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Introduction

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

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

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

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

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

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

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What Do I Mean by Unethical Lawyering?

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

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

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

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

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

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

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

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

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

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

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

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

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

So, I do not discount the importance of moral questions to professional legitimacy, still less exclude them from a notion of professional ethics, but I think it is important to concentrate on professional misconduct because it is fundamental; it is a *basic* expectation that lawyers adhere to their professional rules. Those rules are part of their law; they cannot be dismissed as the ethics of personal, idiosyncratic

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value judgments. Moreover, a failure to follow professional obligations can lead to even more serious problems. To stick with NDAs as an example, questions have been raised about whether lawyers may have perverted the course of justice and breached their professional conduct rules when drafting draconian gagging clauses.[6] Such (alleged) examples suggest that lawyers too often discount problems with the legality of their actions, if they think about them at all, and, as I will explore, use inadequate notions of professional ethics to ignore, discount, or excuse professional misconduct. This points towards one of my central concerns: professional misconduct is bound up in an ideology, a marriage of convenience between, philosophy, psychological identity, and economics that is itself flawed in ways I will explore.

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

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

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

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

The Post Office and Other Case Studies

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

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

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

As such, the case studies are not a complete record of what happened; such an account is impossible, of course. What I offer here is an attempt to write a fair account of events, but focused on potential breaches of professional

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ethics, on what we know now. The case studies are not intended to indicate that any individual *has* committed professional misconduct but will sometimes suggest that the evidence, as is known, suggests they might have done so. Sometimes, that evidence looks strong, other times the position is more balanced, but even where the evidence looks strong, we should withhold judgement on the individuals. We do not know the truth.

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

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

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

The Central Arguments of the Book

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

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

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

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

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

The Structure of the Book

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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