Financial Elites, Law, and Regulation:

A Historical Perspective

TT Arvind, Joanna Gray, and Sarah Wilson

# Introduction: The concept of a financial elite

Elite groups and clusters of power and influence can play a critical role in determining who gains and who loses within the financial system. This is borne out most starkly when losses occur and crystallise in times of financial crisis and shock. But it holds true too throughout the entire financial and economic cycle. For, far from being the products of some kind of entropic spontaneous ordering, the markets, products and services that are the bones and lifeblood of the financial system itself are constituted and shaped by elites rather than by the ultimate users of the financial system.[[1]](#footnote-1) Alexis Drach makes this point elsewhere in this volume showing how the ultimate elite of banking supervision, the Basel Committee on Banking Regulation and Supervisory Practices constitutes the market itself as well as its supervision. The role of these elites, and their divergence from the interests of users of the financial system, came under intense scrutiny in the period immediately after the post-2008 financial crisis. The focus of that scrutiny was on those who occupy leadership and management roles at the apex of the financial system: the members of the governing bodies of financial institutions – be they mutual associations, partnerships, trusts, or proprietary corporations – and on the cadre of richly compensated individuals – traders, brokers, investment analysts – whose reckless risk-taking was seen as being the key cause of the crisis. This aetiology is not without basis. But these individuals are only the most visible part of the networks of elites who dominate the financial system. And although in the wake of many financial scandals it is the competence, integrity and behaviour of bank boards and senior management that has been at the forefront of calls for accountability, public anger and popular scorn, the influence of the other less visible elites in finance must not be overlooked.

The purpose of this chapter is to draw attention to one such less visible grouping of elites, namely, the community of lawyers – practitioners, judges, arbitrators, and academics – who play a vital role in structuring and maintaining the functioning of the financial system. Financial activity takes place within the framework of law and is enabled by the law, but it also claims *legitimacy* from the law. Financial transactions, at a private level, cloak themselves in the normative claims that underpin the private law concepts of contract, expectations, trust, fiduciary conduct, and shareholder responsibility. At a regulatory level, they claim legal legitimacy through their purportedly willing and voluntary engagement with regulatory standards – seen, most recently, in the eagerness of financial institutions suspected of misconduct to reach agreed settlements with regulators under which they undertake to reshape their future conduct, and to pay vast sums of money to atone for their past misdeeds.

Yet the law is not static: it is constantly being reshaped through processes in which elites are strongly implicated. It is often forgotten that the complex financial instruments that have been the target of so much opprobrium were legal documents – contracts, deeds, and other instruments of obligation – and that their creation involved *legal* innovation as much as it involved *financial* innovation.[[2]](#footnote-2) It is also often forgotten that this pattern of legal innovation – a relentless drive to transmute and transform the legal framework of finance – is as old as modern finance. Legal history tells us of a constant trend, going back at least as far as the 17th century, of financial elites working through and with legal actors to reshape, extend, and repurpose legal concepts, categories, and understandings in ways that better serve the ends they seek to pursue.[[3]](#footnote-3)

This makes it imperative that we consider who these legal actors are. Who are the individuals who advise and assist financial institutions? What role do they play within the broader networks of financial elites and the financial system? How do they influence understandings and outcomes in relation to what is and what is not permissible, possible or profitable within the framework of law? And is it possible for the law to be structured in a way that ameliorates the most deleterious effects of their influence? These questions, which are fundamental to any enquiry into the role, influence, and accountability of financial elites, are the subject of this chapter.

# 1. Financial elites and legal elites: Mapping the relationship

Insofar as an elite is an exclusive repository of specialist knowledge and privilege, the legal profession must surely be seen as being one. In the case of the financial sector and especially in the case of the large financial institutions that have come to dominate it from the late 20th century to the present time there is now a core of global highly specialist professional advisory firms. A significant number of these have grown up in the UK and remain headquartered in the City of London. In the UK the term ‘Magic Circle’ is often used to refer to this elite group of legal advisers.

As with all elites, the elite status of this group of legal actors is enhanced by their relationship with the individuals and organisations which occupy the highest circles of state power. The contribution financial elites make to UK GDP and export earnings – and, thus, their overall importance to the British polity – is highlighted from time to time not just by the industry and profession themselves, but also by Government Ministers and other public authorities. Thus in 2011, the then Lord Chancellor and Secretary of State for Justice, Sir Kenneth Clarke, extolled what he termed a “national genius” for legal services in the UK highlighting export earnings and contribution to UK GDP of law as a business sector.[[4]](#footnote-4)

The relationship between these leading law firms and the financial industry is fundamental to their elite status. The Corporation of the City of London, in a report issued around much the same time as Sir Kenneth’s comments discussed above, singled out the contribution these law firms made to the financial industry, and their role (along with their counterparts in New York) in making the UK a key centre for financial, tax, and commercial law.[[5]](#footnote-5) Unsurprisingly, then, such firms inevitably identify closely with their client base of (equally global) financial institutions. This identification has profound implications for their activities and goals. Far from simply documenting financial transactions and deals after they have been struck, such lawyers are intimately involved with their financial sector client base. A revolving door of secondment of staff from law firms into their financial sector clients and back again, into their clients’ regulatory bodies, and into Government departments that shape financial sector policy, cements cultural ties and secures a congruence of perspective and world view from the earliest stages of a lawyer’s career.

The close and symbiotic relationship between financial institutions and their lawyers exists at every level of the law firm. Taken together with the importance government and regulatory bodies attach to the symbolic capital built up by elite lawyers, it leads to a culture in which elite firms have both the opportunity and the motive to influence policy in their clients’ interests. Junior lawyers in elite firms monitor legislative, regulatory and policy developments that might affect their clients’ interests, and identify areas on which mid-career lawyers can devote time to lobbying and advocacy with Government on their clients’ behalf. Senior and retired partners in the ‘Magic Circle’ law firms are in demand not only as non-executive Board members of financial institutions, but to fulfil critical roles within regulatory bodies.[[6]](#footnote-6) This is far from a purely modern phenomenon. The discussion below in Part 3 of the role of Standing Counsel at the Bank of England in the wake of 19th century banking scandal shows the facility with which the legal profession has long been able to stay close to and intertwined with the very core of finance and influence its elites.

# 2. Financial elites and the courts: The problem of insulation

In addition to the legal profession, two other elite groups in the UK that are less visible than the directors and senior managers of banks are the judges tasked with adjudicating financial sector disputes and the regulatory bodies tasked with oversight of the financial sector. Adjudication by the judiciary of both private law disputes between parties to a financial transaction and public law challenges to regulatory action is constitutive of the way in which law and the legal process mediate competing interests in the financial system. The civil judiciary have, in particular, played a key role over the years in the allocation of property rights, and in determining the priority of the claims of different interest groups, in the aftermath of market collapses, financial shocks or frauds.

In a common law system such as that of England and Wales,[[7]](#footnote-7) however, the judiciary has a second, broader role, in that it is through the outcome of adjudication of specific disputes that common law behavioural standards and norms are set, as well as losses and gains apportioned. That prospective standard-setting characteristic of the common law occurs through the effect of the operation of the common law doctrine of precedent, according to which like cases are treated alike.[[8]](#footnote-8) This means that the manner in which the courts dealt with a prior case influences the manner in which subsequent cases are decided, having a value that is either persuasive or even binding, depending on the position of the prior court within the judicial hierarchy. Judges’ choice of different legal norms and concepts within which to frame and evaluate legal issues arising from complex factual matrices is therefore determinative not just of the outcome of any individual adjudication, but also of whose interests are privileged and advanced not just by the instant decision but by the future development of the financial system and the conduct of future financial business within it. Judges in England and Wales are, however, drawn from an extremely narrow pool not only with reference to society as a whole, but even with reference to the legal profession. Most judges are drawn from the bar, which constitutes less than 10% of the legal profession in England and Wales, and almost exclusively from the most senior ranks of the bar, narrowing the pool even further.[[9]](#footnote-9) It is, in other words, inherent in the nature of the English legal system that a narrow section of the legal elite are entrusted with important aspects of the law-making and norm-establishing functions.

This does not, of course, in and of itself mean that the law that emerges from the courts will reflect the interests of the financial sector. A notable characteristic of the early modern common law was that it was structurally insulated from being captured by elite groups, despite the elite composition of its institutions, because the legal system and legal institutions were strongly characterised by what Peter Evans has termed ‘embedded autonomy’. A system or institution has embedded autonomy if it combines in itself the ability to make decisions that are *not* mere reflections of the interests of the class of persons with which its members identify (autonomy) with the presence (embeddedness) of “a concrete set of social ties” that binds the institution in question to society, and provides “institutionalized channels for the continual negotiation and renegotiation of goals and policies.”[[10]](#footnote-10)

An institution will, typically, be embedded if officials responsible for its functioning have a close personal relationship with society, or if it has within it a set of feedback loops through which officials can gather information about the preferences or interests of a broad cross-section of society (and not just its best-connected members). It will be autonomous if there are formal or informal institutional constraints in place which insulate its officials from identifying too closely with any particular sector in society, whether through formal regulatory capture or more informally through subscribing to the ‘thought styles’ that are characteristic of any section of society.[[11]](#footnote-11)

Historically, the fact that the common law evolved through litigation gave it a high degree of embeddedness. At the same time, the role of legal doctrine in adjudication before the latter half of the twentieth century, a time when legal thought saw the common law tradition as a repository of high wisdom,[[12]](#footnote-12) ensured that the approach to adjudication remained largely autonomous of the competing interests of different classes and groups within society. Inherent in this approach was the view that if there was a conflict between merchant rationality and the rationality inherent in common law doctrine, then it was the rationality of the common law that should prevail. The history of the early modern common law is littered with cases in which the common law courts refused to give effect to novel instruments such as the promissory note,[[13]](#footnote-13) on the basis that doing so would be contrary to the common law understanding of the nature of contract: the mere fact that a new instrument had been “invented in Lombard Street” would not give it any special standing in the eyes of law, because Lombard Street did not “give laws to Westminister Hall.”[[14]](#footnote-14) As late as the 1930s, the fact that a particular rule was inconvenient to commerce, or even to finance, was not seen as an argument against the rule. It was, instead, seen as illustrating the need for commercial parties to write their contracts more carefully.[[15]](#footnote-15)

None of this holds true today. Very little remains of the conventions and rules that served to insulate the judiciary so strongly from identifying with, or being captured by, the commercial and financial classes. Instead, modern judges in the superior courts identify closely with the elite interests of persons engaged in commerce and finance. The role of the courts, as they see it, is to put in place rules which support and further the needs of the commercial sector. Lord Goff, a leading commercial judge who did much to reshape commercial law in a more business-friendly direction in the 1980s and 1990s, put it in characteristically evocative language in a speech, originally delivered in a non-judicial capacity but subsequently adopted by the House of Lords:[[16]](#footnote-16)

We are there to help businessmen, not to hinder them; we are there to give effect to their transactions, not to frustrate them; we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil.[[17]](#footnote-17)

It is not our purpose here to argue that this is a change for the worse, although there is a powerful argument to be made that the law’s role must, in fact, sometimes include putting a spanner in the works of the relentless pursuit by businessmen of their interests. It is, rather, to point out that the result is a profound shift, akin to what Philippe Nonet and Philip Selznick have characterised as a shift from ‘autonomous’ law to ‘responsive’ law,[[18]](#footnote-18) wherein the courts see their role not as giving effect to the law’s autonomous rationality, which is expressly insulated from the expectations of any individual section of society, but as being to fulfil the expectations of those who are primarily affected by it. The result is not just to challenge the law’s traditional autonomy, but also to transform the basis of its embeddedness. Governing institutions, Evans pointed out, could be embedded in a broad cross-section of society, but they could equally be embedded in a much narrower section of society, such as the capital-owning classes. A narrowly embedded institution will still govern effectively, but the outcomes it produces will reflect a much narrower range of interests and perspectives than a more broadly embedded institution.

The final section of this paper will argue that this change has had the effect of entrenching and privileging the interests of global financial elites within the UK’s legal system, but before getting to that argument it is useful to examine the common law courts’ response to the last great financial crisis in Britain before the crisis that emerged in 2008, namely, the bank failures of the late 19th century. These came at a time when the case law emerging from the civil courts had begun to shift in a more overtly business-friendly direction, but before that shift would be institutionally entrenched by the effective abolition of the civil jury and the creation of the commercial court. Yet at the time of the Victorian banking failures, the law – particularly the criminal law – retained a strong sense that, notwithstanding the imperative of facilitating commerce, the legal system must enforce broader social standards of acceptable conduct.

There is a clear contrast to be made with the modern law. The new legal rules embodied in the Financial Services (Banking Reform) Act 2013 are illustrative. This package of statutory reforms was a response to the perceived absence of accountability for senior executives in financial institutions, particularly given the continued intensity of concerns expressed in the early post-crisis period. Reforms pursuant to this legislation include a new Senior Managers and Certification Regime[[19]](#footnote-19) and a new criminal offence, which has become colloquially known as the ‘reckless banking’ offence. The character of this offence is of profound importance to analysing the significance of the financial elite in post-crisis discourse in the UK. The close alliances subsisting between the financial elite within the City of London and the UK legal elite can be illustrated by how, during the conception of the new law, it was proposed that incurring liability could be avoided. Interestingly, such consideration of the avoidance of liability arose notwithstanding that from the earliest stages of its conception, the new criminal offence was widely considered as a symbolic extension of criminal liability rather than one intended to be widely enforced.

It is this that highlights the contrast with the common law’s attitude during its pre-elite, more socially embedded phase. Examining how these ideas worked themselves out in the course of the prosecutions and trials of leading bankers in the 19th century gives us a powerful insight into how a more socially embedded legal system responded to and dealt with financial elites. The manner in which the judiciary holds to account under criminal law those members of financial elites it deems responsible for egregious harm to the financial system or to particular groups of its customers (and indeed whether it does so at all) reveals something about our broader collective expectations of financial elites. And, even more fundamentally, exploring the opportunities generated for an increasingly identifiable and indeed metropolitan financial elite *through* a culture of heightening legal interest in banking during the nineteenth century sheds significant light on the nature of financial elites today, and the issues arising from their operation in the modern context.

# 3. Financial elites and the public interest: Contrasting 19th and 21st century criminal law

The 19th century was a crucial time in terms of the financial elite’s interactions with the legal elite. Legal change occurring from the middle years of the nineteenth century empowered the financial elite significantly, in an apparent inversion of the financial-legal elite alliances likely to arise from the operation of the new ‘reckless banking’ offence. The opportunities for the financial elite in actually scoping legal reforms relating to business broadly and banking specifically arose from how legal expertise in ‘commercial law’ was during that time burgeoning but also nascent. That this phenomena from more than a century ago might be significant for analysing new law in the light of current policy trends and possible future directions flows in many ways from how the global financial crisis 2007-8 has clearly concretised perceptions that new approaches are needed for how financial institutions are regulated.

From many highly profiled references to this from key regulators (who can themselves be configured as a specialist branch of the present-day financial elite), one appears to be particularly salient. In 2012 then head of Financial Stability of the Bank of England - and currently and Executive Director Monetary Analysis & Statistics - Andy Haldane remarked that responding to the financial crisis would require nothing less than a radical departure from the regulatory path taken during the past fifty years. This alone would be capable of delivering change demanded by the ‘once-in-a-lifetime crisis’ represented by the events of 2007-8.[[20]](#footnote-20) For Mr Haldane this radical departure would indeed require regulators to tread where they feared to go, rather than being led elsewhere by the market.[[21]](#footnote-21) This reflected the need for fresh approaches, grounded in simplicity instead of ‘feeding’ the widely purported complexity of modern finance, and for brighter lines to separate commands of ‘thou shalt’ and ‘thou shalt not’.[[22]](#footnote-22)

Clearly the spirit of Mr Haldane’s remarks in 2012 can be seen in earlier highly publicised policy critiques of financial institutions and particularly banks following the crisis, for example the FSA Report on Royal Bank of Scotland,[[23]](#footnote-23) as well as subsequently for example in the publications of the Parliamentary Commission on Banking Standards appointed in the wake of the Libor-fixing revelations of June 2012. But for present purposes, attention is paid instead to how in making such aspirational statements, Mr Haldane adopted a long analytical timeframe. Interestingly in drawing on times long predating the crisis as well as ones immediately doing so, Mr Haldane’s remarks illustrate a more pervasive analytical trend within discourses on configuring new regulatory directions. Current references to the importance of history for configuring regulatory reform can be traced initially to the Treasury Select Committee’s 2007-8 Report *The run on the Rock*.[[24]](#footnote-24) This Report linked banking ‘runs’ from the nineteenth century to ‘lessons’ which must be learned from the collapse of Northern Rock in recognising the importance of preventing the collapse of systemically important financial institutions in approaches adopted in future to promote systemic stability.[[25]](#footnote-25) Subsequently, this can also be tracked through Bank of England references respectively to historical events and patterns,[[26]](#footnote-26) and FSA allusion – prior to its demise- to the value of history,[[27]](#footnote-27) and to then Governor of the Bank of England Mervyn King’s lament in 2012 that too little attention had been paid to ‘lessons’ from history during the time which in retrospect was the antecedence of the crisis.[[28]](#footnote-28)

Whilst regulators show no awareness of channelling ‘historical awareness’, these sentiments expressed by them are very much in the vein of historian John Tosh’s representation of the present being part of an unfolding trajectory, whereby past and present are linked to one another and to the future through an understanding of the journey undertaken as societies pass from one point in time to another.[[29]](#footnote-29) Even without reference to this intellectual underpinning for attaching significance to the past as responses to current societal challenges are being cast, in the regulatory aftermath of the crisis, it was recommended that the Bank of England should put in place measures which would in future promote its ability to learn from the past.[[30]](#footnote-30) Prior to this speeches from Mr Haldane and then Bank of England Deputy Governor Paul Tucker,[[31]](#footnote-31) had both alluded to banking’s operations during the nineteenth-century, in presenting their visions for its future parameters in the wake of the crisis. Again, without reference to how historians and legal historians alike have identified the nineteenth century as a period of ‘striking change’ and ‘pressure for change’,[[32]](#footnote-32) with this in turn mirroring contemporary reflections,[[33]](#footnote-33) Mr Haldane and Mr Tucker’s interest in this point of time provides an entreaty for analysing the significance of the nineteenth-century financial and legal elites. They also help to set out how important periods of financial instability - widely analysed as ‘crises’- would be for consolidating their operations and actually their significance and power.

Very importantly, it appears that the basis of banking’s traditional ‘social contract’ – that which permits bankers to pursue personal reward for undertaking risk inherent in providing services to the economy,[[34]](#footnote-34)- became forged as determined efforts were made to calibrate and then to embed a culture of responsibility and accountability. This reflected how banks would emerge as principal depositories of financial savings and primary allocators of credit and ultimately management of the nation’s payment systems.[[35]](#footnote-35) In turn, the development of such a discourse for banking would help to mark out ‘commercial distress’ experienced in Britain during the 1850s from a century-long pattern of ‘economic uncertainty’ with ‘severe trade cycles and a stock market crash roughly every ten years’.[[36]](#footnote-36) From this, by drawing on a strong tradition of ‘banking history’,[[37]](#footnote-37) we can regard the 1850s as a decade of manifest importance for banking in becoming a matter of ‘public concern’, and not simply a ‘matter of concern for shareholders’, bringing about significant change for the contemporary elite.[[38]](#footnote-38) During this decade generally industrial capitalism would become recognisably embedded in the world’s first industrial nation, with this embeddedness increasingly manifested in the development of supporting legal and cultural frameworks, with this occurring within the setting of a nascent modern state which regarded itself as increasingly capable and confident. For banks specifically, structurally a growing preference for incorporation over the traditional partnership model would transform these business entities, with the trend towards incorporation having significant outward-looking effects. As increasing attention became fixed on the crucial links banks provided between business and the nation’s pioneering capitalist economy, a growing discourse of responsibilising the actions of bankers would become heightened by the instability of the 1850s.

More generally, this ‘commercial crisis’ had significant lasting impact from originating in turbulence experienced in US railway speculations,[[39]](#footnote-39) and from the proximity of this with Britain’s own railway crisis a decade earlier, which had shaken confidence in the new model of ‘investor capitalism’,[[40]](#footnote-40) destabilised many banks, and even threatening the Bank of England’s own ability to continue making payment.[[41]](#footnote-41) The impact of this earlier turbulence on banking specifically would help to concretise a sense of the banking sector’s increasing ‘public utility’ during the 1850s through recognised importance of this financing sector across an increasingly broad section of society, and with this being increasingly reflected in the attraction of banks as investment prospects.

The responsibilising effects of this trajectory can be seen readily in key mid-century developments spanning ones which are well-known and ones which are less so. An example of the former lies in Palmerston’s famous 1855 missive on the importance of distinguishing banks from other types of business, on account of recognising its unique qualities arising from being underpinned by ‘duty ... of the nature of a trust’:[[42]](#footnote-42) Drawing attention to this was necessary because banks, through the model of incorporation, were in many ways being required to behave as ordinary businesses in generating profit and appeasing shareholders. A less well-known illustration of this can be found in criminal cause celebre trials dating from c 1850 when bankers predominated in accusations that businessmen had engaged in conduct so egregious that it should attract liability to reflect this: liability distinct from that arising from an institution’s relationship with its customers and shareholders, and which instead acknowledged the impact of impropriety on society.

For pioneers of nineteenth-century criminal liability, responding to misconduct in business was a conscious reflection of harm believed to be inflicted by irresponsible conduct, and through a small cluster of ‘financial crime history’ far more is now understood about this. This has also been able to shed light on how banking became such a strong focal point within this generalised favour for engendering responsibilisation through criminal culpability on account of its unique importance within the financial system and its corresponding unparalled ability to scatter ‘wide-spread ruin ... over the whole of the country’ ruining businesses and plunging families into poverty.[[43]](#footnote-43) This setting appears to have its own parallels with current perspectives on how banking is capable of ‘imposing unacceptable costs on the rest of society,[[44]](#footnote-44) which new measures such as the Senior Managers and Certification Regime and ‘reckless banking’ offence are seeking to remedy. But far too little is still known about how these attempts to responsibilise the activities of bankers through legal innovation and enforcement led to the empowerment of the nineteenth-century financial elite. This is a particularly interesting line of enquiry on account of how this occurred within, and consolidated the existence of a distinctive ‘space’ in which the private sphere of business was able to influence a markedly special sphere of public activity. Indeed, even in the context of a dominant culture of private prosecution, criminal prosecution was recognised as responding to a public ‘wrong’.[[45]](#footnote-45)

More than a century later, in presenting the Government’s case for extending criminal liability for bankers, a Treasury Consultation in 2012 noted that FSA’s 2011 Report on the Royal Bank of Scotland had stimulated interest new criminal sanctions as another way of ‘shifting the balance between risk and reward for bank directors’.[[46]](#footnote-46) This emphasis was seen within a context of concern about the likely role played by excessive risk-taking in bringing about the crisis in 2007, and ensuring its effects would be wide-spread and prolonged. And although the Consultation endorsed earlier sentiments that extending criminal liability for reckless decision-making was intended to encourage care in decisions taken by institutions of ‘vital national importance’ through casting the ‘shadow of prosecution’ over their senior executives rather than being widely enforced,[[47]](#footnote-47) it also envisaged that achieving this would require alliances between financial and legal communities. This was expressed through how determinations of liability arising for the ‘Offence relating to a decision causing a financial institution to fail’[[48]](#footnote-48) would involve discerning what would constitute ‘normal or non-excessive risks’ and in which a ‘responsible bank board’ was likely to seek ‘legal advice about whether a decision could be considered reckless’.[[49]](#footnote-49)

The significance which is being attached to *legal* assessments of *commercial* decision-making, and indeed the legitimation of the latter by the former speaks to how the consequences of conviction can be extremely grave, even if this measure is intended to be largely symbolic instead of widely enforced. S 36 carries a maximum sentence of imprisonment for seven years,[[50]](#footnote-50) and in the course of targeting senior organisational figures, that those serving on bank boards intended to be subject to its reach might be configured as ‘financial elite’ can follow persuasively from emphasis within the discourse of SiFIs and ‘institutions of vital national importance’. Moreover, that the legal advice envisioned is likely to be generated through legal services provided by the City’s legal elite can be extrapolated from known alliances between these communities which transpired during the crisis. Indeed we need look no further than at the affairs of Northern Rock, coming to light in September 2007, and subsequently stimulating the Treasury Select Committee’s interest in nineteenth-century bank runs. Whilst the popular sectors of the media diligently published the now iconic images of queues outside Northern Rock’s branches as concerns about its continuing viability generated considerable public alarm, different sectors of the press explained how Northern Rock’s difficulties had brought about a permanently changed relationship between City legal stalwarts Freshfields (Freshfield Bruckhaus Deringer), and its oldest and most famous client- the Bank of England.

Several years on from 2007, the banking community (elite?) itself continues to enthuse about how Freshfields is called upon regularly to advise the Bank of England,[[51]](#footnote-51) but the position whereby the Bank sought legal advice from Freshfields exclusively, and which had subsisted since 1743, came to an end in 2007. This was when Freshfields commenced advising the stricken Northern Rock in relation to its restructuring, thereby creating a conflict of interest on account of the emergency assistance being provided by the Bank of England. The legal controversy created by Northern Rock’s financial difficulties involving Freshfields also drew in two other key City law firms, as Clifford Chance advised the Bank of England and Allen & Overy provided guidance for Northern Rock in connection with its emergency assistance. These firms together with Linklaters and Slaughter & May embody the prowess and expertise associated with the ‘Magic Circle’, and they are thus particularly well placed to become prominent and influential players in the advice given to bank boards on avoiding decision-making which could be regarded as reckless. More than a century earlier, the firm known traditionally as Messers Freshfields played a central role in alliances forged between legal and financial elites during the nineteenth century. These were alliances which it is argued greatly empowered commercial interests in Victorian determinations of legal liability.

Through investigations into the history of financial crime it is possible to trace the emergence of a small elite of legal actors which occurred from the 1850s, who became experts in matters of ‘financial crime’. This in turn tells a tale of how very bold and determined statements were made concerning the ‘proper bounds’ of conduct in business for the purposes of framing criminal liability in circumstances where law professed to know little about business matters,[[52]](#footnote-52) and actually that it should not adjudicate on them, and instead leave such matters to businesspeople.[[53]](#footnote-53) Legal boldness in business matters can be seen in key statutory reform undertaken in the Punishment of Frauds Act 1857[[54]](#footnote-54) and in courtroom statements made during criminal trials of businessmen for misconduct alleged to amount to ‘high art’ crime.[[55]](#footnote-55) Both sought to communicate strong normative messages of propriety in the conducting of business affairs, and within this both placed particularly marked emphasis on responding to indulgence in ‘ill-considered’ venturing[[56]](#footnote-56) which then often precipitated secondary or collateral[[57]](#footnote-57) wrong-doing manifested in misappropriations to try to make good losses, or misrepresentations designed to conceal them.[[58]](#footnote-58)

Both these legislative and courtroom discourses, in their interest in the activities of the financial and wider commercial elites, often targeted bankers specifically. This professional grouping can be seen at the heart of the ‘mischief’ underpinning the 1857 Act,[[59]](#footnote-59) and also as the subject of many of the criminal trials of the second half of the nineteenth century. And in terms of configuring the operations of nineteenth-century capitalist activities as ones occupied by an elite, it was of course so that through the onset and progression of the enterprise economy arising from embedding industrial capitalism the composition of the commercial elite would undergo significant change. Key actors would increasingly come from beyond the confines of the traditional elite embodying the ‘City club’[[60]](#footnote-60) as an influx of new participants and the decline in ‘face to face’ dealings resulting from increased transactional freedom precipitated a break-down traditional transactional governance.[[61]](#footnote-61) But as the criminal proceedings show, those on trial either were from ‘high office’[[62]](#footnote-62) from highest social echelons, [[63]](#footnote-63) or ‘respectable’ ‘gentlemen’ from ‘good family backgrounds’,[[64]](#footnote-64) who through their ability to penetrate such occupational circles were able to acquire elite credentials.[[65]](#footnote-65)

In the context of courtroom addresses concerning those who stood accused and were convicted of misconduct in their business affairs, judicial pronouncements provide particularly fertile reference points for the importance being placed by mid-to-late nineteenth-century legal discourse upon the proper bounds of business. These show very clear statements on the expected conduct of respectable businessmen regarded as being part of the elite. They also convey strongly the need to ensure that ‘infamous’ conduct- so called because of the harm it was considered capable of inflicting upon the economy and society –was severely punished, on account that failure to do so would amount to ‘a disgrace to the law of any country’.[[66]](#footnote-66) From this it might be asked how legal actors with little or no commercial expertise, and showing strong commitment to the autonomy of business interests in developing a framework for articulating law with industrial capitalism, could make such statements so confidently.

In the context of banking specifically from c 1850, it appears that increasingly the Bank of England became concerned to recruit those with expertise in criminal matters to the role of Standing Counsel. This office had existed since the eighteenth century,[[67]](#footnote-67) but traditionally clustered around the largely chancery-oriented business of the Bank. Perceptions of change in the Bank’s legal needs can be identified from exchanges between the Bank and its solicitor Freshfields, as illuminated in correspondence between the former and Charles Freshfield in the decade from 1849.[[68]](#footnote-68) On a general level, Charles Freshfield regaled the importance of appointing persons who were most suitably qualified rather than those who might be the best connected,[[69]](#footnote-69) thereby chiming into a more generalised social movement away from hierarchy towards meritocracy.[[70]](#footnote-70) Beyond this, an identifiable legal elite can be seen to emerge from the triangulation of initial resource given to ‘criminal matters’[[71]](#footnote-71) and the expertise gleaned from involvement in the legal proceedings themselves with those who occupied key legal roles in the trials. Amongst those who were lead counsel in the iconic early phase ‘financial crime’ trials, were leading lights of the day -including Harry Bodkin Poland – who also held office as Bank of England Standing Counsel c1850-1880 during this critical time for criminalising business activity.[[72]](#footnote-72)

Beyond this, questions remain about how legal confidence in making pronouncements in conduct in business became formulated and entrenched. The early phase criminal trials abound with such clear and definite statements, insisting in turn that alleged misconduct amounted to ‘infamous crime’ which required severe punishment to avoid bringing disgrace upon the nation and its legal culture, and equally that (on different occasions) disgrace lay in that criminal proceedings were ever brought. The trials of the Royal British Bank directors in 1858 and that Overend Gurney’s directors a decade later respectively illustrate these two positions, and also suggest that little factual difference appears to separate the cases.[[73]](#footnote-73) Such divergent views do appear difficult to reconcile, save that contemporary reflection on the latter case points to how in the eyes of the City, the Overend and Gurney directors were considered negligent and ‘sanguine’ in their approach to business, but that their conduct was not regarded as that which should be deemed criminal.[[74]](#footnote-74)

From this, clarifying what underpinned judicial confidence in making such pronouncements in what was an entirely new context for criminal liability,[[75]](#footnote-75) and where lack of expertise was professed alongside (equally strong) insistence that legal intervention in business affairs would be justified only in the most exceptional of circumstances,[[76]](#footnote-76) is complex. And such as illumination subsists, this appears to lie in in significant attempts being made actively to involve City interests in framing criminal liability. This is certainly evident in the criminal trials, which point to a more generalised acknowledged importance of including City interests rather than alienating them in circumstances where commerce required external scrutiny. The perceived importance of constructive dialogue between legal and commercial interests - which would actively eschew accusations that at crime flourished within the City’s environs and culture, and stress the importance of channelling the power and expertise of business towards curbing its worst excesses- can be read into key criminal proceedings. These show considerable reliance being placed on businessmen as expert witnesses, and as jurors in testing the scope and limits of criminal liability, and correspondingly high levels of deference and gratitude for these valued inputs. It is also highly likely that sectors of the City community acted as private prosecutors, looking to ensure that malpractices deemed worthy of public exposure and public censure would receive this, and perhaps to try to keep ones deemed not to away from this scrutiny.[[77]](#footnote-77)

In the trials themselves, that all courtroom interests – those of prosecutors, defence, and judges – appeared to look to men of commerce for guidance in the criminalization of business can be illustrated by reference to the trial of the Royal British Bank directors at the Central Criminal Court in 1858. Lord Campbell’s regard for the qualifications and knowledge of the jurors is manifest in his reference to them as ‘proper judges of fact’.[[78]](#footnote-78) This can be attributed to understandings arising ordinarily in jury trials, [[79]](#footnote-79) but it also appears to recognise that judgement qualities could also arise in more extraordinary ways. The value placed on expertise from business in determining the scope of criminal liability points to the importance of dominant mores and practices in determining which conduct would be considered ‘acceptable’ and what was to be regarded as damaging the ‘high character…of mercantile transactions’[[80]](#footnote-80) and thereby transgressive.

Within this limited evidence base, [[81]](#footnote-81) what can be gleaned from it goes to some considerable lengths towards constructing a plausible narrative for responding to misconduct committed by the contemporary elite. And albeit that understandings of its composition and configuration were highly dynamic during this time, it was so that those standing accused of misconduct did not ‘conform to the popular stereotype of “the criminal”’,[[82]](#footnote-82) and their actions would have lacked the ‘immediate moral outrage’ associated with many activities clothed with the label of crime.[[83]](#footnote-83) Responding to these considerations was challenging and it might appear that legal support for City desire not to penalise carelessness or negligence demonstrates law’s perception of its obligation to ‘oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil’.[[84]](#footnote-84) Approaches taken might also appear to vindicate contemporary concern that rulings on lawfulness sought to reinforce dominant practices and the position of an established elite rather than respond to egregious conduct, reflecting concerns about intrusions from ‘outsiders’ and ‘outlier’ practices in a setting where capitalism’s forces of disruption emerged alongside its ones of innovation (and indeed pressure to innovate).

Given a context where disruption sat uneasily alongside how innovation and economic prosperity held the key to wider societal progression, discerning the lawful limits for business activity became an imperative for contemporaries. And notwithstanding that what appear to be extremely fine distinctions *can* be found in nineteenth-century criminalisations– such as in the Royal British Bank and Overend and Gurney trials - attempts to draw appropriate distinctions do appear to have been undertaken earnestly and robustly and in good faith. In the setting of rapid financial evolution and limited developments in the legal framework for capitalism, discerning criminal liability was a particularly taxing task for contemporaries. This is notwithstanding that then as now, concerns arose from whether determinations of legal accountability for conduct in business could be ones in the interest of ordinary financial citizens and wider society if their origins lie in the furtherance of the interests of business itself.

# 4. In conclusion: Financial elites and the legal system

Let us then conclude by considering the implications of the history of the mutual relationship between legal and financial elites for the modern day. As we have argued elsewhere, the relentless drive to prosecute financiers at the very highest levels presents a striking contrast with the approach to criminal prosecutions post-2008, which have invariably focused on footsoldiers rather than generals.[[85]](#footnote-85) But there is also a more profound contrast between the approach of the criminal courts to the Victorian banking prosecutions, and the approach of the modern civil courts to banking cases. Much financial litigation occurs in the Commercial Court, which was created as an attempt by one set of legal elites to preserve their role in commerce against potential encroachment by another: the newly-formed City of London Chamber of Arbitration (now the London Court of International Arbitration), an organisation which was “to have all the virtues which the law lacks.” A series of poor decisions in the ordinary Court of Queen’s Bench in commercial cases gave this particular impetus. Unsurprisingly, decision making by the Commercial Court has since them been unashamedly rooted in traditions of freedom of contract and *caveat emptor*. It has therefore been reductionist in approach and effect. That means the Court has tended not to look beyond and behind contractual documentation. Indeed, in complex financial transactions that documentation tends to be standard form and drafted on terms that are designed to promote certainty and quick and easy payments rather than to allow for any enquiry into the underlying balance of fairness in the dispute. This echoes that made by Mikael Wendschlag elsewhere in this volume in relation to how economism came to dominate an increasingly technocratic international elite in central banking over the latter half of the last century. It has often been said that one reason for the Commercial Court’s popularity as a forum for dispute resolution in global finance has been these concerns as to efficiency and speed of dispute resolution.[[86]](#footnote-86) These concerns tend naturally to be favourable to frequent user and well advised financial elite users of the Court rather than to outsiders..

The Commercial Court has played a central and influential role in refereeing not just the UK but the entire global financial system.[[87]](#footnote-87) Much of the financial sector work of the Commercial Court has been concerned with disputes between counterparties to what are known as ‘Over the Counter’ (OTC) derivative financial instruments – swaps, futures, contracts for differences and the like. These technically complex contracts are very often concluded *within* financial elites – between financial institutions themselves to manage their own risk exposures. But non-financial corporate, public and third sector users also make use of such instruments from time to time in order to protect themselves from a range of risks which arise in the course of their core non-financial activities. They are therefore transacting with members of financial elites and, although obviously advised professionally, do not have the same familiarity or expertise with such complex instruments as do the financial institutions themselves who use them regularly, design and structure them and, along with the core elite legal firms discussed above, set the parameters of the few Master Agreement templates of terms and conditions pursuant to which these OTC bargains are struck. The most ubiquitous of these Master Agreements is known as the ‘ ISDA Master Agreement’ and consists of extensive sets of standard form yet highly differentiable contractual documentation produced and kept under a review by a wholly private global trade association – the International Swaps and Derivatives Association formed in 1985. ISDA’s membership list reads like a roll call of the global financial elite drawn from financial institutions and their professional advisers in 67 different countries and it describes its mission as being to provide safety and certainty to the global derivatives market.[[88]](#footnote-88)

The ISDA Master Agreement has come before the Commercial Court (and also increasingly the Chancery Division of the High Court) on numerous occasions both before and after the 2008 crisis. These courts have almost invariably engaged in a robust application of the relevant terms and protocols of the ISDA Master Agreement to the disputes before it where attempts have been made by parties from outside of the financial sector to advance legal arguments based on their lack of understanding, capacity or real and genuine consent to the terms of these complex financial products. These types of argument, while they might once have won a fuller hearing from a Court of Equity, have largely fallen on deaf ears in the UK Commercial Court which has instead emphasised what is expressly provided within the four corners of the contract and highlighted the ubiquitous use of the Master Agreement and its commercial efficacy.[[89]](#footnote-89) Although speaking in the Chancery Divison Mr Justice Briggs could easily have been summing up the approach of the Commercial Court when he commented : “English law is one of the two systems of law most commonly chosen for the interpretation of the [ISDA] Master Agreement, the other being New York law. It is axiomatic that it should, so far as possible, be interpreted in a way that serves the objectives of clarity, certainty and predictability, so that the very large number of parties using it should know where they stand.”[[90]](#footnote-90)

The work of the Commercial Court (and indeed other divisions of the High Court most notably Chancery) in interpreting and applying the ISDA Master Agreement to OTC derivatives business in the period following the 2008 financial crisis has won approval from some academic commentators.[[91]](#footnote-91) Despite the financial sector’s continuing preference to litigate its disputes in London, concerns have been voiced by others that try as they might, the judiciary have sometimes struggled to provide the certainty and predictability of decision making in the resolution of complex financial transactions that international financial markets (and we would argue financial elites) require.[[92]](#footnote-92) This has resulted in calls for specialist arbitral tribunals for the resolution of complex financial disputes and an initiative that began in 2010 known as PRIME Finance has now been established in The Hague as expert and private dispute resolution service tailor made for the needs of efficient and low cost dispatch of disputes arising in complex financial transactions. It states its mission in terms that resonate in the public interest as being “to foster a more stable global economy and financial marketplace by reducing legal uncertainty and systemic risk, and, especially in emerging markets, promoting the rule of law. …” And yet its description of itself is in terms that emphasise the elitism and specialism of its members and their closeness to the core of the financial industry:

“This carefully vetted international group includes sitting and retired judges, central bankers, regulators, academics, representatives from private legal practice and derivatives market participants. Many have first-hand experience structuring and executing transactions, as well as of the laws, regulation and standard documentation of the structured finance market, creating a combination of legal and market expertise that is both ideal to the task at hand and completely unprecedented.”[[93]](#footnote-93)

It is not hard to see this development in terms of one truly global and highly specialist legal elite close to and well versed in the ways of the more rarefied parts of the financial sector threatening the core business of another legal elite, namely the UK judiciary, which is also on record as seeing its role in terms of promotion of the rule of law around the globe and support of orderly financial markets. [[94]](#footnote-94)

The response from the UK judiciary has been swift and interesting. In June 2015 the Lord Chief Justice of England and Wales announced the formal establishment within the UK Court structure of what has been dubbed by some as a new “Financial Super-Court” but is in actual fact a specialist list of the Commercial and Chancery Divisions of the High Court for financial claims of a value in excess of £50 million or that raise issues of concern to domestic and international financial markets.[[95]](#footnote-95) In justifying the new list as enabling access to expertise of London’s financial markets lawyers and experienced judiciary, reducing costs and delays of litigation and introducing a text case procedure by which to give fast, clear authoritative guidance to financial markets his Lordship could almost have been responding directly to the threat posed by PRIME Finance of loss of high value financial dispute resolution work to London’s Courtrooms and its attendant legal elites. ‘Promotion of the rule of law’ gains from the new Financial List come last on his list of justifications for it, almost as an afterthought.

The competition between different segments of the legal elite for a central position in hearing commercial disputes is, of course, precisely what prompted the creation of the commercial court in the first place, and its recurrence at a time when the desirability of the continued autonomy of the financial sector had been called into question is unsurprising. Yet it instantiates, yet again, the key themes of this chapter, namely, the shift in the legal system’s willingness and ability to respond robustly to wrongdoing by financial elites or harm caused by them; and the central role played in this shift by the mutually reinforcing interaction of legal and financial elites. The propensity of finance to do harm is a consequence not just of the socially irresponsible conduct of financial elites, but also of the willingness of legal elites to facilitate that conduct and even to reshape legal norms and institutions if that be necessary. Yet, as we have also sought to argue here, such an outcome is far from inevitable. The example of the 19th century trials demonstrates that *even* a legal culture dominated by elites, and by a mutuality of relations between legal and financial elites, is capable of grappling earnestly and robustly with the problem of the socially irresponsible conduct of finance. Against this background, the failure to do so in the post-2008 crisis stands as a hallmark of the failure of legal and regulatory authorities to even begin to grapple with ever-deepening role of financial elites in the everyday operation of the legal system.

1. Katharina Pistor *Towards a Legal Theory of Finance* ECGI Working Paper Series in Law, Working Paper N°. 196/2013 February 2013 [↑](#footnote-ref-1)
2. For a rare exception, see D Howarth, *Law as Engineering: Thinking About What Lawyers Do* (Edward Elgar 2013). [↑](#footnote-ref-2)
3. See e.g. TT Arvind, ‘Law, Creditors, and Crises: The untold story of debt’ in AK Aldohni (ed.), *Law and Finance after the Financial Crisis: The Untold Stories of the UK Financial Market* (Routledge 2016) [↑](#footnote-ref-3)
4. <https://www.gov.uk/government/news/kenneth-clarke-uk-should-be-lawyer-and-adviser-to-the-world> and see also Department of Justice Press release accompanying Action Plan for Legal Services Market reforms [https://www.gov.uk/government/news/uk-cements-position-as-centre-of-legal-excellence (16](https://www.gov.uk/government/news/uk-cements-position-as-centre-of-legal-excellence%20%20(16) May 2011) [↑](#footnote-ref-4)
5. The report trumpeted the UK as “.. a leading provider of many professional and support services associated with the financial services industry [and that] Legal services generated £20.9bn in 2011, 1.6% of GDP, and net exports of £3.3bn. The UK is one of two leading centres for international legal services, including corporate finance, corporate and commercial law and tax. Four of the ten largest global law firms are from the UK…” *An Indispensable Industry: Financial Services in the UK* report published by the City of London Corporation in 2011 <https://www.cityoflondon.gov.uk/business/economic-research-and-information/statistics/Documents/an-indispensable-idustry.pdf>. [↑](#footnote-ref-5)
6. For example in 2004, following an overhaul of its investigation and enforcement procedures and culture, the then lead regulator for the UK financial sector, the Financial Services Authority announced the appointment of a partner in Clifford Chance to chair its newly established Regulatory Decisions Committee <http://www.fsac.org.uk/library/communication/pr/2004/098.html>. More recently, Charles Randell, previously a corporate finance law partner at Slaughter & May and lead adviser to HM Government on many of the key financial stability and restructuring arrangements during the height of the 2008 financial crisis was appointed as an Independent Director to the Board of the Prudential Regulatory Organisation (the subsidiary of the Bank of England responsible for safety and soundness prudential regulation of much of the finance sector) <http://www.bankofengland.co.uk/publications/Pages/news/2014/034.aspx>

   Indeed the managing Director of the IMF, Christine Lagarde, herself chaired key executive committees at one of the largest global law firms having been a corporate law partner at Baker & MacKenzie prior to assumption of a political career https://www.imf.org/external/np/omd/bios/cl.htm [↑](#footnote-ref-6)
7. The UK has three distinct legal systems: England and Wales, Northern Ireland, and Scotland. Northern Ireland is a common law jurisdiction, which means that its laws share core principles with the laws of England and Wales, but it is governed by a different set of precedents and statutes and often differs in particulars. The laws of Scotland are derived from the civil law tradition and Roman law, and differ fundamentally from the common law of England and Wales. Crucially for our purposes, each jurisdiction has its own independent community of lawyers, who are not automatically entitled to practice in the other jurisdictions. [↑](#footnote-ref-7)
8. The alchemy of the workings of the common law doctrine of precedent are well explained to the lay reader (and to those from civilian legal systems) by former Law Lord Lord Reid “The Judge as Law Maker” (1972-1973) 12 *J. Society Public Teachers of Law* 22. [↑](#footnote-ref-8)
9. See A Paterson and C Paterson, *Guarding the guardians? Towards an independent, accountable and diverse senior judiciary* (CentreForum 2012), available at < <http://www.centreforum.org/assets/pubs/guarding-the-guardians.pdf>> (accessed 1 February 2015). [↑](#footnote-ref-9)
10. P Evans, *Embedded Autonomy: States and Industrial Transformation* (Princeton University Press 1995). [↑](#footnote-ref-10)
11. See TT Arvind, *The law of obligations: A new realist approach* (Cambridge University Press 2016), Ch. 3. [↑](#footnote-ref-11)
12. On this, see J Rudolph, *Common Law and Enlightenment in England 1689-1750* (Boydell & Brewer 2013), [↑](#footnote-ref-12)
13. *Clerke v Martin* (1702) 2 Ld. Raym. 758, 92 ER 6 (KB). [↑](#footnote-ref-13)
14. Ibid (Holt CJ). [↑](#footnote-ref-14)
15. See e.g. the observations of Scrutton LJ in *W.N. Hillas & Co Ltd v Arcos Ltd* (1931) 40 Lloyds Rep 307, 310. [↑](#footnote-ref-15)
16. See *The Starsin* [2003] UKHL 12, [2004] 1 AC 715, [57] (Lord Steyn). [↑](#footnote-ref-16)
17. Lord Goff of Chieveley, ‘Commercial Contracts and the Commercial Court’ [1984] LMCLQ 382, 391 [↑](#footnote-ref-17)
18. P Nonet and P Selznick, *Law and Society in Transition: Towards Responsive Law* (Harper & Row 1978). [↑](#footnote-ref-18)
19. See HM Treasury (2012) *Senior Managers and Certification Regime: Extension to all FSMA Authorised Persons* (London, October 2015), accessible at https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/468328/SMCR\_policy\_paper\_final\_15102015.pdf [↑](#footnote-ref-19)
20. A Haldane and V Madouros ‘The Dog and the Frisbee’, (2012) Paper, Federal Bank of Kansas Economic Policy Symposium, Wyoming, 31 August 2012. [↑](#footnote-ref-20)
21. Ibid, 24-25. [↑](#footnote-ref-21)
22. Ibid, 22-23. [↑](#footnote-ref-22)
23. FSA Board, *The Failure of the Royal Bank of Scotland* RBS Report (London: FSA, 2011). [↑](#footnote-ref-23)
24. The House of Commons Treasury Committee Report on Northern Rock: *The run on the Rock*, HC 2007-8, 56-1, see especially pp 3 and 6-7. [↑](#footnote-ref-24)
25. Captured in the acronym SIFI (systemically important financial institutions) with the prefix G-SIFI used to denote global importance. Banks specifically are also identified in the nomenclature (G) SIB to denote systemical importance: see e.g. Financial Stability Board publications from 2011 and 2013, http://www.financialstabilityboard.org/publications/r\_131111.htm [↑](#footnote-ref-25)
26. As considered below in speeches from Andy Haldane and Paul Tucker. [↑](#footnote-ref-26)
27. See S Dewar ‘Tackling financial crime in the current economic climate’, Paper, Annual Financial Crime Conference, 27 April 2009, http://webarchive.nationalarchives.gov.uk/\*/http:/www.fsa.gov.uk/ [↑](#footnote-ref-27)
28. M King , ‘The *Today* Lecture 2012’, 2 May 2012; [↑](#footnote-ref-28)
29. See J Tosh *The pursuit of history: aims, methods and new directions in the study of modern history* (London: Longman, 2010), 40: see generally chapters 1 and 2 for Tosh’s discussion of the uses of history. [↑](#footnote-ref-29)
30. See its Final Report *Changing Banking For Good* (London, 2013). [↑](#footnote-ref-30)
31. See for example P Tucker ‘Redrawing the Banking Social Contract’, Paper, British Bankers Association Annual International Conference, 30 June 2009, p.1, <http://www.bis.org/review/r090708d.pdf>, and A Haldane ‘Credit is Trust’ Paper, Association of Corporate Treasurers, Leeds, 14 September 2009, p.4, http://www.bankofengland.co.uk/archive/Documents/historicpubs/speeches/2009/speech400.pdf. [↑](#footnote-ref-31)
32. See respectively J Black and D McRaild *Nineteenth-Century Britain* (Basingstoke: Palgrave, 2002), p.xvii; and C Stebbings ‘Benefits and barriers: The making of Victorian legal history’ in A Musson and C Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge: Cambridge University Press), 2012, especially pp.72-73. [↑](#footnote-ref-32)
33. See for example *A Century of Law Reform: Twelve Lectures on the Changes in the Law of England During the Nineteenth Century* (London: Council of Legal Education, 1901), p 1 [↑](#footnote-ref-33)
34. And which Mr Tucker insisted must be rethought in the wake of the crisis: see P Tucker ‘Redrawing the Banking Social Contract’, Paper, British Bankers Association Annual International Conference, 30 June 2009, p.1, <http://www.bis.org/review/r090708d.pdf> and also [↑](#footnote-ref-34)
35. See V P Polziatto *World Bank* *Prudential Regulation and Banking Supervision* (Background paper for the 1989 World Development Report, Washington DC 1989). [↑](#footnote-ref-35)
36. M Lobban, ‘Nineteenth-Century Frauds in Company Formation: *Derry v Peek* in Context’ (1996) 112 LQR 287, at pp 287-288. [↑](#footnote-ref-36)
37. See for example Y Cassis *City Bankers 1890-1914* (Cambridge: Cambridge University Press), 2009, and Y Cassis ‘Private Banks and the Onset of the Corporate Economy’ in Y Cassis *et al* (eds) *The World of Private Banking* **(**Aldershot: Ashgate, 1994). [↑](#footnote-ref-37)
38. Per Lord Adair Turner, and indeed a matter of public concern: see FSA Press Notice ‘FSA Board publishes report into the failure of the Royal Bank of Scotland’ 12 December 2011. [↑](#footnote-ref-38)
39. See D M Evans *The Commercial Crisis 1857-1858* (first published 1859; New York: Augustus M. Kelley 1969). [↑](#footnote-ref-39)
40. See S Wilson *The Origins of Modern Financial Crime: Historical foundations and current problems in Britain* (Routledge (Criminology), 2014). [↑](#footnote-ref-40)
41. W Eltis, ‘Lord Overstone And The Establishment of British Nineteenth-Century Monetary Orthodoxy’ *Discussion Papers in Economic and Social History* 2001, 42, University of Oxford [↑](#footnote-ref-41)
42. In the context of debates on making incorporation with limited liability generally available: HC Deb 27 July 1855, vol. 139, col 1446, Viscount Palmerston. [↑](#footnote-ref-42)
43. Sir Frederic Thesiger, Address for the prosecution in the trial of the Royal British Bank directors 1858, cited in Evans, *Facts, Failures & Frauds: Financial Mercantile Criminal* (1859, reprinted New York: Augustus M Kelley 1968), p.289. [↑](#footnote-ref-43)
44. Bank of England *The Role of Macroprudential Policy: A Discussion Paper* (Macroprudential Discussion Paper, 2009) p 3. For general discussion see E Wymeersch et al (eds) *Financial Regulation and Supervision: A Post-Crisis Analysis* (Oxford, Oxford University Press, 2012). [↑](#footnote-ref-44)
45. See extensive discussion of this in S Wilson *The Origins of Modern Financial Crime*. [↑](#footnote-ref-45)
46. H M Treasury *Sanctions for the directors of failed banks*, HM Treasury, 2012, para 4.1: see https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/81565/consult\_sanctions\_directors\_banks.pdf. [↑](#footnote-ref-46)
47. Rt Hon Matthew Hancock MP, ‘The right are right to challenge rewards for failure’, Speech, 12 January 2012, <http://www.matthewhancock.co.uk/campaign/matthew-hancock-mp-right-are-right-challenge-rewards-failure>; [↑](#footnote-ref-47)
48. See s 36 for conditions required for liability to arise, relating to institutional failure and seniority of those entrusted with decision-making [↑](#footnote-ref-48)
49. HM Treasury, *Sanctions for the directors of failed banks*, para 4.11. [↑](#footnote-ref-49)
50. By virtue of Financial Services (Banking Reform Act) s 36(4)(b) [↑](#footnote-ref-50)
51. See for example the British Banking Association’s publicity on its key associates: https://www.bba.org.uk/about-us/associates/freshfields-bruckhaus-deringer/ [↑](#footnote-ref-51)
52. As considered below herein. [↑](#footnote-ref-52)
53. As stated seminally in *Foss v Harbottle* (1843) 2 Hare, 461. [↑](#footnote-ref-53)
54. An Act to make better Provision for the Punishment of Frauds committed by Trustees, Bankers, and other Persons intrusted with property’, 20 and 21 Vict c 54. [↑](#footnote-ref-54)
55. Per D M Evans *Facts, Failures & Frauds*, p 1 [↑](#footnote-ref-55)
56. Ibid, p.128, considered by the author in respect of London bankers Strahan, Paul and Bates, tried at the Central Criminal Court in 1855 for embezzlement of property entrusted by customers. [↑](#footnote-ref-56)
57. See D Nelken ‘White-Collar Crime’ in M Maguire *et al* (eds) *The Oxford Handbook of Criminology* (Oxford: Oxford University Press, 1st edn, 1994), p.355; at 373-374. [↑](#footnote-ref-57)
58. Both of which can be found provided for in the 1857 Act. [↑](#footnote-ref-58)
59. As evident in its long title. [↑](#footnote-ref-59)
60. Per David Kynaston; see *The City of London* (in 4 volumes, London: Chatto and Windus; Pimlico Press, 1994-2001), and indeed the titular significance evident in *The City Of London Volume 4: Club No More, 1945-2000*. [↑](#footnote-ref-60)
61. See discussion in S Wilson, ‘Tort law, actors in the “enterprise economy”, and articulations of nineteenth-century capitalism with law: The Fraudulent Trustees Act 1857 in context’ in TT Arvind and J Steele (eds) *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford: Hart, 2012), p.353. [↑](#footnote-ref-61)
62. As expressed in Baron Alderson’s concluding post-conviction remarks in the trial of Strahan, Paul and Bates in 1855, transcribed in D M Evans *Facts, Failures & Frauds*, 145. [↑](#footnote-ref-62)
63. As stressed in the Committal hearing for the trial of Strahan et al before Bow Street Magistrates: see Evans, *Facts, Failures, & Frauds*, p 117. [↑](#footnote-ref-63)
64. See the defence submissions made on behalf of John Stapleton in the trial of the Royal British Bank directors, the Central Criminal Court London, 1858 (reported (1858) F and F, 213), and fully transcribed in D M Evans *Facts Failures & Frauds,* p 350. [↑](#footnote-ref-64)
65. See the position of Bates in the firm of Strahan Paul and Bates, as illuminated as background to their criminal trial in 1855 in D M Evans Facts, Failures & Frauds, p 110-111. [↑](#footnote-ref-65)
66. Ibid, see the transcription of Lord Campbell’s closing remarks for the Royal British Bank trial, pp 384-5. [↑](#footnote-ref-66)
67. This office had existed since the eighteenth century: see J Slinn *A History of Freshfields* (London: Vanessa Charles, 1994), 17. [↑](#footnote-ref-67)
68. As documented in the Bank of England’s Freshfield Papers Archive, B[ank] of E[ngland] Archives, F6/4. [↑](#footnote-ref-68)
69. BE F6/4, Charles Freshfield to Deputy Governor, Letter, 25 June 1850. [↑](#footnote-ref-69)
70. Per Harold Perkin *Origins of Modern British Society 1780-1880* (London: Routledge and Kegan Paul, 1969). [↑](#footnote-ref-70)
71. See extensive discussion of this in S Wilson XXXX forthcoming [↑](#footnote-ref-71)
72. The significance attached to this timeframe is explored extensively in S Wilson *The Origins of Modern Financial Crime*. [↑](#footnote-ref-72)
73. Ibid, especially pp 189-209. [↑](#footnote-ref-73)
74. Ibid. [↑](#footnote-ref-74)
75. See generally S Wilson *The Origins of Modern Financial Crime.* [↑](#footnote-ref-75)
76. As embodied in *Foss v Harbottle* (1843). [↑](#footnote-ref-76)
77. Discussion of this specifically in the context of banking can be seen in S Wilson The Origins of Modern Financial Crime within the analysis of Chapter 7, pp 189-209. [↑](#footnote-ref-77)
78. Per Lord Campbell, trial of Royal British Bank directors 1858: see Evans, Facts, Failures & Frauds, 386. [↑](#footnote-ref-78)
79. See for example P Devlin *Trial By Jury* (London: Stevens, 1956). [↑](#footnote-ref-79)
80. D M Evans, *Facts, Failures* *& Frauds,* 214. [↑](#footnote-ref-80)
81. See generally S Wilson *The Origins of Modern Financial Crime.* [↑](#footnote-ref-81)
82. E H Sutherland ‘Is “White-collar Crime” Crime?’ *American Sociological Review* (1945) 10, p 132; p 137. [↑](#footnote-ref-82)
83. M Cole ‘The FSA's approach to insider dealing’, Speech, American Bar Association, 4 October 2007. [↑](#footnote-ref-83)
84. Lord Goff of Chieveley ‘Commercial Contracts and the Commercial Court’ (1984) LMCLQ, p382; p 391. [↑](#footnote-ref-84)
85. TT Arvind, J Gray and S Wilson, ‘From the Mid-19th century Bank Failures in the UK to the 21st century Financial Policy Committee: Changing Views of Responsibility for Systemic Stability’ in M Hollow, F Akinbami, and R Michie (eds.), *Complexity and Crisis in the Financial System: Critical Perspectives on the Evolution of American and British Banking* (Edward Elgar 2016). [↑](#footnote-ref-85)
86. Such as the praise for its work from Professor Sir Roy Goode Q.C. in his 1998 Hamlyn Lectures *Commercial Law in the Next Millennium*  (Sweet & Maxwell : London 1998) [↑](#footnote-ref-86)
87. “Three quarters of litigants in UK Commercial Court are foreign” *Financial Times* 29 May 2014 http://www.ft.com/cms/s/0/4c33f0c0-e716-11e3-88be-00144feabdc0.html#axzz3yun9nYns [↑](#footnote-ref-87)
88. ISDA describes its key objectives as reduction of counterparty credit risk, increasing transparency, and improvement of the industry’s operational infrastructure http://www2.isda.org/about-isda/ [↑](#footnote-ref-88)
89. Examples of the Commercial Court interpreting and applying the ISDA Master Agreement so as to thwart investor attempts to either imply terms beyond the ISDA standard form or otherwise agreement or invoke arguments from outside of contract law are abound and include (inter alia) attempts to advance *Bankers Trust International plc v PT Dharmala Sakti Sejahtera* [1996] CLC 518; *Credit Suisse v Stichtung Vestia Groep* [2014] EWHC 3103 (COMM)]; *SNCB Holdings v UBS AG* [2012] EWHC 2044 (Comm); *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) [↑](#footnote-ref-89)
90. *Lomas and others v JFB Firth Rixson, Inc and others* [2010] EWHC 3372 (Ch), [53]. [↑](#footnote-ref-90)
91. Joanne Braithwaite, ‘OTC derivatives, the courts and regulatory reform’ (2012) 7 *Capital Markets Law Journal* 1. [↑](#footnote-ref-91)
92. J Golden ‘Judges and Systemic Risk In the Financial Markets’ (2012) 18 *Fordham Journal of Corporate & Financial Law* Article 4; Jonathan Ross, “The case for P.R.I.M.E. Finance” (2012) 7 *Capital Markets Law Journal* 221. [↑](#footnote-ref-92)
93. http://primefinancedisputes.org/about-us/ [↑](#footnote-ref-93)
94. For example see comments of Mr Justice Geoffrey Vos in speech entitled “The role of UK Judges in the success of UK PLC” (KPMG LECTURE October 2011) available at https://www.innertemplelibrary.com/2011/10/the-role-of-judges-in-the-success-of-uk-plc-speech-by-mr-justice-vos/ [↑](#footnote-ref-94)
95. Lord Thomas, Lord Chief Justice of England Wales speech to the Mansion House in the City of London June 2015 [↑](#footnote-ref-95)