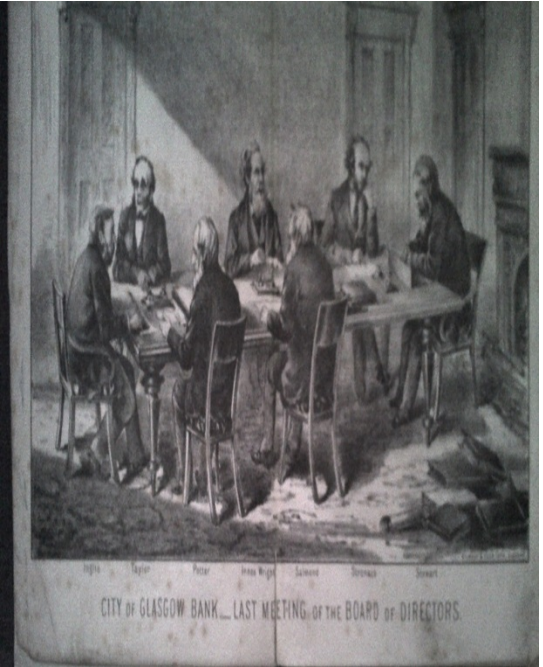


Insider Dealing Enforcement in the UK: Some key perspectives on experiences past, present and future



Dr Sarah Wilson, York Law School

Centre For Financial Regulation and Economic Development, 12 April 2016

Overview of Presentation

I Background Considerations- introducing insider dealing/trading and my approach to its analysis:

- What is insider dealing?: general definition and location within ambit of ‘securities violations’
- Identifying the current legal framework: criminal law, public law and (briefly) private law, and the influence of European Capital Markets Law
- Identifying my analytical approach: multidisciplinary and multi-perspective approach using ‘white-collar crime’ and ‘financial crime’ frameworks

II The current context for enforcement

- Explaining current enforcement approaches: case law and enforcement policy
- Hypothecating a ‘criminal enforcement ‘revival’’: a global movement?
- Intellectualising enforcement challenges: regulators’ views and academic scholarship

III The future?

- Enforcement priorities and challenges: internal and external influences
- Understanding the past for facing the future?: enforcement and intellectual perspectives.



Part I: Background Considerations

Defining insider dealing/trading: general parameters

- BASICALLY involves sale or purchase of securities with an informational advantage
- Where this is subject to restriction/prohibition- such are commonly found termed 'securities violations' (and 'market abuse'), where interruptions in information flow are considered disruptive for effective financial market function
 - Behaviour affecting accuracy of information: market manipulation
 - Behaviour affecting the availability of information: insider dealing/trading
- Prohibitions on dealing (and sometimes attempts) often also include
 - Liability for encouraging others to deal
 - Liability for wrongful disclosure of information not generally available to the market
- Prohibitions/absence of prohibition of insider dealing invites contention.

Insider dealing/trading - discourse of contention

- Regimes where insider dealing is/not restricted/prohibited – approaches examined using classic Henry G Manne arguments:
 - Does insider dealing cause any appreciable harm to markets themselves or investors?
 - Can insider dealing be beneficial in promoting liquidity and assisting ‘price discovery’?
- Conceptualising insider dealing’s contention: signposting complexity arising from the language of ‘financial crime’ and ‘financial abuse’
- Illustrating insider dealing’s position of legal and normative contention through reference to UK legal restrictions/prohibitions: Focus is on ‘state enforced’ prohibitions but awareness of the full spectrum is central for the normative analysis.

Insider dealing and the UK Legal Framework

- The law relating insider dealing as understood by reference to how Law in the English (and wider Common Law) tradition can be classified as:
 - Private Law: State-recognised rights/obligations-based law governing relations between individuals (legal and natural persons) which is enforced by individuals
 - Public Law: Governs relations between individuals and the State, where State-enforced ‘civil’ or ‘administrative’ actions originate in duties imposed for “social utility” reasons
 - Criminal law: a sui generis species of (public) law embodying the right of the State to require individuals to behave properly for the good of society, and to punish transgressors
- Laws relating to insider dealing can be found across these categories:
 - Private Law: fiduciary profit-making and protection of confidential information
 - Public Law: **Market Abuse Regulation (MAR) 2014 (implemented in Member States July 2016)** replacing s 118 Financial Services and Markets Act (FSMA) 2000 (as amended))
 - Criminal Law: s 52 Criminal Justice Act 1993.
- Focus of the presentation is enforcement undertaken *by* the State: arising from recourse to public law (administrative law) and criminal law.

Multi-disciplinary and Multi-perspective analysis

- Analytical approach is multi-disciplinary and multi-perspective: necessary for promoting richness and sophistication in understanding (per Friedrichs)?
 - Multi-disciplinary: built on intellectual views that legal analysis can be enriched by input from cognate disciplines and the fruits of this can also enrich these other disciplines – this work draws on Criminology and History particularly
 - Multi-perspective: valuing perspectives from academic, policy and practitioner communities
- Importance of ‘sophisticated analysis’ for insider dealing – perception of ‘obstacles’ to enforcement is evident in academic discourse and from regulators
 - Tomasic: Is it ‘amongst the most difficult crimes for the legal system to respond to’?
 - FSA: It doesn’t attract ‘immediate moral outrage’ like many other ‘serious’ crimes
- Contributions from Criminology and from History
 - Criminology: the value of conceptualizations of ‘white-collar crime’ and ‘financial crime’
 - History: the value of current interest in the significance of the past for responding to current regulatory challenges.

Contributions from Criminology

- Identifying insider dealing as ‘white-collar crime’ and ‘financial crime’
 - White-Collar Crime scholarship: Descends from Edwin Sutherland’s classic work on unlawful acts committed by persons of high social status and respectability in the course of their occupation, where scholarship is deeply divided and much is critical of Sutherland’s work
 - Financial crime scholarship: Emerged as a distinct focal point from Sutherland’s inclusion of ‘misrepresentations of asset values’ within his white-collar crime framework (alongside duplicity and manipulation of power)
- Insider dealing and definitions of financial crime- from financial crime being a term of wide application and import, here it is identified with ‘large-scale illegality that occurs in the world of finance and financial institutions’ (Friedrichs (2012))
- Insider dealing and the ‘problematics’ of white-collar crime (Aubert (1952)): is insider dealing’s ‘controversial nature’ exactly what makes it ‘so interesting from a sociological point of view and what gives us a clue to important norm conflicts, clashing group interests, and maybe incipient social change’?

The language of criminology applied to policy and enforcement

- In the UK
 - Margaret Cole, FSA Enforcement (2007): the financial crime of insider dealing is a serious white-collar crime despite 'lacking immediate moral outrage' associated with many other serious crimes
 - George Osborne MP (2015): 'individuals who ... commit ... financial crime should be treated like the criminals they are – and they will be. For let us be clear: there is no trade-off between high standards of conduct and competitiveness. Far from it'
- International 'standard setting'
 - IMF and World Bank: use of the language of 'financial crime', 'financial sector crime' and 'financial abuse'
 - ~ Clear descriptive/classification functions: usage of these terms denotes that meaning varies on different occasions, and in different legal systems and cultures
 - ~ Additional evaluative or even normative dimensions: does this also capture how prohibitions/restrictions on insider dealing can be controversial?

Insider dealing as ‘financial crime’- references found in law itself

- UK Securities Law- setting out the ‘regulatory objectives’ of the regime, as including the ‘reduction of financial crime’:
 - **Financial Services and Markets Act (FSMA) 2000**, s 6(3) states that “Financial Crime” as including ‘any offence involving - (a)fraud or dishonesty; (b)misconduct in, *or misuse of information relating to, a financial market*; or (c)handling the proceeds of crime’.
 - **Financial Service Act 2012**, in making amendments to the FSMA 2000, in furtherance of the new ‘integrity objective’ (s 61D), interpretation in 1H(3) states that Financial crime” includes any offence involving - (a)fraud or dishonesty, (b)misconduct in, or misuse of information relating to, a financial market, (c)handling the proceeds of crime, or (d)the financing of terrorism.’
- This is illuminated so as to delineate the regulator’s interest in ‘regulated persons’ and their businesses **but** it does illustrate the use of ‘financial crime’ terminology beyond academic discourse, at the heart of regulation ‘in action’.

Part II: The Law relating to Insider Dealing

Criminal Law: s 52 Criminal Justice Act 1993

- S52 The offence

(1) An individual who has information as an insider is guilty of insider dealing if, in the circumstances mentioned in subsection (3), he deals in securities that are price-affected securities in relation to the information.

(2) An individual who has information as an insider is also guilty of insider dealing if—

(a) he encourages another person to deal in securities that are (whether or not that other knows it) price-affected securities in relation to the information, knowing or having reasonable cause to believe that the dealing would take place in the circumstances mentioned in subsection (3); or

(b) he discloses the information, otherwise than in the proper performance of the functions of his employment, office or profession, to another person.

(3) The circumstances referred to above are that the acquisition or disposal in question occurs on a regulated market, or that the person dealing relies on a professional intermediary or is himself acting as a professional intermediary.

(4) This section has effect subject to section 53

- Sections 54-60 issues of interpretation

- Triable either way, with maximum sentence of 7 years imprisonment for conviction on indictment.

Non-criminal offence – phase 1

- S118 FSMA 2000 (as originally enacted)- which introduced the first State-focused non-criminal liability for insider dealing

(1)For the purposes of this Act, market abuse is behaviour (whether by one person alone or by two or more persons jointly or in concert)—

(a)which occurs in relation to qualifying investments traded on a market to which this section applies;

(b)which satisfies any one or more of the conditions set out in subsection (2); and

(c)which is likely to be regarded by a regular user of that market who is aware of the behaviour as a failure on the part of the person or persons concerned to observe the standard of behaviour reasonably expected of a person in his or their position in relation to the market.

(2)The conditions are that—

(a)the behaviour is based on information which is not generally available to those using the market but which, if available to a regular user of the market, would or would be likely to be regarded by him as relevant when deciding the terms on which transactions in investments of the kind in question should be effected;

(b)the behaviour is likely to give a regular user of the market a false or misleading impression as to the supply of, or demand for, or as to the price or value of, investments of the kind in question;

(c)a regular user of the market would, or would be likely to, regard the behaviour as behaviour which would, or would be likely to, distort the market in investments of the kind in question.

- Amended in 2005 to implement the Market Abuse Directive (MAD) 2003.

Non-criminal offence- phase 2: as amended in 2005, new s 118A-C

S118A Supplementary provision about certain behaviour

...

S118B For the purposes of this Part an insider is any person who has inside information— (a)as a result of his membership of an administrative, management or supervisory body of an issuer of qualifying investments, (b)as a result of his holding in the capital of an issuer of qualifying investments, (c)as a result of having access to the information through the exercise of his employment, profession or duties, (d)as a result of his criminal activities, or (e)which he has obtained by other means and which he knows, or could reasonably be expected to know, is inside information.

118C Inside information (1) This section defines “ inside information ” for the purposes of this Part. (2)In relation to qualifying investments, or related investments, which are not commodity derivatives, inside information is information of a precise nature which— (a)is not generally available, (b)relates, directly or indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments, and (c)would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments. (3)In relation to qualifying investments or related investments which are commodity derivatives, inside information is information of a precise nature which—

(a)is not generally available, (b)relates, directly or indirectly, to one or more such derivatives, and (c)users of markets on which the derivatives are traded would expect to receive in accordance with any accepted market practices on those markets. (4)In relation to a person charged with the execution of orders concerning any qualifying investments or related investments, inside information includes information conveyed by a client and related to the client's pending orders which— (a)is of a precise nature, b)is not generally available, (c)relates, directly or indirectly, to one or more issuers of qualifying investments or to one or more qualifying investments, and (d)would, if generally available, be likely to have a significant effect on the price of those qualifying investments or the price of related investments. (5)Information is precise if it— (a)indicates circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur, and (b)is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of qualifying investments or related investments.

(6)Information would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions.

Non-criminal offence phase 3: adoption of the MAR - key reference points

- Definition under Article 8(1): ‘insider dealing arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates’
- Inside information under Article 7(1): is of precise nature and has not been made public ‘relating directly or indirectly to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments’
- MAR states (Article 14) ‘a person shall not engage in insider dealing’, with no mental element, and instead a (rebuttable) presumption that a person who possesses inside information is presumed to use it (per *Spector Photogroup NV v CBFA* [2010] 2 BCLC 200)
- New features through implementing MAR
 - Prohibitions of attempts (Article 14)
 - Catches some decisions not to trade or to trade differently - upon receiving inside information (Article 8).

Non-criminal enforcement – imposition of penalties

- Following internal investigation, central to enforcement is (FSMA 2000):
 - ‘123 Power to impose penalties in cases of market abuse
 - (1) If the Authority is satisfied that a person (“A”)—
 - (a) is or has engaged in market abuse, or
 - (b) by taking or refraining from taking any action has required or encouraged another person or persons to engage in behaviour which, if engaged in by A, would amount to market abuse,it may impose on him a penalty of such amount as it considers appropriate.
 - (2) But the Authority may not impose a penalty on a person if, having considered any representations made to it in response to a warning notice, there are reasonable grounds for it to be satisfied that—
 - (a) he believed, on reasonable grounds, that his behaviour did not fall within paragraph (a) or (b) of subsection (1), or
 - (b) he took all reasonable precautions and exercised all due diligence to avoid behaving in a way which fell within paragraph (a) or (b) of that subsection.
 - (3) If the Authority is entitled to impose a penalty on a person under this section it may, instead of imposing a penalty on him, publish a statement to the effect that he has engaged in market abuse’.
- **Enforcement:** Following issue of a ‘Warning Notice’ (s 126), an enforcement decision results in a ‘Decision Notice’ being published (s 127): Decision Notice publication triggers a person’s right to appeal to the Upper Tribunal, which must normally be exercised within 28 days (s 133).

Penalties and the MAR

- MAR requires wide-ranging administrative sanctions: now stated as minimum requirements which are generally available (i.e. beyond regulated firms and their managers and employees) ere Member States may make listed sanctions more powerful or add different ones.
- What must now be available (NB already available in principle to the FCA):
 - Injunctions requiring cession of conduct amounting to insider dealing
 - Disgorgement of profits made or loss avoided insofar as ‘can be determined’
 - Maximum administrative penalty of ‘at least’ three times the (aforementioned) profit made or loss avoided (thus, this penalty can be higher than three times, but not lower)
 - Public warnings (censure)
 - Financial penalties up to a max of E 5M for individuals and E 15 M or 15% annual turnover in the case of companies
- Member States are not obliged to have administrative sanctions in an area where they provide criminal prohibitions: reflecting a conscious policy ‘push’ towards criminalization (see Directive on Criminal Sanctions for Market Abuse CSMAD 2014 which the UK has *not* adopted) where the UK is committed to using both criminal and non-criminal pathways whilst pursuing criminal enforcement wherever possible (considered shortly).

Philosophy underpinning prohibitions on insider dealing

- Explaining decisions to impose restrictions and prohibitions across modes of enforcement: a ‘market-focused’ or ‘relationships-focused’ approach:
 - UK liability for insider trading is drawn widely: a relatively simple regime embodying that *the use of* non-generally available information likely to influence investment decisions in and of itself amounts to *its misuse*
 - ~ Strongly influenced by European Capital Markets Law’s commitment to market egalitarianism
 - ~ ‘Macro’ market-focused ideology looking to protect the critical role of the effective and fair dissemination of information in achieving effective market function
 - US liability for insider trading is narrowly drawn: and where a complex regime distinguishes ‘insider’ and ‘tippee’ offending
 - ~ Extensive permitted use of inside information as there is an express rejection of equality amongst investors (*US v Newman* (2014))
 - ~ All liability requires an insider’s breach of fiduciary duty in dealing with privileged information himself or disclosing it in exchange for a benefit (classical theory) or information being stolen (misappropriation theory)
- Micro-relationships-focused ideology looking to protect property rights.

III: UK Enforcement Approaches

Enforcement approaches in summary

- FSA/FCA enforcement activity in the sphere of **non-criminal enforcement**:
 - Non-criminal enforcement for insider dealing (and market manipulation) was a new approach in 2000: NB longstanding views on the necessity for an alternative to 'problematic' criminal enforcement, along the lines of US approaches
 - FSA and FCA very keen to publicise their success in imposing penalties for market abuse (insider dealing and market manipulation) through this mechanism
- FSA/FCA **criminal enforcement** activity
 - FSA/FCA has jurisdiction (under FSMA 2000) to prosecute criminal insider dealing under s 52 Criminal Justice Act 1993
 - Responding to concerns about 'convictionless crime' (Ashe (1993)): it was 2009 that the first conviction was secured, but now FSA and FCA boasts **27 convictions** and is currently prosecuting a further **7 cases**
- FSA/FCA enforcement activity illustrated through 'case studies'.

Criminal Enforcement- examples

- 2009 (March): first successful prosecution by FSA of Christopher McQuoid (8 months imprisonment) and his father in law. McQuoid was a solicitor and counsel to a company which was about to be taken over. He passed this inside information to his father in law who had never bought shares in the company and had not recently dealt in shares. The father in law bought shares in the company at 13 p which he sold at 45 p when the takeover was announced. He then sent a cheque for half of the total profit of £48, 919.20 to his son in law.
- 2009: Matthew Uberoi (12 months imprisonment) and his father Neel Uberoi (24 months imprisonment) where the father made £110,000 profit through inside information sent by his son (an intern at a brokers firm) coded numerically as Chinese meals.
- 2011: Christian Littlewood and others: as a senior investment banker he was sentenced to three years and four months in custody having pleaded guilty to eight counts of insider dealing realizing a profit in the region of £590,000 over an 8 year period.
- 2013: Paul Milsom, a senior equities trader, imprisoned for two years for disclosing information and subjected to a confiscation order for £245,000
- 2015: Paul Coyle, former Group Treasurer and Head of Tax at Wm Morrison Supermarkets plc, pleaded guilty to two counts of insider dealing and has been sentenced to 12 months imprisonment, and was also ordered to pay £15,000 towards prosecution costs and a Confiscation Order in the sum of £203,234.

Non-criminal enforcement examples

- 2008: Richard Ralph (former executive chairman of Monterraico Metals plc) uses inside information on a pending takeover to deal in shares asking another to purchase them
- 2009: Eric Boyen, (Ralph's brother) experienced investor, buys shares for his brother and on his own account on the basis of inside information
- 2009: Chhabra, an authorised person and investment analyst passed inside information to another financial analyst who used this to place spread bets
- 2010: Chief Executive of General Energii for profiting using inside information to buy shares. The appropriate fine - largest individual fine thereto at £976,005 – included penalty and disgorgement of profit
- 2010: Jeremy Burley and (father) Jeffrey Burley fined £144,200 and £35,000. Burley Jr encouraged Burley Sr to sell shares when it was discovered the company concerned (where Jr worked) was unlikely to continue oil exploration, before announcement to the market: fines reflected attempted avoidance of FSA scrutiny & lack of cooperation
- 7 February 2011: David Massey fined £150,000 for trading (through short selling) on the basis of inside knowledge gained as a corporate finance executive and making a profit of over £100,000
- 9 July 2012: Jay Rutland a senior broker fined £160,000 (reduced to £300,000 for a series of mitigating circumstances) for disclosing inside information and encouraging others in his broking team to do so through the use of non-approved telephone sales scripts
- 2014: Ian Hannam's 2012 Decision Notice finding he had improperly disclosed information upheld by the Upper Tribunal, and he was fined £450,000.

Ian Hannam- a useful 'summary' UK case study

SOME OF 'RAINMAKER'S' BIGGEST DEALS

- Launch of Xstrata on London stock market
- JP Morgan's £1bn takeover of stockbroker Cazenove
- £56bn 'mega merger' plan between Glencore and Xstrata
- Miner Kazakhmys' float on London stock exchange
- Listing of Mexican mining firm Fresnillo

FSA

The market abuse cases

FSA

Case Name	Individual	Role	Outcome
Nicholas Kyriakis	[Silhouette]	Head of credit trading at Credit Suisse	£100,000
Ian Hannam	[Photo]	Former partner, Director of equity capital markets at J.P. Morgan/Cazenove	Fine: £450,000 Mr. Hannam ordered to pay costs
Andrew 'Outright'	[Silhouette]	Former partner, Corporate broker for Bank of America Merrill Lynch	Fine: £130,000

Source: The Financial Times

Ian Hannam - encounters with the FSA

- Banker, head of Global Capital Markets at JP Morgan Cazenove UK
- May 2014, found to have committed market abuse by improperly disclosing inside information -NB no trading occurred- breaching s 118(3) FSMA
- There was an investigation with a view to bringing criminal charges but this did not happen and Hannam was expressly found not to have been dishonest
- His unlawful disclosure of inside information (in emails to a friend) was only discovered when Hannam reported suspected insider dealing amongst two of his clients to his superiors and then to the authorities, and his cooperation was noted in the Tribunal ruling as being exemplary
- JPMC stood by him but Hannam considered FSA pursuit made his position untenable.

Hannam – the continuing story

- Hannam fined £450,000 and resigns from JPMC to ‘clear his name’
- He kept his licence (with the ruling noting his honesty and integrity) and several City people defended his ‘rainmaking’ record
- He now fronts a ‘go-kart’ boutique business contrasting with the JPMC ‘Ferrari’ enterprise: he feels ostracised occupationally and personally
- Original FSA Decision Notice 2012 (upheld by the Upper Tribunal in 2014)
 - Penalty justified in view of his serious error of judgement
 - Penalty necessary in order to achieve ‘credible deterrence’
- Why is this such an interesting ‘case study’?: wider perspectives on the continuing story of enforcement - ***criminal*** as well as non-criminal ...

Current approaches – the FSA/FCA narrative

- The FSA and a ‘landmark’ moment in 2008: formal adoption of ‘credible deterrence’ as a corporate philosophy would embed across all FSA functions to promote public confidence in high levels of ‘market quality’ within UK financial markets
- Credible deterrence sought to secure higher standards of behaviour through perceptions of real and meaningful and tough enforcement
- A profound significance for insider dealing enforcement: ‘credible deterrence’ would involve the pursuit of **criminal** enforcement wherever possible, as non-criminal enforcement was:
 - Not significantly ‘less onerous’ than the criminal pathway
 - Had a much diluted deterrent effect.

The FCA and ‘credible deterrence’

- FCA commitment to continue the FSA ‘credible deterrence’ readily apparent before its formal inception in 2013
- Commitment to criminal enforcement has significant support in academic scholarship:
 - Egalitarian and equality under law (Sutherland (1945); Bequai (1978))
 - Symbolism/Expressive function of criminal enforcement (Levi (1999))
 - Realism/pragmatism – the costs are huge, it is not a victimless crime (Nelken (1994); Friedrichs (2012)).
- Important endorsement from Europe- the unique stigmatizing qualities of criminal enforcement: commitment to enhanced criminal enforcement and actually so in pursuit of ‘credible deterrence’ is strongly evident in the genesis of the MAR and particularly so in that relating to the CSMAD.

Is there evidence of a global ‘criminal enforcement movement’?

- CSMAD 2014 has a manifestly different orientation from MAD 2003:
 - MAD 2003 grudgingly stated Member States could have criminal penalties for insider dealing alongside compulsory administrative ones
 - CSMAD sets out minimum criminalisation thresholds for all Member States: to promote harmonization and overall increased levels of state response to insider dealing
- Does this point to a global *movement* favouring criminal enforcement?
 - **UK’s** recent commitment to criminal enforcement stated in 2008/9
 - **Australia’s** criminal enforcement of securities violations is extensive and aggressive (e.g. *Fysh v R* (2013))
 - **US’s** aggressive pursuit of ‘spoofing’ (market manipulation, e.g. *US v Coscia* (2015)) and extradition of the UK ‘flash crash’ trader Navinder Singh Sarao) and Government endeavours to extend the reach of insider trading prohibitions (e.g. *Newman* (2014) and *Salman* (2015))
 - **Hong Kong?** A long-term project inspired by *HKSF v Lee Sung Ho & Ors* (2011).

A global 'criminal enforcement revival'?

- A new emphasis on an established mode of enforcement but one widely regarded as being ineffective- in the UK and beyond ...

'The public no longer believes that the legal system in England and Wales is capable of bringing ... perpetrators ... expeditiously and effectively to book ... At every stage ... the present arrangements offer an open invitation to blatant delay and abuse ... it is all too likely that the largest and most cleverly executed crimes escape unpunished. It follows that fundamental change is required ... [and] we have not shrunk from recommending it ... and [where this is required] changes in attitudes and practices' (Lord Roskill, 1986)

'No jurisdiction has had ... great ... success [using] criminal law in combating sophisticated abusive activity on its capital markets. The standards and procedures of the traditional criminal justice system, which are necessary to ensure general civil and human liberties, present almost insurmountable barriers to the effective prosecution of economic crime' (Rider, 1995).

- Has the global financial crisis engendered new boldness for arguments that criminal law is an appropriate and necessary enforcement tool for insider dealing?: Countering perceived lack of 'moral consensus' on culpability, harm and 'victimization', and concern about the consequences of criminal conviction?

The Future? Will a UK criminal enforcement revival be effective

- The UK has a very long tradition of using criminal enforcement and actually a much shorter one in using non-criminal modes:
 - Insider dealing was first criminalized only in the 1980s: the Companies Act 1980 and Company Securities (Insider Dealing) Act 1985 adopted US-style ‘fiduciary’ oriented liability
 - There is a much longer tradition for criminalizing market manipulation dating back to the nineteenth century: e.g. Punishment of Frauds Act 1857
- There is a long tradition of using criminal enforcement ... but there are also reasons suggesting we should not be too confident that a UK criminal enforcement revival will take hold- even *if* we think it *should*:
 - The ‘convictionless’ years for insider dealing under the Criminal Justice Act 1993; and
 - Experiences from nineteenth-century Britain showing difficulties attaching to a conscious cultural commitment to criminal liability.

Current critical juncture and a 150 year long tradition

- Nineteenth-century encounters with ‘large-scale illegality that occurs in the world of finance and financial institutions’:
 - Evidenced in contemporary recognition of “‘high-art” crime’ arising from mid-century crises
 - Recognizing that financial misconduct was capable of harbouring huge financial and reputational costs to the economy and social costs which were pecuniary and non-pecuniary
- Conscious commitment to criminal responses to business and financial impropriety
 - Wrongdoing not considered capable of being ‘put right’ through making financial reparation ‘between man and man’ (Mr Serjeant Kinglake, Hansard, 1857)
 - Wrongdoing requiring some kind of public rebuke and sanction by virtue of being ‘infamous crime’ (Lord Campbell, 1856) and ‘amongst the worst’ (Pollock CB, 1854) crime capable of being committed
- So why is this a cautionary tale and not one of optimism- even for those who believe criminal liability should be more extensively applied to insider dealing (bearing in mind the different views here)?

Nineteenth-century experiences of financial crime – essence and significance for today?

- Contemporary reactions show determination to regard financial misconduct *as crime*, but *how* might this resonate for insider dealing enforcement *today*?
- This determination also set in motion concerns about using the criminal law in the business context
 - Would regarding financial misconduct as crime ‘carry public confidence’ (Hansard, 1857)
 - Would responses undermine legitimate enterprise whilst looking to curb its worst excesses?
 - Was it is right and proper to give respectable business people custodial sentences?
- We ask do all these questions today, or at least we should be:
 - This might well be an important ‘turning point’ for responding to financial crime: for achieving ‘transformative understandings’ (Friedrichs (2012))
 - But *why* might we want to look at the past as we seek to orient the future?

References to the past in discourses on post-crisis regulatory reform

- Current interest shown by regulators in the relevance of the past in the pursuit of future directions
 - Treasury Committee Report on Northern Rock 2007-8: situating Overend & Gurney 1866 alongside Northern Rock- a lesson on causes and consequences of 'bank runs'?
 - Bank of England: Mervyn King, (2012) - Pre crisis the Bank should have paid greater attention to 'lessons' from history
 - FSA: Sally Dewar (2009) – The importance of countering views that 'history teaches nothing' in the regulatory context
 - PCBS recommendations for the Bank of England ((2013) – for the Financial Policy Committee and beyond)
 - Bank of England (2016) – The continuing lessons of the collapse of Overend & Gurney for today
- Finding a place for 'the past' in configuring new directions: channelling a 'law and history' agenda, drawing on and combining:
 - Legal scholarship (legal history)
 - Modern history and modern history methodology and approach.

Limitations in making connections between past, present and future ...?

- It is hard not to see echoes of current concerns in ones from the past across the spectrum of debate on the *importance of* criminal enforcement, and also the *care required* in its use
- If we can see parallels:
 - What significance should we accord to them;
 - How should we respond to them?
- The value of history understood from those who dismiss its significance:
 - **Views that history teaches nothing:** events shaping societies and informing their particular dispositions and characteristics are matters of accident, blunder and contingency, rather than being part of a pattern with meaning;
 - **Views that history is inconsistent with modernity:** proposing that understanding current conditions and future possibilities requires an approach reflecting 'newness' in societal conditions which is equally progressive and forward looking, and that little attention should be paid to the past.

A place for history in current debate?

- Can we acknowledge the significance of the past without compromising the imperative of seeking ‘forward looking’ responsive approaches which are clearly aligned with current challenges?
- Generally this presentation hopes to emphasize the value of modern history for re-engaging with legal history across a range of interests in legal scholarship:
 - Tosh (2010) - proposition of the value of an ‘inventory of alternatives’ and how this is underpinned by ‘knowing ourselves’ and understanding our social journey and overall trajectory
 - Sewell (2005) - reflections on how ‘expertly’ historians understand society and social change, and how important this is for mapping current social challenges
- This can help to expose the true magnitude of challenges presented by insider dealing/trading in the twenty-first century.

The challenges

- Is society in Britain prepared to accept insider dealing as ‘serious crime’ and generate a discourse of ‘moral outrage’ for it?
 - There is some evidence of this e.g. recent LIBOR conviction of Tom Hayes (2015) – what can we glean from this?
 - History suggests that we were prepared to do both for ‘high art’ financial crime, but with a great deal of angst and discomfort- what can we glean from this?
- If so what about the realities of effective criminal enforcement? Bearing in mind of course the CONSEQUENCES of criminal liability ...
 - What might we conclude from 19th century attitudes to ‘whistle-blowers’ if greater reliance is set to be placed on them today (as UK and European initiatives are suggesting)?
 - What might we conclude from 19th century concerns about enforced reliance of law upon non-legal expertise which law would find difficult to ‘test’ reliably, if reliance is increasingly likely to be placed on a cadre of experts from outside law and expertise which law finds increasingly difficult to access?
- And what about an alternative future altogether ...

UK outside Europe- some insights from the past

- How might BREXIT affect 'UK' approaches to insider dealing enforcement?: Current trends and longer-standing patterns in responding to financial crime
- UK's independence is evident in domestic:
 - Adoption of 'credible deterrence' philosophy sometime ahead of European reforms
 - Origins of extended criminalizations in the Financial Services Act 2012 and new liability under the Banking Reform Act 2013
 - Long tradition of commitment to criminal enforcement
- What about underpinning financial market philosophy?
 - Certainly early insider dealing criminalization was modelled on the US 'relationships-based' approach, but this was without the very extensive tolerance of use of non-public information which continues is evident even in recent jurisprudence
 - A more 'market-based' approach looks likely, and Britain's nineteenth-century history suggests this is part of a 'broad cultural pattern with deep historic roots' (Wheeler et al (1982)) notwithstanding the importance which was attached to fiduciary relationships during these earliest criminalizations of financial misconduct.

Thank you

Comments and Questions

s.wilson@york.ac.uk

法律

法 CUHK
律 LAW

THE CHINESE UNIVERSITY OF HONG KONG
香港中文大學