The Hamlyn Lectures 2024

Frail Professionalism?

Lawyers Ethics after the Post Office and other cases

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This document contains the Hamlyn Lectures given in in the Autumn of 2024. They have been subject to limited amendments to transition from a spoken to a written text. Limited referencing of key texts is included. The lectures have been developed, fully referenced, and turned into a significantly expanded book that will be published by CUP later this year or early next.

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I. What drives ethical failure?

Unreliable gods and their fearless logics

To be asked to give the Hamlyn lectures is a profound honour.

I am incredibly grateful to Baroness Hale for travelling all this way to chair the sessions. She is not only a lawyer of truly historic stature. Baroness Hale holds a special place in the hearts of many legal academics, and socio-legal academics in particular, including me.

And I would like to give my deepest thanks to my colleagues for hosting and **the** Trustees for asking me. I am immensely proud to have been asked, but I know that the reasons are not about me, or even the great work I draw on by the Post Office Project Team, Sally Day, Karen Nokes, Rebecca Helm and Paul Gilbert. It's about the story and the people it affects. It is about the problem, as I have been asked to speak about lawyers' ethics at a critical juncture. A moment of calamity for the legal profession and the legal system.

The theme of these lectures is Frail Professionalism—the frailty and susceptibility of lawyers, individually and collectively, to bad decisions. Incompetence is part of this, but mainly I mean susceptibility to misconduct and the undermining of justice.

To the lawyers who have come. An especially warm welcome. You may feel a bit under the microscope. Defensive. We all feel the adrenaline of an accusation when it is levelled at us. The flight or fight response. I want to acknowledge that and recognise how hard it is to listen to criticism of your (or our) own kind.

The main reason I think we (you) need to listen to such criticism is the Post Office Scandal. It is emblematic of how ethical and system-failure can lead to profound injustice. And I think it speaks 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 scandal victims, that there is

one law for them and another for the powerful: two-tier legality driven by, what I am going to define as aggressive lawyering.

I will argue that the Post Office, but also other cases, are emblematic of three things:

> The first is the subject of tonight's lecture. How unreliable "gods" (self-regarding, unaccountable lawyers) with fearless logics are vulnerable to wrongdoing. How their logics spring from conventional but unbalanced ideas about professional partisanship. How those logics are structured by money, secrecy, and moral sophistry and amplified by human frailties – pyschological dispositions– that magnify the chances of failure.
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> The second lecture looks at how amoral, unreliable lawyering combines with unbalanced organisations. How irresponsible legal orthodoxies can drive cover-ups, "deliberate concealment", "a lack of candour", "the retelling of half-truths", and the massaging of risk.
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> The third will consider reform. Here I wll suggest legal ethics is not solely a problem of individual lawyers, or unbalanced organisations, or legal and regulatory failure. Ethics is both an individual *and* a systemic problem requiring a change in corporate governance, court practice, legal education, professional leadership, and better regulation.

Tonight, I start with this claim: the ways lawyers think and behave has to change. Why?

The Rule of Law

My first point is that legal aggression harms the rule of law.

Steven Vaughan, Kenta Tsuda, and I have already shown how aggressive lawyering and the rule of law can conflict.[2] There can be a hefty tension between legality and professional aggression. I define legal aggression as choices that are *arguably* legal but *probably* unlawful or misleading. That aggression is driven by the rules, systems, and culture of the profession and its clients.

It is why we have SLAPPs and questions about enabling Oligarchs. It is why Parliament's Intelligence and Security Committee suggested that professional enabling threatens national security. It is why we have had Weinstein, Al Fayed, Philip Green, powerful men and their lawyers, deploying freedom of contract to draft menace and silence into the lives of their victims through NDAs and non-disparagement clauses.

Lawyers have helped banks with off-balance sheet accounting, systemic risk-taking, disguising commissions on share deals, or designing lax money laundering controls that have, it transpires, helped Hamas.

In each of these cases, the choices can be presented as arguably legal but are also often *likely to be* improper or criminal. Furthermore, secrecy and rule of law rhetoric often shrouds them from scrutiny.

It is the degrading of legality, integrity, and honesty that concerns me most when I talk of ethics problems. That is the focus of these lectures.

Post Office cases as a reason to act

My second point is the Post Office Scandal is a sufficient reason to act.

The Post Office is not one case but hundreds, arguably thousands. The Post Office ruined thousands of lives: thrown out of their businesses and homes, sued and bankrupted, prosecuted, and imprisoned; the cost has been extraordinary in scale and scope. Minds and bodies are scarred. People have ended their lives. Many victims live on, but in pieces.

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[2] 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)

The Scandal spans decades and the Inquiry has exposed a litany of legal failure.

Lawyers drafted contracts that were unfair. They offered a choice between sub-postmasters accepting debts they did not owe or taking steps capable of amounting to false accounting. That choice was backed up by unfair termination clauses and the like. Lawyers helped pursue those debts with improper aggression.

Lee Castleton, a sub-postmaster from Bridlington, was made an example of, ruined deliberately or simply as the natural consequence of litigation. In that case, a "nice little legal point" was developed based on an illusory simplicity and arguably inadequate disclosure. The claim was that sub-postmasters *agreed* money was owed when signing off accounts. It was good law but factual nonsense requiring subpostmasters to prove the Horizon accounting system did not work if they wanted to defend themselves.

Prosecutions went ahead without key evidence for theft. False accounting was treated almost as a strict liability offence, dishonesty was assumed. Plea bargaining was conducted inappropriately. Plea deals stifled questions about computer errors and were designed to maximise commercial recoveries for the Post Office.

The prosecutions depended on expert evidence that was not independent. Experts were unprofessionally handled by the lawyers, and they were improperly encouraged to change statements to help the Post Office's case. That evidence was tainted.

Under political pressure, the Post Office agreed to review its criminal cases. It led to a period of containment. Disclosure was one of the main focuses of that review. At the very point at which proper disclosure of evidence became the focus, disclosure problems deepened.

The review of Post Office prosecutions had a conflict of interest at its heart. The lawyers doing it were marking their own homework. It was spotted by some lawyers, but misdescribed, diminished or ignored by others. Adverse evidence, some of it of smoking gun quality, was not disclosed by Post Office lawyers in civil or criminal cases. Indefensible, spurious and unreasonable grounds were given for doing so.

Lawyers wrote internal notes about suppressing evidence. Inappropriate redaction of documents and exploitation of legal professional privilege took place.

An investigation by forensic accountants, Second Sight, had its independence compromised by aggressive lawyering. Reports from lawyers to the the Post Office Board were partial (incomplete and biased) and facilitated misleading reporting to government and Parliament.

A complaints mediation scheme was run with hallmarks of obstruction and attrition.

The group litigation was conducted on a scorched earth, and what the judge described as a flat earth, basis. It was littered with misleading arguments and evidence. A tainted expert helped in the shadows. There is a live question as to whether the High Court was deliberately misled about this.

The Post Office tried to have the judge removed when it became clear they were losing the case. They enlisted two of the biggest hitters in law: both advised they had good prospects of winning. One told them they had a duty to remove the judge. At the Inquiry, he said he did not *mean legal* duty. In court, he lost badly.

At the subsequent criminal appeals, at the end of 2020, the taint on expert evidence emerged. Neither barrister who *should have* advised disclosure of core information about this back in 2013 had done so. One represented the Post Office before the Court of Appeal in 2020.

The Hamilton appeal also revealed the alleged shredding of disclosure documents. Lawyers, tipped off that they would be blamed for that shredding, advised the Post Office it was potentially criminal. But were then persuaded to call it a "cultural issue" that had been addressed. Undisclosed for seven years, there is no evidence that this potential crime was appropriately investigated.

Concerns continue to be raised about lawyers connected to the Scandal on other matters to this day.

Each of these points raises questions about the lawyers involved. Lawyers senior and junior, in-house and in private or independent practice, KCs and GCs.

Not all those questions are of potential professional misconduct, but many are. That the Inquiry needed to give self-incrimination warning to several lawyers also shows us criminal proceedings may be properly contemplated.

As such, as a tale of legal carnage – in breadth and consequence – it is unparalleled. Even if no lawyers had done anything wrong, multiple car crashes over so many years, with so many different hands on the wheel, should demand change.

Equally, and this is really important, no part of it is surprising. Each strategy and tactic, each mistake, each duck and weave, is familiar. The story of the PO is a tale of awfulness, but also of orthodoxies. It is a story that has at its heart dangerous ways of thinking: poisonous logics and vulnerable institutions, as well as flawed and sometimes cynical individuals. But the idea of orthodoxy suggests something subtler than bad apples being the sole or main cause. It suggests that something close to ordinary lawyering can render lawyers insensitive to ethical risk, and how certain orthodoxies and particular cultural practices may drive failure.

That suggests the problem is bigger than the Post Office.

Why do lawyers lead themselves astray?

What do I think is driving ethical failure? How can lawyers lead themselves astray?

Frail Gods.

My first reason is why I spoke of Frail Gods. Frail Gods is my ugly language for highlighting what psychologists call the professional 'self-concept'. A belief that, as a professional, I am ethically better.

It feels like an unfair criticism, as professionals, we are *supposed* to be better. But there is a problem with an elevated self-concept. Maryam Kouchaki has shown how *thinking of one's-self as a professional* increases a propensity to lie and cheat.[3] In one experiment, students thinking of themselves as professionals lied and cheated for money 41% of the time, when those who did *not* think of themselves as professionals did so only 6% of the time. The "professionals" lies were also much bigger.

Professor Kouchaki's explanation is 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."[4] 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: those believing themselves to be more objective are often the least objective.

Might an elevated professional concept be a problem for lawyers?

The Post Office Scandal has several examples, including lawyers claiming they would have acted entirely properly before being shown in cross-examination that they probably had not. I want to focus on a less clear-cut example to show how professional complacency can blend with another problem, moral distancing.

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[3] Maryam Kouchaki, 'Professionalism and Moral Behavior: Does a Professional Self-Conception Make One More Unethical?', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 4 April 2013

[4] 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.

Patrick O'Brien and Ben Yong's work tells us that most retired judges think that they do not need to be regulated post-retirement.[5] They found that although most retired judges did not engage directly in litigation, but also they were confident they would know right from wrong when deciding what they *could* do after they leave the bench. They also took different views on what judges were permitted to properly do post-retirement. Signs perhaps of a strong self-concept and weak scaffolding.

Lord Neuberger, a former president of the Supreme Court, was asked to engage with the Bates litigation: to advise, at short notice, 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 gigs go, 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.

Lord Neuberger advised that the recusal had reasonable prospects of success and should be brought. Lord Grabiner, also from Lord Nuebegerger's chambers, handled it. The application was declined by Mr Justice Fraser, and then criticised in excoriating, damning terms by Lord Justice Coulson when the appeal was sought.

Lord Neuberger explained his role in written evidence to the Post Office Inquiry. He says he feels,

> "uneasy when I think, read or talk about the Horizon 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."

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

I wonder about that.

The draft judgment that prompted the recusal discussed malicious prosecution, raising potential miscarriages of justice. Had the recusal prevailed, the Bates case would probably have been lost. The Hamilton appeals, based significantly on the Bates case, may never have been brought. The Scandal might have been contained forever.

Lord Neuberger continued: "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." So is Lord Neuberger distancing himself here? Describing his own role in the narrowest of terms, cutting himself some slack?

Here is an alternative take.

There used to be, some think there still is, a judicial convention against retired judges advising particularly on live cases before the courts. Lord Neuberger, not unreasonably if debatably, thinks the convention had been abandoned. He might well have been aware of the concern about judges advising in such cases, although he tells me many former senior judges *have* advised on live cases before the courts.

This was, of course, a case *about* a judge and more importantly, it is difficult to avoid the *appearance*, I do not suggest this was his intention, that this aided members of his own chambers in a situation of great haste and with limited and partial instructions. 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 (as well as, we can assume, his reading of the draft judgment). Lord Grabiner conceded at the Inquiry that this was an advocate's document. It was partisan. Although Lord Neuberger also tells me, he did not think then or subsequently it "was inaccurate or unfair".

A solicitors' firm could not claim to independently advise here, and there may be a strong potential conflict of interest. Barristers, however, treat each other on the basis that they are completely independent of each other. And are used to opposing each other even if in the same chambers.

Lord Neueberger's approach is thus consistent with the Bar's normal approach. But I think that normal approach is problematic. Team loyalty bias is subtle and subconscious. 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.

One does not have to think, as Lord Justice Pill did, that, "The track record of being a judge is commercially saleable but should not be on the market," to see the risks here. Lord Neuberger's name no doubt influenced the board, and through no fault of his, Lord Grabiner deployed the status of an anonymous "very senior" barrister or judicial person" to try and help win the fateful recusal 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, 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. The bland language of mere advice. That he does so, 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.

The dangerous logics of advocacy.

Role morality is the idea that the morality of my acts are 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. Moral philosophers call it the *standard* conception as a result.

The standard conception provides a series of reasons for doing what the client wants:

1. zealous partisanship (you must maximise your client's interests);
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's rights. Partisanship requires lawyers to *maximise* exploitation of those rights*;* and, the professional role serves the system by serving their clients.

There are moderate and strong versions of the standard conception. For our purposes, lawyers heading towards failure persuade themselves that they must do anything that advances the client's interests unless it is *clearly* prohibited by law or rules of professional conduct.

The rules do not generally speak in these terms and contain restraints: client interests do not come first; and, for example, a lawyer cannot assist criminal conduct; a lawyer should not bring claims abusively (although abuse is narrowly defined); a lawyer cannot mislead anyone, and solicitors must not take unfair advantage by virtue of their position. So keen are the philosophers and practitioners to justify zeal, they can sometimes rush past legitimate restraints, perhaps convincing themselves that only if *clearly* restrained do they *need* to be restrained.

As a result, zeal does not encourage a *balanced* description of lawyers' *actual* ethical obligations under the rules and the law. To give one example, integrity requires lawyers to take particular care not to mislead.

As I will show you in a moment, zeal can push lawyers in the opposite direction.

The story of Alistair Brett

Alistair Brett was an experienced solicitor working in-house for the Times newspaper. He helped a Times journalist, Patrick Foster, run a story on Detective Constable Richard Horton.

DC Horton wrote an acclaimed blog about the police service under a pseudonym, Nightjack. He 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 embarassing his employers. The journalist, Foster, got his story by hacking Horton's email account. A criminal offence. His editor brought him to Brett for advice.

Alistair Brett helped Foster get his story out, but did so in a way that led to him being found to have recklessly mislead the court.

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. That meant he could keep it secret. Secrecy allowed them to create a different story so Foster could get his scoop. He tells Foster off for his conduct and then says, but if you can identify him 'legitimately' from public sources, we can run the story *if* you then 'front him up': that is, give Horton an opportunity to confirm or deny he is Nightjack.

Brett was cross-examined on all this during the Leveson Inquiry.[6]

Lord Justice Leveson suggested that "legitimate identification" was a phoney process. "The map to the maze [is], he said, "already laid out". How can you claim to have identified Horton legitimately if you already know who he is?

The legitimacy, as presented, is an illusion. It is the start of a slippery slope.

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 have to fight or fold. They choose to fight.

[6] The quotes in this section are taken from the Levson Inquiry transcript Mr Brett's live evidence.

Olswangs ask Patrick Foster to swear an affidavit saying he did not hack DC Horton's account. They say he has a history of hacking emails accounts. He was punished for it at University. Brett advises Foster not to respond to that but writes this 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 *say* this. It's an example of a zealous argument. *He does not have a history?* Foster had only done it twice before. *Baseless?* Olswangs might not have evidence for the claim. Clever? Arguable? *Balderdash?* There is worse to come.

When the case is presented to the court, Foster is asked to explain how he identified Horton. 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, they were said to have *begun* that way. He ignored the privileged information but also asserted something that was not true. Foster had *not* begun that way.

Leveson starts to wonder about Brett being too close to the situation and challenges him on it. Here 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… well firstly Leveson make one very short and powerful point.

> Lord Justice Leveson: Let's just cease to be subjective, shall we. Let's look at Mr Foster's statement….

There is a moment of terror, silence and panic. And it is only at that moment, I think, that Mr Brett realises what is about to happen. Let's just cease to be subjective, shall we? 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?

[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 desparate and, I think, hypocritical. He had sought to game precision zealously when he said the hacking claim was baseless and in his attempt to compartmentalise Horton's identification. When drafting that Foster had begun by conducting a legitimate search, he did not cease to be subjective; he magnified subjectivity.

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 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 displinary triubunal, the evidence pointed *invevitably* to the conclusion he had allowed the court to be misled.[7]

But there may also be more at work here. My third point is that our psychological frailties magnify zeal.

[7] Alastair Brett v Solicitors Regulation Authority (SRA) [2014] EWHC 2974

Psychological frailities

There is fascinating literature on behavioural ethics and the psychology of lawyers. The central point of this literature is that, as Sternlight and Robbenolt say, "many ethical infractions result from a combination of situational pressures and all too human modes of thinking."[8]

I cannot discuss all the possibilities, but I want to suggest that these all-too-human modes of thinking, what I call frailties, 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 decisions on those cases are taken for clients rather than for others. This team loyalty bias renders our judgements weaker. Furthermore, if our client is a hallowed institution, or we think our opponent are (say) disloyal leakers or 'thieves and liars', this moral intensification makes us less ethical. Pragmatism makes us impulsive and less principled. We descend down slippery slopes: Strategies, reasonable when unchallenged in the abstract, like Alistair Brett's legitimate identification, become misleading in their execution. We are also prone to the agency effect: we are more inclined to commit certain unethical acts on behalf of others than we are for ourselves. The moral fillip of helping others compensates, to a certain extent, for our morally questionable acts on their behalf. Competitiveness, adversarialism, 'thinking like a lawyer', being too busy can all dull our sensitivity to moral problems.

Through the interaction of zeal and human frailties, a heady cocktail can form, pushing arguments and evidence beyond honesty and integrity.

This brings us to point 4.

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[8] Jennifer K Robbennolt and Jean R Sternlight, 'Behavioral Legal Ethics' (2013) 45 Arizona State Law Journal 1107

Zeal and cultural identity.

Lord Brougham, after his defence of Queen Caroline against the King in Parliament, famously celebrated zeal.[9] Clients, he said, should be served "by all means and expedients". Lawyers should disregard, "the alarm, the torments, the destruction which he may bring upon others." They "must go on reckless of the consequences…." Reckless even to their own interests.

Brougham's words are emblematic of fearlessness; arguably the one word in the Bar's Code of Conduct that strikes an emotional register.

Technically unnecessary, fearlessness remains there for aesthetic impact. 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. It lionises harm.

Brougham repudiated his words in later life. But empirical work on lawyers has tended to suggest lawyers agree that 'client first was bred into me' even though the rules say differently. There is evidence that zeal might be underlaid with self-regard rather than pure selflessness.

And of course, it goes without saying that, when paid on an hourly basis, zeal is heavily aligned with lawyers' economic interests.

I am not against zeal where it is merited. Lawyers sometimes need to resist pressure to ignore proper arguments or compromise their clients' cases unfairly. A more robust defence of subpostmasters when being prosecuted might have tempered the extent of the disaster. Unusual effort and courage *were* likely necessary for the victories in Bates and Hamilton.

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

In one sense, the problem is a simple one: 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 needs to reflect psychological, sociological and economic realities. These realities already push well-resourced lawyers 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 dial back its aesthetic register because it can unbalance lawyers when they most need balance. This would include challenging or qualifying some of zeal's sister concepts.

Zeal's sister concepts

Luban calls zeal's sister concepts adversary system excuses. The ideology of the legal system is adversarial. It is a party's right, a mark of the rule of law, to be allowed (lawyers may feel required even) to take any 'properly arguable' point. Properly arguable is a low bar. And a lawyer is not the judge of his client, and so does not have to investigate the truth of their case. These are part-truths that close minds to the complexities of the situation. Brett didn't just not-judge his client, he created a new truth. 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.

The spurious case of law's amorality

A particular sister concept is a claim made about morality. Lawyers often say they do not do "morality". We advise on law not morality. We are not morally accountable for our clients' actions. The argument can be disingenuous: if you assist a client in an immoral act, its legality does not mean you are not morally accountable, and SRA guidance suggests you may sometimes be professionally accountable.

Lionising amorality can also be a way of doing morality whilst pretending not to. As Rob Atkinson has argued, the standard conception embraces "sophistry in the service of a distinctly diminished form of political justice".[10] A lawyer's claimed neutrality is not amorality; it is one-sided, one-eyed morality. Neutrality and the operation of zeal are also heavily skewed by inequality of arms toward the morality of those with power and resources.

The standard conception just puts a moral veneer on the legal services market. It also mutes the moralities of those with limited resources. They have their cases filtered through merits and means tests; their tactics limited by funders; their seeking of "justice" curtailed by the costs of losing. Hugh Grant (hardly the poorest individual) being forced to settle his hacking claim may illustrate how the law allows one-sided zeal to operate when resources are unbalanced.

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. 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 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 professionalism. 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 lawyer's private lives.

Rob Atkinson argument means only a select few get to *really* make arguments, claim rights, manage facts, and assert their own moral claims; the others are 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.

[10] Rob Atkinson, 'Back to Basics, and beyond Belief: The Radical Re-Valuation Project of the New Standard Conception', Leading Works in Legal Ethics, 2023, 87–112.

Take the Amersi case.[11] Mr Amersi brought a libel action against ex-Conservative MP and activist Charlotte Leslie that was said to be abusive and a SLAPP. Amersi claimed…

> [N]othing 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 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, presumably could not, plead "*serious* harm to reputation." The judge declined to consider whether it was abuse but listed all the behaviour in tension with a solid case for legitimate vindication. He said there was an exorbitant approach to litigation; complexity was increased without tangible benefit; it was wholly disproportionate and could not 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 propriety, preferring to decide cases on other grounds. Issues of abuse and impropriety slow them down, are likely to be hard-fought, involve the drawing of high-stakes or distasteful inferences (calling someone a liar for instance), and may increase the likelihood of appeals.

Discretion may sometimes be better than valour, but can also signal a tolerance of poor conduct. Such caution is one reason why the courts alone cannot protect the rule of law from abuse. Powerful actors also have many ways of avoiding the court's scrutiny, including settling cases, and most SLAPP-like problems take place away from courts. This emphasises the importance of lawyers' ethics and their guardians.

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[11] Amersi v Leslie [2023] EWHC 1368 (KB)

From moral neutrality to moral sensitivity

I want to move towards a conclusion this evening by holding in mind Atkinson's idea of hypocritical, lop-sided morality and Brougham's fearless disregard for harm to others.

The first point to make is a moment to let emotion fill this room. I make no apology for this emotion. I will develop the point in the third lecture, but morality *should* inform our judgements whilst not dictating them.

We should think of those: sacked and slandered like Alan Bates; those imprisoned, at nineteen, twenty two years ago, like Tracy Felstead after refusing to apologise for crime she did not commit; or Jo Hamilton kept out of jail by the village paying extraordinary sums for her so-called debts; or Noel Thomas imprisoned in his 50s, a pillar of the community, in Walton jail; or Seema Misra who was jailed when pregnant. The shadow cast on their lives is beyond extraordinary.

Lawyers distancing themselves from harm may be part of the reason they make the mistakes they do. An ethic of fearlessness encourages lawyers to see the cost of these people as simply the price of doing business. It is moral anomie, a logic that renders them hired guns. With scripts that become semi-automatic weapons:

> I have to take this client.
>
> My client has given me these instructions.
>
> I must follow 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 it's not, but the law suggests otherwise, sometimes) the dangers of it should be plain.

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

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 empashised lawyers owe *divided* loyalties.[12] As Lord Thomas said, advocates are *responsible for strategy* on a case, not the client.[13] As Lord Justice Jackson said, lawyers must take *particular* care not to mislead.[14] As Baroness Hale has noted, privilege is given to enable lawyers to give advice *sensible* as to conduct.[15] The rule of law demands lawyers attend to the values of the system.

The problem is not, usually or only cleverness and arrogance. It can be opportunism or desperation, grasping for the one point that lets us help our client and allows us to seem in charge of events: we can resist that disclosure this way. We can be fantastically precise.

Ethics begins in the half-light of hasty decisions. 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. Next week I will be explaining how it is 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, because we know now how expedience ends. It ends with the list of problems I set out early in this lecture and these quite extraordinary people, the victims of the Scandal.

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[12] Arthur J.S Hall and Co.v. Simons, [2000] UKHL 38.

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

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

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

They have not been let down once, they have each been let down many times. Harmed by an army of lawyers, still desperately trying to avoid responsibility. Often, not always, those lawyers were 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.

II. Can legal logic pollute institutions?

Extraordinary Orthodoxies and Legality Illusions

In the first lecture, I suggested that lawyers had a problem with excessive zeal. Aggressive, self-serving interpretation of law and facts, coupled with traditional scripts like the claim we 'do law and not morality' makes extreme behaviour more likely still. A shallow, somewhat complacent idea of professionalism and the psychological frailties of human decision-making undermine our objectivity. Zeal and frailty take lawyers beyond honesty and legality through aggressive lawyering.

This lecture is about how such risks are magnified *within* organisations; how, when working with or for organisational clients, what lawyers do and how they are used can pollute rather than protect organisations. Although potentially true of any client. I emphasise organisational clients, because they have the added social and legal complexities of being artificial entities involving many people.

At one level my argument is very simple, it is a problem of the slanted signal. Putting court advocacy to one side, if, when advising, a lawyer can imply that X is legal or Y is true (when it is probably not), then clients are likely to make poor decisions; poor in the sense that they are wrong or risky, and poor in the sense that they lack integrity.

They may also tend to communicate those decisions in misleading ways.

This problem is magnified because clients sometimes *want* a slanted signal. They want to hear good news. And lawyers, being human and wanting happy clients to pay their bills, want to tell them what they want to hear

In an organisation, that distorted communication passes between different actors and levels, each with their own agendas and audiences to please. The processes have some subtlety and can take on a life of their own. They stem from a desire for simplicity, and from 'being commercial' when 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 it 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 do practices that look normal have the capacity to be deeply harmful, and when and why do such practices improperly promote the client's interest over the interests of justice?

I call these practices irresponsible orthodoxies. Irresponsible orthodoxies are built on routines (practical scripts). When managed in bad faith, when lawyers forget integrity and the interests of justice, these routines create what I call legality illusions. Illusions that enable badly lead organisations to say: we can do what we want, we can pretend we did the right thing, if not with impunity, with significant levels of deniability.

More later on what legality illusions are but here is one example for now. Two years after the Post Office were told their lead expert was tainted, Paula Vennels wrote to a Government Minister in 2015 to say that, they had found *nothing to suggest that any* of the *prosecutions* the Post Office had brought was unsafe. There was lots of evidence that some convictions were unsafe. You could argue, I suppose, that no one *knew* the convictions were unsafe. But saying there was *nothing* to *suggest* any conviction was unsafe was untrue. Whether she knew it or not, it was misleading.

Was it the system and its routines or individual fault at work here? Was it both? To understand how legality illusions build up we need to understand what organisations want from lawyers and how lawyers respond to that desire.

What organisations want

I can only sketch out some assumptions about what organisations want. No organisations are alike, and no theory of them is uncontested but for businesses, let us assume their primary goals can be simplified as providing financial reward, status, and (sometimes) meaning to those that work in

them. They tend to be managed with a keen eye on profit and reputation. These systems can become unbalanced, typically through profit-maximisation.

Profit is essential, not bad, but profit 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, who are typically particularly sensitive to reputation and financial signals, set priorities and take critical decisions. Typically, the lawyers work with them.

Lawyers are supposed to act in the best interests of the organisation, but usually take their orders on what this means 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 its best interests. We also know lawyers sometimes keep trouble away from Boards.[16] They think, assume, or are told that the Board is better off not knowing about dirty linen.

Agreement, simplicity, confidence

We might hope what organisations want from lawyers is, "sound advice, accurate as to the law and *sensible* as to their conduct."[17] This is the reason why, as Baroness Hale identified, legal professional privilege is given as a fundamental right.

But what organisations actually want is simple signals in complex contexts. 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, and you behaved justly. And, they want to be told this with confidence and simplicity.

An example. Let's take the invasion of Iraq and pretend I am Tony Blair.

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[16] See, for example, Duke of Sussex v MGN Limited [2023] EWHC 3217 (Ch)

[17] Baroness Hale in *Three Rivers*[2004] UKHL 48

If I am behaving responsibly, I want to ensure the invasion is probably legal, and I want to be able to present the legality of invasion with firmness and resolution to other audiences. So I want my legal advice to be yes, it is legal and I want the answer to be a clear yes, a confident yes.

Without clarity and confidence, I am in difficulty. I need to command and persuade others inside and outside the organisation (the Army, the Government, the Parliament, and the Nation).

So there is a problem with *managing, representing, and acting on* uncertainty here. The military and civil service must be told it is lawful; equivocation does not help them. The system arguably needs *and definitely prefers* a positive, simple response. All this gives rise to a number of dilemmas for the lawyer: How sure do I need to be of lawfulness to advise something is lawful? How should I represent any uncertainty? How should I cope with foreseeable risks that my advice will be abused?

There are other problems: 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 Attorney General agreed to advise late. He took meetings from those in favour of invasion. On the key factual question, did Iraq have weapons of mass destruction, he felt able to rely on the Prime Minister's view. He then changed his advice to be favourable to invasion. Many international lawyers said he got that wrong. Whether true or not, the process he adopted arguably undermined his independence.

Being 'commercial'

There are a lot of pressures, implicit and explicit, subtle and unsubtle, on lawyers to say yes to their clients. Read any recruitment brochure, attend any in-house conference, read any client-facing article, and the demand for lawyers to be "commercial" or "business partners" is strong.

Being commercial can just mean being practical, not academic. Who could resist that? And why work other than in partnership with your client? But that is not all that is meant. Being commercial is also an idea used to dilute legality. Being commercial means being willing to flex when presented

with a legal obstacle. A lawyer should not say no to a client but *how*: they should find a way around the problem.

In a case involving Barclays lawyers, they tried to say no, when asked to draft a loan as an increasingly questionable consultancy agreement.

Being commercial can mean flexing advice or drafting to be helpful, or turning a somewhat blind eye to a manifest legal problem.

Greasing the truth

In-house lawyers do this because of a tournament of influence: demonstrating their loyalty and helpfulness in return for status and influence. They hope this earns them the right to say No. If really needed. Sometimes. Similar may be true of private practitioners, especially those with big clients and long-term relationships.

How culture Can eat independence for lunch

Langevoort has researched how sociological, psychological, and economic forces penetrate deep into the interactions between lawyers and clients.[18] He suggests commercial culture likes and sometimes demands intensity, passion, and commitment. It expects optimistic construal: putting the best gloss on situations. What Langevoort labels corporate "grease". "Being positive," he says, "facilitates motivation, cooperation, and trust".

There are problems with passion and optimism. They are associated with unrealistic "situational construals": getting stuff wrong and being overconfident. When the Post Office's instructed lawyers talked about suppressing evidence, or called their opponent's liars and thieves, or strategised wild litigation tactics; in a perverse way they were showing their commitment to, intensity, passion, and alignment with the client, as well as evidencing an apparent loss of professional detachment and propriety. Disdaining oponents as "thieves and liars" is significant psychologically: a form of moral disengagement. It can be seen in legal fields as varied as

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[18] See, for example, Donald C Langevoort, 'Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking' (2010) 96 Cornell L.Rev.1209

finance, conveyancing, and criminal defence. It encourages significant ethical failures.

Organisations also tend to promote risk-takers. Risk if it goes wrong can be excused as bad luck, it can be managed or concealed, but to succeed in financialised organisations you have to try and win and win big. Rainmakers have the power. The Gerard/Decherts and Nigerian Arbitration cases seem to be examples where big bills drove extraordinary behaviour.[19] It should be noted that Post Office fees have boosted the careers and income streams of several lawyers and firms over many years.

Langevoort also suggests lawyers' decision-making styles fit this greasy model. "Intuition and feelings," drive decisions, "as much (or more) than… deductive or inductive reasoning." The "lawyer's mind is trying to work its way," towards meeting what the client wants. Again the Post Office Scandal may provide examples.

Stephen Dilley ran the case against Lee Castleton. He started out thinking Mr Castleton's defence had merit and asked his client some awkward questions but is given a pep talk by in-house lawyer Mandy Talbot about the "serious ramifications for the business," of failure. His more independent-minded questions about Horizon go unanswered. It may just be coincidental.

As we will see, barristers Simon Clarke and Brian Altman decided against exploring why key Fujitsu witness, Gareth Jenkins, gave tainted evidence. This came at a time when Mr Clarke had noticed the Post Office had become "very defensive" about expert evidence. That too, may just be a coincidence.

Langevoort also suggests lawyers are also prone to cognitive dependence and collective rationalization. Lacking expertise (computer systems are a great example) they show excessive deference and dependence on others to interpret facts. So, at the Inquiry, lawyers repeatedly defended their actions as based on their client's *confidence* or *belief* that Horizon was robust.

[19] ENRC v Dechert, Gerard and the Director of the SFO [2022] EWHC 1138 (Comm) and *Nigeria* v *Process* & *Industrial Developments Limited* [2023] EWHC 2638 (Comm)

Lawyers are not just dependent on information from others however; they *manage* and polish it. At the Post Office, cases that went wrong were settled and buried under NDAs. Central management of core knowledge about Horizon's legal failures was absent. Bad news disappeared. Witness statements were drafted in ways stronger than the witnesses intended or were comfortable with.

Even when not sinister, organisational culture and the tournament of influence can promote such cognitive dependency over professional independence. But lawyerly zeal can make it worse. Already dependent on partial information, we naturally burnish pro-client facts and arguments. In developing a narrative, something arguable but probably false can take on the appearance of truth. Cognitive dissonance, means we interpret new information consistent with past or preferred choices. It may have magnified polishing.

Take remote access as an example. Remote access is crucial to the Post Office story. It meant Fujitsu engineers could change subpostmasters' accounts remotely, without the subpostmaster knowing. It meant the system was insecure. Remote access was also a likely cause of accounting errors. Post Office went from saying remote access was not possible, to saying it was possible only with subpostmaster consent, to being possible without consent but controlled, to being uncontrolled but unimportant. Each time their story on remote access was found lacking they just adjusted in line with their core assumptions about Horizon's robustness.

Dealing with Risk

What then would sensible advice as to the law and conduct, the *neutral* handling of facts and law, really require? I would say it requires facts and law to be marshalled, interpreted, and presented as objectively as possible. And it requires uncertainties as to the facts or how to apply the law be handled objectively, with clarity and openness about the risks and uncertainties. Only then can decisions about risk be taken with the best available information on those risks and in a way that most closely reflects what legality requires of the organisation. We have already seen how grease and zeal can distort facts, consciously and unconsciously. When this happens, decisions about risk are taken on an inaccurate, slanted

calculus: slanted towards the interests of the people supplying evidence, and/or taking decisions.

This slanting of the calculus and questions about its legitimacy are important. There is a question of process: how to ensure facts and legal interpretation are as *objective* as possible. Stepping out of cognitive dependency 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 on to that second question with an example, the Attorney General's guidance (2022) on Legal Risk.[20] It was introduced by the last Government to make government lawyers behave more like high-end commercial lawyers. It sought to strengthen the risk appetite of the Government Legal Department. The guidance required Government lawyers to advise, "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 to be taken. Broadly, "unless there is *no* respectable legal argument," Government lawyers should advise that there is a *sufficient* legal basis to proceed. Even a case with more than a 70% chance of being successfully challenged has sufficient basis to proceed. So, cases *very* likely to be unlawful have "*sufficient legal basis*".

It gets a little worse. A lawyer inclined to say there is no respectable argument has to "refer the matter to [their] line manager … before [they] advise". If their manager disagrees, the advice will be revised to say there is sufficient basis.

Advice should explain legal risks, "accurately and clearly " and suggest mitigations, but I think such guidance interferes with the independence of the lawyers involved. It encourages pressure to lean towards yes, and to say "something probably unlawful is sufficiently legal". It has significant potential to mislead. The risks that such a policy will be abused by overwheening Ministers are obvious. The "genius" that says X is *likely* [even highly likely] to be unlawful but can be represented as having sufficient legal basis is it allows the lawyers to give *a superficial claim to legality*

[20] Attorney General's Office, Attorney General's Guidance on Legal Risk (2 August 2022)

and the Minister to say the lawyers say we can do X. It designs in a mutual irresponsibility.

Interestingly, the new Attorney General has announced [and subsequently implemented] plans to change this as part of improving the culture of rule of law in government.

Nuance and mutual irresponsibility

Dysfunctional systems are full of these gaps: policies and processes that distance decision-makers from responsibility. Some gaps are designed, others are accidental.

Lawyer-client mutual irresponsibility is certainly convenient. When it became clear in 2020 that Paula Vennels' claim there was no evidence to suggest that any convictions were unsafe was indefensible, she simply blamed the lawyers: the decisions were theirs or she was just following their advice. Adding that she could not reveal the advice she had had because of legal professional privilege. Lawyers in response have tried to say they simply advised, in difficult circumstances, and the client decided.

One example is the infamous application to recuse the judge in the Bates trial for bias, Mr Justice Peter Fraser (as he was then). Lords Grabiner (and Neuberger) advised the Post Office they had good prospects of success and Grabiner, in particular, told them not just that they could, or should, but that they had *a duty* to apply to recuse. In oral evidence, he said he did not mean a *legal* duty. We do not know what kind of duty he meant, but his evidence boiled down to his being obliged to advise the client how to win the case and recusal was the only way. Putting to one side whether that is right or not, him appearing to tell the client they had a duty to recuse enables them to say, as they did, that in effect they had little or no choice.

Irresponsible orthodoxies

Let's look a little closer at other ways in which zeal, organisational dispositions, and mutual irresponsibilities have given rise to problems. I want to show how those drivers create repeating patterns, what I call irresponsible orthodoxies. In the Post Office Scandal, they provided the

Post Office's justification for decisions, protecting them from risk, and shielding them from scrutiny.

The first orthodoxy is:

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. The drafting of the Post Office's contract with sub-postmasters is a case in point; it helped shape an abusive relationship. Its unreasonable terms held great sway throughout the business. Almost everyone behaved as if the contract required shortfalls be repaid in all circumstances. It was later redrafted (even more unfairly) to try to make liability explicitly no-fault.

The judge's decision in Lee Castleton's case bolstered this unfair approach. He acceded to the argument that subpostmasters were agents who had prima facie agreed debts when signing weekly accounts. This gave the High Court's seal of approval to Horizon's legal defense, PO did not have to worry about Horizon evidence, subpostmasters did.

In Mr Castleton's case, he had regularly disputed the £32,000 of shortfalls in dozens and dozens of helpline calls. Even so, the case was run on an argument that Mr Castleton had agreed shortfalls because he signed the accounts each week. Legally it was a reasonable argument, a "nice little legal point", as Jason Beer KC called it but it was a point that depended on 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. Their truth was challenged in the only way possible, through ringing the helpline and hoping something was done about them.

Draconian termination clauses gave the Post Office further leverage. 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. Post Office Investigators were paid bonuses to maximise recovery under this Machiavellian deal.

That unfair contract, consistent with the majesty of the common law's slow litigant-driven progress, survived 20 years. It took the extraordinary Bates case to undermine it. There are many other occasions when

arguments were deployed by Post Office lawyers 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 Post Office *wanted* to be true, not what *was* true. The implication seems to be evidence handling was either negligent or improper. Evidence about remote access was filtered through a lens of what they wanted to say, and so on.

Point 2…

2. Zeal not independence dominated decision-making

Post Office lawyers repeatedly refused disclosure of relevant evidence. It is a great example of how zeal, not independence, dominated decision-making.

When the Inquiry has considered this, files notes and emails suggest their lawyers sought a rationale for *not* disclosing rather than objectively applying the relevant tests. Some decisions were impossible to defend, and conceded as flawed under cross-examination, but usually only with hindsight. One email, from Bond Dickinson, drafted by two of their solicitors whilst working on the Bates case suggests "suppressing" evidence and seeking to advance arguments that "appear legitimate" until the pressure to provide the documents becomes too great. One of the lawyers responsible for that now says there were, in fact, legitimate grounds for resisting disclosure. They were just not mentioned in the email. This leaves me with 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? Neither speaks well to ethical culture.

The resistance of disclosure, repeated, spread across time, across different lawyers, and different cases, suggests a problem that is deep-seated, endemic even. The lawyers were often incapable of ensuring proper disclosure. Zeal turned rights on their heads: subpostmaster actual rights to documents became Post Office rights to resist including, as we will now see in the next orthodoxy…

3. Exploitation of privilege

In 2011, in response to four sub-postmaster claims, a lawyer in Royal Mail Group (they owned the Post Office then) issued a litigation hold to Post Office 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, staff were told how to try and attract privilege to it, to shield it from disclosure. One tactic was to encourage staff to write down adverse evidence in a way that, "its dominant purpose can be said to be evidence gathering for use in the litigation." Can be *said* to be.

Litigation holds and maximising legal privilege are orthodox.

They are seen as protecting client rights to privileged documents, but they can also encourage synthetic claims to legal privilege. Here, not only is harmful evidence shielded, the lawyers discourage it from being created in the first place. If it is created, they encourage the synthesising of arguments for resisting its disclosure. Whether this is an abuse or not probably depends on whether we think the business and the lawyers were acting in good faith and how the litigation hold was actually managed. As we have seen disclosure was routinely resisted often enough improperly to cast doubt on that good faith.

Good faith brings me to Orthodoxy 4.

4. Sophisticated evidence management

The aversion to creating or dealing with adverse evidence takes other forms. Richard Morgan, a barrister (now KC) who led Post Office's case against Lee Castleton, described his general approach:

> A. …I'm trying to find out what's going on. …without 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 intriguing and 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 not being encumbered with specific adverse knowledge if possible, unless he will trip over it.

We get another sense of these tactical instincts at a meeting with senior Post Office lawyers five or six years after Castleton. Here Mr Morgan was asked whether the Post Office should have an independent investigation into Horizon. Fresh cases are looming. 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 the focus is on making cases go away for the Post Office. Those cases include possible wrongful prosecution claims that Morgan distances himself from in the Inquiry as beyond his expertise, but at the time he advises on whether to get a report nonetheless. The desire is to respond tactically rather than face up to the potential injustice. It is a pretty explicit moment of turning away by the lawyers in the room. A rock is not lifted.

5. An absence of rock lifting

This was a feature, not bug, of this Scandal.

A central example surrounds Gareth Jenkins. He was a Fujitsu software engineer who gave evidence in various criminal cases, including at Seema Misra's trial.

The Post Office's lawyers had not handled him properly. They sought to harden his evidence in their client's favour and did not advise him adequately on his obligations to the court while holding him out as an

independent expert. When problems with his evidence became apparent, Simon Clarke, a barrister working for Post Office's criminal law firm Cartwright King, reviewed Mr Jenkin's witness statements and said, "Dr. Jenkins credibility as an expert witness is fatally undermined." This was because of Mr Jenkins' 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. He went from thinking, he had to find out what had gone wrong and needing (hed advised) "a face-to-face conference with Gareth Jenkins" to simply reviewing Jenkins' statements and saying in his advice that why "Dr. Jenkins failed to comply with this duty are beyond the scope of this review." Clarke's says his failure to lift the rock is down to him wanting to look forward not back. He says he did not know his firm might have been involved in the original problems with Jenkins' evidence (as they were). This would have been a clear conflict of interest had he appreciated it and also would have given him a less savoury reason not to lift the rock.

Brian Altman KC, who was appointed to review Cartwight King's work, agreed Mr Jenkins was clearly tainted. Mr Altman started off his work saying he would have to consider carefully seeing 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 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 General Counsel 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. His advice was not responded to for two weeks. It then prompts a rather wishy washy response saying in essence *if this has happened it would be bad and contrary to our policy*. Inspite of this, and a threat to blame them for the problem, the Cartwright King lawyers say they were reassured the issue had been addressed. They cannot remember how, and there is no evidence that the shredding, an allegation of criminal misconduct in a

review of criminal prosecutions, was properly investigated. From this point forward, whenever it is mentioned, the shredding episode is referred to as "cultural issues" that have been "addressed". The rock was replaced and covered in the moss of my next orthodoxy.

6. Speak bad news softly, good news brightly

Calling shredding cultural issues 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 catastrophes of Gareth Jenkins' evidence and Second Sight's work she failed to convey their full significance. She was excluded from the Board meeting by the Chairman and, humiliated, she is managed out or leaves the business shortly afterwards. As the bearer of bad news, she appeared to mute it, and still paid the price of a messenger.

This orthodoxy primarily relates to investigations or advice organised by the client, or provided by the lawyer, in ways designed to maximise helpfulness to the client.

Being helpful is a phrase pregnant with meaning. We have started to see this helpfulness in the political domain. David Pannick's advice on the Boris Johnson Privilege Committee Inquiry might be an example. Criticised for its approach and content, the advice may be a creature of its instructions helping the previous PM.[21] Linklaters provided advice helpful to Lehman Brothers off-balance sheet accounting. There was nothing wrong with the advice, but it was misused in ways arguably foreseeable by the lawyers. This raises an interesting question as to what such foreseeability requires of the lawyer, if anything. Lord Grabiner's independent review of alleged misconduct in the Bank of England tested alleged misconduct against criminal standards when professional standards would perhaps have been more apt if less helpful to the Bank (they would have been more likely to be criticised as a result).

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://davidallengreen.com/2022/09/the-curious-incident-of-the-absolutely-devastating-johnson-legal-opinion-is-now-even-curiouser/; Richard Moorhead, 'The Fog of Lawfare'.

Independent investigations into corporate misconduct are routinely derided as being whitewashes, susceptible to cherry-picking. The Post Office contains a series of reviews that I would argue had significant problems in remit and execution. For example, Cartwright King's review of their own criminal prosections and Brian Altman's review of their review both failed to deal appropriately with the fundamental conflict of the firm marking its own homework. These reviews were then filtered through the Post Offices PR lens to say convictions were "not unsafe"; Horizon was fundamentally sound or *without systemic problem*. A third review, the Swift review, raised many of the problems the Inquiry is now investigating, but was kept from the Post Office Board after probably erroneous advice from the General Counsel, Jane Macloed. It was also summarised in a rose-tinted way for the Government Minister.

Legality illusions

This organisation, execution and communication of legal work shows us the purpose of lawyers from the Post Office's perspective. It was to provide professional backing for their own particular, partial versions of the truth.

Organisations are used to representing messiness in positive and simplified terms. Some are more willing than others to encourage and accept illusions where they are useful and can be defended by lawyers and PR.

To capture this problem I have begun to develop 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 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)

In summary: *misleadingly* asserting what they have done is *just* when the *likelihood* is it is not.

I do not want to try your patience with a full defence of this idea or definition, but it goes beyond existing theories of lawyering like creative compliance. Creative compliance is defined as artful compliance with law in form but not spirit. What we see in legality illusions is, I think, worse than that; a legality illusion is a (probably) deliberate or reckless attempt to behave unlawfully or mislead others.

Take Standard Chartered Bank's 'wire-stripping' of transaction identifiers off Iranian money transfers.[22] The transfers seem to have included handling Hamas money. The bank disguised transactions by removing those Iranian Identifiers to avoid US sanctions controls. Lawyers in London were central to this, which presents as an orchestrated strategy to manage a breach of US law. Advised it was unlawful, the lawyers nonetheless told their risk committee it was reasonable. By disguising the transactions and not telling their US sister company, they thought they could enforcement proof it. 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.

Example 2. To stave off government intervention during the financial crisis, an injection of Qatari funds was papered by Barclays' lawyers as a consultancy agreement.[23] It was an illusion that was used to mislead various people externally and possibly internally about the deal.

No 3. UBS commissioned a lawyer to review an alleged rape investigation. A judge said lawyers and the bank cherry-picked "conclusions that were

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[22] This account is based on Moorhead, On the wire, and Benjamin M. Lawsky, *In the Matter of Standard Chartered Bank Order Pursuant to Banking Law*, 2012.

[23] PCP Capital Partners v Barclays Bank [2021] EWHC 307 (Comm) . See also Richard Moorhead, 'Something Smelly at Barclays…', and Clark, Trevor, 'PCP v Barclays: The Dirty Work of Lawyering?'.

favourable to and exonerated the Respondent."[24] The illusions that they had handled the case properly took something of a beating.

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 idea of "risk illusions" which itself draws on the great Ulrich Beck's idea of "organised irresponsibility."[25] Their work suggests irresponsibility and illusion are products of the system, made of but bigger than the individuals that run them. Individuals may even be powerless to prevent them.

If they are right, professionally-sanctioned zeal might mean facts and arguments are inevitably slanted because that's what the system is designed to do. In the Post Office scandal, many hands certainly contributed to how contracts constructed an illusion of fault; prosecutions an illusion of crime; and, the reviews illusions of propriety, safety, and soundness; Strategies of excess in contract management, in litigation, and the handling of press and polticians cemented the problems.

At almost all stages along the chain, the Post Office managers and lawyers would (I think) argue that they were engaged in the good faith management of uncertainty. They may admit, with hindsight, that they got decision X Y Z wrong . They may have not disclosed facts A, B and C, 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 and that is their right.

It 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 largely disintegrates when the lawyers become tightly woven into the client's actions as inhouse and private practice lawyers did in this case. To put it

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[24] 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, https://www.ft.com/content/a072c9af-325f-41cc-9c4c-69bc44e15b50; Richard Moorhead, 'Independence MsA Takes'.

[25] Dean Curran, 'Risk Illusion and Organized Irresponsibility in Contemporary Finance: Rethinking Class and Risk Society', Economy and Society 44, no. 3 (3 July 2015

another way considering irresponsible orthodoxies in context shows how vital it is that the rule of law is *professionally* and *responsibly* administered.

The purpose of lawyering in these circumstances is crucial, it is why the casual advocacy of evidence suppression is so telling: assessing the quality of 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. Taking a nice little legal point to defeat Lee Castleton, 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: none of these explain the scandal on their own, none of them are equal to the scale of the disaster, and not all are actionable misconduct, but together they have created something truly awful. Part accident, part misconduct, but also, potentially, part conspiracy and part system-driven perversion of the course of justice. My argument is that what joins them together are professional frailties, irresponsible orthodoxies, and, among some lawyers and clients, an appetite for legality illusions.

Conclusions

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. I believe we must challenge the orthodoxies of zealous ideology; ensure practitioners 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. It is absolutely *not* all about lawyers.

This 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 (and objectivity) 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 culturally embedded scripts laced with zeal and 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. The Chambers of one of the leading barristers involved in the Post Office Scandal marketed his services until recently, "as a steam roller that crushes anything getting in his way." And another, again until recently, was being sold as someone who can turn "a pile of refuse into something that looks great". Steamrollers or a Midas with the refuse are 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; what clients think, and are encouraged to believe, the orthodoxies work towards. It is mercenary logic dressed up in professional finery.

The rule of law is threatened by these excesses of zeal, by irresponsible orthodoxies, and by a taste for legality illusions. In the Post Office cases, it looks like lawyers were leading the line i1n 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 defined a "cover-up" as:[26]

> Deliberate concealment, a lack of candour, the retelling of half-truths, and the massaging of risk.

How like my list of orthodoxies, his definition is. Cover-ups are not always, but of course, are not *uncommonly* legality illusions. 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 systems' rules and approaches: that's what next week's lecture is about:

[26] Langstaff, 'Infected Blood Inquiry, The Report: Overview and Recommendations, HC 569-I', 189.

what can we, what do we need to do, to promote more rigorous, honest, integrity and independence of judgement?

III. Routes back to proper professionalism?
Lucidity, morality and accountabilities

I ended the second Hamlyn lecture with a basic and practical question: what do we need to do to promote more rigorous, honest, integrity and independence of judgement in the legal professions?

Tonight I am going to try to provide my own answer to that question. But first I want to say, how great it is to be back at UCL Laws for the last of these lectures. I am grateful to all my former colleagues here, especially Eloise, the Dean, Anna Donovan, of the Centre for Ethics and law, for hosting, and Laura of the events team, who has done a highly professional job.

I want mention my colleagues on the Post Office Project. I draw on some of our work and want to thank them for their sterling support over recent weeks. And I am immensely grateful to the Hamlyn Trust and the Trustees for this fabulous opportunity.

And, of course, I want to pay tribute to all the subpostmasters and mistresses whose remarkable resilience in the face of adversity is an example to us all.

I want to dwell a little on my next thanks. James. We all know Lord Arbuthnot as a hero of the Post Office tale. A national treasure. Having got to know him a bit, I am able to confirm he is a marvellous man. But I want to make a slightly different point. James is also a politician.

I already believed that not all politicians are bad, indeed many, most even, are selfless public servants, doing their very best. Now, James does rather better than most people's very best, but even so he is one of many trying their best to do the right thing.

Which brings me to lawyers. Not all lawyers are bad apples, and it is often suggested to me that not all lawyers are unethical; a point with which I agree, but which I would also reframe**.** For the reasons I have given over the last two lectures, many lawyers *are vulnerable* to ethical failure. Difficult situations, complacent thinking, poor practices, and pressure, can make fools of us all

That's one reason why, across the more than twenty years of the Post Office Scandal, we have seen lawyers responsible for: unfair contracts; aggressive enforcement and making examples of litigants; prosecutions with key evidence missing and outrageous plea bargaining; improper influencing of experts badly briefed; disclosure failures that range from the unreasonable to indefensible suppression; exploitation of legal professional privilege; flawed and conflicted "independent" reviews; Second Sight's investigation undermined by aggressive legal handling; sanitised reporting to the board and beyond; an attritional mediation scheme; scorched earth, flat earth litigation; and misleading arguments and evidence; questionable recusal advice; NDAs, libel threats, and guilty pleas used to silence people. Claims of misconduct and covering-up continue to this day.

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.

All are linked by two things: working for the Post Office and thinking like lawyers. Their failures. include questionable judgements, negligence, cynicism, recklessness, and even, perhaps, more deliberate wrongdoing. Many failures perhaps, but not all, may be professional misconduct. Some may even be criminal.

But in tonight's lecture, I will look less at individuals and more at systems. This is not to excuse individual responsibility, but because we need to think more broadly than blame. We need to 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 in two earlier lectures that these failures, and others like them, are driven by human frailties and organisational cultures that reduce our capacity for objectivity. They are also driven by shallow, inadequate professional scripts and irresponsible orthodoxies. Mutual irresponsibility, zeal, can take advantage of professional secrecy (privilege) and *partiality*; the half-truth that can drown out honesty and integrity.

I have suggested this is very much not just a Post Office problem. I have spoken of cases for Banks, and Oligarchs, the threats to national security posed by professional enabling, alleged SLAPPs, NDAs, corruption and hacking. The Blood Inquiry only contains a little on lawyering, but cover-ups are a practice for which lawyers are too useful: deliberate concealment, lack of candour, half-truths, massaging risk. It could almost be an imagined executive summary for Sir Wyn Williams' forthcoming report.

A whole systems approach to the Post Office Scandal would require us to think about a lot: government policy pushing Post Office to be more commercial; and courts to be more managerial; criminal justice policy; the design and resourcing of courts; systems for redressing inequality of arms (legal aid, costs recovery, and other sources of legal funding).

I concentrate tonight on lawyers because, well, we only have an hour, but also because the evidence suggests lawyers were not merely advising, they were often running the show. Lawyers drove the view 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 Post Office, and shaping how it was understood internally. Early drivers for these positions came from the business, but by the time the scandal shifted from attack to containment, I would say legal lead.

Even so, a systems approach reminds us of multiple influences and levels of the system at work here.

If we think about where the "facts' about Horizon's came from for instance: witnesses running the Horizon system wanted to look competent and help; lawyers glossed their stories in favourable terms in witness statements; "sophisticated" evidence management built glosses to a varnish, and skirted and suppressed 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."[27] They hear what they want to hear; are told what they want to be told. They let things slide that they should not or that they do not understand.

The 'business' wants success, optimism, a way forward. The story and the advice adapts to meet that need. Problems, factually complex, involving many different bits 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. It is someone else's job to speak up if there are problems.

What organises such systems in practice?

Such failures are organised by the system's dynamics. This should make us wonder, *why* is *this* system unbalanced? What is wrong with its "identity, philosophy and purpose"?

Viable systems, "seek stability, not maximisation," balance long-term and short-term interests, do not allow, "One signal in the system …[to] swamp all others."[28] What we see in the Post Office Scandal is information being processed on the basis of 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 something of a cypher for the self-interest of the lawyer and those around him.

This pressure on independence is an everyday phenomenon, as the SRA's thematic review on in-house practice has shown. But the signs are there for private practice too.

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[27] Dan Davies, The Unaccountability Machine: Why Big Systems Make Terrible Decisions–and How the World Lost Its Mind (Profile Books, 2024)

[28] ibid.

They offer to turn our legal refuse into gold. They are encouraged to say yes more, compete on being commercial, and more of a business partner. They suggest they might rather enjoy steamrollering our opponents. The desire to impress those we work with can be stronger than the effort and risk in resisting saying what they want to hear.

How decisions are taken

The way decisions are really taken adds to this. Systems thinking views decisions as relational, not rational, pragmatic, not analytical. Evidence and argument are often *not* weighed forensically. Satisficing takes place. Decisions are goal-oriented; attempts to garner or show control, and taken under, "difficult conditions …limited time, uncertainty, high-stakes, vague goals…."[29] It has been said, "We do not make decisions, we fight fires." We sense problems and react to their shape.

Disclosure may be an example. Evidence to the Inquiry suggests Post Office lawyers saw their goal as not disclosing harmful documents. Reasons were geared toward *finding a basis* for refusing disclosure. A fair application of disclosure tests was inherently unlikely; rationalisation of unfairness, likely.

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, towards integrity not self-interest?

A lawyer might say the rules of disclosure need changing, or investigation of failures just need to be improved.

A whole system approach suggests such changes are unlikely to work alone. A behavioural approach is needed, involving rules and processes that take better account of biases. Institutions, cultures, and philosophies

[29] Gary Klein, 'Naturalistic Decision Making', *Human Factors 50.3 (2008): 456-460.* 50, no. 3 (2008), p. 456.

and how people will respond to attempts to change them need to be factored in.

Because we are dealing with both deeply rooted orthodoxies and a complex system, changing it will be very challenging indeed. The desire to let the ripples of the Post Office Scandal dissipate and return to normal will be very strong.

A concerted effort across years, not months, will be needed.

Enforcement and culture change

A typical response to the litany of failures I have outlined is, *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.

There is, it seems to me, a very plausible case that enforcement, if done well, and as openly as possible, 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 SDT, that suggests they are sometimes too cautious, tending to pick low-hanging fruit. They indeed 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 BSB commissioned report was highly critical of BSB investigations. This, plus the LSBs own assessments of regulatory performance, suggest significant problems.

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 the SQE and tougher Bar Practice Course assessments have raised standards. Those claims can and should be tested as we did in this work.

For somewhat understandable reasons, the regulators have largely surrendered their soft power over undergraduate education. 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 improtant for students of law, whatever their eventual career, to be taught to think critically and reflectively about lawyering. 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 behaviour is difficult. The speed and invisibility of investigation and enforcement do not help; regulators could be more open, share better information, and 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.

That said, 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 less strong across all these areas.

The Courts

Courts can influence ethics through wasted costs, contempt applications, or disciplinary appeals. These are all topics for another time, but some points on how courts contribute to the broader ethical climate are merited.

Individual judges send mixed signals on ethics, varying in their enthusiasm for zeal and restraint. My instinct is 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. Similar ideological divisions may underly views on lawyers' conduct: there may, for instance, be something of a fetish made of the red-bloodedness of commercial litigation by some.

When faced with questionable conduct, judges can be disinclined to get too involved. They may talk equivocally about naughtiness, but are also sometimes accused of going off half-cocked in contempt cases. Problems with witness statements give rise to a host of difficulties. Poor management of these may encourage flat earth drafting.

It seems to me a thorough critical look at how judicial practice impacts litigation ethics would be timely and helpful. Ongoing constructive challenge may be needed to consider how the messages judges send, and the behaviours tolerated, 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 Sir Peter Fraser's handling of the Post Office case stands out. It has been made to me repeatedly by senior lawyers. They say, many High Court judges would *not* have stood up to the PO legal team as robustly as he did.

Sir Peter's immense judgments suggest they might be right in a number of 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 witness management in complex cases. That the Post Office legal

team tried to pressurise the judge in a number of ways also tells us they thought it a tactic worth trying. Judges are independent but also conscious of their reputations. There were costs and reputational risks in Sir Peter making such a powerful and prescient stand. The arguments made in and around the attempts to recuse him show this.

Another way of putting the point is that the big beasts of the professions, 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 of intellect and independence, but they also work alone. Better resourcing and support for judges, is both unlikely and *essential* to the management of cases with difficult parties and lawyers.

And however it is done there needs to be a *concerted*, ongoing, *visible* effort for regulators and judges to work together on cultural problems in litigation.

Let me shift to a new topic.

Changing the rules around legal risk

If lawyers are too zealous, too inclined to abuse arguability and fact management, 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 required in court proceedings? Should lawyers be required to operate under a extended obligations 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.[30]

Requiring reasonableness of interpretation outside of the courtroom, is more strongly indicated. When providing formal opinions or ordinary advice to clients, the law gives a push in that direction. That push might be made more firmly. We know advice-seeking can be manipulated by

[30] Elizabeth O'Loughlin, 'Transparency and Judicial Review, An Empirical Study of the Duty of Candour' (Nuffield Foundation, October 2024

clients, although professional failures to resist foreseeable or actual manipulation may also be an issue.

I said I was not sure because the minutiae of such judgements make enforcing different risk rules difficult and certain cases merit more flexible approaches: criminal defence in particular. 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. It might boil down to whether a higher test than properly arguable is easier to define and police? 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.

Accountability solutions (mitigations)

My instinct is that other more flexible, system-sensitive approaches may be more effective. Let me try and illustrate with another example.

Jordan Breslow was a General Counsel in the US. Breslow's CEO asked if they should offer new employees a particular stock option clause as an incentive for them to join the company. The clause enabled a particularly favourable valuation of the option. It was a great deal for the employee. Their competitors were offering these deals, making them more attractive, but something bothered Breslow and he took some time to think about it, to 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.

It was a good call. Such deals were subsequently investigated and prosecuted. They led to jail sentences, including for the 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 speak to suggest some basics.

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"; Chief Financial Officers 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 also had a "Let's not do anything illegal" philosophy. He also said he, "never felt unsafe …saying no to them or making a recommendation that they might not want to hear …"

In other words, philosophy and psychological safety are important. His model relies on trust and authenticity, as well as the *good-faith* handling of legal risk. Independence, to some degree, coexists with interdependence.

A rule cannot magic up this kind of relationship but certain kinds of rules may make it more likely. How?

There is evidence that in positions of responsibility, where they are accountable for those responsibilities, lawyers improve the management of risk.[31]

- Lawyers hired onto Boards or senior executive roles substantially reduce legal breaches.

[31] 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): 2099–2130.

- Illegality also decreases where lawyers have a "signing-off function", personal responsibility, "exposure to liability" or reporting requirements around legal risk.

Other things weaken these effects.[32] Aligning lawyers bonuses with business performance, a poor relationship with the CEO, and, for certain matters at least, the retention of 'top-tier' outside lawyers.

A worry might be that accountability mechanisms drive excessive risk aversion but the evidence does not suggest that either. One study found, "GCs appear to tolerate moderately aggressive behaviour but constrain it such that it would not result in violation of securities laws and jeopardize their standing within the firm".[33]

Accountability mechanisms are central to the Senior Managers and Certification Regime in financial services. 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 on culture including the culture around legal work.

For these reasons, I would suggest 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 named individuals are responsible for managing and taking legal risk decisions and that they can be held accountable for them. I would suggest that such people may

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[32] 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). 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. 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); Tanina Rostain and Milton C. Regan, Confidence Games: Lawyers, Accountants, and the Tax Shelter Industry (MIT Press, 2014). Preeti Choudhary, Jason D. Schloetzer, and Jason D. Sturgess, 'Boards, Auditors, Attorneys and Compliance with Mandatory SEC Disclosure Rules', Managerial and Decision Economics 34, no. 7–8 (1 October 2013): 471–87.

[33] Hopkins et al, op.cit.

need to be identified for legal risk management generally in organisations; and specifically for legal projects, especially litigation. So a company should have a named individual taking responsibility for oversight of legal risk, with default rules for when it is not done. In financial services, this role should be mandated under the Senior Managers and Certification Regime.

Corporate governance guidance should encourage good practice on legal risk management, ensuring and supporting the ultimate responsibility of the lead and the Board as appropriate. Board Effectiveness Reviews should actively consider legal risk management. And such guidance should cover appropriate lines of management (for the General Counsel, for instance) and channels of communication between the business and its legal advisers. Guidance (and lawyers' contracts) should include legal advisers (inside and outside the organisation) being able to access 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.

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, have begun to 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 may be particularly important for parties and legal teams that threaten or bring litigation. Indeed, an interesting suggestion made to me is that there may be a case for stricter regulation of litigation as a reserved matter, particularly in relation to disclosure. 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 Post Office Scandal also render it tempting to recommend disclosure problems be made subject to a failure to prevent 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 something less process-driven.

Challenging philosophies through lucid integrity

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? How do we encourage and empashise, rather than undermine, integrity and legality?

I have argued zeal crowds-out the true fundamentals of the legal profession: justice, honesty, and integrity. We need an approach that makes these public interest elements more lucid. Integrity needs to be strongly and clearly present in the early moments of problem-solving—front and centre, not back of mind.

I emphasise lucidity for practical, not theoretical reasons. A more lucid ethics should provide early-warning signs to think carefully and guide action. My thoughts on how to do this are preliminary. Our Post Office Project team, are researching how to evolve a more practical ethics. 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.

I think there are two aspects to this: one is about interpreting uncertain law in good faith. *Respecting* legality. Counselling towards, not away from, what the law requires. But 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 and much, if not all, falls into place.

As Professor Vaughan emphasises integrity underlines values already in professional law. Sir Tom Bingham's (when Master of the Rolls) reminded solicitors not to show "anything less than complete integrity, probity and trustworthiness" or expect severe sanctions….”[34] Sir Rupert Jacksons said more recently that integrity demands, "…more than mere honesty… [it involves taking] particular care not to mislead [and being] …scrupulous about accuracy"[35] The emphasis is important: scrupulousness, completeness, and particular care.

I would add to that the importance of integrity being judged in context, alongside the foreseeable consequences of one's actions. I cannot simply advise my client and be reckless as to whether they will use 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 I have an *argument* for saying that my expedient is not misleading; my *obligation*, the particular, scrupulous, active obligation, is on me not to mislead *anyone* or to be *complicit in* misleading anyone *in the context I am operating in*. It involves considering the purpose to which my work will be put.

Breslow's success is marked by stepping away from a narrow to a broader frame. He zooms out from the stock option is not clearly *illegal*, to *how can we honestly account for it?* Something similar is true for 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.

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[34] Bolton v Law Society [1994] 1 WLR 512.

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

If a firm 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 did the latter when advising on the lawfulness of the Northern Irish Protocol Bill for example.

Lawyers should not, for example, design a system weakening 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 they actually mean 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 of starting to flesh 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 witnessess in civil cases. It is another area where the BSB have done less well than the SRA.

There may be various ways to bring integrity further to the forefront, rendering it more lucid and practically tractable. Scrupulousness, completeness, particular care not to mislead, and responsibility of purpose should inform the aesthetic, featuring more prominently in any professional code.

This brings me to some words that should be diminished in the profession's ethical ideology.

Clear out fearlessness and the presumption on harm

What to do to aid lucid ethical thinking? We should mute two related ideas.

Fearlessness and the *presumption* that lawyers can harm third parties on behalf of their clients. They should be removed from the codes and guidance. They romanticise aggression and risk normalising what is a much more complex situation legally. Harm cannot always be avoided but being required to consider, and if proportionate, mitigate or alleviate such harm, might reduce some of the unnecessary excess.

Consider morality

There is a third piece of ground-clearing to ensure integrity is central. I would challenge the claim that lawyers do law but not morality.

I am not arguing 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 client self-interest. Banks thought evading US money laundering/sanctions controls okay because the "[effing] Americans" were engaged in regulatory imperialism; the Post Office'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 has said , "Commercial parties can be most unfair and entirely unreasonable, if they can get away with it."[36] Sumption's cynical logic does not make ignoring morality good legal risk management. Do 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. And many of the cases I have analysed contain such legal mistakes.

Moreover, a sophisticated body of literature points to legal reasoning having an inherently moral component, especially in difficult cases. Indeed, judges draw on morals when deciding hard cases. Such reasoning is not confined to judges or jurisprudes: Breslow's initial instinct picked up on discomfort not illegality.

[36] https://www.supremecourt.uk/docs/speech-170508.pdf

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. Anyone who thinks the 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. Rules, especially complex rules, unmoored from any notion of morality, beget manipulation.

There is a final reason I would give for saying lucidity requires morality. 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; littered with bias, partial sightedness, and so on. 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 want to go on but 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 reporting up and out; on lawyers as whistleblowers; on the abuse of privilege; and on the drafting of unreasonable contracts. The Bar, in particular, needs to revise its Code of Conduct. I would argue lawyers should have a single, unified code of conduct. But I want to return to one more systems-oriented point and deal with a problem that has bothered me a great deal since I began watching the Inquiry.

Tackling the self-concept

The Post Office Inquiry has been fascinating for the occasional, catalytic importance of independent challenge and accountability. Cross-examination has shown how revealing but also how hard it is to break through lawyers' defences against such a challenge. We all resist the idea that we are 'bad', especially (it turns out) when being live-streamed on YouTube, as those giving evidence at the Inquiry were. As lawyers

- we have our self-concept;

- we have the creativity of argument to justify our own or our client's 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 over 40% did not know or could not properly use their own rules. 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 expert evidence when prosecuting Seema Misra, painfully admitted, after a devasting cross-examination, "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".

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 this the professional imaginarium: we think of ourselves as more proper, competent, and ethical than we are.

Inpite of the imaginarium, the SRA's found that 10% of inhouse lawyers "said their regulatory obligations had been *compromised* trying to meet organisational priorities." This is concerning in itself but also leaves one wondering, how accurate were the other 90%? We have a clue from the 40% of barristers shakey on their own rules. These two figures, rough estimates at best of course, provide an important indication of the scale of the problem

How to overcome this weakness? How to build greater self-awareness and improvement? We need somehow to find additional mechanisms short of investigation for encouraging accountability and self-development. Ethical 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 FCA has skilled person reports. They appoint a skilled, independent person to require a report and remedial steps on a particular theme in a regulated firm. If the 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; or firm Y it's management of litigation holds, or Firms ABC about the due diligence they do before sending out SLAPP-like threats.

The COLPs role is, I would say, under-developed and the quality of COLPs and COLP-SRA relations is mixed. We know relatively little about effectiveness. These are areas which need review and improvement to make the role effective.

The regulators could also look to something similar to Board Effectiveness Reviews directed at how firms manage ethical culture. Reviews could drive improvement in the management of ethical culture by looking at COLP and firm practices. Care and time would be needed to develop reviews sufficiently independent, useful, and not tick-boxy in approach. It could mix voluntary approaches, and targeted compulsion, for instance of higher-risk firms or practice areas. The aim would be to develop, in lawyers and their firms, substantial and meaningful engagement with ethics and ethical leadership.

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, though, I think it is fair to say, enough.

Privilege

I have set out concerns about mutual irresponsibility and excessive zeal, but the eagle-eyed will have noticed I have not engaged that 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.

It is a very complex area and I do not want to make precipitous proposals on that subject tonight. The regulators (and the courts) plainly need to grasp the nettle of abuse though. And I would recommend too, a full, independent review of the law on privilege.

To conclude

The Post Office Scandal is a lesson in how lawyers played, not just with facts and rules. They played with lives. They ruined lives. Indeed, it's worse than that: they often *led* that harm. Incompetence and orthodoxy, cynicism and recklessness, complacency, vanity and, I am sorry to say, sometimes, dishonesty, played their part.

The Post Office Scandal shows us the lawyers have to do more than say sorry, half-heartedly or otherwise and be disciplined by stronger regulators. We have to change the way lawyers think and behave. We have to put complete integrity and particular care not to mislead at the front of our thinking. We should turn away from lauding amorality and guard against harm.

Lucid 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.

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 aligned, many will be opposed, and resources are thin on the ground. It will require exceptional leadership and determination.

It is for that reason I end with my final proposal. The Clementi reforms 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 Post Office Scandal suggests unfinished business that requires something of similar weight, independence and political commitment behind it. It needs to tackle issues in the professions, in the courts, and corporate governance, with its central agenda: how to improve honesty, integrity and effectiveness in the use of

law. It needs to lead independent of, but also working with, government, the professions, the courts and regulators. 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 programme of reform, not just one big bang. The victims of the Post Office Scandal do not just deserve more sincere apologies, and proper compensation, although please God let that be soon. They deserve real change in the integrity of lawyers, the legal system and those who use them. That means real change, properly implemented. It means much more, and is much harder, than mere words of the kind I offer up tonight.

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