoning, parsing the truth into the one bit of the story he wants to tell:

> Mr Alastair Brett: My Lord, all I can do is, rightly or wrongly, I had believed that you could separate the earlier misconduct by Mr Patrick Foster and you could then say, once he had done this legitimately, that could be presented to the court perfectly properly as he had done it legally.

> Now, I accept that you say that the two inextricably intertwined, but that, if I may say so, is a subjective judgment. I happen to take the view that you could separate out the one from the other.

So, what happens? Firstly, Leveson makes a very short and powerful point. 'Let's just cease to be subjective, shall we. Let's look at Mr Foster's statement . . .' There is what I take to be a moment of terror, silence, and panic as Alistair Brett rifles through the bundle of documents looking for the statement. It is only at that moment, I think, that Mr Brett realises the extent of his difficulty. The moment when he will be forced to cease to be subjective, because he must account for his actions openly. The time when zeal is tested:

> Lord Justice Leveson: To put the context of the statement in, he's talking about the blog and he says that he decided that one or two things had to be true and that it was in the public interest to reveal it, so there he is wanting to find out who is responsible for NightJack. Then he talks about paragraph 9, which Mr Jay has asked you about, and then he goes on, 'Only 24 hours to crack the case', which is a citation from the blog.
>
> Would you agree that the inference from this statement is that this is how he went about doing it?
>
> Mr Alastair Brett: Yes, it certainly does suggest –
>
> Lord Justice Leveson: And then he starts at paragraph 12: 'I began to systematically run the details of the articles in the series through Factiva, a database of newspaper articles collated from around the country. I could not find any real-life examples of the events featured in part 1 of the series.'

That suggests that's where he's started and that's how he's gone about it, doesn't it?

Mr Alastair Brett: It certainly suggests he has done precisely that, yes.

Lord Justice Leveson: And that's how he's gone about it?

Mr Alastair Brett: Yes.

Lord Justice Leveson: That's not accurate, is it?

There is a long, long pause.

Mr Alastair Brett: It is not entirely accurate, no.

Lord Justice Leveson: Paragraph 15. I'm sorry, Mr Jay, I've started now. Paragraph 15: 'Because of the startling similarities between the blog post and the case detailed in the newspaper report, I began to work under the assumption' – I began to work under the assumption – 'that if the author was, as claimed, a detective, they probably worked . . . ' et cetera.

Same question: that simply isn't accurate, is it?

Mr Alastair Brett: My Lord, we're being fantastically precise.

Lord Justice Leveson: Oh, I am being precise because this is a statement being submitted to a court, Mr Brett.

Mr Alastair Brett: Yes.

Lord Justice Leveson: Would you not want me to be precise?

Mr Alastair Brett: No, of course I'd want you to be precise. It's not the full story.

Lord Justice Leveson: Paragraph 20. I repeat, I'm not enjoying this: 'At this stage I felt sure that the blog was written by a real police officer.' That is utterly misleading, isn't it?

Mr Alastair Brett: It certainly doesn't give the full story.

Lord Justice Leveson: Well, there are two or three other examples, but I've had enough.

Brett's final throw of the dice is to suggest Leveson's *fantastic precision* is unfairly skewering him. It is both desperate and, I think, hypocritical. He had sought to game precision zealously when he said the history of hacking claim was baseless and by compartmentalising Horton's identification to be able to convince himself they can say Horton was properly identified. When drafting that Foster had begun by conducting a legitimate search, he did not cease to be subjective; he magnified subjectivity and wrote something misleading to boot.

What lessons do I suggest this illustrates?

Zeal, the facility to make an argument on the slenderest of bases, coupled with the ability to ignore inconvenient facts because they will (he thinks) never be disclosed, is dangerous. This poses explicit dangers to honesty and integrity. As the High Court said, in dismissing Brett's appeal against prosecution in the disciplinary tribunal: 'In my judgment, the evidence, particularly that of the contemporaneous correspondence and the lack of any response by Mr Brett to the demands contained in it, pointed inevitably to the conclusion that Mr Brett acted recklessly, as described above, in allowing the court to be misled.'[56]

Zeal manifest as the ability to make strained and ultimately misleading arguments in correspondence or even in statements before the court, that would be unlikely to be tested in normal circumstances, and the protection provided

[56] *Brett* v *SRA*, para. 100.

by being confident certain information can be shielded as privileged, are likely significant elements here, but there may also be more going on. Our psychological frailties may magnify the tendencies of zeal to overreach.

3 Psychological Frailties

There is fascinating literature on behavioural ethics and the psychology of lawyers that explores our psychological frailty, some applicable to humans, some particularly relevant to lawyers.[57] The central point of this literature is that 'many ethical infractions result from a combination of situational pressures and all too human modes of thinking'.[58] Tricky situations and poor decision-making are as – and maybe more – important than individual character. I cannot discuss all the possibilities, but I want to describe some of these all-too-human modes of thinking – 'frailties', for short – and show how they can amplify the adversarial habits of a zealous lawyer.

As lawyers, we are demonstrably (and likely unwittingly) prone to assessing cases as stronger just because

[57] Jennifer K. Robbennolt and Jean R. Sternlight, 'Behavioral Legal Ethics', *Arizona State Law Journal* 45 (2013): 1107; Andrew M. Perlman, 'A Behavioral Theory of Legal Ethics', *Indiana Law Journal* 90 (2015): 1639; Donald C. Langevoort, 'Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk, and the Financial Crisis', *Wisconsin Law Review* (2012): 495; Donald C. Langevoort, 'Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking', *Cornell Law Review* 96 (2010), 1209 are great examples.

[58] Robbennolt and Sternlight (see n.264).

decisions on those cases are taken for clients rather than for others.[59] This 'team loyalty' bias renders our judgements weaker. It can lead lawyers to overestimate the likelihood and size of case wins. Furthermore, if our client is a hallowed institution, or our opponents are seen as morally degenerate (Horton was seen as a disloyal leaker, SPMs were portrayed as thieves and liars), we are prone to moral intensification.[60] Moral righteousness makes us less ethically inclined; we are more likely to do something shady if we feel that our opponent is 'bad' and so deserves it. Pragmatism also makes us impulsive and less principled, and we can descend slippery slopes: strategies, reasonable when unchallenged in the abstract, like Alistair Brett's legitimate identification approach, become misleading in their execution. We are also prone to the agency effect, being more inclined to do certain unethical acts for others than we are for ourselves: the moral fillip of helping others compensates, up to a point, for our morally questionable acts on their behalf. Competitiveness, adversarialism, and being too busy can all dull our sensitivity to moral problems, as can the lawyer's art of argument and being good at rationalising. It can become a means of moral disengagement.[61]

59 Robbennolt and Sternlight (see n.264). See also, Perlman (n.264) and the references within on team loyalty biases.

60 See, for example, Robbennolt and Sternlight (see n.264); Albert Bandura, *Moral Disengagement: How People Do Harm and Live with Themselves* (Worth Publishers, 2016).

61 For fuller accounts of behavioural elements to ethical decision-making I would recommend, in particular, Cara Biasucci and Robert Prentice, *Behavioral Ethics in Practice: Why We Sometimes Make the Wrong Decisions* (Routledge, 2020); Robbennolt and Sternlight (see n.264).

Zeal and human frailties can form a heady cocktail, pushing arguments and evidence beyond honesty and integrity. This brings us to point 4.

4 Zeal and Cultural Identity

Lord Brougham, after his defence of Queen Caroline in divorce proceedings brought by the king in Parliament, famously celebrated zeal.[62] Clients should be served 'by all means and expedients', he argued. Lawyers should disregard 'the alarm, the torments, the destruction which he may bring upon others'. He 'must go on reckless of the consequences', even to his own interests.

Brougham repudiated his words in later life, but they are emblematic of fearlessness. 'Fearlessness' is arguably the one word in the Bar's Code of Conduct that strikes an emotional register.[63] It appears in the first paragraph of the Bar Standards Board's introduction to its Code of Conduct: 'Our system of justice depends on those who provide such services acting fearlessly, independently and competently, so as to further their clients' best interests, subject always to their duty to the Court.'

And rC15 includes the requirements that:

1. you must promote fearlessly and by all proper and lawful means the *client's* best interests;

[62] Monroe H. Freedman, 'Henry Lord Brougham, Written by Himself', *Georgetown Journal of Legal Ethics* 19, no. 4 (2006): 1213–20.

[63] It appears once approvingly in the SRA's thematic review of SLAPPs, but is not otherwise apparent in their Code; for instance: https://bit.ly/3Y1Ppbo.

2. you must do so without regard to your own interests or to any consequences to you . . .;
3. you must do so without regard to the consequences to any other person (whether to your *professional client*, *employer* or any other person)

It is worth observing that fearlessness is technically unnecessary here. One cannot imagine proper and lawful representation being criticised for an absence of fearlessness. It follows that fearlessness is in the text for its aesthetic, aspirational quality. It remains for its emotional impact.[64] It promotes *a feeling* that zeal is selfless and heroic. It may make zeal the most psychologically appealing heuristic of what it means to be a lawyer.[65]

Through rC15.3 it also picks up on Brougham's lionising of harm. The cultural appeal of Brougham's rhetoric is not confined to the Bar or its code. I am often told by practising solicitors that what defines their ethics is, as Lord Hunt professed as part of his review of legal services, that 'client first was bred into me'.[66] An analysis of differing personal values of

[64] This idea was prompted by Illan Wall and Daniel Matthews, 'Sovereignty and the Persistence of the Aesthetic', *The Modern Law Review*, 20 March 2024, 1468–2230.

[65] Kenneth R. Hammond, Robert M. Hamm, Janet Grassia, and Tamra Pearson, 'Direct Comparison of the Efficacy of Intuitive and Analytical Cognition in Expert Judgment', IEEE *Transactions on Systems, Man, & Cybernetics* 17, no. 5 (1987): 753–70; Victoria McGeer and Philip Pettit, 'Sticky Judgement and the Role of Rhetoric', in *Political Judgement: Essays for John Dunn* (Cambridge University Press, 2009), 48–73.

[66] David Hunt the Rt Hon Lord, 'The Hunt Review of the Regulation of Legal Services' (London: The Law Society, 2009), http://governance.law

lawyers suggests zeal might be underlaid with self-serving values rather than selfless ones.[67] And, of course, it rather goes without saying that, when paid hourly, zeal and lawyers' economic interests are heavily aligned. This may or may not explain the extent of the legal costs paid by the PO.[68]

My concern about zeal is, in some ways, a subtle one. If, for instance, we take the dictionary definition of zeal as 'great energy or enthusiasm for a cause or objective',[69] for instance, the quality seems rather admirable. Energy or enthusiasm is merited if it does not cloud judgements of appropriateness and, where it is merited, restraint. Fearlessness might tip the lawyer towards foolhardiness as often as it summons courage. The main alternative theories to the standard conception tend to emphasise a Dworkinian notion of justice or commonly accepted notions of morality as the lodestar of lawyering,[70] but even they emphasise that zeal is often or sometimes

society.org.uk/secure/meeting/182044/Hunt_review_of_legal_services.pdf [URL no longer functional at time of writing].

67 Richard Moorhead and Rachel Cahill-O'Callaghan, 'False Friends? Testing Commercial Lawyers on the Claim That Zealous Advocacy Is Founded in Benevolence towards Clients Rather than Lawyers' Personal Interest', *Legal Ethics* 19, no. 1 (2 January 2016): 30–49.

68 'Revealed: The Quarter-Billion-Pound Payday for Post Office Scandal Lawyers – The Lawyer | Legal Insight, Benchmarking Data and Jobs', 21 August 2024, www.thelawyer.com/revealed-the-quarter-billion-pound-payday-for-post-office-scandal-lawyers/.

69 Extracted from online version of *The Concise Oxford English Dictionary 11th Edition, Originally Published in 2008 as a Book by Oxford University Press*. March 2024.

70 Luban (see n.7); Simon (see n.248).

desirable, typically when defending in criminal cases.[71] And I would certainly accept that lawyers sometimes need courage to resist pressure against them making proper arguments or encouraging them to compromise their clients' cases unfairly. Indeed, a more robust defence of SPMs when they were being prosecuted might have tempered the extent of the disaster. Unusual effort and courage *were* likely necessary for the victories in *Bates* and *Hamilton*. To give one particular example, the legal team that first argued for Ground 2 in the *Hamilton* appeal were Paul Marshall and Flora Page (now KC). A little-known fact is that the more serious ground that led to the Court of Appeal saying many of the convictions were an affront to justice was pursued in the teeth of considerable pressure to not do so. History might have been quite different had they acceded to that pressure.

In one sense, the problem is a simple one: zeal is treated as the singular, pre-eminent trait of professionalism when it is not and should not be. In particular, zeal and our human frailties push restraints to the back of our mind when they should be closer to the front. Ethical thought and practice need to reflect psychological, sociological, and economic realities. These realities already push lawyers, particularly when well resourced, towards zeal when cases like Brett's suggest the need to pull back. I would tend to go further than the professional codes, which already make zeal subordinate to the interests of justice. I would reframe the issue as one of *proper* rather than zealous representation and take steps to

[71] Simon (see n.248); David Luban, 'Are Criminal Defenders Different', *Michigan Law Review* 91 (1993): 1729–66.

dial back its aesthetic register because it can unbalance lawyers when balance may be most needed. This would include removing fearlessness from the Bar's code and challenging or qualifying some of zeal's sister concepts.

5 Zeal's Sister Concepts

Zeal's sister concepts are ancillary justifications offered up to support a zealous approach to a case. Luban had a similar idea: he called them adversary system excuses.[72] The ideology of the legal system is adversarial, and that fact is often used to excuse conduct that would otherwise be regarded as questionable. The classic example of a legitimate adversary system excuse is when a defence lawyer defends their client by putting the prosecution to proof and cross-examining their witnesses (within limits) even if their client has confessed their guilt because of the burdens placed on the prosecution to prove their case.

There are a couple of zeal's sister concepts that I think are worth dwelling on briefly as giving rise to problems. It is a party's right, a mark of the rule of law, to be allowed – and lawyers may argue that they are required – to take any 'properly arguable' point.[73] 'Properly arguable' is a low bar, and judges are reluctant to suggest that breaches have occurred when lawyers have ducked under it. For something to not be

[72] David Luban, ed., 'The Adversary System Excuse', in *Legal Ethics and Human Dignity, Cambridge Studies in Philosophy and Law* (Cambridge University Press, 2007), 19–64.

[73] *Richard Buxton* v *Mills-Owen* [2010] EWCA Civ 122.

properly arguable requires an argument to be hopeless or bound to fail.

A second example would be the claim that a lawyer is not the judge of his client's cause and so does not have to investigate the truth of their client's case.[74] These are part-truths which close minds to the complexities of the situation. Brett went beyond not judging his client; he created him a new, illusory 'truth'. Interestingly, you could see how his illusory view was based on an arguable case theory (Horton was capable of being identified legitimately) but executed in a misleading way (they *began* by identifying him legitimately). Nor does not judging your client mean never doing due diligence on what they say. And bringing every single arguable point in a civil case creates an untenable mismatch between zeal and proportionality, for example.

6 Law Not Morality

A particular sister concept of the standard conception is a claim made about lawyers and morality. Lawyers often say they do not *do* morality: *we advise on law not morality*, they say. They do so alongside the claim that they are not morally accountable for their clients' actions.

This argument can be disingenuous: if you assist a client in an immoral act, its legality does not mean you are not morally accountable.[75] As Luban bluntly puts it, 'Loyalty

[74] *Haddad* v *Rostamani & Ors* [2024] EWHC 448 (Ch) (1 March 2024), https://knyvet.bailii.org/ew/cases/EWHC/Ch/2024/448.html.

[75] Wendel (see n.220).

outweighs the evil of the cause – except, of course, that it does nothing of the sort. Evil remains evil, and loyalty to evil remains just that: loyalty to evil.'[76] Moreover, SRA guidance suggests a solicitor may sometimes be professionally accountable for lawful activity: 'A solicitor is independent of his client and having regard to his wider responsibilities and the need to maintain the profession's reputation, [they] must and should on occasion be prepared to say to [their] client "What you seek to do may be legal but I am not prepared to help you to do it".'[77]

Lionising amorality can also be a way of doing morality whilst pretending not to. Rob Atkinson has argued that the standard conception embraces 'sophistry in the service of a distinctly diminished form of political justice'.[78] To boil his idea right down: a lawyer's claimed neutrality is not virtuously amoral; it is one-sided, one-eyed morality. Neutrality and the operation of zeal are heavily skewed by the inequality of arms towards the interests of those with power and resources.[79] Lawyers are not, or at least not often, summoning what Markovits calls (after an idea from the Romantic poet John Keats) negative capability to restrain their own moral positions; they are usually asserting non-accountability as comforting

[76] Luban (see n.279), p. 24.

[77] 'Conduct in Disputes – Guidance', 3 April 2022, www.sra.org.uk/solicitors/guidance/conduct-disputes/, and the discussion of 'In the matter of Paul Francis Simms', SDT, 2002.

[78] Rob Atkinson, 'Back to Basics, and Beyond Belief: The Radical Re-Valuation Project of the New Standard Conception', in *Leading Works in Legal Ethics*, ed. Julian S. Webb (Routledge, 2023), 87–112.

[79] Gillian K. Hadfield, 'The Price of Lawyers: How the Market for Lawyers Distorts the Justice System', *Michigan Law Review* 98 (1999): 953–1006.

philosophical window-dressing whilst they follow the money. The ways in which law firms assert control over the 'political' pro-bono activity of their lawyers[80] give us further reason to doubt that non-accountability is a principle which holds much real sway when contested, particularly by the business needs of the firm. The standard conception, in some ways, just puts a rather plastic moral veneer on market values: who pays wins.[81] Amoral non-accountability may also help leverage fee levels.

This happens whilst economics and bureaucracy mute the moralities of those with limited resources. They have their cases filtered through the merits and means tests of government or third-party funders; their tactics may be similarly constrained and their seeking of 'justice' curtailed by the costs of losing. Hugh Grant, hardly the poorest individual, being forced to settle his hacking claim against Rupert Murdoch's newspaper empire may illustrate how the law allows one-sided zeal to operate when resources are unbalanced. News Group Newspapers (NGN) said 'the out-of-court settlement was reached "without admission of liability" and that it was "in both parties financial interests not to progress to a costly trial"'.[82] Grant said:

> I would love to see all the allegations that they deny tested in court . . . But the rules around civil litigation mean that if I proceed to trial and the court awards me damages that are

[80] Timothy Kuhn, 'Positioning Lawyers: Discursive Resources, Professional Ethics and Identification', *Organization* 16, no. 5 (9 January 2009): 681–704.

[81] See, further, Hadfield (see n.286).

[82] 'Hugh Grant Settles Privacy Case against Sun Publisher', *BBC News*, 17 April 2024, Entertainment & Arts, www.bbc.com/news/entertainment-arts-68834392.

> even a penny less than the settlement offer, I would have to pay the legal costs of both sides.
>
> My lawyers tell me that that is exactly what would most likely happen here. Rupert Murdoch's lawyers are very expensive. So even if every allegation is proven in court, I would still be liable for something approaching £10 million in costs. I'm afraid I am shying at that fence.

The system allows deep-pocketed defendants to defend cases and protect themselves against the risk of adverse judgment by making a sizeable offer that it is economic madness not to accept. Money keeps talking in the hope justice stops walking.

The Bar's 'cab rank' rule, whether you support it or not, aligns with the commercial and reputational interests of the Bar better than with access to justice.[83] Suggesting one represents oil and gas clients or Russian oligarchs *because* of a belief in the 'rule of law' is the figgiest of fig leaves. The justification offered is unlikely to have been the reason for action and yet it is offered as such.[84] The alignment of practice with money goes well beyond confining zeal to the well-resourced. Judging firm, and fee-earner, reputations on fee-earning has long been linked with the erosion of

[83] Moorhead, 'Lights out at the Rank?' (n.11) contains my own thoughts in outline on the 'cab rank'. See also John Flood and Morten Hviid, 'The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market' (Social Science Research Network: 2013).

[84] Moorhead, Vaughan, and Tsuda (see n.2); Steven Vaughan, 'Moral Remainders: What is the Price of Professional Integrity?' (Lecture, City of London Solicitors Company, 3 June 2024); Vaughan (see n.4).

professionalism.[85] League tables measure 'eliteness' on profit per equity partner. Commercial firms squeeze out morality that might offend clients in other ways; some US firms drive out volunteering for progressive causes, even from their lawyers' private lives.[86] President Trump's recent actions in attacking lawyers through executive orders allegedly for taking cases of the kind he disapproved of are a very public, more powerful, and so more troubling example of a well-established private practice

A corollary of Atkinson's argument is that only a select few get to *really* make arguments, claim rights, manage facts, and assert their own moral claims. As the SPMs have experienced, everyone else is more often subjected to them. The powerful get to take advantage of phoney neutrality in ways that can be abused.

The courts struggle to handle such sophistic advantage-taking. The Amersi case is an example of the difficulties courts have.[87] Mr Amersi brought a libel action against ex-Conservative MP Charlotte Leslie that was said to be abusive and a SLAPP. He claimed:

> Nothing could be further from the truth.
>
> The right to bring a legal claim is a fundamental right in a democracy, and it is my wish, as is well within my right, to challenge the defamatory allegations that have been

[85] Marc Galanter and William Henderson, 'The Elastic Tournament: A Second Transformation of the Big Law Firm', *Stanford Law Review*, 2008, 1867–1929; Cyrus Tata, 'In the Interests of Clients or Commerce? Legal Aid, Supply, Demand, and "Ethical Indeterminacy" in Criminal Defence Work', *Journal of Law and Society* 34, no. 4 (2007): 489–519.

[86] Kuhn (see n.287).

[87] *Amersi* v *Leslie* [2023] EWHC 1368 (KB).

> made about me by the Defendants in a court of law in order to vindicate my reputation.

Amersi's claim failed because his lawyers did not plead '*serious* harm to reputation' as they were required to do. Presumably they could not plead that or they would have done so, although one cannot rule out the possibility there is some other explanation. The judge, Nicklin J, said Amersi's barrister had not 'seriously argued' otherwise, a clue that the case was poor or weak, though perhaps not unarguable. The judge declined to consider whether it was an abuse as the courts understand it but listed all the behaviours in tension with a solid case for legitimate vindication.[88] He said there was an exorbitant approach to litigation; complexity was increased without tangible benefit; it was wholly disproportionate and cannot have had regard to the overriding objective; there had been a deliberate and tactical use of multiple proceedings; and there was collateral evidence of the desire to embarrass the Conservative Party (which was not a legitimate purpose of litigation).

Judges often avoid issues of abuse and impropriety, preferring to decide cases on other grounds. Issues of abuse and impropriety slow them down. They are likely to be hard fought, involve the drawing of high-stakes or distasteful inferences that require greater care than other findings (calling someone a liar, for instance), and may increase the likelihood of appeals. One can see why a judge would think that discretion may sometimes be better than valour, but not

[88] *Amersi* v *Leslie*, para. 240.

confronting the behaviour more squarely can also signal a tolerance of poor conduct. Such caution is one reason why the courts cannot protect the rule of law from abuse alone; they need the professions to take their own obligations seriously, and they need the regulators to step in when they do not. Powerful actors also have many ways of avoiding the court's scrutiny, including settling cases, before judges get anywhere near them. Most SLAPP-like problems take place away from courts. This emphasises the importance of lawyers' ethics and their guardians. A rule of law perspective that concentrates on access rights to courts fails.

7 From Moral Neutrality to Moral Sensitivity

I want to move towards a conclusion by holding in mind Atkinson's idea of hypocritical, lop-sided morality and Brougham's fearless disregard for harm to others. I also want to take a moment to let emotion into the argument. I make no apology for this emotion, and call upon it as a signal of our human sense of morality – a morality that *should*, I argue, inform our judgements whilst not dictating them.

We should, when thinking about lawyers ethics, think of those like: Alan Bates, sacked and slandered by the PO; Tracy Felstead, imprisoned aged nineteen, after refusing to apologise for a crime she did not commit; Jo Hamilton, kept out of jail because the entire village pulled together, paying extraordinary sums for her so-called debts; Noel Thomas, imprisoned in his fifties, initially in Walton jail, until that point a pillar of the community; Seema Misra, jailed when pregnant; Lee Castleton, bankrupted at tremendous cost to him and his family; and

Janet Skinner, who, when imprisoned, felt she had to insist her children did not visit her.

The shadows cast on their lives by these events is beyond extraordinary.[89] They were harms inflicted in large part by lawyers.

Lawyers distancing themselves from harm may be part of the reason they make the mistakes they do. An ethic of fearlessness encourages lawyers to ignore the cost to these people as simply the price of doing business. It is moral anomie, part of a logic that renders them hired guns. Zeal's sister concepts form scripts that become semi-automatic weapons: I must take this client. My client has given me these instructions. I must follow them if I can argue them. I can disregard any harm and not judge my client.

These scripted simplifications switch off moral sensitivities. Whether disregarding harm is theoretically justified or not (my view is that it is not), the Bar's professional code, and the court's attitude to hard-fought commercial litigation, encourages it to be ignored but the dangers of that should be plain, and the courts and the professions should rethink.

Zeal discourages reflection. It makes us more likely to miss the time when our client does not have a right to make a claim; or when our actions are an abuse or involve the taking of unfair advantage; or when our zealous interpretations look rather like, or become like, lies. Sometimes it encourages things that are lies.

[89] Growns et al. (2024) (see n.22) and S. Day, K. Nokes, R. Moorhead, and R. Helm, 'Understanding the Impacts of the Post Office Scandal', May 2025, https://bit.ly/49262Kg.

The rule of law demands that lawyers attend to the values of the system:

> It is a critical test of the freedom inherent in our democratic society that those accused (usually by the State) of committing criminal offences can and should be represented by capable criminal advocates, independent in spirit who, subject to the rules of law and procedure which operate in our courts and to the dictates of professional propriety, are prepared to put the interests of their clients at the forefront and irrespective of personal disadvantage. Similarly, advocates instructed to prosecute crime must be impartial, balanced and fair. These are the values, to the great advantage of the rule of law in this country, that have long been embedded in the practice of advocates before our criminal courts. Those who have the responsibility for the regulation of advocates (whether barristers or solicitors) are imbued with the same sense of the centrality of independence and mindful both of the need to maintain standards and the critical importance of supporting professional independence.[90]

Loyalty is an important part of any professional relationship, and the proper protection of legality, of which rights are a part, is important too. But lawyers can trip themselves up with adversarial logics and their own self-concept. As Lord Hoffman has emphasised, lawyers owe *divided* loyalties.[91] As

90 *Lumsdon & Ors, R (On the Application Of)* v *General Council of the Bar & Ors* [2014] EWHC 28 (Admin).

91 *Arthur J. S Hall and Co.* v *Simons* [2000] UKHL 38; 'SRA | Topic Guides: Guide Application Principle 1 | Solicitors Regulation Authority', https://bit.ly/4p8V1f3.

Lord Thomas said, advocates are *responsible for strategy* on a case, not the client.[92] As Lord Justice Jackson said, lawyers must take *particular* care not to mislead.[93] As Baroness Hale has noted, privilege is given to enable lawyers to give advice *sensible* as to conduct.[94]

The problem is not, usually or only, cleverness and arrogance. It can be opportunism or desperation, grasping for one point that lets us help our client, or makes amends for our mistake, and allows us to seem in charge of events. We can resist disclosure this way. We can be fantastically precise. We can advise that something is fundamentally sound when it is not. Ethics begins in the half-light of hasty decisions and sugary phrasing. Most lawyers do not think they are gods, but the logic of partial facts and any available argument is a logic of expedience and sometimes extremism. In Chapter 7, I will be explaining how it drives cover-ups.

We need to think radically about how to dial down zeal and consign self-regarding fearlessness to the history books. If the profession is really to promote justice or the rule of law, it needs to change the way it thinks and behaves. We know now how expedience ends. It ends with the list of problems faced by the victims of the scandal. They have not been let down once, they have each been let down many times, harmed by a legion of lawyers still desperately trying to avoid responsibility. Often, though not always, those lawyers were

92 R v Farooqi & Ors [2013] EWCA Crim 1649.

93 *Wingate & Anor* v *The Solicitors Regulation Authority* [2018] EWCA Civ 366.

94 *Three Rivers District Council* v *Governor and Company of the Bank of England* [2004] UKHL 48.

in the wrong: some negligent, some reckless, some lacking in integrity, some – I am incredibly sorry to say – probably criminal. Some do not even have an arguable excuse. And, as all good lawyers know, not having an arguable excuse is a pretty low bar.

7

How Lawyering Can Pollute Institutions

In Chapter 6 I suggested that lawyers had a problem with excessive zeal and how its encouragement of contentious, self-serving interpretations of law and facts, coupled with scripts borne of zeal's sister concepts, such as the claim we 'do law and not morality', make misconduct more likely still. A shallow, somewhat complacent idea of professionalism and the ordinary frailty of human decision-making also undermines lawyers' objectivity. That objectivity is, I would suggest, an essential constituent of any lawyer's professionally mandated independence. Clients need it, sometimes more than they appreciate. And we saw how aggressive zeal can slide down a slippery slope into misconduct, taking lawyers beyond honesty and legality.

This chapter is about how such risks are magnified within organisations. Its aim is to show how the approaches lawyers offer and how lawyers are used can pollute rather than protect organisations. I emphasise organisational clients because the social and legal complexities of being artificial agents hosting individuals with their own interests and vulnerabilities add extra dimensions to the problems posed by an overly close lawyer–client relationship. Organisations also operate bureaucratically, across time and space. Legal work helps structure those operations, bridging time and space in ways that rewrite history and geography. We saw an example earlier in the way the contract between POL and the SPMs helped structure and manage unfair treatment as legal and normal. Prosecutions led to software errors being misdiagnosed as theft in ways that the organisation would not retract, and this dominated significant aspects of its governance and management.

At one level, my argument in this chapter is very simple: organisations often want, and lawyers will too often provide, slanted signals about facts, legality, and propriety. We can see the point if we think of two features of the legal relationship that emerged in the last chapter: lawyers keep certain information confidential for their clients (through privilege), and they can interpret situations in the best interests of their client in ways that are or border on the tendentious. The interaction of these two things leads to the discounting of – ignoring of, even – adverse confidential information and the exaggeration of positive interpretations.

In court, if the advocate does not mislead the court or their opponents, the slanting of the client's story is understood as part of the game within limits and, in theory at least, any interpretive position offered by the advocate is tested by their opponent and the judge. In other advocacy situations some slanting of signals is also understood to be occurring and acceptable. If I am negotiating with you, for instance, your positions are treated with a measure of scepticism. If the lawyer does not mislead their opponent, then their approach is within the bounds of the reasonable.

But when advising the client, if a lawyer can imply that X is legal or Y is true when it is probably not, then the situation is different. Clients are going to make bad decisions or decisions justified on a false basis. Those decisions would be bad as in wrong or risky, because the client did not properly understand the risks of what they were being advised to do, or they may be bad in the sense of lacking in integrity because the decisions are designed to misrepresent or mislead about the law, the facts on which they are based, or the risks that interpretation of these two raises. If a client wants the lawyer to advise that X is less risky than it actually is then that is likely to be an integrity problem, even if the client appreciates the true risk: the lawyers slanted signal as to the risk is misleadingly protecting the decision maker or is likely to be used to mislead others (or both).

In an organisation, such slanted understandings pass between different actors and levels, each with their own agendas and audiences to please. The processes involved can have some subtlety and can take on a life of their own. They do not only stem from a desire to supplant the truth; they can stem from a desire for simplicity. They can also stem from what 'being commercial' can mean when a lawyer is asked 'is it legal?'

I assume the desire for simplicity is an inescapable fact of individual psychology and organisational culture. Why, in extremis, does this manifest as a lack of integrity? Is this just the system? Or lawyers being lawyers? How much is misconduct? To consider these questions we need to examine how organisations interact with lawyers and how individuals and systems create integrity gaps and mutual irresponsibilities. How can practices that look normal have the capacity to be deeply harmful? And when and why do they promote the client's interests over the interests of justice?

I call these practices *irresponsible orthodoxies*. Irresponsible orthodoxies are built on routine ways of thinking and practical scripts that appear normal or routine but are, or are carried out in ways, that are irresponsible. If I remind my organisation of a document retention policy, which governs the legitimate destruction of documents not just their retention, on the day I discover I am about to be raided by the police, I may be unlucky or I may be behaving irresponsibly (or worse than that). And deployed irresponsibly, when managed in bad faith, or when lawyers forget the integrity and the interests of justice – such orthodoxies can create legality illusions.[1] In the police raid example, the illusion would be that the documents were routinely and lawfully destroyed. These illusions enable badly lead organisations to say 'we can do what we want' when they should not, or 'we did the right thing' when they did not, and so on – if not with impunity then with significant levels of deniability.

I will discuss in more depth what legality illusions are later, but one example was discussed in Chapter 5: Paula Vennells writing to a government minister in 2015 to say that there was nothing to suggest that any of the hundreds of SPM convictions was unsafe. There was significant evidence that convictions were unsafe, not least a tainted expert witness. It might be arguable that no one *knew* the convictions were unsafe – after all, only a court decides that, and Vennells' legal team may have been of the view that the convictions

[1] See also Whelan's examples of lawyers using the 'tricks of the trade' to create illusions for their clients: C. Whelan, *The Bodyguard of Lies, Lawyers' Power and Professional Responsibility* (Bloomsbury, 2022).

could be defended as safe despite the problems they had discovered – but that is not the same as saying there was *nothing to suggest* any conviction was unsafe. Her statement was untrue, whether she knew it or not. It was an illusion informed by a slanted interpretation of the legal position. It was misleading. Any lawyer helping to make or approve the statement ought to have realised this. Was it the system and its routines or individual fault at work here? Was it both?

What Organisations Want

To understand how legality illusions build up we need to understand what organisations want from lawyers and how lawyers respond to that desire. To do so let me sketch out some assumptions. No organisations are alike, and no theory of them is uncontested. For businesses, their primary goals can be simplified as providing financial reward, status, and (sometimes) meaning to those who work in them. They tend to be managed with a keen eye on profit and reputation.

These systems can become unbalanced. Typically, they do so because of profit-*maximisation*.[2] Profit is a necessary positive for any commercial organisation, but maximisation can be dangerous, driving excessive cost-cutting and other risk-taking. Financial and reputational drivers cascade through the organisation and, when unbalanced, can diverge from the long-term interests of the organisation. Senior managers, perhaps particularly sensitive to reputation and financial signals because of their visibility and contractual

[2] Davies (see n.13).

incentives, set priorities and take critical decisions. Typically, senior lawyers work with them.

Lawyers are supposed to act in the best interests of the *organisation*, but usually take direction on what those best interests are from the executives. In times of conflict, there can be huge difficulties in working out who the client really is or what is actually in their best interests.[3] We also know lawyers sometimes keep trouble away from boards. Sometimes, that is sensible. The board is not often best deployed in considering legal minutiae, but it can also have a less savoury aspect, with lawyers thinking, assuming, or being told that the board is better off not knowing about 'dirty linen' or being told in ways that are sanitised or off the record.

In Prince Harry's hacking case against Mirror Group Newspapers (MGN), MGN in essence alleged that the truth about hacking was concealed from the board. The judge found that 'A pretence was maintained by Mr Vickers [a board member] and Ms Bailey [the then CEO]' that there was 'no credible evidence' of VMI (voice mail interception) at MGN newspapers. Both knew that there was evidence, but felt able to deny it.[4] One reason the judge formed this view was findings made regarding MGN in-house solicitor Martin Partington:[5]

[3] Richard Moorhead, 'The Levitt Report: Independence Frayed', *Lawyer Watch* (blog), 11 September 2021, https://lawyerwatch.wordpress.com/2021/09/11/the-levitt-report-independence-frayed/.

[4] *The Duke of Sussex and others* v. *MGN Limited* [2023] EWHC 3217 (Ch) ('*Sussex v MGN*').

[5] *Sussex* v *MGN*; Richard Moorhead, 'Joking aside, What Does the Judge Say about Lawyers in the Harry v MGN Case?', *Lawyer Watch* (blog), 15 December 2023, https://bit.ly/3MFuQzb.

> In dealing with the 14 Incidents above, I have made findings that Mr Partington would have been aware of UIG [unlawful information gathering] from 1999 and was aware of phone hacking activities from no later than the end of 2003, but probably earlier as a result of his 'legalling' work. The claimants have therefore proved their case that the legal department of MGN knew about phone hacking. There was no formal report to the board. I have found that, on the 'no surprises' understanding between them, Mr Partington told Mr Vickers what he knew. Mr Vickers was the group head of legal and a main board director, so it cannot be said that the legal department concealed VMI and UIG from their employer.

It was not necessarily concealed, it just was not written down in a formal report. The board, or some of its members, knew about it but could deny it.

Agreement, Simplicity, Confidence

As Baroness Hale identified, legal professional privilege is given as a fundamental right because 'It is in the interests of the whole community that lawyers give their clients sound advice, accurate as to the law and sensible as to their conduct.'[6] The point of privilege is that clients are encouraged to make a clean breast of their situation behind the cloak of privilege to enable the lawyer to counsel them towards legality, not away from it.[7] And yet,

[6] *Three Rivers District Council* v *Governor and Company of the Bank of England* [2004] UKHL 48.

[7] Moorhead, Vaughan, and Tsuda (see n.2); Andrew Higgins and Richard Moorhead, 'Working Paper 9, Reforms to Privilege Laws', 8 January 2025,

what organisations actually want is more complicated than sound, accurate, or sensible advice, even when acting in good faith. They want permission or validation. They want to be told you can do this, it is lawful, or we have investigated that and you behaved justly. And they want to be told this with confidence and simplicity.

As an example, let's take the invasion of Iraq. Pretend I am Tony Blair: in 2003 I was considering the UK being part of the invasion and occupation of Iraq. There were doubts about the legality of this. Some argued that existing UN resolutions were sufficient, others that a UN resolution needed to be passed.

If I am behaving responsibly, I want to ensure that the invasion is likely legal, and I want to be able to present the legality of the invasion with firmness and resolution to other audiences. So, I want the answer to be 'yes, it is legal'. I also want the answer to be a *clear* 'yes', a *confident* 'yes'. Without clarity and confidence, I am in difficulty. I need to inform and persuade others, both within and outside the organisation (the army, the government, parliament, and the nation), that what is proposed is legal. So, there is a problem with managing, representing, and acting on uncertainty here. The military and civil service must be informed that it is lawful; equivocation does not assist them. The system arguably needs, and definitely prefers, a positive, simple response. All this gives rise to dilemmas for the lawyer: How

https://bit.ly/495GiLI; H. L. Ho, 'Legal Professional Privilege and the Integrity of Legal Representation', *Legal Ethics* 9, no. 2 (January 2006): 163–86.

sure do they need to be to advise something is lawful? How should they represent any uncertainty? How should they cope with foreseeable risks that their advice is mispresented or otherwise manipulated? The temptation on lawyers to slant their approach to their immediate client's preferences can be strong. There are other problems adding to this. The factual basis of advice, or the questions asked, can be biased in favour of a particular outcome. Advice requests can be left late to maximise pressure on the adviser to say yes. Draft advice can be subject to lop-sided scrutiny.

In the Iraq example, the Chilcot report summarises his key findings on the Attorney General's advice.[8]

> On 9 December, formal 'instructions' to provide advice were sent to Lord Goldsmith. They were sent by the FCO on behalf of the FCO and the MOD as well as No.10. The instructions made clear that Lord Goldsmith should not provide an immediate response.
>
> Until 27 February, No.10 could not have been sure that Lord Goldsmith would advise that there was a basis on which military action against Iraq could be taken in the absence of a further decision of the Security Council.
>
> Lord Goldsmith's formal advice of 7 March set out alternative interpretations of the legal effect of resolution 1441. While Lord Goldsmith remained 'of the opinion that the safest legal course would be to secure a second resolution', he concluded (paragraph 28) that 'a reasonable case can be made that resolution 1441 was capable of

[8] John Chilcot, 'Iraq Report: The Full Chilcot Report HC 264', 6 July 2016, sec. 5, pp. 8–9, www.gov.uk/government/publications/the-report-of-the-iraq-inquiry.

reviving the authorisation in resolution 678 without a further resolution'.

Lord Goldsmith wrote that a reasonable case did not mean that if the matter ever came to court, he would be confident that the court would agree with this view. He judged a court might well conclude that OPs 4 and 12 required a further Security Council decision in order to revive the authorisation in resolution 678.

At a meeting on 11 March, there was concern that the advice did not offer a clear indication that military action would be lawful. Lord Goldsmith was asked, after the meeting, by Admiral Boyce on behalf of the Armed Forces, and by the Treasury Solicitor, Ms Juliet Wheldon, in respect of the Civil Service, to give a clear-cut answer on whether military action would be lawful rather than unlawful.

Lord Goldsmith concluded on 13 March that, on balance, the 'better view' was that the conditions for the operation of the revival argument were met in this case, meaning that there was a lawful basis for the use of force without a further resolution beyond resolution 1441.

Mr Brummell [the AG's legal secretary] wrote to Mr Rycroft [The Prime Minister's Private Secretary for Foreign Affairs] on 14 March: 'It is an essential part of the legal basis for military action without a further resolution of the Security Council that there is strong evidence that Iraq has failed to comply with and co-operate fully in the implementation of resolution 1441 and has thus failed to take the final opportunity offered by the Security Council in that resolution. The Attorney General understands that it is unequivocally the Prime Minister's view that Iraq has committed further material breaches as specified in [operative] paragraph 4 of resolution 1441, but as this is a judgment for the Prime Minister, the Attorney would be grateful for confirmation that this is the case.'

Mr Rycroft replied to Mr Brummell on 15 March: 'This is to confirm that it is indeed the Prime Minister's unequivocal view that Iraq is in further material breach of its obligations, as in OP4 [operative paragraph 4] of UNSCR 1441, because of "false statements or omissions in the declarations submitted by Iraq pursuant to this resolution and failure to comply with, and co-operate fully in the interpretation of, this resolution".'

Senior Ministers should have considered the question posed in Mr Brummell's letter of 14 March, either in the Defence and Overseas Policy Committee or a 'War Cabinet', on the basis of formal advice. Such a Committee should then have reported its conclusions to Cabinet before its Members were asked to endorse the Government's policy.

Cabinet was provided with the text of Lord Goldsmith's Written Answer to Baroness Ramsey setting out the legal basis for military action.

That document represented a statement of the Government's legal position – it did not explain the legal basis of the conclusion that Iraq had failed to take 'the final opportunity' to comply with its disarmament obligations offered by resolution 1441.

Cabinet was not provided with written advice which set out, as the advice of 7 March had done, the conflicting arguments regarding the legal effect of resolution 1441 and whether, in particular, it authorised military action without a further resolution of the Security Council.

> The advice should have been provided to Ministers and senior officials whose responsibilities were directly engaged and should have been made available to Cabinet.

The Attorney General was instructed to and agreed to advise later in the process than was possible and, arguably at least, sensible. He took meetings with those in favour of invasion to discuss his advice before it was given.[9] He treated the PM as his client when it was the government that was his client. On the key factual question – whether Iraq had weapons of mass destruction – he felt able to rely on the Prime Minister's view. As the decision loomed, his advice softened to be favourable to invasion and it was reported to Cabinet in terms that limited scrutiny and understanding of it. Moreover, many international lawyers said he got the substantive advice wrong.[10] Regardless of whether that is the case, I would argue that the process adopted probably undermined his independence.[11] He himself says, though, 'As the person who had the responsibility to advise at the time though, I did nothing other than give my honest and genuinely held opinion reached after careful study of all the information. There was nothing expedient or political about my actions, and there is no finding to the contrary in Sir John Chilcot's report.'[12]

9 Richard Moorhead, 'Independence Play – Chilcot on the Legal Process', 7 July 2016, https://bit.ly/3L3hDiT.

10 Philippe Sands, *Lawless World: Making and Breaking Global Rules* (Penguin UK, 2006).

11 Moorhead (see n.310).

12 'Chilcot Report: Lord Goldsmith's Legal Advice on Iraq War Provides Lessons in Lawyering', www.ibanet.org/article/64bb9449-a904-4c27-ad38-1af7ab2b8cbd.

Being 'Commercial'

The position and approach of the Attorney General advising a government when the Prime Minister is on a war footing contained myriad problems, not least the problem of who the client was.[13] It is also an interesting analogue for how a lawyer desperate to 'be commercial' for their employer or client might behave. Such problems manifest in many other contexts. There are numerous pressures, both implicit and explicit, subtle and overt, on lawyers to say 'yes' to their clients. Read any trainee solicitor recruitment brochure or client-facing article, or attend any in-house conference, and the demand for lawyers to be 'commercial' or 'business partners' is strong.

In organisations, this pressure can mean a range of things designed to please senior people working for organisational clients. Being commercial can also just mean being practical, not academic. Who could resist that? And why work otherwise than in partnership with your client? But that is not all that is meant. Being commercial can also mean that when presented with a legal obstacle, a lawyer should not say 'no' to the proposed course of action, but find a way around the problem. Being commercial is also an idea used to dilute legality. It can be an encouragement to look the other way when presented with a legal risk or to minimise it more than is justified.

To give an example, from the global financial crisis of 2008, Barclays sought investment to avoid having to seek

[13] See Section V of Chilcot, 'The Chilcot Report'; Moorhead (see n.310).

a government bailout. The Qatari's were willing to invest but for a significant fee. That meant that rules on financial assistance and commission payments needed to be worked around. Barclays sought to enter into cooperation agreements with their investor constituting (or, one might argue, disguising) the fee. These agreements had to be structured as normal arms-length commercial terms quite separate from the share subscription to be effective. Lawyers in Barclays were put under pressure to accept agreement terms that made the supposedly arm's-length deal look like a paper exercise. The terms suggested became increasingly absurd.[14] There is an excruciating passage where one Barclays lawyer says, of the suggestion by the investor's lawyers that the bank will have to sign a 'nice soft short letter': 'I do know what he's getting at but he's got to grow up. This is not how it's going to be, he is going to have to give the services in exchange otherwise you are going to end up in front of the Fraud Squad explaining why.'[15]

We can get a sense of how this ended by noting how the judge described one of these agreements. Whilst not meeting the tests for a sham agreement, he said it was problematic in significant ways:

> The agreement, as executed, may well be regarded as uncommon or artificial or even perhaps reflective of a breach of fiduciary duty on the part of those who were involved in its production on Barclays' side . . . It might be

[14] *PCP* v *Barclays*; Clark (see n.218); Moorhead (see n. 218).

[15] *PCP* v *Barclays*, para. 355.

> regarded as a transaction at an undervalue. On any view the whole process looked 'smelly' or 'dodgy'.[16]

The judge says it was 'manifestly the case, this was adopted as a way to conceal from other investors that Qatar was in effect receiving a higher fee and . . . was clearly part of the package deal for Qatar along with the subscription agreement'.[17] It is another example of a legality illusion, a package deal with elements that could be concealed from others. There is also some suggestion that there was also a plan to mislead Barclays' own board about the deal if necessary:[18]

> Mr Dobson [Senior Legal Counsel] had said that in the prospectus, the agreement for general advisory services would have to be disclosed but not the fee. As far as Barclays was concerned, and according to a conversation between Mr Jenkins and Mr Boath, Mr Lucas [all senior Executives within Barclays] would tell the Board it was a three-year contract without disclosing the amount payable, but if he had to, he would give the impression (or not deny the assumption) that the payment would be spread over the whole 3 year period, as opposed to being made in the first year.

The process shows how being commercial to get the deal done meant flexing to try to avoid financial-assistance and share-commission rules. The drafting enabled the deal to be presented in misleading terms. We cannot be certain whether the lawyer appreciated the extent to which the agreements might mislead. Of the broader context of the deal, it is of note

[16] *PCP* v *Barclays*, para. 366.
[17] *PCP* v *Barclays*, para. 367.
[18] *PCP* v *Barclays*, para. 346.

that Barclays' initial advisers (Linklaters) resigned from the job 'ostensibly on conflict grounds',[19] having sought reassurances to ensure the deal did not amount to unlawful financial assistance. The resignation, the judge said, was 'a serious warning sign' to Barclays and its internal and external legal advisers of problems.[20]

Greasing the Truth

Why do lawyers flex to be commercial?

In-house lawyers are in a tournament of influence: to get things done and to be highly regarded they need to demonstrate their loyalty and helpfulness in return for status and influence.[21] They hope that by flexing when making marginal calls on legal risk this earns them the right to say 'no' when their client proposes something more clearly problematic. Saying no is hard; they believe they need political capital within the business to do so effectively.

Similar problems may occur with private practitioners, especially those with big clients and long-term relationships. Recall how POL described Cartwright King to the inquiry as an 'enormous' client, and how that 'must have' impacted how the firm 'approached its advice and its ability to advise impartially and independently'.[22] Henderson and Galanter have warned about the financialisation of Big Law undermining ethicality.[23]

[19] *PCP* v *Barclays*, para. 116. [20] *PCP* v *Barclays*, para. 505.

[21] Moorhead, Vaughan, and Godhino (see n.11).

[22] POL Final Submissions (see n.54), para. 204.

[23] Galanter and Henderson (see n.292).

Langevoort has extensively researched how sociological, psychological, and economic forces penetrate deep into the interactions between lawyers and commercial clients.[24] He demonstrates how deeply culture permeates thought and behaviour. To adapt a phrase falsely attributed to Peter Drucker, we should worry that culture eats independence for lunch.[25]

He suggests commercial cultures like, and sometimes demand, intensity, passion, and commitment. Optimistic construal is expected: putting the best gloss on situations. Langevoort labels this corporate 'grease'. 'Being positive', he says, 'facilitates motivation, cooperation, and trust'.[26]

There are problems with passion and optimism. They are associated with unrealistic 'situational construals', getting stuff wrong, being overconfident. Extreme examples are found when POL-instructed lawyers talked about suppressing evidence improperly,[27] or suggesting they attack 'the postmasters credibility by calling out [Noel] Thomas, [Seema] Misra and [Jo] Hamilton . . . as the liars and criminals that they are', or when they suggested tactics designed to ensure the claimants 'burn money'. At the time, the lawyer defended tactical brainstorming of similar tactics in these terms: 'I'm sure everyone can raise a million reasons why the below is crazy . . . I think it's crazy . . . but we need to find a way

[24] Langevoort (2012) (see n.264); Langevoort (2010) (see n.264).

[25] Dean Foust, 'Peter Drucker Never Said, "Culture Eats Strategy for Breakfast"', *Medium*, 5 March 2024, https://bit.ly/4alGybU.

[26] Langevoort (2012) (see n. 264), 510.

[27] See the earlier discussion of Amy Prime's email (see n.64).

forward so we all need a positive (if deluded) mental attitude!'[28]

What the lawyer in that example suggests was just a 'straw man' discussion at the time might look like a loss of professional detachment. A proponent of the standard conception might suggest that this is the lawyer just doing what the client would do if they could handle the case themselves, helping them pull legal levers in a way that maximises their chance of winning.[29] They become the 'perfect' amoral agent making pleas to, or proving a licence for, amorality in the client's nature. In a perverse way, the comments show a commitment to, intensity and passion for, and alignment with the client. As I noted in Chapter 6, disdain for others is particularly significant psychologically: it is a form of moral disengagement.[30] As Langevoort has noted, aggressive financial innovation led banks' towards 'disdain for any sense that they owed special fiduciary-like obligations to their institutional customers – a way of distancing themselves so as to rationalize hyper-competitive behavior toward the customers, too'.[31] Clark has suggested that this aggression to the client's opponents or counterparties is sometimes driven by the lawyers' interests, not the clients'.[32]

Langevoort suggests that organisations have structural biases that mean they tend to promote risk-takers. Risk crystallising can be excused as bad luck, managed, or concealed, but to

[28] Parsons Transcripts, 13 and 14 June (see n.69). [29] Pepper (see n.243).
[30] Bandura (see n.267). [31] Langevoort (2012) (see n.264), 514.
[32] Trevor Clark, *Ethics in Leveraged Finance* (Oxford University Press, 2025).

succeed in financialised organisations you have to try and win – and win big. Rainmakers have the power. To give an extraordinary example, Neil Gerard switched from being a partner at DLA Piper to Decherts on the basis he would make a lot of rain for Decherts.

His approach to the business of lawyering was mercilessly dissected by the High Court in the ENRC case. In essence, this case is about allegations that Mr Gerard engaged in deliberate or reckless conduct designed to ensure the Serious Fraud Office acted against his client in ways that would maximise his fees. One suggestion is that it was the pressure to deliver on promises to his firm of fee income that drove his behaviour. The judge found that:[33]

> Mr Gerrard did indeed have a motive and inclination to 'kick-start' more substantial work for ENRC by increasing the prospect that the SFO would become involved, not so as to provoke a criminal investigation; but rather to cause a large amount of work to be done which would lead to a self-report and some form of civil settlement which would avoid a criminal investigation.

Interestingly, the firm had had warning signs of his approach when he was interviewed by Dechert lawyers during his recruitment. Notes of those interviews 'refer to his ego, a lack of clarity on details of profits for the work he did, his ability to turn a small job into a large one and a strategy of "hero marketing" around him'.[34] One partner had warned the

[33] *ENRC* v *Dechert*, Gerard and the Director of the SFO [2022] EWHC 1138 (Comm).

[34] *ENRC* v *Dechert*, para. 261.

firm against taking on Gerard because he had seen that 'the advice Neil's team was giving was unduly negative and to an extent scaremongering in order to increase DLA's fees'.[35] In the ENRC case the judge found that Gerard had breached his duties to ENRC (his client) by, amongst other things, instigating leaks against them and giving the wrong advice about tactics and other matters relevant to the Serious Fraud Office investigating them.

Examples of the economic self-interest for lawyers to work aggressively but strongly contrary to client interests are rarely so vividly exposed. The promotion of egregious or bound-to-fail tax schemes is an analagous example.[36] Usually, it is harder to disentangle whether expensive, aggressive tactics are for or against the client's best interests. Whilst PO work has provided major fillips to the careers and the income streams of several lawyers and firms over many years, in the short and medium term, whilst those tactics remained secret they protected the PO against legal claims and losses.

Langevoort suggests that lawyers' decision-making styles fit a greasy model where both lawyer and client's inclinations and interests are, or appear to be, more aligned.

[35] *ENRC* v *Dechert*, para. 259.

[36] Dan Neidle, 'The Outrageous £50m Tax Scheme That Was KC-Approved. Part 1: The Scheme', *Tax Policy Associates Ltd* (blog), 6 July 2023, www.taxpolicy.org.uk/2023/07/03/scheme/; Dan Neidle, 'The Outrageous £50m Tax Scheme That Was KC-Approved. Part 2: The Opinion', *Tax Policy Associates Ltd* (blog), 6 July 2023, www.taxpolicy.org.uk/2023/07/04/kc/; Dan Neidle, 'The Other KC Opinion behind the Outrageous £50m Tax Scheme (Part 3 of a Series)', *Tax Policy Associates Ltd* (blog), 4 July 2023, www.taxpolicy.org.uk/2023/07/06/kc_2/.

Decisions are 'driven by intuition and feelings as much (or more) than explicit deductive or inductive reasoning', with the lawyer's mind 'trying to work its way' towards meeting what the client wants.[37] This is what 'being commercial' can mean. Again, the PO scandal may provide examples. Stephen Dilley ran the civil litigation against Lee Castleton. He started out thinking Mr Castleton's defence appeared 'to hold potential merit based on the limited documentation' and advised POL to settle the case.[38] He also asked questions about the reliability of Horizon. In-house lawyer Mandy Talbot then told him of the 'serious ramifications for the business' of failure. The case became one of defending the system rather than settling a debt claim.[39] As we have seen, Simon Clarke and Brian Altman (both barristers) decided against exploring why key Fujitsu witness Gareth Jenkins gave evidence that was tainted. This came at a time when Mr Clarke had noticed that the PO 'became very defensive' about expert evidence.[40]

Langevoort also suggests lawyers are prone to cognitive dependence and collective rationalisation. When lacking expertise (knowledge of computer systems would be a good example) they show excessive deference and dependency on others for evidence and its interpretation. At the inquiry, lawyers repeatedly defended their actions because of their client's *confidence* or *belief* that Horizon was robust, for

[37] Langevoort (2012) n.264, 495. Team loyalty biases mean that innate biases towards the client's position may also exist subconsciously.

[38] 'POL00070496 – Email Chain – Stephen Dilley, Tom Beezer, Bob Heckford and Simon Richardson Re Castleton Default Judgement', 22 November 2005, https://bit.ly/4949S4a; Talbot (see n.93).

[39] Talbot (see n.93). [40] Clarke (see n.164).

instance, in the absence of hard evidence that such confidence was justified.

Lawyers are not just dependent on information from others; however, they manage it, fitting it to the best-case story and polishing it by emphasising what is helpful and diminishing what is not. Organisations naturally silo and diffuse information. At the PO, cases that went wrong were settled and sometimes buried under NDAs. Central management of core knowledge about Horizon's failures (including legal failures) was absent. Bad news disappeared. Witness statements were drafted in a manner that was more beneficial to the business than the witnesses intended or were comfortable with.

Even when not sinister, organisational culture and the tournament of influence can promote cognitive dependency over professional independence. However, lawyerly zeal can exacerbate the situation. Already dependent on partial information, lawyers naturally burnish pro-client facts and arguments. In developing a narrative, something arguable but probably false can take on the appearance of, or be asserted as, truth. Cognitive dissonance – the human tendency to interpret new information in a way that is consistent with past or preferred choices – may magnify the polishing.

The PO's approach to remote access may be a case in point. As we have seen, remote access is crucial to the PO story. Fujitsu engineers could change SPMs accounts remotely, without the SPM knowing and without there always being a controlled process for permissions to alter accounts and a secure audit trail for what they did. It meant the system was not demonstrably secure. It was also a likely cause of accounting errors. The truth about remote access appears to have been passed onto POL haphazardly over time. Rather than clarifying the risks of this, POL went from denying that remote access was possible, to stating it was possible only with SPM consent, to admitting it was possible without consent but controlled, and then claiming it was uncontrolled but unlikely to be an important source of Horizon problems. They developed denials and lines to take rather than understanding and communicating the truth.

Dealing with Risk

What would sensible advice as to the law and conduct, the unslanted handling of legal risk, really require? If we bear in mind the requirement for independence mandated by professional rules, I suggest that what is required is that:

1. facts and law are marshalled, interpreted, and presented within the organisation as objectively as possible; and,
2. uncertainties as to the facts or how to apply the law should be handled objectively, with clarity and openness when advising the client about the risks and uncertainties inherent in that handling.

Only then can decisions about risk be made with the best available information on those risks and in a manner that most closely reflects what the law requires of the organisation.

We have already seen how grease and zeal can distort facts, consciously and unconsciously. When it happens, decisions about risk are made on a slanted calculus: inaccurately and slanted towards the preferences of the people in the organisation supplying the information and its key decision-makers. This slanting of the calculus and questions about its legitimacy are important. There is a question of process: how to best ensure that facts and legal interpretation are as objective as possible. Stepping out of cognitive and other dependencies takes real effort, skill, and a focus on proper evidence not belief. And there is a question of substance: how risky does a legal decision have to be before an organisation should not take it?

Let me move onto that second question with an example.

The Attorney General's Guidance (2022) on Legal Risk.

This guidance was introduced in 2015. The version I want to use is an example of slanted legal risk management. It was last updated by the previous Conservative government in 2022, under then-Attorney General Suella Braverman. Part of the aim was to make government lawyers behave more like high-end commercial lawyers.[41] It sought to strengthen the risk appetite of the Government Legal Department or, to put it another way, to align it better with the high risk-appetite of its client. The House of Lords Constitution Committee reported

[41] This section derives in part from work I did with Steven Vaughan and Kenta Tsuda. Attorney General's Office, Attorney General's Guidance on Legal Risk (2 August 2022), www.gov.uk/government/publications/attorney-generals-guidance-on-legal-risk [no longer available at time of writing], and the work of Graeme Johnston on this Guidance, on file with the authors, with his kind permission.

Suella Braverman's view (then as Attorney General) that government lawyers were 'too cautious in their advice [and] . . . hampered ministerial policy objectives needlessly'. They should move away from the '"computer says no" approach' to encourage a 'solutions-based approach and use innovative legal thinking', and to 'instil a "private sector" approach to client service'.[42]

The guidance required government lawyers to advise whether 'there is a sufficient legal basis to proceed' with a controversial policy unless 'there is *no respectable legal argument* that can be put to the court' in favour of 'the action we wish to take' (my emphasis). This meant that even a case with more than a 70 per cent chance of being successfully challenged may have sufficient basis to proceed. So, cases *very* likely to be unlawful had 'sufficient legal basis' under the guidance. It gets a little worse. A lawyer inclined to say there was no respectable argument 'should refer the matter to [their] line manager . . . before [they] advise'.[43] If their manager disagrees with their assessment, the advice will be revised to say there is sufficient basis.

Advice was still expected to explain legal risks 'accurately and clearly'[44] to and suggest mitigations, but it is my view that such guidance interferes with the independence of the lawyers involved. It encourages pressure to lean towards

[42] See Select Committee on the Constitution, 'The Roles of the Lord Chancellor and the Law Officers (HL Paper 118)', https://publications.parliament.uk/pa/ld5803/ldselect/ldconst/118/11802.htm, ch 3, [135]–[149] and summary [13]–[15].

[43] Select Committee on the Constitution (see n.343), [8].

[44] Select Committee on the Constitution (see n.343), [12].

'yes' and, in requiring the lawyer to say something probably unlawful is sufficiently legal, it has significant potential to mislead. The risk that ministers would abuse such a policy are obvious and occur against a wider background of a high tolerance for legal risk, or what I defined earlier as legal aggression: the deliberate attempt to engage in likely unlawful practices. It has been suggested that Home Secretary Suella Braverman was willing to ignore advice about very high legal risks associated with her immigration policies, for instance.[45] There is a further element of the twisted genius that says X is likely to be unlawful but can be represented as having sufficient legal basis. It is that it allows the lawyers to give *behind* that representation an account of the problems with X and yet allow the minister to say the lawyers advise we can do X. It designs-in a mutual irresponsibility.

Interestingly, the incoming Labour Attorney General almost immediately changed this guidance as part of a stated policy of improving the culture of rule of law in government.[46] Referral up is still required if the lawyer proposes that the proposed policy is legally untenable, but this is somewhat balanced by the requirement to also refer up where there is a 'medium-high' (>50 per cent) or 'high' (>70 per cent) risk of unlawfulness. In the latter case, advice must be sought from one of the Law Officers 'immediately'. More notably still, the 'principal factor' governing advice is whether a legal challenge

[45] '23 November 2022 – Work of the Home Secretary – Oral Evidence – Committees – UK Parliament', 23 November 2022, https://bit.ly/3MPinsA.

[46] 'Attorney General's Guidance on Legal Risk', 2024.

would be successful if brought; this is more important under the new guidance than whether a court challenge is likely and the impact of any such challenge. In other words, legality is more important than the likelihood of challenge; or, as Graeme Johnston has put it, there is now 'less of a "can we get away with it?" vibe'.[47]

Nuance and Mutual Irresponsibility

Dysfunctional systems are full of accountability gaps and mutual irresponsibilities: policies and processes that distance decision-makers from responsibility.[48] Some gaps are designed; others are accidental. When it became clear in 2020 that Paula Vennells' claim that there was no evidence to suggest any convictions were unsafe was indefensible, she blamed POL's lawyers for the advice given and said she could not reveal that because of legal professional privilege. Asked to explain herself to the chair of the House of Commons Business Select Committee, she said this:[49]

> Post Office relied on lawyers (both internal and external) for advice in relation to criminal matters, and lawyers held the operational responsibility for investigating and prosecuting criminal misconduct . . .
>
> [A]n additional layer of oversight was provided by the courts and the CCRC. [And], Post Office engaged a senior

47 Graeme Johnston, 'Legal Advice as Risk Assessment: New AG Guidance, What Does It Mean?', *Lawyer Watch* (blog), 7 November 2024, https://bit.ly/48PBBqK.

48 Davies (see n.13).

49 Vennells, 'Paula Vennells to Darren Jones MP', 24 June 2020.

> criminal QC to advise on the response to a letter received from the CCRC regarding convictions relating to Horizon, and also to advise on prosecution related issues. In referring to this advice I do not and do not intend to waive any privilege of Post Office or myself, if any, over the advice the criminal QC gave.

As we have seen, the lawyers, now forced to defend that advice, have tried to say, in essence, that they simply advised in difficult circumstances, and perhaps with hindsight, in ways not entirely correct, but the client took the relevant decisions. The recusal application is an example of mutual irresponsibility and an interesting example of the way in which adversarial zeal encourages the client to maximise legal aggression to boot. Lord Grabiner's best argument for his approach was that he was obliged to advise the client how to win the case and this was the only way of doing that.[50] Aggression was the only path to victory and he had to advise them in the strongest terms to take it, he in effect said.

Irresponsible Orthodoxies

Let us look a little closer at other ways in which zeal, organisational dispositions, and mutual irresponsibilities have given rise to problems. Here, I want to show how those drivers create repeating patterns, the irresponsible orthodoxies that lie at the heart of many of the ethical problems here. In the PO scandal, these orthodoxies provided the PO with justification for its decisions, protected it from risk, and shielded it from

[50] Grabiner (see n.51).

scrutiny. Because they are orthodoxies, they can take on an almost autonomous quality, separate from the individuals involved. It is easier to think 'we always do X' than it is to think about whether 'doing X' is the proper thing to do in the circumstances. The orthodox step, its routineness, means a lawyer fails to think more fully about how the step is taken or the context in which the step is taken.

I highlight six such orthodoxies here.

1 A World Shaped by Arguments More Than Evidence

Contracts are supposed to define rights, but when misused, they do more. They can mislead. They can drive abuse.[51] The drafting of the PO's contract with SPMs is a case in point: it helped shape an abusive, exploitative relationship. Its unreasonable terms held great sway throughout the business: almost everyone behaved as if the contract *required* shortfalls to be repaid in *all* circumstances and that SPMs could be removed easily. It was later redrafted (even more unfairly) to try to make liability *explicitly* 'no fault'.[52]

The High Court decision in Lee Castleton's case bolstered POL's unfair approach, giving the High Court's imprimatur to Horizon's legal defensibility and the shoddy evidential practices around it.[53] They accepted that Mr Castleton had agreed accounts containing shortfalls that he could then not disprove was a reasonable argument – a 'nice

[51] Moorhead (see n.6). [52] *Bates No. 3*, para. 1122.

[53] *Post Office Limited* v *Castleton* [2007] EWHC 5 QB ('*POL v Castleton*').

little legal point', as Jason Beer KC called it. In accepting that the evidence before him should be limited to largely exclude evidence from other branches as a 'trial within a trial', the judge helped POL create a legal debt trap.[54]

In context, the notion that he was an agent signing an account as accurate was an illusion. Mr Castleton only signed such accounts because his contract *required* him to. He had to accept the accounts each week or cease trading. He challenged their truth in the only way possible, through ringing the helpline and hoping something would happen that led to the erroneous transactions being corrected. Draconian termination clauses gave the PO further leverage to handle him. It was legal totalitarianism. You have agreed shortfalls, you owe us the money, you can't prove otherwise, we will fire you or sue you or prosecute you if you don't pay up. To make matters worse, PO investigators were paid bonuses to maximise recovery under this Machiavellian deal.

This unfair contract survived for twenty years. It took the extraordinary *Bates* case to undermine it. As things stand, the SRA rules and guidance confine explicit concern with contracts to NDAs, saying they 'must not include or propose clauses *known to be* unenforceable or use warranties, indemnities, and claw back clauses in a way which is designed to, or has the effect of, improperly preventing or inhibiting permitted reporting or disclosures being made' (my emphasis).[55] The same logic applies to any contract, but the SRA guidance does not include the situation where a clause is used that is probably unenforceable but worth a punt. One might argue that

[54] *POL* v *Castleton*, para. 22.

[55] NDA Warning Notice (see n.18).

deliberately using probably unenforceable clauses is lacking in integrity, or may constitute taking unfair advantage (another breach of SRA rules), or (if the legality of clauses is asserted too strongly) is misleading, but making such arguments would require a great deal of contractual expertise and a regulator very willing to take up such complaints.[56] Neither professional rules nor contract law discourage trying out unreasonable clauses in the hope they will be taken seriously by those they are designed to control.

There are many other occasions in the PO scandal when arguments were deployed at some remove from the facts. When Mr Justice Fraser said the *Bates* case was a 'flat earth' case he meant witness statements were based on what the PO *wanted* to be true, not what *was* true. The implication seems to be that it was either negligent or improper. Evidence about remote access was filtered through a lens of what POL wanted to say, and so on.

2. *Zeal, Not Independence-Dominated Decision-Making*

Disclosure of relevant evidence was repeatedly denied by PO lawyers. When the inquiry has considered this, files, notes, and emails suggest a pattern whereby the PO's lawyers habitually sought a rationale for *not* disclosing rather than objectively

[56] Catharine Macmillan, 'Private Law and Public Concerns: Non-Disclosure Agreements in English Contract Law', in *Contents of Commercial Contracts, Terms Affecting Freedoms* (Hart Bloomsbury, 2022), 315–38.

applying the relevant tests. Some decisions were impossible to defend when put to them under cross-examination and were conceded as flawed. They usually sought to mitigate any criticism by pointing out that any admission was made 'with hindsight'.

One email from Bond Dickinson, drafted by two of their solicitors, suggests foresight. Whilst working on the *Bates* litigation, 'suppressing' evidence is explicitly suggested. They proposed using arguments that only 'appear legitimate', if and until the pressure to provide the documents became so great that they would need to be disclosed. One of the lawyers responsible now says there were, in fact, legitimate grounds for resisting disclosure; they were just not mentioned in the email. This leaves a question: did they think they were suppressing evidence at the time, or were they just making a show of 'suppressing' evidence to impress the client?

The repeated resistance to disclosure spread across time, different lawyers, and different cases suggests a problem that is deep-seated and potentially endemic. The lawyers were incapable, it seems, of ensuring proper disclosure. Zeal turned disclosure rights on their heads: SPMs rights to documents became PO rights to *resist* disclosure including, as we will now see through the next orthodoxy, the exploitation of privilege.

3 Exploitation of Legal Professional Privilege

In 2011, in response to four SPMs' claims, a RMG lawyer (who owned the PO then) issued a litigation hold to staff. Worries were growing about a group action. A litigation hold is a warning to keep all relevant documents safe. This one also discussed 'document creation'. It emphasised controlling the creation of documents 'potentially damaging to POL's defence' because they might be disclosable. Everyone was urged to 'think very carefully' before writing down anything 'critical of our own processes or systems'. If there was a need to write something down, they were advised how to try to attract privilege to it and so help shield it from disclosure. One tactic was to encourage staff to write down adverse evidence so that 'its dominant purpose *can be said to be* evidence gathering for use in the litigation'.[57] Being told to write something down in such a form that it can be *said to be* recorded for the purposes of litigation evidence gathering, whether or not it *was being* recorded for that purpose, does seem, whether it was the author's intention or not, to invite a degree of dishonesty about a document's purpose.

Litigation holds and the maximising of legal privilege are orthodox. They are seen as protecting the client's rights to claim privilege over documents properly needed for legal work, but can also encourage synthetic claims to legal privilege. In this example, not only is harmful evidence encouraged into the privilege shield, but the lawyers also discourage such evidence from being recorded in the first place. If it is created, they encourage the synthesising of arguments for resisting its

[57] They were told 'where possible' to copy it to legal, 'to enable them to advise on the content'. And, 'If in doubt, call Legal Services before committing anything to writing . . ..' POL00107696 – Email from Emily B Springford to Helen Watson in Re to JFSA Claims Disclosure and Evidence Gathering', Post Office Horizon IT Inquiry, 20 December 2011, https://bit.ly/4s69hrp.

disclosure. Whether this is ordinary risk management, or an abuse, probably depends on whether we think the business and the lawyers were acting in good faith and how the litigation hold was actually managed. This brings me to the next orthodoxy.

4 *Sophisticated Evidence Management*

The aversion to creating or dealing with adverse evidence takes other forms, and the evidence of several of the lawyers before the inquiry suggests it is orthodox. Richard Morgan, a barrister (now KC) who led the PO's case against Lee Castleton, described his general approach when asking questions which might reveal adverse evidence:

> A. . . . I'm trying to find out what's going on . . .. [W]ithout being so crude as to say 'Give me full and frank disclosure', I want to know are there any unexploded landmines that I'm going to step on if I go down a particular course? Is there anything that's going to come out that I should know about now? Generally, with sophisticated firms of solicitors, they know that that's what you're asking them when you say, 'What's out there?'

Sophistication is left opaque. Full and frank disclosure, to him, who is leading the case before the court, is seen as crude. There appears to be merit in him being unencumbered with specific adverse knowledge if possible. We get another sense of these tactical instincts at a meeting with senior PO lawyers five or six years after *Castleton*. Here, Mr Morgan is asked whether the PO should have an independent investigation into Horizon. Fresh cases are looming at this point. The note of the meeting, and probably Morgan's view, but perhaps the collective view of the group, was no: 'Whatever the findings of the expert report it [will] not resolve the problem. POL will be "damned if they do and damned if they don't".' Either the report will be seen as a 'whitewash' or it 'will open the floodgates to damages claims by SPM's who were imprisoned for false accounting and . . . all the civil cases they are currently sitting on'.

Notice that the focus is on making cases go away for the PO. Those cases include possible wrongful prosecution claims. Morgan points out in his oral evidence to the inquiry that such cases were beyond his expertise and so he would not have, or should not have been taken to have, advised on those. Overall, the note suggests that this group desired a tactical response to the problems it faced rather than confronting the potential injustice of those who might have been prosecuted unfairly. It is a moment of turning away. A rock is not lifted. Tactics trump integrity.

5 *An Absence of Rock Lifting*

An absence of rock lifting was a feature not a bug of this scandal. A central example concerns Gareth Jenkins. As we know, he was a Fujitsu software engineer who gave evidence in various criminal cases, including at Seema Misra's trial that ended in her imprisonment when pregnant. The PO's lawyers had not handled him properly. Some of them sought to harden his evidence in their client's favour and did not advise him adequately on his obligations while holding him out as an independent expert. When problems with his evidence became apparent, Simon Clarke, a barrister working for the PO 's criminal law firm Cartwright King, reviewed Mr Jenkins's witness statements and said his 'credibility as an expert witness is fatally undermined'.[58] This was because of his failure to disclose in evidence Horizon problems of which he was aware.

Curiously, Simon Clarke does not probe this with Mr Jenkins to find out what might have gone wrong. As discussed earlier, Brian Altman KC, appointed to review Cartwight King's work, agreed that Mr Jenkins was clearly tainted. Mr Altman started his work by saying he would have to consider carefully whether to see Mr Jenkins, but he too decided against it. Altman explains his change of mind on the basis that he was only reviewing Cartwright King and not investigating. Counsel to the inquiry, Jason Beer KC, suggests not speaking to Jenkins meant that the Jenkins issue 'remained shelved . . . never to be returned to'. Asked 'weren't you not loading the dice by excising him?', Altman's replies 'I don't see it that way'.

Another example of not lifting the rock occurs when Simon Clarke warns Post Office GC Susan Crichton that minutes of disclosure meetings may have been shredded. His advice warns that, if repeated, this would amount to criminal and professional misconduct for anyone involved. This 'sat in a drawer for a couple of weeks'. The response to it from Susan Crichton is somewhat equivocal:[59]

> Post Office Limited is committed to conducting its business in an open, transparent and lawful manner. Any suggestion to the contrary would not reflect Post Office

[58] Clarke (see n.142). [59] Clarke (see n.164).

> Limited policy, and would not be authorised or endorsed by Post Office Limited. Accordingly, the purported statements referred to in Simon's note do not reflect or represent Post Office Limited's position.

The response is, in essence, that if this had happened, *it would be bad and contrary to our policy*. It does not deal with whether it had, in fact, happened, or what to do about that. It does not suggest that the problem has been considered and addressed. It is a curiously evasive response. Despite this, and an early warning that they might be blamed for the problem when it came to light, the Cartwright King lawyers say they were reassured that the issue had been addressed. They cannot remember *how* they were reassured, and there is no evidence that the shredding, *an allegation of criminal misconduct in a review of criminal prosecutions*, was properly investigated. A limited note of a meeting afterwards kept by Bond Dickinson refers to 'cultural issues' that have been 'addressed' in ways that may suggest, as Simon Clarke agrees when he gave evidence to the inquiry, minimisation of the problem by POL and their solicitors.[60] The rock is replaced and covered in the moss of my next orthodoxy.

6 *Speak Bad News Softly, Good News Brightly*

Recharacterising shredding as *a cultural issue* is but one example of bad news being spoken softly. We know that when Susan Crichton reported in writing to the board in 2013 on the emerging problems of Gareth Jenkins' evidence

[60] Clarke (see n.164).

and Second Sight's interim report, she did not convey their full significance. She was excluded from the board meeting by the Chair of the Board and, humiliated, she was managed out or left the business shortly afterwards. As the bearer of bad news, she muted it and still paid the price of a messenger.

This bad news/good news orthodoxy often arises in investigations (or advice) that are organised (by the client) or provided by the lawyer in ways to maximise helpfulness to the client. We have started to see this in the political domain.

Lord Pannick's advice (which he wrote with a colleague, Jason Pobjoy) on the Boris Johnson Privilege Committee Inquiry, is arguably an example. It concluded:[61]

> For the reasons set out above, we advise Mr Johnson that the Committee is proposing to proceed by reference to substantive errors as to the ingredients of contempt and the standard of proof required, and is proposing to adopt an unfair procedure. But for Parliamentary privilege, a court hearing a judicial review application brought by Mr Johnson would declare the Committee's Report to be unlawful.

The opinion was criticised for having been published in unusual circumstances and for its substance. David Allen Green suggests that the advice was unusually poor and was commissioned with the intention that it would be published for political reasons. As is his normal practice, Green does not criticise the lawyers, suggesting their advice may be a creature

[61] Joint Opinion of Lord Pannick QC and Jason Pobjoy – Committee of Privileges – Boris Johnson (Matter Referred on 21 April 2022), 1 September 2022, https://bit.ly/4aYpNDM.

of their instructions (the questions they were asked to answer). Nonetheless, he makes very trenchant criticisms of the substance:[62]

> Indeed, there cannot be many weaker legal opinions that have ever been published. That the Opinion was weak has now also been stated by the parliamentary committee itself, in a special report on the Opinion. The committee in a mere six pages of its report refutes (and not just rebuts) the twenty-two page Opinion. The committee's report is, well, absolutely devastating. The language is extraordinarily strong for such a report – for example, at paragraph 12:
>
> *'We consider this concern to be wholly misplaced and itself misleading.'*
>
> At paragraph 6, the committee says the Opinion *'is founded on a systemic misunderstanding of the parliamentary process and misplaced analogies with the criminal law'*.
>
> And so on.

The Committee's report was informed by advice from Sir Ernest Ryder, a former Lord Justice. However, we should

[62] https://committees.parliament.uk/publications/28816/documents/173975/default/. David Allen Green, 'The Curious Incident of the "Absolutely Devastating" Johnson Legal Opinion Is Now Even Curiouser', *The Law and Policy Blog* (blog), 27 September 2022, https://bit.ly/4j5GBL4/; Richard Moorhead, 'The Fog of Lawfare', *Lawyer Watch* (blog), 7 September 2022, https://lawyerwatch.wordpress.com/2022/09/07/the-fog-of-lawfare/; Richard Moorhead, 'Don't Pannick, the Lawfare Boomerang', *Lawyer Watch* (blog), 29 September 2022, https://lawyerwatch.wordpress.com/2022/09/29/dont-pannick-the-lawfare-boomerang/.

not attribute the view that the opinion was misleading to him. The point seems to be that the opinion was sought for political purposes, not to persuade legal audiences. If the criticisms of the Committee and David Allen Green are accurate, it was deficient as an opinion but useful as a piece of political theatre and so helpful to the client in that sense because it lacked, in their view, balance.

The problems with helpful opinions can be more subtle than this. Linklaters provided advice helpful to Lehman Brothers off-balance-sheet accounting. Their advice was on whether a particular 'repo transaction', an agreement to sell debt and then repurchase later, amounted to a true sale under English law.

The context for the transaction was that Lehman were using such repo transactions to sell debt before a management accounting date and then repurchase it shortly after that date. The effect of this was to improve its debt figures, arguably artificially, making the bank look more solvent than it was.

There was nothing wrong with the advice that the solicitors gave. Linklaters gave a competent and correct legal opinion stating that it was a true sale. But there are strong arguments that it was misused in arguably foreseeable ways.[63] If that is correct, the solicitors would or should have been conscious of the risk that the repos were to be used for balance-sheet manipulation. David Kershaw and I have suggested that lawyers need to take some consequential responsibility for such problems when they are foreseeable, taking

[63] Kershaw and Moorhead (see n.216).

steps to minimise the risks of serious illegality when they present.[64] We do not know whether that happened in the Lehman example, but in the Barclays case discussed earlier there are suggestions that Linklaters did the right thing. They raised pertinent questions with Barclays when considering whether the proposed Qatari investment gave rise to questions of illegal financial assistance. One potential explanation for their resigning from that case is that they did not receive answers to those questions that satisfied them they could advise the deal was lawful.

Opinions are not the only source of potential problems when it comes to giving a client good or bad news. When investigating misconduct, a critical question is: by what standards should the conduct be judged? Consider an independent review of the role of the Bank of England and the rigging of foreign exchange markets. This was conducted, as it happens, by Lord Grabiner. When conducting this review, he tested alleged misconduct by looking to see if the conduct under scrutiny breached criminal standards. This decision meant that criticism of the bank was less likely. Finding proof of criminal offences is hard. Had the conduct been measured against broader professional standards it would have been more likely to lead to the bank being criticised.[65]

Independent investigations into corporate misconduct are routinely derided as being whitewashes, susceptible

[64] Kershaw and Moorhead (see n.216).

[65] Richard Moorhead, 'Béar Growls but Does Not Roar: The Bank of England and the Remit Problem', *Lawyer Watch* (blog), 3 March 2015, https://bit.ly/3MLOOZ0.

to cherry-picking.[66] The PO scandal contains reviews that I would argue had significant inadequacies in remit and execution. Cartwright King's review and Brian Altman's review of their review would fall into this category. How such reviews are then reported up and out is also important. Cartwright King and Altman's overly positive findings were what was passed through the PO's legal and PR lens to say there was nothing to suggest any convictions were 'unsafe'. Second Sight's review was selectively interpreted so that Horizon could be described as without *systemic* problem. As we have seen earlier, a third review, the Swift Review, raised many of the problems the inquiry is now investigating but was kept from the PO board after probably erroneous advice from the GC, Jane Macloed. It was also summarised in a rose-tinted way for the government minister. The review was reported to Parliament with even more misleading blandness years later.

Legality Illusions

This organisation, execution, *and communication* of legal work shows us the purpose of lawyers from the PO's perspective. It is to provide professional backing for their own particular and *partial* versions of the truth: partial as in only part of the truth, and partial as in slanted. Organisations, used to

[66] Kate Beioley and Stephen Morris, 'Court Told UBS It Could Not Rely on Legal Privilege to Keep Report on Alleged Rape Private', 17 April 2021, www.ft.com/content/a072c9af-325f-41cc-9c4c-69bc44e15b50; Richard Moorhead, 'Independence MsA Takes', *Lawyer Watch* (blog), 19 April 2021, https://lawyerwatch.wordpress.com/2021/04/19/independence-msa-takes/.

representing messiness in positive and simplified terms, are also willing to encourage and accept illusions where they are useful and can be defended.

To capture this, I suggest the idea of *legality illusions*. In general terms, I see legality illusions as fostered illusions of legality by which lawyers and their clients abuse power and avoid accountability. More specifically, I define legality illusions as:

a. misleadingly or unlawfully
b. implying or asserting that actions, decisions, and assessments of facts
c. are 'just' or 'legal' or 'within the law' or 'true (or fair representations) of facts'
d. when they are likely or highly likely to be unlawful (or illegal) (or untrue)

They are misleading or unlawful instances of legal aggression.

I do not want to try your patience with a full defence of this idea or definition – not least because I am still refining it. But it goes beyond theories of lawyering like creative compliance.[67] Creative compliance is artful *compliance* with law, compliance in form but not spirit. What we see in legality illusions is, I think, worse than that; a (probably) deliberate or reckless attempt to behave unlawfully or mislead others.

[67] Doreen McBarnet, 'Legal Creativity: Law, Capital and Legal Avoidance' in M. E. Cain and C. B. Harrington (eds.), *Lawyers in a Postmodern World: Translation and Transgression* (New York University Press, 1994), 73–84; McBarnet and Whelan (see n.9).

Take Standard Chartered Bank (SCB)'s 'wire-stripping', for which they were fined considerable sums.[68] SCB was accused of 'wire-stripping' information that would have identified the Iranian origin of transactions cleared through the US banking system. Iranian transactions had to be cleared through US-based due diligence. Rather than do this, SCB did due diligence on the transactions outside of the US. They 'repaired' (to use their euphemism) the transactions by removing the Iranian identifiers – a process that has become known as 'wire-stripping' – and ensured their US group companies were not told about the practice. This lack of knowledge, they hoped, would mean that the US regulators could not enforce any breach of their rules. There was evidence that SCB's due diligence processes, which were in breach of the US law because due diligence was not carried out in the US, were also inadequate: some of SCB's client banks were claimed to finance terrorist groups, including Hamas.[69]

The main commercial driver of this for SCB was that due diligence in New York just slowed things down and meant, they thought, they would lose business. Evidence in the Prosecutor's Order issued at the time of the bank agreeing to pay a large fine suggests SCB's GC advised on whether their wire-stripping strategy was enforcement proof and how to

[68] This account is based on Moorhead (see n.219) and Benjamin M. Lawsky, *In the Matter of Standard Chartered Bank Order Pursuant to Banking Law* (2012), New York State Department of Financial Services, 6 August 2012, www.dfs.ny.gov/about/ea/ea120806.pd.

[69] Lawsky (see n.369).

increase the chances it would not be scrutinised as per the outline given above. There were other examples of in-house lawyers participating in the process at key points. For instance, SCB's Group Legal Advisor, 'counselled several of SCB's officers that payment instructions for Iranian Clients "should not identify the client or the purpose of the payment"'. A 2005 report by 'senior SCB executives' noted their wire-stripping process could 'be perceived by OFAC as a measure to conceal the Iranian connections from SCBNY, and therefore evade their controls for filtering Iranian related payments [which if investigated] ... may result in heavier penalty than might otherwise be applied, and significant criticism'. An in-house compliance lawyer appeared to raise a concern that the process was being used so 'that any payment that could conceivably give rise to an OFAC [Office of Foreign Assets Control] problem should always be dealt with [in a way to avoid detection]'. Moreover, 'the bank's outside counsel ... in the US warned that the bank's system ... did "not comport with the law or the spirit of OFAC rules"'. And yet, in 2006 SCB's chief legal counsel advised SCB's audit and risk committee that 'it is reasonable to undertake due diligence on behalf of New York outside the US', even though 'we are potentially placing our SCB New York office and the Bank at risk if our due diligence procedures are not fully effective'.

Full effectiveness did not seem to entail, in this explanation, doing the due diligence in the US as the rules required. The illusion of reasonableness was pricked by US regulators. They said it was a fraud and disgorged a massive fine in settlement. Many other banks were fined later for doing similar things.

As already noted, to stave off government intervention during the financial crisis, Barclays' lawyers presented payment for an injection of Qatari funds as a consultancy agreement.[70] It was an illusion that helped mislead various people externally (and possibly internally) about the deal. The Union Bank of Switzerland (UBS) commissioned a lawyer to review an alleged rape investigation. A judge said lawyers and the bank cherry-picked 'conclusions that were favourable to and exonerated the Respondent'.[71] The illusions that they had handled the case properly took something of a beating, although the lawyer involved was not disciplined after the SRA investigated but decided to take no further action, with her former firm saying she had been exonerated.[72] In the first two cases, at least, a strongly arguable case can be made that the lawyers knew what they were doing was illusory.

The idea of legality illusions is derived from Dean Curran's 'risk illusions' which itself draws on Ulrich Beck's idea of 'organized irresponsibility'.[73] Their work suggests:[74]

> the social production and distribution of risk in a context of organized irresponsibility, where organized irresponsibility may be glossed as a social relation in which agents, through the interaction of their acts with others'

[70] *PCP* v *Barclays*; Moorhead (see n.218); Clark (see n.218).

[71] Beioley and Morris (see n.367); Moorhead (see n.367).

[72] 'SRA Drops Investigation into Freshfields Partner after Three Years', RollOnFriday, 11 February 2022, https://bit.ly/49mWWrz.

[73] Dean Curran, 'Risk Illusion and Organized Irresponsibility in Contemporary Finance: Rethinking Class and Risk Society', *Economy and Society* 44, no. 3 (3 July 2015): 392–417.

[74] Curran (see n.374), p. 393.

> actions, collectively create risks for which they are able to avoid being held individually responsible.

In other words, irresponsibility and illusion are products of a system, made of the actions, the agency of individuals, but that can be blamed on the system. Irresponsibility is institutionalised. Again, the recusal application is a central example in the PO scandal. Lord Grabiner's evidence is that he was merely advising in the way that his role demanded; the board says it cannot be criticised for following his advice. If we accept their views, then there is a system of risk being created for which no one is accountable. Under this model, individuals may be powerless to prevent such risks eventuating. If they are right, a lawyerly duty of zeal means facts and arguments are inevitably slanted, because the system demands it.

More generally, in the PO scandal a willingness to slant evidence and advice as it passed through many hands certainly contributed to the ways in which the contracts constructed an illusion of fault; the prosecutions an illusion of crime; and the reviews illusions of propriety, safety, and soundness – as well as the strategies of excess that were held out as proper: in contract management, in litigation, and in the legal team's contribution to political engagement and PR.

At almost all stages along the chain, the PO managers and lawyers would (I think) argue that they were engaged in the good faith management of uncertainty which allowed or required a margin for slanting. They may, with hindsight, have got decisions X, Y, and Z wrong. They may not have disclosed facts A, B, and C, or utilised NDAs or SLAPPs, or overclaimed professional privilege, but what they were *really* doing is simply what the rule of law required of them: interpreting the facts and law to their client's advantage, as is their right.

An alternative view is that this is a system excuse. To say simply 'I am defending my client's rights, as I am obliged to, on the facts as they tell me' is an abstraction which starts to disintegrate as the lawyers become tightly woven into the client's actions and do (or should) realise their complicity in the creation of wrongs.

Considering irresponsible orthodoxies in context shows how vital it is that the rule of law is *professionally* and *responsibly* acted on. Considering the purpose of lawyering in these circumstances is crucial; assessing the quality of these professional judgements can only be done in context. Nonetheless, legality illusions, like risk illusions, *are* a product of the system's logics and practices. They are made of individual *acts*, often smaller failures in themselves than the problems they lead to. They *may* be difficult *but not impossible* to resist at the individual level. Taking a nice little legal point, shaving a sentence in an expert's report, not lifting a rock that the client seems to be sitting on, redacting Gareth Jenkins' name from a key document – these are choices that should be assessed in context, under the accumulating experience of those involved.

None of these explain the scandal on their own, none of them are equal to the scale of the disaster, and not all are necessarily actionable misconduct, but together they have created something truly awful. Part accident, part misconduct, but also, potentially, part conspiracy to pervert the course of justice. My argument is that what joins them together are professional frailties, irresponsible orthodoxies, and, amongst some lawyers and clients, an appetite for legality illusions.

Conclusion

What should we do about these problems? Honest representations of facts on the ground and objective, balanced legal advice are not much to ask, and yet they are more difficult to achieve than they look. Part of the answer involves us challenging some of the less helpful orthodoxies of zealous ideology and requiring practitioners to think more contextually and with a keener eye on the consequences of their actions. We also need to find ways of ensuring accountability for the risks they *and their clients* take. I emphasise the latter because it is absolutely *not* all about lawyers, but equally it is not all about feckless or overweening clients.

The importance of context and accountability requires thinking about ethical lawyering as an institutional and behavioural practice. Rules and enforcement are important, but so too are defining the structures and behaviours that *active* independence (of which objectivity is an important part) requires. Thinking about the purpose of lawyering in any situation helps us think about what is *really* influencing decisions. Understanding ethics in its social and psychological context suggests we should spend less time on political philosophy and more on a basic and *practical* question: what do we need to do to promote more rigorous, honest integrity and independence of judgement?

The professional codes demand these but are being undermined in practice by zeal culturally embedded in various ways, including irresponsible orthodoxies. We can see this culture in what is bought and sold in the market for legal services. Let me illustrate with two examples. Until recently, the chambers of one of the leading barristers involved in the PO scandal marketed his services 'as a steam roller that crushes anything getting in his way'.[75] And another, again until recently, was being sold like as someone who can turn 'a pile of refuse into something that looks great'.[76] Steamrollers or a magician with refuse are how legal services were being sold at the apex of the Bar.

If I am steamrollering my opponents or rendering refuse golden, we see how deeply embedded ideas of aggression and illusion are; what the real purpose of fearlessness and zeal is; and what clients think, and are encouraged to believe, that the orthodoxies work towards. It is mercenary logic dressed up in professional finery.

Integrity, independence, and respect for the rule of law are threatened by these excesses of zeal, irresponsible orthodoxies, and a taste for legality illusions. In the PO cases, it looks like lawyers were leading the line on their creation. We should take profoundly seriously the problems this creates. It is a larger problem than one enormous scandal. Sir Brian Langstaff's report on the infected blood scandal

[75] Downloaded from 2BR 2 Bedford Row website page for Brian Altman QC, 22 August 2022 [no longer available online; original on file with author].

[76] Downloaded from One Essex Court webpage for Lord Grabiner QC, 22 August 2022, www.oeclaw.co.uk/barristers/profile/lord-grabiner-kc.

defined a 'cover-up' as 'Deliberate concealment, a lack of candour, the retelling of half-truths, and the massaging of risk'.[77] His definition is almost like a list of my orthodoxies. Cover-ups are not always but, of course, are not *uncommonly* legality illusions. What should we do about them? To restrain them we need to punish the failures that amount to misconduct. All of them. But what else? We also need to think more fundamentally about the system's rules and approaches: that's what the next chapter is about.

[77] Langstaff, 'Infected Blood Inquiry, The Report: Overview and Recommendations, HC 569-I', 189.

8

Routes Back to Proper Professionalism

I ended the previous chapter with a basic and practical question: what do we need to do to promote more rigorous, honest integrity and independence in the legal professions? I did so having explained how many lawyers and their host organisations are vulnerable to ethical failure. Difficult situations, complacent thinking, poor practices, and pressure can make fools of us all, but so can orthodox patterns of behaviour that disguise or ignore integrity problems. Seeing such problems as partly system-driven is not done to excuse individual responsibility, but it does indicate the need to think more broadly than blame in diagnosing and resolving the problems lawyers face. It is in the interests of justice, as well as those of clients and lawyers, that we reduce innocent error and poor judgement as well as misconduct. Behaviours and cultures need to change. We need to think about whole systems.

Allocate Blame but Also Change Systems

I have suggested that these failures, and others like them, are driven by human frailties and organisational cultures that reduce our capacity for objectivity. These failures are also driven by shallow, inadequate professional scripts and irresponsible orthodoxies. Mutual irresponsibility and zeal, often shielded from scrutiny through professional secrecy (privilege), encourages improper partiality: half-truths in the management of evidence and the application of law that can drown out honesty and integrity.

I have suggested this is very much not just a PO problem, illustrating this with cases for banks and oligarchs, the threats to national security posed by professional enabling, alleged SLAPPs, NDAs, corruption, and hacking. The Infected Blood Inquiry, which only contains a little on lawyering, conducted by Sir Brian Langstaff, reminds us that cover-ups are a broader cultural problem, engaging practices for which lawyers are too useful: deliberate concealment, lack of candour, half-truths, and the massaging of risk.

A whole systems approach to the PO scandal would require us to think about a lot. Government policy pushed the PO to be more commercial. It also rendered POL's board defensive and likely encouraged it to project competence it did not have. A culture of managing the optics rather than the substance of problems was an unsurprising side-effect of that. Government justice policy over many years has pushed courts to be more managerial. Criminal justice policy has been driven by the desire to be tough on crime and efficiency. Such policies couple-up with traditional notions of judging as passive arbiters that drive the design and resourcing of courts to the detriment of litigants in person and in ways that help explain some of the judicial dependence on the competence and propriety of the lawyers before it. If, as practitioners often claim, the courts are generally prosecution friendly, then a culture tolerant of prosecution incompetence creates the space to breed bigger problems. Systems for redressing inequality of arms that might tilt justice's playing field towards something more level (legal aid and rules on costs recovery, for instance) have been eroded over many years; litigation funding and class actions are subject to scrutiny and controls that other sources of funding are not.

I concentrate in this chapter on elements of the system most directly relevant to lawyers because that fits my own expertise, but also because the evidence suggests that in the PO scandal the lawyers were not merely advising – they were often running the show. Lawyers drove the view that prosecution was justified and, when challenged, that it was safe. Lawyers stepped in to say it would be unwise to investigate Horizon independently. Lawyers were crucially responsible for suppressing adverse evidence within the PO, and shaping how it was understood internally. Lawyers came up with the tactics in *Bates*. Lawyers also played an important role in helping POL with its lines to take when challenged by the press and Parliament. Early drivers for these positions may have come from the business, but I would say legal led most, if not all, of the time.

Even so, a systems approach reminds us of multiple influences and levels of the system at work here. Let us think about where the 'facts' about Horizon came from, for instance: witnesses running the Horizon system wanted to look competent and help; lawyers glossed their stories in witness statements; 'sophisticated' evidence management built glosses to a varnish, skirting, ignoring, and suppressing adverse evidence; a self-justificatory truth was created. A flat earth.

Story refinement is both natural and dangerous. And those stories are interpreted by decision-makers who react 'to their immediate pain points'.[1] They hear what they want to hear, are told what they want to be told, and steer the conversation to make clear what is helpful. When Paula Vennells wrote to her colleagues for clarification on the true position on remote access, she asked:[2]

> What is the true answer? I hope it is that we know this is not possible and that we are able to explain why that is. I need to say no it is not possible and that we are sure of this because of xxx and that we know this because we have had the system assured.

People in the chain of command often let things slide that they should not, or disregard things that they do not understand. The business wants success, optimism, and a way forward. The story and the advice adapt to meet that need. Problems – factually complex and involving many different aspects of the business, spread over a lengthy history – become distorted. No one is responsible for the holes. Everyone has reasons for forgetting or not mentioning difficulties; they do not consider themselves responsible for decisions they do not feel they are actually taking.[3] It is someone else's job to speak up if there are problems.

[1] Davies (see n.13), 73.

[2] 'Transcript Paula Vennells 22 May', www.postofficehorizoninquiry.org.uk/hearings/phases-56-22-may-2024.

[3] Davies (see n.13), 68.

What Organises Such Systems in Practice?

Such failures are organised by individuals operating within the system's dynamics. This should make us wonder why *this* system is unbalanced. What is wrong with its identity, philosophy, and purpose?[4] Viable systems 'seek stability, not maximisation', balance long-term and short-term interests, and do not allow one signal in the system to swamp all others.[5] What we see in the PO scandal is information being processed based on what is *arguable* or *helpful* rather than what is true, fair, and balanced. A culture of 'can we get away with it?' is driven by wishful thinking and legitimised by lawyerly zeal. What is maximised is a self-serving version of truth.

In aligning the interpretation of facts, law, and the design of strategy to the client's preferences *maximally*, lawyers cease to maintain the integrity of their role. A lack of independence means the legal signal that a lawyer sends into the system becomes slanted, something of a cypher for the self-interest of the lawyer and those around him. It is or can become misleading.

This pressure on independence is an everyday phenomenon, as the SRA's thematic review on in-house practice has shown.[6] But the signs are there for private practice too. They offer to turn our legal refuse into gold. They are sounded out before they get instructed to see if they will be helpful in their approach to the case. They are encouraged to say yes to what it is the client needs or wants. They compete on *being*

[4] Davies (see n.13), 125. [5] Davies (see n.13), pp. 265–68.

[6] SRA Thematic Review on In-House Lawyers, 2024, www.sra.org.uk/sra/research-publications/in-house-solicitors-thematic-review.

commercial, and more *business partnerish*. They suggest they might rather enjoy steamrollering our opponents. The desire to impress the client can be stronger than the effort and risk in resisting what their clients want to hear.

How Decisions Are Taken

The way decisions are really taken can magnify these problems. Systems thinking views decisions as relational not rational, pragmatic not analytical.[7] Evidence and argument are often *not* weighed forensically. Decisions are taken that aim for satisficing not optimality: the aim is 'good enough' – rather than 'good' – decisions. Compromise creeps in and shifts attention away from the more wicked problems. Decisions are goal-oriented.[8] They are attempts to garner or show control, often taken under 'difficult conditions . . . limited time, uncertainty, high-stakes, vague goals'.[9] It has been said that 'We do not make decisions, we fight fires.'[10] We sense problems and react to their shape. Disclosure may be an example. Evidence to the inquiry suggests that PO lawyers saw their goal as not disclosing harmful documents rather than properly considering whether such documents should be disclosed. Reasons were geared towards *finding a basis* for refusing disclosure. A fair application of disclosure tests was inherently unlikely, and rationalisation of unfairness likely.

7 Gary Klein, 'Naturalistic Decision Making', *Human Factors* 50, no. 3 (2008): 456–60.

8 B. Brehmer, 'Dynamic Decision Making: Human Control of Complex Systems', *Acta Psychologica* 81, no. 3 (December 1992): 212.

9 Klein (see n.385), p. 456.

10 Brehmer (see n.386), p. 212.

How *Do* We Change Decisions and Behaviour?

An interesting question is: Can we – or *how* can we – reorient decisions towards what the rules actually require, and towards integrity not self-interest?

A lawyer might say that the rules of disclosure need changing or the investigation of failures just needs to be improved. A whole-system approach suggests that rule changes are unlikely to work alone. A behavioural approach is needed, involving rules and processes that take better account of biases.[11] Institutions, cultures, philosophies, and how people will respond to attempts to change them need to be factored in. Because we are dealing with both deep-rooted orthodoxies and a complex system, changing it will be very hard indeed. The desire to let the ripples of the PO scandal dissipate and the surface of law's pond to return to normal will be very strong. A concerted effort across years, not months, will be needed to change the behaviour and ways of thinking of lawyers. Such a change would need to be capable of coping with a differentiated spectrum of behaviours: from intentional wrongdoing, recklessness, cynicism, and negligence, through to misguided error.[12]

[11] Yuval Feldman, *The Law of Good People: Challenging States' Ability to Regulate Human Behavior* (Cambridge University Press, 2018).

[12] Alexander Conrad Culley, 'How Effective Are the Enforcement Activities of Derivatives Exchanges in the Digital Age? A Survey of Enforcement Notices through the Lens of Humans', *Journal of Financial Regulation and Compliance* 32, no. 3 (2024): 313–54; Judith Bovensiepen and Mathijs Pelkmans, 'Dynamics of Wilful Blindness: An Introduction', *Critique of Anthropology* 40, no. 4 (1 December 2020): 387–402.

Enforcement and Culture Change

A typical response to the litany of failures I have outlined is that we just need to punish the bad apples. Rigorous investigation and firm but fair enforcement are essential to persuading the public to trust law and the professions to take professional standards seriously at all times. The senior figures in this story need particular scrutiny if regulators are to be taken seriously and the professions are to deserve public trust.

There is, it seems to me, a very plausible case that, if done well and as openly as possible, enforcement can significantly improve culture, but even if done perfectly, it alone is not enough. Enforcement only touches cases investigated by the regulators. It is reactive, expensive, and vigorously resisted, especially by well-resourced lawyers and firms. It also shreds the nerves and lives of those involved. There is evidence, mainly anecdotal but of good quality, that SRA investigation is not done as well as it should be.

Whilst the SRA has high success rates at the Solicitors Disciplinary Tribunal (SDT),[13] this suggests that they are sometimes too cautious, tending to pick low-hanging fruit. They recruit investigators at levels unlikely to regularly attract the calibre necessary to take on big firms well, for instance. For the Bar Standards Board, the situation is significantly worse. In particular, Fieldfisher's 2024 BSB-commissioned report was

[13] Andrew Boon and Avis Whyte, '"Trusted to the Ends of the Earth?" An Analysis of Solicitors' Disciplinary Processes in England and Wales from 1994 to 2015', *International Journal of the Legal Profession* 28, no. 2 (10 March 2021): 1–29.

highly critical of BSB investigations.[14] This, plus the Legal Services Board's own assessments of regulatory performance, suggest significant problems.[15] Smarter, better resourced, more respected regulators (or a single regulator) and possibly a single disciplinary tribunal are essential elements of change.

Education

Of course, good qualifications and ongoing education are essential. The regulators hope that the Solicitors Qualifying Examination (SQE) and tougher Bar Practice Course assessments have raised standards. Those claims can and should be tested. I was involved in some such work for the Inns of Court College of Advocacy.[16] The regulators have largely surrendered their soft power over undergraduate education, for understandable but perhaps short-sighted reasons. Clinics aside, courses on lawyers and especially ethics have always been Cinderella subjects in UK law schools. Law School Heads, and hitherto uninterested law firms, should be clamouring to change this. It is incredibly important for students of law, whatever their eventual career, to be taught to think critically and reflectively about lawyering.

14 Fieldfisher, 'Bar Standards Board Enforcement Review', April 2024, https://bit.ly/4j795nL.

15 'Current Regulatory Performance Assessments', *The Legal Services Board* (blog), March 2025, https://bit.ly/4seQEBW; and in particular Legal Services Board, 'Regulatory Performance: Performance Assessment November 2022 An Assessment of Each Legal Services Regulatory Body against the LSB Regulatory Performance Standards', 12 January 2023, https://bit.ly/3KMH2NY.

16 Moorhead et al. (see n.258).

For practising lawyers, some suggest compulsory annual refresher training on ethics. How to get learning on ethics taken seriously, especially in practice, in a way that changes thinking and behaviours is difficult. The speed and invisibility of investigation and enforcement does not help; regulators could be more open, share better information, look for ways to spark more water-cooler debate. The regulators, who are often pretty ordinary producers of research, could agree to fund an independent centre of research and education to drive educational infrastructure, debate, and insight.

And, whilst execution could be improved, the SRA's guidance, thematic reviews, and warning notices in particular, have progressed debate. I would believe, although without substantial evidence, that it improves practice. More robust enforcement might also drive an appetite for preventative training. Another route to progress is to start engaging with and challenging what chambers, firms, teams and especially COLPs (compliance officers in law firms) do to foster an ethical culture. I shall return to this later. I would say the BSB is also less strong across these areas.

The Courts

Courts can influence ethics by punishing errors (through wasted costs and contempt applications) and via oversight of disciplinary tribunals through appeals; these are topics for another time. Some points on how courts contribute to the broader ethical climate, though, are merited. Individual judges send mixed signals on ethics, varying in their enthusiasm for zeal and restraint.[17] My instinct is that this depends on the case before them, varied grasps of regulatory law, and divergent philosophies. John Sorabji has suggested that elements of civil justice reform have been resisted by what he calls judicial traditionalists and rejectionists.[18] Similar ideological divisions may underlie views on lawyers' conduct: there may, for instance, be a fetish made of the red-bloodedness of commercial litigation by some.

It is also important to note that, when faced with questionable conduct, judges can be disinclined to get too involved. They may talk equivocally about practitioner misconduct because they are unsure whether the lawyer to the client is to blame for problems and tend to give practitioners a wide margin for error but, equally, and oppositely, are also sometimes accused of going off half-cocked in contempt cases when they do intervene. Problems with witness statements give rise to a host of difficulties. Weak general management of witness statements generally by the courts, who naturally enough want to concentrate on the substance of a case not its procedural instantiations, may encourage flat-earth drafting. It seems to me that a thorough critical look at how judicial practice impacts litigation ethics would be timely and helpful. Ongoing constructive challenges may be needed to consider how the messages judges send, and the behaviours tolerated,

[17] Compare 'Haddad v Rostamani & Ors [2024] EWHC 448 (Ch) (1 March 2024)'; Gloster J, *Berezovsky* v *Abramovich* [2012] EWHC B15 (Ch) (EWHC (Ch) 31 August 2012); *Bates No. 6*; R v Farooqi & Ors [2013] EWCA Crim 1649.

[18] John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis*, 1st edn (Cambridge University Press, 2014).

align with ethics, justness, and professional codes, not to mention proportionality.

Problems may not primarily be about rules but about power and culture. One comment, about Mr Justice Fraser's (as he now is) handling of the PO case stands out. It is a point that has been made to me repeatedly by senior lawyers. They tell me many High Court judges would *not* have stood up to the PO legal team as robustly as he did. Mr Justice Fraser's immense judgments suggest they might be right in some important ways. One can easily imagine a judge taking a far less robust line in *Bates*, making some gentle remarks about polishing evidence or the perils of witnesses in complex cases, and leaving it there. That the PO legal team tried to pressurise the judge in several ways also tells us that they thought pressure a tactic worth trying. Judges are independent, but are also conscious of their reputations. There were costs and reputational risks in Mr Justice Fraser making such a powerful and, as it transpired, prescient stand. The arguments made in and around the attempts to recuse him show this and suggest that there may be something in the point that suggests judicial independence needs nurturing more generally.

Another way of putting the point is that big beasts, firms in particular, appear to have more institutional power than courts and regulators over the culture of litigation. They can fight the long game, through appeals and in any subsequent regulatory investigation, as repeat players. Judges are exceptional in intellect and independence, but they also work alone. Better resourcing and support for judges is both politically unlikely and yet essential to the management of cases with difficult parties and lawyers. More generally, there needs to be a *concerted*, ongoing, *visible* effort for regulators and judges to work together on cultural problems in litigation.

Changing the Rules Around Legal Risk

If lawyers are too zealous, too inclined to abuse arguability, and overly 'sophisticated' in their presentation and containment of facts, can we simply change their rules of engagement? Rather than allow any merely arguable point to be taken, could a higher threshold be demanded? Could the rules require arguments to be closer to well-founded and reasonable, rather than merely arguable? Could this be done in court proceedings or only in advisory work? Should lawyers be required to operate under an obligation of candour?

For reasons I will explain, I am not sure, but interestingly, candour is required in some cases, and recent research suggests it works reasonably well in judicial review. However, there are examples of the duty being seriously breached by the government.[19] Requiring reasonableness of interpretation outside of the courtroom is more strongly indicated. When providing formal opinions or ordinary advice to clients, the law encourages a balance, requiring consideration of both the merits and risks.[20] That push

[19] Elizabeth O'Loughlin, 'Transparency and Judicial Review, An Empirical Study of the Duty of Candour' (Nuffield Foundation, October 2024), https://bit.ly/3Lgr6DH. *R* v *ex p. Citizens UK* [2018] EWCA CIV 1812.

[20] Richard Moorhead, 'Unpicking Mutual Irresponsibility', *Thoughts on the Post Office Scandal* (blog), 21 March 2025, https://richardmoorhead.substack.com/p/unpicking-mutual-irresponsibility.

might be made more firmly. We know that advice-seeking can be manipulated by clients, although professional failures to resist foreseeable or actual manipulation may also be a concern.

I said I was not sure about such an approach because the minutiae of such judgements make enforcing different risk rules difficult. Law (sometimes) and facts (often) are protean: they are genuinely uncertain. Judging, after the event, a lawyer's application of uncertain law to messy 'facts on the ground' is difficult. Additionally, certain cases warrant more flexible approaches. In criminal defence, for instance, there are already cultural tendencies for lawyers to doubt their clients in situations of profound jeopardy to them.[21] A rule change that does not address that problem might well make things worse and reinforce ways in which the criminal justice system acts against the presumption of innocence. Criminal defence aside, the answer may boil down to whether a higher test than 'properly arguable' is easier to define and enforce. I do not know. Requiring arguments to be supported by sufficient evidence *in the relevant context* and guarding against the exploitation of advice may work better.

[21] Mike McConville, Jacqueline Hodgson, Lee Bridges, and Anita Pavlovic, *Standing Accused, The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press, 1994); Daniel Newman, 'Still Standing Accused: Addressing the Gap between Work and Talk in Firms of Criminal Defence Lawyers', *International Journal of the Legal Profession* 19, no. 1 (March 2012): 3–27; Daniel Newman, *Legal Aid Lawyers and the Quest for Justice*, 1st edn (Hart Publishing, 2013).

Accountability Solutions (Mitigations)

Other, more flexible, system-sensitive approaches may be more effective than simply changing the arguability test. Let me try and illustrate with another example.[22]

Jordan Breslow was a GC in the United States. Breslow's CEO asked if they should offer new employees a particular stock option clause as an incentive for them to join the company.[23] The clause enabled the option's price to be calculated in a way particularly favourable to the employee. The company's competitors were offering these deals, making them more attractive to would-be hires, and yet something bothered Breslow, and he took some time to think about it, research it, and talk it through with others. Here is how he described it:

> Other people were doing it. The advice from outside law firms . . . [was] there's nothing strictly illegal about that . . . that may well be correct technically. . . . [But, I realised] . . . illegality can come from the fact that you failed to disclose and account for this practice.
>
> But all in all it seemed . . . too good to be true . . . and I said so to Ben [his CEO].
>
> . . . I . . . [said] it didn't make sense to me. I didn't think it was strictly legal and I didn't want to mess with it.

In spite of the advice that it was not strictly illegal, Breslow's was a good call. Such deals were subsequently investigated

[22] Ben Horowitz, 'Why I Did Not Go to Jail' (Andreessen Horowitz, 6 February 2014), https://a16z.com/2014/02/06/why-i-did-not-go-to-jail.

[23] Richard Moorhead, 'Not *Strictly* Legal: When and How to Say No as a GC' (*Lawyer Watch*, 25 April 2023), https://bit.ly/4j7rPUp.

and prosecuted. They led to jail sentences, including for the Chief Financial Officer (CFO) that had recommended it to Breslow's boss.

Building a relationship of trust is complicated, but Breslow and a substantial number of the GCs I have spoken to suggest some basics.[24] The GC should always report to the CEO. Breslow describes reporting *indirectly* as self-evidently wrong: there is a necessary tension with the 'numbers guys'; CFOs tended to be strong, 'creative people'. GCs are there to 'keep them honest . . . [Y]ou keep people from acting on their own worst impulses.' Breslow was not risk-averse, just not risk-maximising. He was willing to be aggressive and creative, but he also had a 'let's not do anything illegal' philosophy. And he also said he 'never felt unsafe . . . saying no to them or making a recommendation that they might not want to hear'.[25] In other words, philosophy and psychological safety are important: his model depends on trust and authenticity, on the *good faith* handling of legal risk. Independence, to a degree at least, coexists with or operates within social systems of interdependence.[26] A rule cannot magic up the right kind of relationship, but certain types of rules may make it more likely. How?

There is evidence that in positions of responsibility, where they are accountable for those responsibilities,

[24] Richard Moorhead, Trevor Clark, Alan Brener, Paul Gilbert, and Steven Vaughan, 'In-House Lawyers and Non-Executive Directors: A Discussion About Best Practice', *SSRN Scholarly Paper* (Rochester, NY: Social Science Research Network, 27 June 2019).

[25] Moorhead (see n.402).

[26] Moorhead, Vaughan, and Godhino (see n.11).

lawyers improve the management of risk. Lawyers hired onto boards or in senior executive roles tend to substantially reduce legal breaches.[27] Compliance is improved by requirements that individual lawyers take personal responsibility for (say) SEC disclosures with some 'exposure to liability' as a result.[28] In the US, the Sarbanes-Oxley Act led to securities rules requiring lawyers to report misconduct up the corporate ladder. This is said to have amplified the positive effects of legal expertise in this process. Other things weaken these effects. Aligning lawyers' bonuses with business performance,[29] a poor relationship with the CEO,[30]

[27] Compare Byungjin Kwak, Byung T. Ro, and Inho Suk, 'The Composition of Top Management with General Counsel and Voluntary Information Disclosure', *Journal of Accounting and Economics* 54, no. 1 (August 2012): 19–41; Charles Ham and Kevin Koharki, 'The Association between Corporate General Counsel and Firm Credit Risk', *Journal of Accounting and Economics* 61, no. 2–3 (April 2016): 274–93; Jayanthi Krishnan, Yuan Wen, and Wanli Zhao, 'Legal Expertise on Corporate Audit Committees and Financial Reporting Quality', *The Accounting Review* 86, no. 6 (2011): 2099–130.

[28] Adair Morse, Wei Wang, and Serena Wu, 'Executive Lawyers: Gatekeepers or Strategic Officers?', Working Paper (National Bureau of Economic Research, September 2016); Alan D. Jagolinzer, David F. Larcker, and Daniel J. Taylor, 'Corporate Governance and the Information Content of Insider Trades', *Journal of Accounting Research* 49, no. 5 (1 December 2011).

[29] Morse, Wang, and Wu, 'Executive Lawyers'; Justin J. Hopkins, Edward L. Maydew, and Mohan Venkatachalam, 'Corporate General Counsel and Financial Reporting Quality', *Management Science* 61, no. 1 (January 2015): 129–45.

[30] Beng Wee Goh, Jimmy Lee, and Jeffrey Ng, 'The Inclusion of General Counsel in Top Management and Tax Avoidance', *SSRN Scholarly Paper* (Rochester, NY: Social Science Research Network, 8 July 2015);

and, for certain matters at least, the retention of 'top-tier' outside lawyers incline their organisations to behave more riskily.[31]

A worry might be that accountability mechanisms drive excessive risk aversion, but the evidence does not suggest that either. Lawyer restraint of excessive risk is real but modest. One study found that 'GCs appear to tolerate moderately aggressive behaviour but constrain it such that it would not result in a violation of securities laws and jeopardize their standing within the firm'.[32]

Accountability mechanisms are central to the Senior Managers and Certification Regime in financial services.[33] Evaluation of these reforms is thin on the ground, but I am told regularly, especially by lawyers in financial services, that this has had a significant beneficial influence, including on the culture around legal work.[34] Hickman and Brener's recent work suggests that their interviewees saw that the level of accountability had improved, but there was a range of

Tanina Rostain and Milton C. Regan, *Confidence Games: Lawyers, Accountants, and the Tax Shelter Industry* (MIT Press, 2014).

31 Preeti Choudhary, Jason D. Schloetzer, and Jason D. Sturgess, 'Boards, Auditors, Attorneys and Compliance with Mandatory SEC Disclosure Rules', *Managerial and Decision Economics* 34, nos 7–8 (1 October 2013): 471–87.

32 Hopkins et al. (see n.408).

33 Along with pre-approval of senior managers and annual certification that staff in high-risk roles are fit and proper persons.

34 Trevor Clark, Richard Moorhead, Steven Vaughan, and Alan Brener, 'Agency over Technocracy: How Lawyer Archetypes Infect Regulatory Approaches: The FCA Example', *Legal Ethics* 24, no. 2 (3 July 2021): 91–110.

views – positive, negative, and ambivalent – on the impact on culture and professionalism.[35]

I would suggest that ethical reform should have a particular focus on building and strengthening accountability systems for legal risk in organisations and in the professions. In broad terms, accountability systems need to ensure that named individuals are responsible for managing and taking legal risk decisions and, avoiding mutual irresponsibility, that they can be held accountable for them. I would suggest that such people may need to be identified for oversight of legal risk management generally in organisations and, more specifically, for material legal projects, especially major litigation. A company should have a named individual taking responsibility for the oversight of legal risk, with default rules for when they do not. In the financial services sector, this role should be mandated under the Senior Managers and Certification Regime.[36]

Corporate governance guidance should also encourage good practice on legal risk management, ensuring and supporting the ultimate responsibility of the lead and the board as appropriate. Such guidance should cover appropriate lines of management (for the GC, for instance) and

[35] Eleanore Hickman and Alan Brener, 'The Senior Managers and Certification Regime in UK Practice and Global Context', *Journal of Banking Regulation*, 7 January 2025.

[36] A version of this recommendation was adopted in Institute of Directors, 'The Post Office Scandal, A Failure of Governance, Insights for Directors and Policy Makers from Phase 6 of the Public Inquiry', October 2024, https://bit.ly/3Y7ZBza.

channels of communication between the business and its legal advisers. Board Effectiveness Reviews should actively consider legal risk management. Guidance (and lawyers' contracts) should include legal advisers (inside and outside the organisation) having access to an organisation's senior decision-makers when dealing with matters of serious concern. Professional regulation and guidance for lawyers should aim to mirror these requirements.

Legal services regulators do not have the power to regulate in-house lawyers unless they happen to be (say) solicitors or barristers, but they could do more to strengthen leadership and responsibility in teams through supervision requirements. The SRA, after much urging, has begun to better define independence, for instance. The power of regulators to regulate in-house lawyers and support their independence more broadly is a knotty technical problem. I can think of various ways of solving it, some involving legislation, but one thing that might give the regulators sufficient leverage to make a real difference would be to make providing legally privileged advice a reserved matter requiring a practising certificate.

Better accountability mechanisms might be particularly important for parties and legal teams threatening or bringing litigation. Indeed, an interesting suggestion is that there may be a case for firmer regulation of litigation as a reserved matter, and disclosure in particular. Something like a separate disclosure officer, as is best practice in prosecutions, and documented responsibility and sign-off around privilege, disclosure, and redaction, might improve disclosure. The extent and nature of disclosure failures in the PO scandal also render it tempting to recommend that disclosure problems be made subject to a failure to prevent type obligation, including responsibility for the proper management of legal privilege.

There would obviously be debates to be had about practicality, proportionality, and effectiveness, but accountability mechanisms are one of the few things that have been shown to work in restraining serious excess in risk-taking. COLPs are another point of accountability, but for now I want to change topic to other ways of changing the culture and behaviour of lawyers.

Challenging Philosophies Through Lucid Integrity

The Breslow story was about relationships, but also about philosophy. Can a profession's philosophy be changed? Can better models of ethics contest cynicism, expedience, or sophistry? I have argued that zeal crowds out the true fundamentals of the legal profession: justice, honesty, and integrity. How do we encourage and emphasise, rather than undermine, integrity and legality?

We need an approach that makes these public interest elements more lucid. By lucidity, I mean that those public interest elements, integrity in particular, need to be strongly and clearly present in the early moments of problem-solving. They need to be front and centre, not back of mind, when lawyers are thinking about the choices that face them and their clients.

I emphasise lucidity for practical, not theoretical, reasons.[37] A more lucid ethics should provide early warning signs to prompt careful thought and guide action. My thoughts on how to do this are preliminary. I am leading the Post Office Project team, which is conducting in-depth research on how to develop more practical ethics. A starting point would be to note that how we frame situations can transform our perception of those situations and our responses to them, and, ultimately, how those frames can lead to better models for simulating and addressing the ethical dimensions of a problem. Those frames must grapple with the objectives, value structures, and subjective preferences of those making the decisions: we need to shape their problem space (their goals, priorities, functions, processes, and configuration). I should also emphasise that while lucidity emphasises clarity and prioritises integrity, it does not exclude complexity below the surface where it is merited. To this end, we are working with lawyers on causal maps of ethical situations and how they handle moments of challenge. Stephen Mayson's work on public interest and Steven Vaughan's on integrity provide rich food for thought too.[38]

[37] I am grateful to Iris van Domselaar for suggesting the relevance of non-ideal theory; see also David Schmidtz, 'Nonideal Theory: What It Is and What It Needs to Be', *Ethics* 121, no. 4 (2011): 772–96; Laura Valentini, 'Ideal vs. Non-ideal Theory: A Conceptual Map', *Philosophy Compass* 7, no. 9 (September 2012): 654–64.

[38] Stephen Mayson, 'Legal Services Regulation: The Meaning of "the Public Interest"' (UCL, London, September 2024), https://bit.ly/44A6vko; Steven Vaughan, 'Moral Remainders: What Is The Price of Professional Integrity?' *SSRN*, 6 June 2024, http://dx.doi.org/10.2139/ssrn.4856109.

I think there are two aspects to integrity worth dwelling on now: one is about interpreting uncertain law, in good faith. That is, *respecting* legality and counselling towards, not away from, what the law requires. I am going to concentrate on a second, overlapping issue: integrity with facts and process, and its relationships with honesty, ethics, and the rule of law. My instinct is: get integrity right in this second sense and much, if not all, falls into place. As Vaughan emphasises, integrity underlines values already in professional law. Sir Tom Bingham (when Master of the Rolls) reminded solicitors if they showed 'anything less than *complete* integrity, probity and trustworthiness' they could expect severe sanctions.[39] Sir Rupert Jackson more recently said that integrity demands 'more than mere honesty . . . [it involves taking] particular care not to mislead [and being] . . . scrupulous about accuracy'.[40] The emphasis is important: scrupulousness, completeness, and *particular care*. I would add to that list the importance of integrity being judged in context, alongside the foreseeable consequences of one's actions. I cannot simply advise my client recklessly risking their use of my advice to mislead others, for instance.

Expedience and zeal encourage lawyers to narrow their focus, to frame facts and law opportunistically, to search for an *excuse* for doing that which the law, in spirit and not uncommonly in reality, prohibits. It is not enough to think that I have an argument for saying my position is not

[39] *Bolton* v *Law Society* [1994] 1 WLR 512.

[40] *Wingate & Anor* v *The Solicitors Regulation Authority* [2018] EWCA Civ 366.

misleading; my obligation, my scrupulous and active obligation, is to not mislead anyone or to be complicit in misleading anyone in the context in which I am operating.

This includes a need to consider the purpose to which my work will be put. Breslow's success is marked by stepping away from a narrow frame (it is not strictly illegal, his outside lawyers had advised) to a broader frame: the stock option is not clearly illegal, but how can we honestly account for it?

Something similar applies to the interpretation of law. My interpretation may explore uncertainty but should also respect legality; if done in good faith, uncertainty and the risks of illegality that flow from them must be analysed and described as impartially as possible, attending to the context. If a lawyer is asked for an opinion that will foreseeably assist illegality or mislead others they should decline or take reasonable steps to prevent or limit that risk. James Eadie KC arguably did the latter when advising on the government's attempt to amend the Northern Irish Protocol. He was asked to advise on the assumption that the Bill to do this did not breach international law. The substance of his response was leaked to a journalist:[41]

> he [says] has been asked only to 'assume' there is a respectable legal basis on which to support the arguments made by the other lawyers. 'He says he is happy to comply with this request' – 'I do so,' he writes – but then adds 'I am not asked to opine on the merits of those views' . . . Eadie's

[41] David Allen Green, 'The Odd and Worrying Situation of the Legal Advice on the Northern Ireland Protocol', *The Law and Policy Blog* (blog), 9 June 2022, https://bit.ly/49nEpLL.

> agreement to do as directed – and rely on the view of other lawyers – allows the government to say he was consulted more generally and is on board with the plan. Inconveniently, however, he is understood to have then volunteered a view in his submission: that he found the argument of one particular lawyer advising government 'considerably easier to follow and more convincing'. The lawyer he cites says that it would be 'very difficult' for the UK to argue it is not 'breaching international law'.

Lawyers should not, for example, design a system that weakens sanction controls and advise it is 'reasonable' when they have advice that it is unlawful. Rather than illusions of reasonableness disguising or excusing illegality, they need to show *complete* integrity *in context*. They should counsel towards, not away from, legality.

Lawyers may need to be encouraged to think contextually by better scaffolding. Drawing on SDT dicta, supported in the High Court case of Simms, the SRA have said a solicitor must sometimes say 'it may be lawful for you to do X, but I will not do it'. They have been coy about what this actually means, though. Simms is a consequential liability type situation about assisting with highly dubious transactions. Setting out all the consequential liability risks on lawyers when dealing with questionable projects would be one way for the SRA to start to fleshing out what 'potentially lawful' things should not be done.

The NDA debate has been rendered much more real by recognising that *how* lawyers draft NDAs can pervert the course of justice, for instance. Recent stories about

Mohammed Al Fayed show us an obvious but ignored risk about NDAs and potential witnesses in civil cases. For now, SRA guidance concentrates on NDAs that inhibit reporting to regulators, or to the police; it does not address the use of NDAs to inhibit witnesses cooperating with civil cases. That said, NDA guidance is another area where the BSB have done less well than the SRA.

There may be various ways that integrity can be brought further to the front, rendered more lucid and more practically tractable. Scrupulousness, completeness, particular care not to mislead, and responsibility of purpose should inform the aesthetic, featuring more prominently in any professional code. Thinking about the aesthetic brings me to some words that should be diminished in the profession's ethical ideology.

Clear Out Fearlessness and the Presumption on Harm

To aid more lucid and appropriate ethical thinking, we should mute two related ideas. The promotion of fearlessness and the presumption that lawyers can harm third parties for their clients should be removed from the codes and guidance. These two ideas romanticise aggression and risk normalising harm. They also simplify a situation more legally complex than professional rhetoric suggests. Harm to a client's opponents, for instance, cannot always be avoided, but being required to consider and, if proportionate, mitigate or alleviate harm might reduce some of the unnecessary excess that lawyers engage in.

Consider Morality

There is a third piece of work I think necessary to ensure integrity is central. We need to more clearly challenge the claim that lawyers do law but not morality. That does not require us to argue that morality should generally trump legal rights, but there is a great deal of hypocrisy in lawyers saying they do not do morality.

The disclaiming of morality often merely makes room for a morality defined by the client's self-interest.[42] Banks thought evading money laundering controls okay because the '[effing] Americans' (as they referred to them) were engaged in regulatory imperialism;[43] the PO's obscene behaviour was dignified as protecting pensioners against 'thieves and liars'. From time to time, a show is made of excluding morality from legal reasoning. Lord Sumption, for example, said 'Commercial parties can be most unfair and entirely unreasonable, if they can get away with it.'[44] Sumption's cynical logic does not make ignoring morality good legal risk management. Doing something 'entirely unreasonable' is likely to inspire opponents, regulators, politicians, and the press to take your client on. They will publicise your amorality and seek out your legal mistakes. Many of the cases I have covered contain such legal mistakes. Think back to SCB's wire-stripping example: they thought they could enforcement-proof their scheme for side-stepping

[42] Atkinson (see n.285). [43] Lawsky (see n.369).

[44] www.supremecourt.uk/docs/speech-170508.pdf, and see Mindy Chen-Wishart, 'Schrödinger's Lawful Act Duress: Dead or Alive?' *Oxford Law Blogs*, 27 March 2024, https://bit.ly/4qmgovQ.

US rules on due diligence and defend the practice if exposed on the basis that it was reasonable rather than lawful.

Moreover, lawyers may sometimes need to consider morality when contemplating how courts will act. A sophisticated body of literature suggests that legal reasoning inherently incorporates a moral component. Indeed, judges draw on morals when deciding hard cases.[45] Such reasoning is not confined to judges or legal theorists: Breslow's initial instinct picked up on discomfort, not illegality. Law is also replete with moral tests (dishonesty, reasonableness, iniquity, etc.), and, contrary to what we might expect, used wisely, such tests can improve legal certainty not reduce it.[46] Anyone who thinks that rules and amoral application lead to greater certainty and justice should read the contract arguments advanced for saying Harvey Weinstein's NDA was perfectly proper.[47] Rules, especially complex rules, unmoored from any notion of morality, can plainly beget manipulation and self-serving ex-post arguments.

[45] See Alan Bogg, 'Doctrinal Method in Labour Law in Common Law Systems: Potential, Problems, Prospects', in *Research Methods in Labour Law* (Edward Elgar Publishing, 2024), 186–218, citing Raz and Kahn-Freund.

[46] Fred Ellinghaus and Ted Wright, 'The Common Law of Contracts: Are Broad Principles Better than Detailed Ones? An Empirical Investigation', *SSRN Scholarly Paper* (Rochester, NY: Social Science Research Network, 29 July 2005); E. W. Wright and M. P. Ellinghaus, 'The Common Law of Contracts: Are Broad Principles Better than Detailed Rules?', *Texas Wesleyan Law Review* 11, no. 2 (2005): 399–420.

[47] *SRA* v *Solicitor Z*, Memorandum of Applications for Summary Dismissal & Stay for Abuse of Process, Case No. 11941–2019 (29 April 2020).

There is a final reason I would give for saying that lucidity requires morality and for arguing that lawyers should be responsive to moral concerns, if not subservient to them. That reason is cognitive. Legal problems are complex and social, marked by bias, partial sightedness, and other issues. The wise adviser needs all their cognitive faculties to do a good job. Their decisions require breadth of vision and moral sensitivity, not just narrow logic.

And so on . . .

I am tempted to continue with more detail on what a system that makes integrity lucid looks like, but I will not. There is a great deal of detailed work needed to develop and improve guidance; to understand, define, and support independence as behaviour, not just a label; to work on how and when lawyers should report up and out (lawyers as whistleblowers pose particular challenges in terms of culture and the law); on the abuse of privilege; and on the drafting of unreasonable contracts. The Bar needs to revise its Code of Conduct. It is poorly drafted. I would argue that lawyers should have a single, unified code of conduct. However, I would like to return to one more systems-oriented point and address a problem that has bothered me greatly since I began watching the inquiry.

Tackling the Self-Concept

The PO inquiry has been fascinating for the occasional catalytic moments of independent challenge and accountability.

Cross-examination has shown how revealing and hard it is to break through lawyers' defences against such challenges. We all resist the idea that we are 'bad', especially (it turns out) when being live-streamed on YouTube. As lawyers, we have our somewhat complacent self-concept, and we have the creativity of argument to justify our own, or our clients', actions and to shape how we portray facts.

This means we can also delude ourselves. We are also more insensitive to our own rules than we should be. When we did research on barristers within three years of call, we found that over 40 per cent did not know or could not properly use their own rules.[48] Recent research by the SRA suggests similar problems.[49] Yet sometimes, under very detailed questioning, the lawyers before the inquiry did, I think, realise their limitations and mistakes. Very occasionally, they conceded them.

Warwick Tatford, the barrister alleged to have hardened-up the expert evidence when prosecuting Seema Misra, painfully admitted, after a devasting cross-examination that 'there are many failings that I had ignored on my part, and I perhaps created a rosier version [of myself] in my memory that wasn't really there'.[50] Professionalism is an idea that isn't really, or at least is not always, there; it gets lost in the melee of winning cases.

I call the imagined or asserted propriety that exists instead of actual competence and propriety 'the professional

[48] Moorhead et al. (see n.258). [49] SRA (see n.10).
[50] Tatford (see n.147).

imaginarium'. To a degree, we likely all live in something like this. We think of ourselves as more proper, competent, and ethical than we are. Despite the imaginarium, the SRA found that 10 per cent of in-house lawyers 'said their regulatory obligations had been *compromised* trying to meet organisational priorities' (my emphasis).[51] This is concerning in itself, but also leaves one wondering: how accurate were the other 90 per cent? We have a clue from the 40 per cent of barristers who are shaky on their own rules. These two figures (rough estimates, of course) provide an important indication of the scale of the problem. How can we overcome the weakness of the imaginarium? How can we build greater self-awareness and improvement?

We need somehow to find additional mechanisms short of investigation for encouraging accountability and self-development. Ethical knowledge and practice should of course be a routine and proactive part of competence review for all lawyers in firms and chambers. There may also be situations where cases or areas of work of particular providers could be referred for non-disciplinary investigation and analysis to encourage lesson learning and remediation, not punishment. The Financial Conduct Authority (FCA) can call on skilled-person reports: they appoint a skilled, independent person to produce a report and advise on remedial steps on a particular theme in a regulated firm. This is a step short of investigation and discipline. If, as it seems, legal service

[51] www.sra.org.uk/sra/research-publications/in-house-solicitors-thematic-review/.

regulators do not have this power, perhaps they ought to be given it. Imagine being able to ask firm X to commission a review of its use of without-prejudice letters, firm Y's management of litigation holds, or firms A, B, and C about the due diligence they do before sending out SLAPP-like threats.

The COLP role is, I would say, under-developed, and the quality of COLPs and COLP–SRA relations is mixed.[52] We know relatively little about the effectiveness of COLPs as a regulatory tool. These are areas which need review and improvement to make the role effective. The regulators could also deploy something like Board Effectiveness Reviews[53] directed at how firms manage ethical culture. Reviews could drive improvement in the management of ethical culture by examining COLP and firm practices. Care and time would be needed to develop reviews sufficiently independent, useful, and not tick-boxy in approach. This could mix voluntary approaches and targeted compulsion. The regulators could encourage reviews on a general voluntary basis, but require them for higher-risk firms or practice areas, for example.

The aim would be to develop substantial and meaningful engagement with and reflection on ethics and ethical leadership among lawyers and their firms. The challenge of encouraging *authentic* engagement and improvement should not be underestimated; regulators and the regulated need to build mutual, justified trust and respect. Current approaches alone are not, I think it is fair to say, enough.

[52] See SRA (see n.10), for some recent supporting evidence on this front.

[53] Tracy Long, 'Board Evaluation', in *Effective Directors* (Routledge, 2021), 36–42, https://bit.ly/497m44v.

Privilege

I have set out concerns about mutual irresponsibility and excessive zeal, but the eagle-eyed will have noticed that I have not engaged much with the third limb of the system problem: professional secrecy. Professional privilege is beloved of lawyers and treated as a fundamental right by the courts. It is also unarguably abused and diminishes proper professional accountability.

Privilege is a sensitive and complex area, and I do not want to make precipitous proposals on that here. I have made some preliminary suggestions with Andrew Higgins elsewhere.[54] The regulators (and the courts) plainly need to grasp the nettle of abuse, and I would recommend a full, independent review of the law on privilege.

Concluding Thoughts

The PO scandal is a lesson in how lawyers played not just with facts and rules; they played with lives. They ruined lives. In fact, it's worse than that: they often led the ruining of those lives. Incompetence, orthodoxy, cynicism, recklessness, complacency, vanity, and, I am sorry to say, sometimes, criminality from some appear to have played a part. The PO scandal reveals that lawyers must do more than simply apologise, whether half-heartedly or otherwise, and must be held accountable by stronger regulators. We have to change the way lawyers think and behave. Lawyers must put complete

[54] Higgins and Moorhead (see n.308).

integrity and particular care to avoid misleading at the forefront of their thinking. We should turn away from lauding amorality and guard against harm.

Lucid integrity and clearer ethical thinking could be aided by modest changes to codes, better guidance, and a concerted programme of work scaffolding that, with training, explicit accountabilities, and early challenge mechanisms of the sort outlined herein. This may require modest changes in the law and the codes and more fundamental development of the regulatory apparatus. At first reading, to harried practitioners and judges, it will sound like a forbidding agenda. Ideologically, these groups are not monolithic; many will be opposed to the points I make, either intellectually or emotionally, and resources are scarce. It will require exceptional leadership and determination to move this work on.

It is for that reason I end with my final proposal. The Clementi reforms changed legal services regulation significantly, leading to the Legal Services Act 2007. This has, I would suggest, improved the independence of regulation of legal services but failed to tackle the fragmented approach of multiple regulators. It also concentrated on competition and consumerism. It made significant progress but left ethics underplayed in the equation. It provided a compromised form of independent regulation. The PO scandal suggests unfinished business that requires something of similar weight, independence, and political commitment behind it.

Whilst the Legal Services Board has, after the Hamlyn lectures that led to this book, indicated a very welcome focus on the effective regulation of professional ethics,[55] something broader, more profound, and urgent is needed. There is a need to address issues in the professions, in the courts, and in corporate governance, with a central focus on improving honesty, integrity, and the effectiveness of law. This needs to lead independently of, but also work in collaboration with, the government, the professions, the courts, and the regulators. It should consider the perspectives of victims of injustice and those affected by professional misconduct. Given problems in accountancy, it may need to encompass other professional advisers. I have set out some ideas as starting points. I suggest a strongly led commission with a mandate to address a comprehensive programme of reform, not just a one-off big bang. The victims of the PO scandal do not just deserve more sincere apologies and proper compensation as speedily as possible. They deserve genuine change in the integrity of lawyers, the legal system, and those who utilise them. That means real change, properly implemented. It means much more and is much harder than mere words of the kind I offer up here.

55 LSB (see n.19).