8

Routes Back to Proper Professionalism

I ended the previous chapter with a basic and practical question: what do we need to do to promote more rigorous, honest integrity and independence in the legal professions? I did so having explained how many lawyers and their host organisations are vulnerable to ethical failure. Difficult situations, complacent thinking, poor practices, and pressure can make fools of us all, but so can orthodox patterns of behaviour that disguise or ignore integrity problems. Seeing such problems as partly system-driven is not done to excuse individual responsibility, but it does indicate the need to think more broadly than blame in diagnosing and resolving the problems lawyers face. It is in the interests of justice, as well as those of clients and lawyers, that we reduce innocent error and poor judgement as well as misconduct. Behaviours and cultures need to change. We need to think about whole systems.

Allocate Blame but Also Change Systems

I have suggested that these failures, and others like them, are driven by human frailties and organisational cultures that reduce our capacity for objectivity. These failures are also driven by shallow, inadequate professional scripts and irresponsible orthodoxies. Mutual irresponsibility and zeal, often shielded from scrutiny through professional secrecy (privilege),

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encourages improper partiality: half-truths in the management of evidence and the application of law that can drown out honesty and integrity.

I have suggested this is very much not just a PO problem, illustrating this with cases for banks and oligarchs, the threats to national security posed by professional enabling, alleged SLAPPs, NDAs, corruption, and hacking. The Infected Blood Inquiry, which only contains a little on lawyering, conducted by Sir Brian Langstaff, reminds us that cover-ups are a broader cultural problem, engaging practices for which lawyers are too useful: deliberate concealment, lack of candour, half-truths, and the massaging of risk.

A whole systems approach to the PO scandal would require us to think about a lot. Government policy pushed the PO to be more commercial. It also rendered POL's board defensive and likely encouraged it to project competence it did not have. A culture of managing the optics rather than the substance of problems was an unsurprising side-effect of that. Government justice policy over many years has pushed courts to be more managerial. Criminal justice policy has been driven by the desire to be tough on crime and efficiency. Such policies couple-up with traditional notions of judging as passive arbiters that drive the design and resourcing of courts to the detriment of litigants in person and in ways that help explain some of the judicial dependence on the competence and propriety of the lawyers before it. If, as practitioners often claim, the courts are generally prosecution friendly, then a culture tolerant of prosecution incompetence creates the space to breed bigger

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problems. Systems for redressing inequality of arms that might tilt justice's playing field towards something more level (legal aid and rules on costs recovery, for instance) have been eroded over many years; litigation funding and class actions are subject to scrutiny and controls that other sources of funding are not.

I concentrate in this chapter on elements of the system most directly relevant to lawyers because that fits my own expertise, but also because the evidence suggests that in the PO scandal the lawyers were not merely advising – they were often running the show. Lawyers drove the view that prosecution was justified and, when challenged, that it was safe. Lawyers stepped in to say it would be unwise to investigate Horizon independently. Lawyers were crucially responsible for suppressing adverse evidence within the PO, and shaping how it was understood internally. Lawyers came up with the tactics in *Bates*. Lawyers also played an important role in helping POL with its lines to take when challenged by the press and Parliament. Early drivers for these positions may have come from the business, but I would say legal led most, if not all, of the time.

Even so, a systems approach reminds us of multiple influences and levels of the system at work here. Let us think about where the 'facts' about Horizon came from, for instance: witnesses running the Horizon system wanted to look competent and help; lawyers glossed their stories in witness statements; 'sophisticated' evidence management built glosses to a varnish, skirting, ignoring, and suppressing adverse evidence; a self-justificatory truth was created. A flat earth.

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Story refinement is both natural and dangerous. And those stories are interpreted by decision-makers who react 'to their immediate pain points'.[1] They hear what they want to hear, are told what they want to be told, and steer the conversation to make clear what is helpful. When Paula Vennells wrote to her colleagues for clarification on the true position on remote access, she asked:[2]

> What is the true answer? I hope it is that we know this is not possible and that we are able to explain why that is. I need to say no it is not possible and that we are sure of this because of xxx and that we know this because we have had the system assured.

People in the chain of command often let things slide that they should not, or disregard things that they do not understand. The business wants success, optimism, and a way forward. The story and the advice adapt to meet that need. Problems – factually complex and involving many different aspects of the business, spread over a lengthy history – become distorted. No one is responsible for the holes. Everyone has reasons for forgetting or not mentioning difficulties; they do not consider themselves responsible for decisions they do not feel they are actually taking.[3] It is someone else's job to speak up if there are problems.

[1] Davies (see n.13), 73.

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

[3] Davies (see n.13), 68.

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What Organises Such Systems in Practice?

Such failures are organised by individuals operating within the system's dynamics. This should make us wonder why *this* system is unbalanced. What is wrong with its identity, philosophy, and purpose?[4] Viable systems 'seek stability, not maximisation', balance long-term and short-term interests, and do not allow one signal in the system to swamp all others.[5] What we see in the PO scandal is information being processed based on what is *arguable* or *helpful* rather than what is true, fair, and balanced. A culture of 'can we get away with it?' is driven by wishful thinking and legitimised by lawyerly zeal. What is maximised is a self-serving version of truth.

In aligning the interpretation of facts, law, and the design of strategy to the client's preferences *maximally*, lawyers cease to maintain the integrity of their role. A lack of independence means the legal signal that a lawyer sends into the system becomes slanted, something of a cypher for the self-interest of the lawyer and those around him. It is or can become misleading.

This pressure on independence is an everyday phenomenon, as the SRA's thematic review on in-house practice has shown.[6] But the signs are there for private practice too. They offer to turn our legal refuse into gold. They are sounded out before they get instructed to see if they will be helpful in their approach to the case. They are encouraged to say yes to what it is the client needs or wants. They compete on *being*

[4] Davies (see n.13), 125. [5] Davies (see n.13), pp. 265–68.

[6] SRA Thematic Review on In-House Lawyers, 2024, www.sra.org.uk/sra/research-publications/in-house-solicitors-thematic-review.

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commercial, and more *business partnerish*. They suggest they might rather enjoy steamrollering our opponents. The desire to impress the client can be stronger than the effort and risk in resisting what their clients want to hear.

How Decisions Are Taken

The way decisions are really taken can magnify these problems. Systems thinking views decisions as relational not rational, pragmatic not analytical.[7] Evidence and argument are often *not* weighed forensically. Decisions are taken that aim for satisficing not optimality: the aim is 'good enough' – rather than 'good' – decisions. Compromise creeps in and shifts attention away from the more wicked problems. Decisions are goal-oriented.[8] They are attempts to garner or show control, often taken under 'difficult conditions . . . limited time, uncertainty, high-stakes, vague goals'.[9] It has been said that 'We do not make decisions, we fight fires.'[10] We sense problems and react to their shape. Disclosure may be an example. Evidence to the inquiry suggests that PO lawyers saw their goal as not disclosing harmful documents rather than properly considering whether such documents should be disclosed. Reasons were geared towards *finding a basis* for refusing disclosure. A fair application of disclosure tests was inherently unlikely, and rationalisation of unfairness likely.

[7] Gary Klein, 'Naturalistic Decision Making', *Human Factors* 50, no. 3 (2008): 456–60.

[8] B. Brehmer, 'Dynamic Decision Making: Human Control of Complex Systems', *Acta Psychologica* 81, no. 3 (December 1992): 212.

[9] Klein (see n.385), p. 456. [10] Brehmer (see n.386), p. 212.

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How *Do* We Change Decisions and Behaviour?

An interesting question is: Can we – or *how* can we – reorient decisions towards what the rules actually require, and towards integrity not self-interest?

A lawyer might say that the rules of disclosure need changing or the investigation of failures just needs to be improved. A whole-system approach suggests that rule changes are unlikely to work alone. A behavioural approach is needed, involving rules and processes that take better account of biases.[11] Institutions, cultures, philosophies, and how people will respond to attempts to change them need to be factored in. Because we are dealing with both deep-rooted orthodoxies and a complex system, changing it will be very hard indeed. The desire to let the ripples of the PO scandal dissipate and the surface of law's pond to return to normal will be very strong. A concerted effort across years, not months, will be needed to change the behaviour and ways of thinking of lawyers. Such a change would need to be capable of coping with a differentiated spectrum of behaviours: from intentional wrongdoing, recklessness, cynicism, and negligence, through to misguided error.[12]

[11] Yuval Feldman, *The Law of Good People: Challenging States' Ability to Regulate Human Behavior* (Cambridge University Press, 2018).

[12] Alexander Conrad Culley, 'How Effective Are the Enforcement Activities of Derivatives Exchanges in the Digital Age? A Survey of Enforcement Notices through the Lens of Humans', *Journal of Financial Regulation and Compliance* 32, no. 3 (2024): 313–54; Judith Bovensiepen and Mathijs Pelkmans, 'Dynamics of Wilful Blindness: An Introduction', *Critique of Anthropology* 40, no. 4 (1 December 2020): 387–402.

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Enforcement and Culture Change

A typical response to the litany of failures I have outlined is that we just need to punish the bad apples. Rigorous investigation and firm but fair enforcement are essential to persuading the public to trust law and the professions to take professional standards seriously at all times. The senior figures in this story need particular scrutiny if regulators are to be taken seriously and the professions are to deserve public trust.

There is, it seems to me, a very plausible case that, if done well and as openly as possible, enforcement can significantly improve culture, but even if done perfectly, it alone is not enough. Enforcement only touches cases investigated by the regulators. It is reactive, expensive, and vigorously resisted, especially by well-resourced lawyers and firms. It also shreds the nerves and lives of those involved. There is evidence, mainly anecdotal but of good quality, that SRA investigation is not done as well as it should be.

Whilst the SRA has high success rates at the Solicitors Disciplinary Tribunal (SDT),[13] this suggests that they are sometimes too cautious, tending to pick low-hanging fruit. They recruit investigators at levels unlikely to regularly attract the calibre necessary to take on big firms well, for instance. For the Bar Standards Board, the situation is significantly worse. In particular, Fieldfisher's 2024 BSB-commissioned report was

[13] Andrew Boon and Avis Whyte, '"Trusted to the Ends of the Earth?" An Analysis of Solicitors' Disciplinary Processes in England and Wales from 1994 to 2015', *International Journal of the Legal Profession* 28, no. 2 (10 March 2021): 1–29.

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highly critical of BSB investigations.[14] This, plus the Legal Services Board's own assessments of regulatory performance, suggest significant problems.[15] Smarter, better resourced, more respected regulators (or a single regulator) and possibly a single disciplinary tribunal are essential elements of change.

Education

Of course, good qualifications and ongoing education are essential. The regulators hope that the Solicitors Qualifying Examination (SQE) and tougher Bar Practice Course assessments have raised standards. Those claims can and should be tested. I was involved in some such work for the Inns of Court College of Advocacy.[16] The regulators have largely surrendered their soft power over undergraduate education, for understandable but perhaps short-sighted reasons. Clinics aside, courses on lawyers and especially ethics have always been Cinderella subjects in UK law schools. Law School Heads, and hitherto uninterested law firms, should be clamouring to change this. It is incredibly important for students of law, whatever their eventual career, to be taught to think critically and reflectively about lawyering.

[14] Fieldfisher, 'Bar Standards Board Enforcement Review', April 2024, https://bit.ly/4j795nL.

[15] 'Current Regulatory Performance Assessments', *The Legal Services Board* (blog), March 2025, https://bit.ly/4seQEBW; and in particular Legal Services Board, 'Regulatory Performance: Performance Assessment November 2022 An Assessment of Each Legal Services Regulatory Body against the LSB Regulatory Performance Standards', 12 January 2023, https://bit.ly/3KMH2NY.

[16] Moorhead et al. (see n.258).

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For practising lawyers, some suggest compulsory annual refresher training on ethics. How to get learning on ethics taken seriously, especially in practice, in a way that changes thinking and behaviours is difficult. The speed and invisibility of investigation and enforcement does not help; regulators could be more open, share better information, look for ways to spark more water-cooler debate. The regulators, who are often pretty ordinary producers of research, could agree to fund an independent centre of research and education to drive educational infrastructure, debate, and insight.

And, whilst execution could be improved, the SRA's guidance, thematic reviews, and warning notices in particular, have progressed debate. I would believe, although without substantial evidence, that it improves practice. More robust enforcement might also drive an appetite for preventative training. Another route to progress is to start engaging with and challenging what chambers, firms, teams and especially COLPs (compliance officers in law firms) do to foster an ethical culture. I shall return to this later. I would say the BSB is also less strong across these areas.

The Courts

Courts can influence ethics by punishing errors (through wasted costs and contempt applications) and via oversight of disciplinary tribunals through appeals; these are topics for another time. Some points on how courts contribute to the broader ethical climate, though, are merited. Individual judges send mixed signals on ethics, varying in their enthusiasm

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for zeal and restraint.[17] My instinct is that this depends on the case before them, varied grasps of regulatory law, and divergent philosophies. John Sorabji has suggested that elements of civil justice reform have been resisted by what he calls judicial traditionalists and rejectionists.[18] Similar ideological divisions may underlie views on lawyers' conduct: there may, for instance, be a fetish made of the red-bloodedness of commercial litigation by some.

It is also important to note that, when faced with questionable conduct, judges can be disinclined to get too involved. They may talk equivocally about practitioner misconduct because they are unsure whether the lawyer to the client is to blame for problems and tend to give practitioners a wide margin for error but, equally, and oppositely, are also sometimes accused of going off half-cocked in contempt cases when they do intervene. Problems with witness statements give rise to a host of difficulties. Weak general management of witness statements generally by the courts, who naturally enough want to concentrate on the substance of a case not its procedural instantiations, may encourage flat-earth drafting. It seems to me that a thorough critical look at how judicial practice impacts litigation ethics would be timely and helpful. Ongoing constructive challenges may be needed to consider how the messages judges send, and the behaviours tolerated,

[17] Compare 'Haddad v Rostamani & Ors [2024] EWHC 448 (Ch) (1 March 2024)'; Gloster J, *Berezovsky* v *Abramovich* [2012] EWHC B15 (Ch) (EWHC (Ch) 31 August 2012); *Bates No. 6*; R v Farooqi & Ors [2013] EWCA Crim 1649.

[18] John Sorabji, *English Civil Justice after the Woolf and Jackson Reforms: A Critical Analysis*, 1st edn (Cambridge University Press, 2014).

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align with ethics, justness, and professional codes, not to mention proportionality.

Problems may not primarily be about rules but about power and culture. One comment, about Mr Justice Fraser's (as he now is) handling of the PO case stands out. It is a point that has been made to me repeatedly by senior lawyers. They tell me many High Court judges would *not* have stood up to the PO legal team as robustly as he did. Mr Justice Fraser's immense judgments suggest they might be right in some important ways. One can easily imagine a judge taking a far less robust line in *Bates*, making some gentle remarks about polishing evidence or the perils of witnesses in complex cases, and leaving it there. That the PO legal team tried to pressurise the judge in several ways also tells us that they thought pressure a tactic worth trying. Judges are independent, but are also conscious of their reputations. There were costs and reputational risks in Mr Justice Fraser making such a powerful and, as it transpired, prescient stand. The arguments made in and around the attempts to recuse him show this and suggest that there may be something in the point that suggests judicial independence needs nurturing more generally.

Another way of putting the point is that big beasts, firms in particular, appear to have more institutional power than courts and regulators over the culture of litigation. They can fight the long game, through appeals and in any subsequent regulatory investigation, as repeat players. Judges are exceptional in intellect and independence, but they also work alone. Better resourcing and support for judges is both politically unlikely and yet essential to the management of cases

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with difficult parties and lawyers. More generally, there needs to be a *concerted*, ongoing, *visible* effort for regulators and judges to work together on cultural problems in litigation.

Changing the Rules Around Legal Risk

If lawyers are too zealous, too inclined to abuse arguability, and overly 'sophisticated' in their presentation and containment of facts, can we simply change their rules of engagement? Rather than allow any merely arguable point to be taken, could a higher threshold be demanded? Could the rules require arguments to be closer to well-founded and reasonable, rather than merely arguable? Could this be done in court proceedings or only in advisory work? Should lawyers be required to operate under an obligation of candour?

For reasons I will explain, I am not sure, but interestingly, candour is required in some cases, and recent research suggests it works reasonably well in judicial review. However, there are examples of the duty being seriously breached by the government.[19] Requiring reasonableness of interpretation outside of the courtroom is more strongly indicated. When providing formal opinions or ordinary advice to clients, the law encourages a balance, requiring consideration of both the merits and risks.[20] That push

[19] Elizabeth O'Loughlin, 'Transparency and Judicial Review, An Empirical Study of the Duty of Candour' (Nuffield Foundation, October 2024), https://bit.ly/3Lgr6DH. *R* v *ex p. Citizens UK* [2018] EWCA CIV 1812.

[20] Richard Moorhead, 'Unpicking Mutual Irresponsibility', *Thoughts on the Post Office Scandal* (blog), 21 March 2025, https://richardmoorhead.substack.com/p/unpicking-mutual-irresponsibility.

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might be made more firmly. We know that advice-seeking can be manipulated by clients, although professional failures to resist foreseeable or actual manipulation may also be a concern.

I said I was not sure about such an approach because the minutiae of such judgements make enforcing different risk rules difficult. Law (sometimes) and facts (often) are protean: they are genuinely uncertain. Judging, after the event, a lawyer's application of uncertain law to messy 'facts on the ground' is difficult. Additionally, certain cases warrant more flexible approaches. In criminal defence, for instance, there are already cultural tendencies for lawyers to doubt their clients in situations of profound jeopardy to them.[21] A rule change that does not address that problem might well make things worse and reinforce ways in which the criminal justice system acts against the presumption of innocence. Criminal defence aside, the answer may boil down to whether a higher test than 'properly arguable' is easier to define and enforce. I do not know. Requiring arguments to be supported by sufficient evidence *in the relevant context* and guarding against the exploitation of advice may work better.

[21] Mike McConville, Jacqueline Hodgson, Lee Bridges, and Anita Pavlovic, *Standing Accused, The Organisation and Practices of Criminal Defence Lawyers in Britain* (Clarendon Press, 1994); Daniel Newman, 'Still Standing Accused: Addressing the Gap between Work and Talk in Firms of Criminal Defence Lawyers', *International Journal of the Legal Profession* 19, no. 1 (March 2012): 3–27; Daniel Newman, *Legal Aid Lawyers and the Quest for Justice*, 1st edn (Hart Publishing, 2013).

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Accountability Solutions (Mitigations)

Other, more flexible, system-sensitive approaches may be more effective than simply changing the arguability test. Let me try and illustrate with another example.[22]

Jordan Breslow was a GC in the United States. Breslow's CEO asked if they should offer new employees a particular stock option clause as an incentive for them to join the company.[23] The clause enabled the option's price to be calculated in a way particularly favourable to the employee. The company's competitors were offering these deals, making them more attractive to would-be hires, and yet something bothered Breslow, and he took some time to think about it, research it, and talk it through with others. Here is how he described it:

> Other people were doing it. The advice from outside law firms . . . [was] there's nothing strictly illegal about that . . . that may well be correct technically. . . . [But, I realised] . . . illegality can come from the fact that you failed to disclose and account for this practice.
>
> But all in all it seemed . . . too good to be true . . . and I said so to Ben [his CEO].
>
> . . . I . . . [said] it didn't make sense to me. I didn't think it was strictly legal and I didn't want to mess with it.

In spite of the advice that it was not strictly illegal, Breslow's was a good call. Such deals were subsequently investigated

[22] Ben Horowitz, 'Why I Did Not Go to Jail' (Andreessen Horowitz, 6 February 2014), https://a16z.com/2014/02/06/why-i-did-not-go-to-jail.

[23] Richard Moorhead, 'Not *Strictly* Legal: When and How to Say No as a GC' (*Lawyer Watch*, 25 April 2023), https://bit.ly/4j7rPUp.

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and prosecuted. They led to jail sentences, including for the Chief Financial Officer (CFO) that had recommended it to Breslow's boss.

Building a relationship of trust is complicated, but Breslow and a substantial number of the GCs I have spoken to suggest some basics.[24] The GC should always report to the CEO. Breslow describes reporting *indirectly* as self-evidently wrong: there is a necessary tension with the 'numbers guys'; CFOs tended to be strong, 'creative people'. GCs are there to 'keep them honest . . . [Y]ou keep people from acting on their own worst impulses.' Breslow was not risk-averse, just not risk-maximising. He was willing to be aggressive and creative, but he also had a 'let's not do anything illegal' philosophy. And he also said he 'never felt unsafe . . . saying no to them or making a recommendation that they might not want to hear'.[25] In other words, philosophy and psychological safety are important: his model depends on trust and authenticity, on the *good faith* handling of legal risk. Independence, to a degree at least, coexists with or operates within social systems of interdependence.[26] A rule cannot magic up the right kind of relationship, but certain types of rules may make it more likely. How?

There is evidence that in positions of responsibility, where they are accountable for those responsibilities,

[24] Richard Moorhead, Trevor Clark, Alan Brener, Paul Gilbert, and Steven Vaughan, 'In-House Lawyers and Non-Executive Directors: A Discussion About Best Practice', *SSRN Scholarly Paper* (Rochester, NY: Social Science Research Network, 27 June 2019).

[25] Moorhead (see n.402).

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

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lawyers improve the management of risk. Lawyers hired onto boards or in senior executive roles tend to substantially reduce legal breaches.[27] Compliance is improved by requirements that individual lawyers take personal responsibility for (say) SEC disclosures with some 'exposure to liability' as a result.[28] In the US, the Sarbanes-Oxley Act led to securities rules requiring lawyers to report misconduct up the corporate ladder. This is said to have amplified the positive effects of legal expertise in this process. Other things weaken these effects. Aligning lawyers' bonuses with business performance,[29] a poor relationship with the CEO,[30]

[27] Compare Byungjin Kwak, Byung T. Ro, and Inho Suk, 'The Composition of Top Management with General Counsel and Voluntary Information Disclosure', *Journal of Accounting and Economics* 54, no. 1 (August 2012): 19–41; Charles Ham and Kevin Koharki, 'The Association between Corporate General Counsel and Firm Credit Risk', *Journal of Accounting and Economics* 61, no. 2–3 (April 2016): 274–93; Jayanthi Krishnan, Yuan Wen, and Wanli Zhao, 'Legal Expertise on Corporate Audit Committees and Financial Reporting Quality', *The Accounting Review* 86, no. 6 (2011): 2099–130.

[28] Adair Morse, Wei Wang, and Serena Wu, 'Executive Lawyers: Gatekeepers or Strategic Officers?', Working Paper (National Bureau of Economic Research, September 2016); Alan D. Jagolinzer, David F. Larcker, and Daniel J. Taylor, 'Corporate Governance and the Information Content of Insider Trades', *Journal of Accounting Research* 49, no. 5 (1 December 2011).

[29] Morse, Wang, and Wu, 'Executive Lawyers'; Justin J. Hopkins, Edward L. Maydew, and Mohan Venkatachalam, 'Corporate General Counsel and Financial Reporting Quality', *Management Science* 61, no. 1 (January 2015): 129–45.

[30] Beng Wee Goh, Jimmy Lee, and Jeffrey Ng, 'The Inclusion of General Counsel in Top Management and Tax Avoidance', *SSRN Scholarly Paper* (Rochester, NY: Social Science Research Network, 8 July 2015);

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and, for certain matters at least, the retention of 'top-tier' outside lawyers incline their organisations to behave more riskily.[31]

A worry might be that accountability mechanisms drive excessive risk aversion, but the evidence does not suggest that either. Lawyer restraint of excessive risk is real but modest. One study found that 'GCs appear to tolerate moderately aggressive behaviour but constrain it such that it would not result in a violation of securities laws and jeopardize their standing within the firm'.[32]

Accountability mechanisms are central to the Senior Managers and Certification Regime in financial services.[33] Evaluation of these reforms is thin on the ground, but I am told regularly, especially by lawyers in financial services, that this has had a significant beneficial influence, including on the culture around legal work.[34] Hickman and Brener's recent work suggests that their interviewees saw that the level of accountability had improved, but there was a range of

Tanina Rostain and Milton C. Regan, *Confidence Games: Lawyers, Accountants, and the Tax Shelter Industry* (MIT Press, 2014).

[31] Preeti Choudhary, Jason D. Schloetzer, and Jason D. Sturgess, 'Boards, Auditors, Attorneys and Compliance with Mandatory SEC Disclosure Rules', *Managerial and Decision Economics* 34, nos 7–8 (1 October 2013): 471–87.

[32] Hopkins et al. (see n.408).

[33] Along with pre-approval of senior managers and annual certification that staff in high-risk roles are fit and proper persons.

[34] Trevor Clark, Richard Moorhead, Steven Vaughan, and Alan Brener, 'Agency over Technocracy: How Lawyer Archetypes Infect Regulatory Approaches: The FCA Example', *Legal Ethics* 24, no. 2 (3 July 2021): 91–110.

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views – positive, negative, and ambivalent – on the impact on culture and professionalism.[35]

I would suggest that ethical reform should have a particular focus on building and strengthening accountability systems for legal risk in organisations and in the professions. In broad terms, accountability systems need to ensure that named individuals are responsible for managing and taking legal risk decisions and, avoiding mutual irresponsibility, that they can be held accountable for them. I would suggest that such people may need to be identified for oversight of legal risk management generally in organisations and, more specifically, for material legal projects, especially major litigation. A company should have a named individual taking responsibility for the oversight of legal risk, with default rules for when they do not. In the financial services sector, this role should be mandated under the Senior Managers and Certification Regime.[36]

Corporate governance guidance should also encourage good practice on legal risk management, ensuring and supporting the ultimate responsibility of the lead and the board as appropriate. Such guidance should cover appropriate lines of management (for the GC, for instance) and

[35] Eleanore Hickman and Alan Brener, 'The Senior Managers and Certification Regime in UK Practice and Global Context', *Journal of Banking Regulation*, 7 January 2025.

[36] A version of this recommendation was adopted in Institute of Directors, 'The Post Office Scandal, A Failure of Governance, Insights for Directors and Policy Makers from Phase 6 of the Public Inquiry', October 2024, https://bit.ly/3Y7ZBza.

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channels of communication between the business and its legal advisers. Board Effectiveness Reviews should actively consider legal risk management. Guidance (and lawyers' contracts) should include legal advisers (inside and outside the organisation) having access to an organisation's senior decision-makers when dealing with matters of serious concern. Professional regulation and guidance for lawyers should aim to mirror these requirements.

Legal services regulators do not have the power to regulate in-house lawyers unless they happen to be (say) solicitors or barristers, but they could do more to strengthen leadership and responsibility in teams through supervision requirements. The SRA, after much urging, has begun to better define independence, for instance. The power of regulators to regulate in-house lawyers and support their independence more broadly is a knotty technical problem. I can think of various ways of solving it, some involving legislation, but one thing that might give the regulators sufficient leverage to make a real difference would be to make providing legally privileged advice a reserved matter requiring a practising certificate.

Better accountability mechanisms might be particularly important for parties and legal teams threatening or bringing litigation. Indeed, an interesting suggestion is that there may be a case for firmer regulation of litigation as a reserved matter, and disclosure in particular. Something like a separate disclosure officer, as is best practice in prosecutions, and documented responsibility and sign-off around privilege, disclosure, and redaction, might improve disclosure. The extent and nature of disclosure failures in the PO

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scandal also render it tempting to recommend that disclosure problems be made subject to a failure to prevent type obligation, including responsibility for the proper management of legal privilege.

There would obviously be debates to be had about practicality, proportionality, and effectiveness, but accountability mechanisms are one of the few things that have been shown to work in restraining serious excess in risk-taking. COLPs are another point of accountability, but for now I want to change topic to other ways of changing the culture and behaviour of lawyers.

Challenging Philosophies Through Lucid Integrity

The Breslow story was about relationships, but also about philosophy. Can a profession's philosophy be changed? Can better models of ethics contest cynicism, expedience, or sophistry? I have argued that zeal crowds out the true fundamentals of the legal profession: justice, honesty, and integrity. How do we encourage and emphasise, rather than undermine, integrity and legality?

We need an approach that makes these public interest elements more lucid. By lucidity, I mean that those public interest elements, integrity in particular, need to be strongly and clearly present in the early moments of problem-solving. They need to be front and centre, not back of mind, when lawyers are thinking about the choices that face them and their clients.

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I emphasise lucidity for practical, not theoretical, reasons.[37] A more lucid ethics should provide early warning signs to prompt careful thought and guide action. My thoughts on how to do this are preliminary. I am leading the Post Office Project team, which is conducting in-depth research on how to develop more practical ethics. A starting point would be to note that how we frame situations can transform our perception of those situations and our responses to them, and, ultimately, how those frames can lead to better models for simulating and addressing the ethical dimensions of a problem. Those frames must grapple with the objectives, value structures, and subjective preferences of those making the decisions: we need to shape their problem space (their goals, priorities, functions, processes, and configuration). I should also emphasise that while lucidity emphasises clarity and prioritises integrity, it does not exclude complexity below the surface where it is merited. To this end, we are working with lawyers on causal maps of ethical situations and how they handle moments of challenge. Stephen Mayson's work on public interest and Steven Vaughan's on integrity provide rich food for thought too.[38]

[37] I am grateful to Iris van Domselaar for suggesting the relevance of non-ideal theory; see also David Schmidtz, 'Nonideal Theory: What It Is and What It Needs to Be', *Ethics* 121, no. 4 (2011): 772–96; Laura Valentini, 'Ideal vs. Non-ideal Theory: A Conceptual Map', *Philosophy Compass* 7, no. 9 (September 2012): 654–64.

[38] Stephen Mayson, 'Legal Services Regulation: The Meaning of "the Public Interest"' (UCL, London, September 2024), https://bit.ly/44A6vko; Steven Vaughan, 'Moral Remainders: What Is The Price of Professional Integrity?' *SSRN*, 6 June 2024, http://dx.doi.org/10.2139/ssrn.4856109.

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I think there are two aspects to integrity worth dwelling on now: one is about interpreting uncertain law, in good faith. That is, *respecting* legality and counselling towards, not away from, what the law requires. I am going to concentrate on a second, overlapping issue: integrity with facts and process, and its relationships with honesty, ethics, and the rule of law. My instinct is: get integrity right in this second sense and much, if not all, falls into place. As Vaughan emphasises, integrity underlines values already in professional law. Sir Tom Bingham (when Master of the Rolls) reminded solicitors if they showed 'anything less than *complete* integrity, probity and trustworthiness' they could expect severe sanctions.[39] Sir Rupert Jackson more recently said that integrity demands 'more than mere honesty ... [it involves taking] particular care not to mislead [and being] ... scrupulous about accuracy'.[40] The emphasis is important: scrupulousness, completeness, and *particular care*. I would add to that list the importance of integrity being judged in context, alongside the foreseeable consequences of one's actions. I cannot simply advise my client recklessly risking their use of my advice to mislead others, for instance.

Expedience and zeal encourage lawyers to narrow their focus, to frame facts and law opportunistically, to search for an *excuse* for doing that which the law, in spirit and not uncommonly in reality, prohibits. It is not enough to think that I have an argument for saying my position is not

[39] *Bolton* v *Law Society* [1994] 1 WLR 512.

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

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misleading; my obligation, my scrupulous and active obligation, is to not mislead anyone or to be complicit in misleading anyone in the context in which I am operating.

This includes a need to consider the purpose to which my work will be put. Breslow's success is marked by stepping away from a narrow frame (it is not strictly illegal, his outside lawyers had advised) to a broader frame: the stock option is not clearly illegal, but how can we honestly account for it?

Something similar applies to the interpretation of law. My interpretation may explore uncertainty but should also respect legality; if done in good faith, uncertainty and the risks of illegality that flow from them must be analysed and described as impartially as possible, attending to the context. If a lawyer is asked for an opinion that will foreseeably assist illegality or mislead others they should decline or take reasonable steps to prevent or limit that risk. James Eadie KC arguably did the latter when advising on the government's attempt to amend the Northern Irish Protocol. He was asked to advise on the assumption that the Bill to do this did not breach international law. The substance of his response was leaked to a journalist:[41]

> he [says] has been asked only to 'assume' there is a respectable legal basis on which to support the arguments made by the other lawyers. 'He says he is happy to comply with this request' – 'I do so,' he writes – but then adds 'I am not asked to opine on the merits of those views' . . . Eadie's

[41] David Allen Green, 'The Odd and Worrying Situation of the Legal Advice on the Northern Ireland Protocol', *The Law and Policy Blog* (blog), 9 June 2022, https://bit.ly/49nEpLL.

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> agreement to do as directed – and rely on the view of other lawyers – allows the government to say he was consulted more generally and is on board with the plan. Inconveniently, however, he is understood to have then volunteered a view in his submission: that he found the argument of one particular lawyer advising government 'considerably easier to follow and more convincing'. The lawyer he cites says that it would be 'very difficult' for the UK to argue it is not 'breaching international law'.

Lawyers should not, for example, design a system that weakens sanction controls and advise it is 'reasonable' when they have advice that it is unlawful. Rather than illusions of reasonableness disguising or excusing illegality, they need to show *complete* integrity *in context*. They should counsel towards, not away from, legality.

Lawyers may need to be encouraged to think contextually by better scaffolding. Drawing on SDT dicta, supported in the High Court case of Simms, the SRA have said a solicitor must sometimes say 'it may be lawful for you to do X, but I will not do it'. They have been coy about what this actually means, though. Simms is a consequential liability type situation about assisting with highly dubious transactions. Setting out all the consequential liability risks on lawyers when dealing with questionable projects would be one way for the SRA to start to fleshing out what 'potentially lawful' things should not be done.

The NDA debate has been rendered much more real by recognising that *how* lawyers draft NDAs can pervert the course of justice, for instance. Recent stories about

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Mohammed Al Fayed show us an obvious but ignored risk about NDAs and potential witnesses in civil cases. For now, SRA guidance concentrates on NDAs that inhibit reporting to regulators, or to the police; it does not address the use of NDAs to inhibit witnesses cooperating with civil cases. That said, NDA guidance is another area where the BSB have done less well than the SRA.

There may be various ways that integrity can be brought further to the front, rendered more lucid and more practically tractable. Scrupulousness, completeness, particular care not to mislead, and responsibility of purpose should inform the aesthetic, featuring more prominently in any professional code. Thinking about the aesthetic brings me to some words that should be diminished in the profession's ethical ideology.

Clear Out Fearlessness and the Presumption on Harm

To aid more lucid and appropriate ethical thinking, we should mute two related ideas. The promotion of fearlessness and the presumption that lawyers can harm third parties for their clients should be removed from the codes and guidance. These two ideas romanticise aggression and risk normalising harm. They also simplify a situation more legally complex than professional rhetoric suggests. Harm to a client's opponents, for instance, cannot always be avoided, but being required to consider and, if proportionate, mitigate or alleviate harm might reduce some of the unnecessary excess that lawyers engage in.

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Consider Morality

There is a third piece of work I think necessary to ensure integrity is central. We need to more clearly challenge the claim that lawyers do law but not morality. That does not require us to argue that morality should generally trump legal rights, but there is a great deal of hypocrisy in lawyers saying they do not do morality.

The disclaiming of morality often merely makes room for a morality defined by the client's self-interest.[42] Banks thought evading money laundering controls okay because the '[effing] Americans' (as they referred to them) were engaged in regulatory imperialism;[43] the PO's obscene behaviour was dignified as protecting pensioners against 'thieves and liars'. From time to time, a show is made of excluding morality from legal reasoning. Lord Sumption, for example, said 'Commercial parties can be most unfair and entirely unreasonable, if they can get away with it.'[44] Sumption's cynical logic does not make ignoring morality good legal risk management. Doing something 'entirely unreasonable' is likely to inspire opponents, regulators, politicians, and the press to take your client on. They will publicise your amorality and seek out your legal mistakes. Many of the cases I have covered contain such legal mistakes. Think back to SCB's wire-stripping example: they thought they could enforcement-proof their scheme for side-stepping

[42] Atkinson (see n.285). [43] Lawsky (see n.369).

[44] www.supremecourt.uk/docs/speech-170508.pdf, and see Mindy Chen-Wishart, 'Schrödinger's Lawful Act Duress: Dead or Alive?' *Oxford Law Blogs*, 27 March 2024, https://bit.ly/4qmgovQ.

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US rules on due diligence and defend the practice if exposed on the basis that it was reasonable rather than lawful.

Moreover, lawyers may sometimes need to consider morality when contemplating how courts will act. A sophisticated body of literature suggests that legal reasoning inherently incorporates a moral component. Indeed, judges draw on morals when deciding hard cases.[45] Such reasoning is not confined to judges or legal theorists: Breslow's initial instinct picked up on discomfort, not illegality. Law is also replete with moral tests (dishonesty, reasonableness, iniquity, etc.), and, contrary to what we might expect, used wisely, such tests can improve legal certainty not reduce it.[46] Anyone who thinks that rules and amoral application lead to greater certainty and justice should read the contract arguments advanced for saying Harvey Weinstein's NDA was perfectly proper.[47] Rules, especially complex rules, unmoored from any notion of morality, can plainly beget manipulation and self-serving ex-post arguments.

[45] See Alan Bogg, 'Doctrinal Method in Labour Law in Common Law Systems: Potential, Problems, Prospects', in *Research Methods in Labour Law* (Edward Elgar Publishing, 2024), 186–218, citing Raz and Kahn-Freund.

[46] Fred Ellinghaus and Ted Wright, 'The Common Law of Contracts: Are Broad Principles Better than Detailed Ones? An Empirical Investigation', *SSRN Scholarly Paper* (Rochester, NY: Social Science Research Network, 29 July 2005); E. W. Wright and M. P. Ellinghaus, 'The Common Law of Contracts: Are Broad Principles Better than Detailed Rules?', *Texas Wesleyan Law Review* 11, no. 2 (2005): 399–420.

[47] *SRA* v *Solicitor Z*, Memorandum of Applications for Summary Dismissal & Stay for Abuse of Process, Case No. 11941–2019 (29 April 2020).

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There is a final reason I would give for saying that lucidity requires morality and for arguing that lawyers should be responsive to moral concerns, if not subservient to them. That reason is cognitive. Legal problems are complex and social, marked by bias, partial sightedness, and other issues. The wise adviser needs all their cognitive faculties to do a good job. Their decisions require breadth of vision and moral sensitivity, not just narrow logic.

And so on . . .

I am tempted to continue with more detail on what a system that makes integrity lucid looks like, but I will not. There is a great deal of detailed work needed to develop and improve guidance; to understand, define, and support independence as behaviour, not just a label; to work on how and when lawyers should report up and out (lawyers as whistleblowers pose particular challenges in terms of culture and the law); on the abuse of privilege; and on the drafting of unreasonable contracts. The Bar needs to revise its Code of Conduct. It is poorly drafted. I would argue that lawyers should have a single, unified code of conduct. However, I would like to return to one more systems-oriented point and address a problem that has bothered me greatly since I began watching the inquiry.

Tackling the Self-Concept

The PO inquiry has been fascinating for the occasional catalytic moments of independent challenge and accountability.

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Cross-examination has shown how revealing and hard it is to break through lawyers' defences against such challenges. We all resist the idea that we are 'bad', especially (it turns out) when being live-streamed on YouTube. As lawyers, we have our somewhat complacent self-concept, and we have the creativity of argument to justify our own, or our clients', actions and to shape how we portray facts.

This means we can also delude ourselves. We are also more insensitive to our own rules than we should be. When we did research on barristers within three years of call, we found that over 40 per cent did not know or could not properly use their own rules.[48] Recent research by the SRA suggests similar problems.[49] Yet sometimes, under very detailed questioning, the lawyers before the inquiry did, I think, realise their limitations and mistakes. Very occasionally, they conceded them.

Warwick Tatford, the barrister alleged to have hardened-up the expert evidence when prosecuting Seema Misra, painfully admitted, after a devasting cross-examination that 'there are many failings that I had ignored on my part, and I perhaps created a rosier version [of myself] in my memory that wasn't really there'.[50] Professionalism is an idea that isn't really, or at least is not always, there; it gets lost in the melee of winning cases.

I call the imagined or asserted propriety that exists instead of actual competence and propriety 'the professional

[48] Moorhead et al. (see n.258). [49] SRA (see n.10).
[50] Tatford (see n.147).

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imaginarium'. To a degree, we likely all live in something like this. We think of ourselves as more proper, competent, and ethical than we are. Despite the imaginarium, the SRA found that 10 per cent of in-house lawyers 'said their regulatory obligations had been *compromised* trying to meet organisational priorities' (my emphasis).[51] This is concerning in itself, but also leaves one wondering: how accurate were the other 90 per cent? We have a clue from the 40 per cent of barristers who are shaky on their own rules. These two figures (rough estimates, of course) provide an important indication of the scale of the problem. How can we overcome the weakness of the imaginarium? How can we build greater self-awareness and improvement?

We need somehow to find additional mechanisms short of investigation for encouraging accountability and self-development. Ethical knowledge and practice should of course be a routine and proactive part of competence review for all lawyers in firms and chambers. There may also be situations where cases or areas of work of particular providers could be referred for non-disciplinary investigation and analysis to encourage lesson learning and remediation, not punishment. The Financial Conduct Authority (FCA) can call on skilled-person reports: they appoint a skilled, independent person to produce a report and advise on remedial steps on a particular theme in a regulated firm. This is a step short of investigation and discipline. If, as it seems, legal service

[51] www.sra.org.uk/sra/research-publications/in-house-solicitors-thematic-review/.

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regulators do not have this power, perhaps they ought to be given it. Imagine being able to ask firm X to commission a review of its use of without-prejudice letters, firm Y's management of litigation holds, or firms A, B, and C about the due diligence they do before sending out SLAPP-like threats.

The COLP role is, I would say, under-developed, and the quality of COLPs and COLP–SRA relations is mixed.[52] We know relatively little about the effectiveness of COLPs as a regulatory tool. These are areas which need review and improvement to make the role effective. The regulators could also deploy something like Board Effectiveness Reviews[53] directed at how firms manage ethical culture. Reviews could drive improvement in the management of ethical culture by examining COLP and firm practices. Care and time would be needed to develop reviews sufficiently independent, useful, and not tick-boxy in approach. This could mix voluntary approaches and targeted compulsion. The regulators could encourage reviews on a general voluntary basis, but require them for higher-risk firms or practice areas, for example.

The aim would be to develop substantial and meaningful engagement with and reflection on ethics and ethical leadership among lawyers and their firms. The challenge of encouraging *authentic* engagement and improvement should not be underestimated; regulators and the regulated need to build mutual, justified trust and respect. Current approaches alone are not, I think it is fair to say, enough.

[52] See SRA (see n.10), for some recent supporting evidence on this front.

[53] Tracy Long, 'Board Evaluation', in *Effective Directors* (Routledge, 2021), 36–42, https://bit.ly/497m44v.

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Privilege

I have set out concerns about mutual irresponsibility and excessive zeal, but the eagle-eyed will have noticed that I have not engaged much with the third limb of the system problem: professional secrecy. Professional privilege is beloved of lawyers and treated as a fundamental right by the courts. It is also unarguably abused and diminishes proper professional accountability.

Privilege is a sensitive and complex area, and I do not want to make precipitous proposals on that here. I have made some preliminary suggestions with Andrew Higgins elsewhere.[54] The regulators (and the courts) plainly need to grasp the nettle of abuse, and I would recommend a full, independent review of the law on privilege.

Concluding Thoughts

The PO scandal is a lesson in how lawyers played not just with facts and rules; they played with lives. They ruined lives. In fact, it's worse than that: they often led the ruining of those lives. Incompetence, orthodoxy, cynicism, recklessness, complacency, vanity, and, I am sorry to say, sometimes, criminality from some appear to have played a part. The PO scandal reveals that lawyers must do more than simply apologise, whether half-heartedly or otherwise, and must be held accountable by stronger regulators. We have to change the way lawyers think and behave. Lawyers must put complete

[54] Higgins and Moorhead (see n.308).

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integrity and particular care to avoid misleading at the forefront of their thinking. We should turn away from lauding amorality and guard against harm.

Lucid integrity and clearer ethical thinking could be aided by modest changes to codes, better guidance, and a concerted programme of work scaffolding that, with training, explicit accountabilities, and early challenge mechanisms of the sort outlined herein. This may require modest changes in the law and the codes and more fundamental development of the regulatory apparatus. At first reading, to harried practitioners and judges, it will sound like a forbidding agenda. Ideologically, these groups are not monolithic; many will be opposed to the points I make, either intellectually or emotionally, and resources are scarce. It will require exceptional leadership and determination to move this work on.

It is for that reason I end with my final proposal. The Clementi reforms changed legal services regulation significantly, leading to the Legal Services Act 2007. This has, I would suggest, improved the independence of regulation of legal services but failed to tackle the fragmented approach of multiple regulators. It also concentrated on competition and consumerism. It made significant progress but left ethics underplayed in the equation. It provided a compromised form of independent regulation. The PO scandal suggests unfinished business that requires something of similar weight, independence, and political commitment behind it.

Whilst the Legal Services Board has, after the Hamlyn lectures that led to this book, indicated a very welcome focus

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on the effective regulation of professional ethics,[55] something broader, more profound, and urgent is needed. There is a need to address issues in the professions, in the courts, and in corporate governance, with a central focus on improving honesty, integrity, and the effectiveness of law. This needs to lead independently of, but also work in collaboration with, the government, the professions, the courts, and the regulators. It should consider the perspectives of victims of injustice and those affected by professional misconduct. Given problems in accountancy, it may need to encompass other professional advisers. I have set out some ideas as starting points. I suggest a strongly led commission with a mandate to address a comprehensive programme of reform, not just a one-off big bang. The victims of the PO scandal do not just deserve more sincere apologies and proper compensation as speedily as possible. They deserve genuine change in the integrity of lawyers, the legal system, and those who utilise them. That means real change, properly implemented. It means much more and is much harder than mere words of the kind I offer up here.

[55] LSB (see n.19).

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