Administrative Jurisdiction

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Abstract

Jurisdiction is the extent of a power. This gives rise to an important distinction. Jurisdictional errors take an authority outside the scope of its power. Nonjurisdictional errors do not, even if they render the ensuing exercise of power unlawful. Unwelcome baggage has made the task of arriving at a coherent account of jurisdiction needlessly difficult. That baggage is the common assumption that lack of jurisdiction is the sole basis for judicial review. This is wrong. Abandoning it makes space for an attractive account of when an error is jurisdictional. An error is jurisdictional if (i) it is an instance of a kind of error, in the sense of ground of review, which could arise at the outset of proceedings, but (ii) it does not pertain to a collateral matter, the purpose of which is tangential to the purpose of the inquiry. I shall call this the revised temporal view of jurisdiction. It accepts the possibility of judicial review on both jurisdictional and nonjurisdictional grounds. But the distinction has practical significance for at least three reasons. First, only acts with a jurisdictional flaw are nullities. Second, jurisdictional questions take analytical priority over nonjurisdictional ones. Third, post hoc explanations are only acceptable for jurisdictional issues.

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* For purposes of this table, I have treated England and Wales, and Scotland, as a single legal jurisdiction. I also included Privy Council appeals, no matter their jurisdiction of origin.

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1 Brexit

On 23 June 2016, the electorate of the United Kingdom made the momentous decision to leave the European Union. After some haranguing, Parliament passed legislation to empower the government to notify the EU of the UK's intention to withdraw from the Union.[1] This triggered a process, culminating in an eventual Brexit.

That process involved a series of strained negotiations between the two parties. Terms needed to be agreed to avoid a 'hard' exit. Few wanted this. It would mean trade relations would revert to the basic rules of international trade. Among other things, this would hinder free movement along the Irish border.

In the midst of its negotiations with the EU, the UK Government faced resistance back home. Typically, the government would command the confidence of a majority of the House of Commons. But the issue of how best to proceed in the ongoing negotiations sharply divided the House. A clear majority disapproved. And so, with the assistance of muscular action taken by John Bercow, then-Speaker of the Commons, the House took the extraordinary step of wresting control of its agenda from the government.[2]

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[1] Under Article 50 of the Treaty on European Union. The government previously tried to invoke Article 50 without parliamentary authorisation. But the Supreme Court found this attempt unlawful in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (*Miller I*).

[2] This led Parliament to enact the European Union (Withdrawal) (No 2) Act 2019 (UK), which required the government to seek an extension of negotiations prior to formal withdrawal. It is also known as the Benn Act. But Boris Johnson called it the Surrender Act. Needless to say, it was inconsistent with his government's negotiating strategy.

That placed the government in an untenable position. Historically, the path forward would have been clear. Call a general election, and seek to convince the public to elect a more supportive House. Such a path, however, was unavailable, thanks to the constitutional reforms enacted under a prior coalition government.[3] So the government tried a different tack. It advised the Queen to prorogue Parliament, ending the current session and setting a date for the start of the next parliamentary session. Typically, the intervening period in which Parliament is not in session—that is, the time between the end of the old session, and the start of the new session—would be brief. Not this time. According to the terms of the government's advice, the period would have lasted just over a month.

The government's advice sparked uproar. Litigation ensued. Among those who sought judicial review was Gina Miller. She brought her case all the way up to the Supreme Court. And, in *Miller II*, the court ruled in her favour.[4] The government could not prorogue Parliament in this way.

The court reached this conclusion in a remarkable way. It relied on what amounts to a three-part argument. It goes as follows.

> (**P1**) The *extent* of the power to prorogue Parliament is always reviewable in the courts; only questions regarding how that power is *exercised* could be nonjusticiable.[5]
> (**P2**) The prerogative power only extends so far as its consequences, including its effect on the possibility of adequate parliamentary supervision, could be reasonably justified.[6]
> (**P3**) The manner in which the government sought to prorogue Parliament, including how long it sought to keep Parliament out of session, was unreasonable.[7]

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[3] Namely, the Fixed-term Parliaments Act 2011 (UK), since repealed by the Dissolution and Calling of Parliament Act 2022 (UK).

[4] *R (Miller) v Prime Minister* [2019] UKSC 41 (*Miller II*).

[5] *Miller II* at [35].

[6] *Miller II* at [48]-[50].

[7] *Miller II* at [58]-[61].

> (**C**) Hence, the government's advice exceeded the scope of its powers, and that meant it was a nullity.[8]

In this way, the court asserted the reasonableness of the exercise of a prerogative power was a question of the power's scope, not the manner of its exercise.

I found this impossible to accept. But that's not to say the government should have prevailed. How a power is exercised, according to the first premise, is only potentially nonjusticiable. This suggests some exercises of power could be reviewable. Including, perhaps, the exercise of power in *Miller II*. This, I would have thought, would be the most promising avenue to pursue for those dead set on judicially reviewing the government's advice.[9] There are good arguments on either side of this issue.

Not, however, for what *Miller II* actually said: that unreasonable prorogations exceed the scope of the power to prorogue. This, at any rate, was my initial reaction. And it led to a troubling thought. The court has taken the law on a wildly wrong turn.

To explain *why* the court made such a big mistake, however, turned out to be more difficult than the strength of my intuitions would have suggested. Clearly, the reasonableness of an exercise of power is a question of how that power is exercised. But the distinction between scope and exercise is tricky. Articulating the basis for this distinction is the task of this thesis.

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[8] *Miller II* at [61].

[9] This, in effect, describes the disagreement between the two appellate decisions prior to the Supreme Court taking up *Miller II*. Both the Divisional Court and the Inner House of the Court of Session agreed the matter went to the exercise of a prerogative power: *R (Miller) v Prime Minister* [2019] EWHC 2381 (QB) at [37], [40]; *Cherry v Advocate General* [2019] CSIH 49 at [50], [78], [96]-[97]. It is just the former thought the matter nonjusticiable on that basis, while the latter thought it could interfere on the basis of an improper motive: compare *Miller* [2019] EWHC 2381 at [54]-[57], [60] with *Cherry* [2019] CSIH 49 at [51], [83]-[87], [102]-[103].

The distinction, in my view, transcends the prerogative. It applies to statutory powers as well. By this I mean the government could make two kinds of errors when it exercises a statutory power. It could exceed the scope of the powers that Parliament conferred upon it. But it could also exercise the power it possesses, but in an unlawful manner. If I'm correct, the mistaken reasoning in *Miller II* reflects a broader malaise in the law. It lies in the effective abolishment of the distinction between jurisdictional and nonjurisdictional errors. That abolishment rests on a crucial point. All errors of law take the government out of the proper scope of its powers. Hence, all errors of law are jurisdictional; any such error takes the government outside the powers it might otherwise possess.[10]

So goes the modern orthodoxy in English law. It is wrong.[11] In what follows, I will show why. The argument unfolds in three parts.

The second chapter elaborates upon, and refines, the concept of jurisdiction. To do so, it articulates what I call a revised temporal test. It goes as follows. Jurisdictional errors are (i) the kind of error, in the sense of ground of review, which could arise at the outset of proceedings, but not (ii) those pertaining to matters the purpose of which is tangential to the purpose of the inquiry.

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[10] In this thesis, I shall refer to unlawful acts as 'errors' or 'errors of law'. Strictly speaking, those acts are downstream from the relevant error. It is the decision to do those acts which is erroneous; the act which follows is wrongful. Moreover, it is sometimes off-putting to describe a decision to commit some wrongs as erroneous. Take, for instance, the decision to take a bribe. It is surely erroneous, but we don't typically describe conscious wrongdoing as mistakes. Nonetheless, the courts typically describe any unlawful act as an error. Here I'll follow that convention.

[11] Since *Miller II* assumed this orthodoxy, it was wrongly reasoned. It does not follow, however, that it was wrongly decided. When the Queen prorogued Parliament, she *exercised* her prerogative power to achieve that result. But whether that exercise is justiciable, and if so whether the requirement of reasonable justification is an appropriate legal control to impose, are issues outside the scope of this thesis.

But this raises an important worry. Does the idea of jurisdiction lack significance? As the worry goes, it fails to bear on how courts should decide cases. The worry is compounded by a key plank of my position: there are circumstances when it is appropriate for a court to intervene to remedy nonjurisdictional errors. To address this, the next two chapters lay out practical ways in which the distinction between jurisdictional and nonjurisdictional issues materialises.

The third chapter addresses the retroactive invalidity of administrative action. When a court finds administrative action unlawful, it ordinarily acts as if the act never occurred. For unlawful acts are 'null and of no effect'.[12] This can have serious ripple effects on the broader legal landscape. The status of other administrative decisions might hinge on the judicially reviewed act. For their legal basis rests on the validity of that judicially reviewed act. Are they all invalid, too? The answer turns on why the judicially reviewed act is unlawful. If it is based on a jurisdictional error, the starting point must be those downstream acts are also invalid. If the error is nonjurisdictional, however, a court may quash the error, and that error alone.

The fourth chapter addresses a couple of related issues. First, the analytical priority of jurisdictional issues over nonjurisdictional issues. Suppose the government disappoints an applicant's legitimate expectation, in circumstances where that disappointment is abusive. This is a nonjurisdictional error which renders its decision susceptible to judicial intervention. But not if the applicant's initial expectation was of ultra vires action. The government should not have induced an expectation of unlawful conduct. Having done so, however, it lacks jurisdiction to satisfy that expectation. Second, the significance of post

[12] *Miller II* at [69].

hoc explanations. Suppose a public authority, in making its decision, articulates a particular set of supporting reasons. Later it comes to realise its initial reasons are bad, but that other reasons support its decision. Must the authority stick to its original explanation, or can it make use of these new arguments instead? The answer turns on jurisdiction. A court should, in principle, listen to those arguments when considering jurisdictional issues. Such arguments, however, should be inadmissible when it considers nonjurisdictional issues.

Together, these chapters argue that the idea of jurisdiction is both conceptually sound and practically useful. Its premature death in English law should therefore be reversed.[13]

[13] The thesis does not address *how* this should occur as a practical matter. Such questions of policy—of implementation—lie outside its scope. So I'm not misunderstood, however, here are a few brief thoughts. I would not, for my part, advocate direct legislative reform. Jurisdiction is a fundamentally juridical concept. Any chance for its revival, I suspect, will depend on whether it is internalised by judges. Those judges will need to work out the concept for themselves and flesh out its implications. Nor, however, would I call for the direct revival of jurisdiction by way of a watershed case. I recognise the arguments in this thesis depart dramatically from current doctrine. An incremental approach would be more realistic, and perhaps more fruitful. What I'd want, instead, is for more sustained judicial engagement with the grounds of review: what they are, the ways they are distinctive, and the things they have in common.

2 Jurisdiction

This chapter consists of eight sections.

First, I situate this chapter alongside some broader debates about the foundations of judicial review. Scepticism about jurisdiction could arise on either normative or conceptual grounds. The normative point is the law, prior to *Anisminic*, overly restricted the grounds of review. The conceptual point denies the existence of any workable distinction between jurisdictional and nonjurisdictional errors. This chapter only seeks to refute that latter point.

Second, I compare powers and duties. I show it is possible for a person to exercise a power, and thereby possess jurisdiction, in breach of duty.

Third, I introduce a possible account of jurisdiction. Call it the *temporal* view. It holds an error is jurisdictional if it arises at the outset of the inquiry. By contrast, errors which arise during, or after, that inquiry are nonjurisdictional.

Fourth, I level two objections to the temporal view. First, not every error which arises at the outset of an inquiry is jurisdictional. Consider trivial mistakes, like failing to provide lunch to decisionmakers before they discuss whether to start an inquiry, despite lunch being legally required. Second, not every error which arises during an inquiry is nonjurisdictional. Consider a decisionmaker who takes a bribe after she begins to hear the case. The temporal view must therefore be revised.

Fifth, I revise the temporal view to address the first objection. It must be qualified to exclude errors which are only tangential to the purpose of the inquiry. Such errors, even if they arise at the outset of an inquiry, are not jurisdictional.

Sixth, I revise the temporal view to address the second objection. According to the temporal view, jurisdictional errors arise from the outset. Now let's go up a level of generality. Now jurisdictional errors are the *kind* of error which could arise at the outset. For instance, a decisionmaker could have taken a bribe at the start of the inquiry, even if she happened to receive it after proceedings began.

Seventh, I take stock. According to my revised temporal view, an error is jurisdictional when (i) it is an instance of a kind of error, in the sense of ground of review, which could arise at the outset of proceedings, but (ii) it does not pertain to a collateral matter, the purpose of which is tangential to the purpose of the inquiry. Now I seek to motivate this account. It reflects an important difference between two kinds of reasons. Some reasons count in favour of, or against, a particular decision. Other reasons, however, go to a more basic issue: whether someone should be in a position to make that decision.

Eighth, I address a possible objection. In my view, some violations of even natural justice are nonjurisdictional. You may find this unintuitive. But I try to show why you should nonetheless endorse the implication. In particular, I tease out important similarities between review for natural justice and review for irrationality.

2.1 Ultra vires

By jurisdiction I mean the extent of one's power to directly alter our legal rights, duties, liabilities, and so on. To issue a warrant, rendering a suspect liable to have her home searched, an official must possess jurisdiction. By contrast, no jurisdiction is required for police constables to go to the local pub and ask questions about a suspect. This is so, even if that pub trip leads to the suspect's arrest, and therefore a change to her legal rights. This

is because the pub trip didn't *directly* lead to the change. Rather it uncovered leads, which later informed the exercise of jurisdiction to arrest the suspect.

Here I want to show the importance of jurisdiction for understanding administrative law. Now sometimes the invocation of jurisdiction serves to express one's allegiance to a particular justification of judicial review. Commonly known as the ultra vires theory, it seeks to justify all grounds of judicial review as a means of vindicating parliamentary intent. When Parliament delegates power to the executive, it does so on a limited basis. The courts, whenever they conduct judicial review, simply seek to police those limits.[1] Now this theory, in its modern form, is rather sophisticated. In particular it places heavy reliance on implied intent. It holds that Parliament, in conferring power, must have meant to keep faith with the rule of law.[2] On this view, the concept of jurisdiction is useful so far as it reminds us that Parliament confers limited powers.

To be clear, this is *not* what I mean. Indeed I seek to defend what is, in many ways, its antithesis. The notion of jurisdiction is not useful because it shows that all instances of judicial review concern the outer bounds of conferred authority. Quite the opposite. It is useful because there is an important distinction between the *extent* of one's jurisdiction and legal controls on how one *exercises* that jurisdiction.

For many, this suggestion will raise alarm bells. For others, it will simply strike them as a quaint, outdated curiosity. To address these worries, I want to start with a brief disclaimer. Then I will introduce the precise issue this chapter seeks to address.

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[1] C F Forsyth and I J Ghosh, *Administrative Law* (12th edn, Oxford 2023) 27-28.

[2] see eg Mark Elliott, *The Constitutional Foundations of Judicial Review* (Bloomsbury 2001) ch 4.

First the disclaimer. Many suppose the extent of jurisdiction marks a hard limit to judicial review. On this view, the courts cannot intrude on points which reside within an authority's jurisdiction. To describe an error as nonjurisdictional is simply to say the error is unreviewable. I reject this. Both jurisdictional and nonjurisdictional errors are susceptible to judicial review. To be clear, I don't mean to diminish the distinction's importance. That an error is jurisdictional has many important legal consequences. Some of them form the topic of my next two chapters. These include retroactive invalidity, analytical priority, and the relevance of post hoc justifications. But reviewability is not one of those consequences.

Why not? Everything hinges on what we understand by 'jurisdiction'. Many deploy the phrase to identify a particular basis for judicial review, namely legislative intention. On this view, courts correct jurisdictional errors to enforce Parliament's will. To that, the ultra vires theorists add a further premise: the *only* acceptable basis for judicial review is the enforcement of legislative intention. For Parliament has conferred a power on the authority, and a court can only frustrate the exercise of that power if it, too, has legislative warrant.

This claim has attracted significant criticism. For the critics, the conferral of a power need not authorise all possible exercises of that power.[3] This opens up a third possibility. The conferral could be silent on whether the agency can exercise a power in a particular way.[4]

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[3] John Laws in 'Illegality: The Problem of Jurisdiction' in Michael Supperstone and James Goudie eds, *Judicial Review* (Butterworths 1997) at 4.17-4.18; Timothy Endicott, 'Constitutional Logic' (2003) 53 *University of Toronto Law Journal* 201, 204-05; Tom Adams, 'Ultra Vires Revisited' [2018] *Public Law* 31, 35-37.

[4] *Cooper v Wandsworth Board of Works* [1863] 4 WLUK 37, 143 ER 414 at 420, per Byles J.

For my part, I am on the side of the critics. But this is an old debate, and I do not intend to resuscitate it here. One side says legislative intent alone can justify judicial review; the other side disagrees. The language of jurisdiction crops up often in this debate. But not in the sense I will use it. For my account of jurisdiction is neutral as to the ultimate *justification* of the grounds upon which the courts engage in judicial review. For instance, I will say the taking of bribes is a paradigmatic instance of a jurisdictional error. This is so, regardless of whether the source of the anti-bribery norm is legislative intent or the common law. The flip side is true, too. *Wednesbury* unreasonableness is a paradigmatic instance of a nonjurisdictional error. This is so, whether it is Parliament who implicitly authorises the courts to police those limits or if the common law imposes those limits on its own.

All this leaves open whether bribery or *Wednesbury* are justifiable grounds for the courts to intervene. I think they are, but I won't argue for that conclusion here. So I assume the grounds of review in English administrative law are broadly justified.

That's because my primary concern lies with a different question: whether a coherent and workable test for what does, and does not, fall within an agency's jurisdiction is available. It is. The worries of jurisdiction being conceptually unsound are therefore misplaced. The arguments in this chapter are mostly directed at addressing such worries. But lurking in the background, I suspect, is a normative, not conceptual, point. It is that, if administrative law is to embrace the concept of jurisdiction, the reach of judicial review will be unacceptably narrow.[5] This disclaimer is meant to assuage this anxiety.

[5] It is true that, under my account, certain grounds of review would be successfully excluded by the kind of ouster clauses found in *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22. But I won't address the issue of ouster clauses in this thesis; my focus lies primarily in the ordinary operation of the grounds of review, absent extraordinary legislative intervention.

With that out of the way, let's introduce the issue that animates this chapter. At first glance, the ultra vires theory of judicial review seems to entail a conceptual division between jurisdictional and nonjurisdictional errors of law. When Parliament confers power on a public authority, it gives the authority discretionary space to act within a bounded area. So errors of law which take a public authority beyond those boundaries strike at jurisdiction. Those errors within its discretion, by contrast, are nonjurisdictional.

Enter *Anisminic*.[6] No longer would the courts recognise such a distinction, at least in practice. Now we understand each legal error as a condition on the authority's power. Say a public body has a statutory power to undertake *insubstantial* construction projects. If so, the public body lacks the power to construct substantial projects. Any attempt to construct one would be ultra vires. What *Anisminic* recognises, then, is that statutory conditions set the bounds of a statutory power. And so, prior to *Anisminic*, the law made a conceptual mistake. It failed to recognise that all errors of law are jurisdictional.

Or so goes the predominant narrative. Consider, for instance, how Lord Diplock tells the story in *O'Reilly v Mackman*.

> The breakthrough that the *Anisminic* case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine.[7]

Sometimes, though, a case becomes known more for what it represents than what it holds. *Wednesbury* is such a case; *Anisminic* is another. None of the speeches in *Anisminic*

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[6] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL).

[7] *O'Reilly v Mackman* [1983] UKHL 1, [1983] 2 AC 237 at 278.

reveal an awareness they might be taken to abolish, at least in practice, the longstanding distinction between jurisdictional and nonjurisdictional errors. But one should not underestimate Lord Diplock's influence, and his speech in *O'Reilly* has spawned a greatly influential myth about *Anisminic*.

Some say, more sympathetically, that *Anisminic* made the jurisdictional distinction so conceptually unstable as to render its abolishment inevitable. Put schematically, this argument goes as follows.

> (**P1**) statutory powers have limits,
> (**P2**) those limits form conditions, ie if X_1 $X1_2$, X_3, then Y (where Y is the proposition that the agency is empowered to address the matter),
> (**P3**) any breach of condition negates Y, so
> (**C**) there are no nonjurisdictional errors of law.[8]

The source of the problem is **P2**. It assumes a critical point: that all legal controls on administration take the form of conditions on a legal power. This assumption is unfounded, as I will now show.

2.2 Powers and duties

To start, I want to establish a more limited claim. It is, in principle, possible to breach a duty while successfully exercising a power. Perhaps this seems puzzling at first glance. Why impose a duty on someone, yet simultaneously give them the power to violate it? But this scenario is commonplace in everyday life. Take a football referee. The rules of the

[8] This was Justice Scalia's argument in *City of Arlington v Federal Communications Commission* (2013) 569 US 290 at 297-301. But it will also be familiar to English public lawyers: see Paul Craig, *Administrative Law* (9th edn, Oxford 2021) 485-86; Forsyth and Ghosh, *Administrative Law* 193.

game impose duties on her. They require her to make, or refrain from making, certain decisions. Nonetheless she may, despite acting in breach of the football rules, successfully exercise power over the players. For instance, she might mistakenly award a penalty, even though the players did nothing wrong. By doing so, the referee alters the normative position. So the players must accept her decision, even though the referee failed to do as she ought.

In this way, not all football rules condition the referee's power. Some of the rules impose duties on the referee. And she might breach those duties by exercising a power she possesses. If she does so, she still acts in her capacity as a football referee. She has just made a mistake *within* her role.[9] This reflects a difference in the nature of duties and conditions. Duties concern the normative status of a referee's actions. They render those acts prohibited, to the extent they fall outside the duty. By contrast, conditions concern the normative position of those who would otherwise be subject to a power. If the conditions are not met, a purported exercise of a power has no effect on others.

Now let's apply this analysis to judicial review. Are legal controls on a public authority just duties, or do they also condition its power? I began with the suggestion that one might breach a duty without losing a power. But we know authorities can, in breach of duty, alter our legal position. Many know this as the presumption of legality. When an official tells us not to enter a restricted area, for instance, we cannot simply point to a legal error and ignore them. By doing so we would, in turn, breach a legal duty of our own. So authorities, in breach of duty, can nonetheless exercise a power to impose duties on us.

[9] cf John Gardner, *Law as a Leap of Faith* (Oxford 2012) 133.

This raises a tempting possibility. Perhaps legal controls *never* condition an authority's power, even as they impose duties. Those authorities can, it seems, flout those controls while successfully changing how we ought to act. On this view, an authority's breach of duty does not, in itself, alter the legal status of its power. Rather the breach simply calls for judicial correction. As Thomas Adams argues, it places courts under a duty to quash the agency's decision.[10] If so, legal controls are never conditions. Instead they require the court to wield its own power to overturn an agency's mistaken, inferior exercise of power.

The existence of the presumption of legality, however, does not entail this conclusion. For there are two possibilities. First, that the presumption is a separate source of normativity. It is a common law rule which imposes a duty to do as the agency purports to require. If so, an agency's exercise of power need not suffice to explain the duty. We can resort to the presumption of legality. So it is consistent with the view that legal controls condition the scope of power. Second, that the presumption is normatively inert. An agency retains the ability to impose duties on us, notwithstanding its breach of duty. If so, the presumption simply reflects what is already the case. This is consistent with the view that legal controls do not condition an agency's power.

Here I defend a pluralist position. Both possibilities are partially correct. Some legal controls condition an authority's power, whilst others simply impose a duty on the authority. To arrive at this position, we must resort to both possible explanations of the presumption of legality. The first applies when the legal controls are conditions, the second when they are just duties.

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[10] Thomas Adams, 'The Standard Theory of Administrative Unlawfulness' (2017) 76 *Cambridge Law Journal* 289, 302.

2.3 Time

To recap, I have shown it is *possible* for some legal controls to be conditions, and others duties. This is some progress, but not much. Showing the possibility of both options is necessary, but far from sufficient, to demonstrate their co-existence.

Scepticism about the existence of a workable distinction between conditions and duties likely poses the greatest threat to the concept of jurisdiction. Many articulations of this scepticism, however, suffer from a fatal flaw. As we saw, they simply assume their conclusion. If we start from the premise that legal controls condition an agency's power, it straightforwardly follows that all legal errors are jurisdictional. Not all legal errors go to a condition on a power, however.

To see how, I want to turn to a rather old case in English law—*R v Bolton*.[11] It began with a rather pedestrian issue. A local parish sought to evict Bolton from the cottage in which he, and his family, resided. For a while he paid rent to reside there. Then he was imprisoned for smuggling. During that time the parish allowed his family to stay in the cottage for free, on grounds of impoverishment. After Bolton served his time, he returned to his family. What happened next is a matter of dispute. The parish claims they initially permitted him to gratuitously reside in their cottage. Then they changed their mind, and sought to evict him. Bolton rejects this. For he claims to have occupied a public office, which entitled him to stay in the cottage for free. He did, though, insist he paid the requisite taxes. The case came before the local magistrates. They found no evidence of his occupying

[11] (1841) 1 QB 66, 113 ER 1054.

a public office or paying the relevant taxes. So they issued an order of possession in favour of the parish. Bolton sought judicial review.

Lord Denman CJ delivered the judgment of the court. He began with a fundamental principle. When reviewing an authority's decision, the High Court can only 'see that the case was one within their jurisdiction'.[12] Now it seems tolerably clear 'jurisdiction' refers to the extent of the authority's power. But how exactly do we work out whether an agency fell outside its power? A crucial passage addresses this point.

> The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry.[13]

The passage consists of two parts. The first says judicial review is not about the merits of the decision. For now, though, the point with which we are concerned arrives in the second part. There Lord Denman CJ points us in the direction of the holy grail: a workable test for determining those errors which are, and are not, jurisdictional. He says errors going to jurisdiction arise at an inquiry's commencement. Nonjurisdictional errors, by contrast, arise at its conclusion. This is a temporal test. To apply it, we need to figure out *when* the local authority commits the purported error, assuming it is an error.

Lord Denman CJ cites two cases: *Brittain v Kinnaird*[14] and *Cave v Mountain*.[15] Neither supports the second part of this passage. So *Bolton* announced a novel test.[16] I do not claim

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[12] *Bolton* 113 ER at 1057.

[13] 113 ER at 1057.

[14] (1819) 129 ER 789, 1 B & B 432.

[15] (1840) 133 ER 330, 1 Man & G 257.

[16] Philip Murray, 'Escaping the Wilderness: *R v Bolton* and Judicial Review for Error of Law' (2016) 75 *Cambridge Law Journal* 333, 346.

the principle underlying *Bolton*'s reasoning was ever the law in England. If I were, it would be important to show that courts post-*Bolton* have consistently applied the case. My sole concern, however, is what *Bolton* can tell us about the nature of jurisdiction.

Again, according to Lord Denman CJ, an error is jurisdictional if it arises at the outset of the inquiry. From now on, I shall call this the *temporal view*. Is it sound?

2.4 Two objections

Here are two reasons to doubt the temporal view. First, not every error which arises at the outset of an inquiry is jurisdictional. Second, not every error which arises during an inquiry is nonjurisdictional.

To see the force of the first objection, consider this rather extreme example. Suppose the law requires lunch to be provided to decisionmakers before they discuss whether to start an inquiry. Say no food was provided, whether by accident or to save money. Does this mean any decision which arises from this inquiry is infected with a jurisdictional error? Surely not. Lunch is too divorced from the purpose of the inquiry. It is what makes the error seem technical. Such errors do not take the decisionmaker outside its legal powers.

To see the force of the second objection, consider bribery. Under the temporal view, an authority who accepts a bribe at the start of its inquiry commits a jurisdictional error. An authority who accepts the bribe after proceedings begin, however, commits a nonjurisdictional error.

That cannot be right. Whatever the legal consequences of recognising an error as jurisdictional might be, they cannot turn on *when* the decisionmaker, say, accepts a bribe. This is a matter of principle. The question is whether the nature of a bribe turns on the time

at which it is accepted. It does not. The suggestion leads to absurdities. Significant legal consequences should not follow from minute empirical differences as to when the bribe was received. More fundamentally, acceptance of a bribe—even if it occurs late in the process—must deprive the decisionmaker of jurisdiction. That's because it is incompatible with the role the decisionmaker occupies as a matter of law.

Now I will propose some revisions to the temporal view to address these concerns.

2.5 Trivial errors

The first objection points to trivial errors to challenge the temporal view. The thought is a designation of an error as 'jurisdictional' has serious consequences, and so it shouldn't turn on trivial differences.[17]

I agree. The problem is what this observation is taken to entail. It is easy to jump to the following conclusion: that whether an error is jurisdictional turns on whether it is sufficiently serious to warrant the consequences of a finding of jurisdiction. This, in my view, is disastrous. It skips directly to the question of whether the court would prefer a state-of-affairs in which the act is invalid. This circumvents any serious inquiry as to the nature of the ground of review.

The worry is this. To ask whether the remedy of invalidation would be desirable under the particular circumstances assumes something important. Or, rather, it assumes something away. Namely, whether, as a matter of principle, a court *must* find the act invalid,

[17] For some, these consequences include reviewability. Again, I reject this; I think administrative decisions are reviewable for some nonjurisdictional errors. But that isn't to say the identification of jurisdictional errors is unimportant. I think it is quite serious, as the next two chapters will argue.

even if it is not something the court would do if it were wholly unconstrained. Perhaps the question is not, at least entirely, 'inherently discretionary', despite what the House of Lords suggested in a leading case.[18]

For some time, English law grappled with this possibility. It distinguished between errors which arise from mandatory as opposed to directory provisions. The thought was some requirements were, by their nature, 'mandatory'. This meant their violation was capable, in principle, of invalidating the authority's decision. By contrast, violations of a directory provisions did not possess this character. At first glance, this seems like a promising way to revise the *temporal view*. We could just say an error is jurisdictional if it (i) does not concern a directory provision, and (ii) arises at the outset of the inquiry.

But the distinction just pushes the problem one step back. For there remains an outstanding question. What, precisely, *explains* the difference between mandatory and directory provisions? What features do mandatory provisions possess that directory provisions do not? Here are two possibilities.

First, that mandatory provisions are, well, mandatory. By contrast, directory provisions are simply suggestions, something an authority is free to disregard. But this cannot be right. As the House of Lords recognised, 'when Parliament lays down a statutory requirement for the exercise of legal authority it expects its authority to be obeyed down to the minutest detail'.[19] Parliament is not typically in the business of offering suggestions. When it lays

[18] *London & Clydeside Estates v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 190, per Lord Hailsham.

[19] [1980] 1 WLR at 189, per Lord Hailsham.

down a requirement, even a seemingly trivial one, we should not presume it to be a mere recommendation.

Second, that mandatory provisions require *full* compliance, while directory provisions only require *substantial* compliance.[20] On this view, a provision is directory if it is satisfied by something short of strict compliance. There is some judicial support for this inquiry.[21] But this confuses matters. There is a distinction between what *amounts* to a breach and what *consequences* should follow from a breach. 'The breach, even if tolerated, is still a breach.'[22] To describe an act as 'substantially' complying with a requirement is to admit it has, in some sense, fallen short of what was actually required. That a court will decline to quash an act if it substantially complies with a directory requirement is a '*consequence* of finding that a provision was merely directory'.[23]

Given these difficulties, the distinction between mandatory and directory provisions has been described as 'elusive'.[24] No wonder, then, that it has 'gone out of fashion'.[25] What has replaced it? When faced with a breach of a statutory requirement, the courts now start with 'whether Parliament intended the outcome to be total invalidity'.[26] Such an inquiry might seem promising. Often, however, there will be no precise intention on this point. So

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[20] *Woodward v Sarsons* (1875) LR 10 CP 733 at 746.

[21] *Natt v Osman* [2014] EWCA Civ 1520 at [29].

[22] Jim Evans, 'Mandatory and Directory Rules' (1981) 1 *Legal Studies* 227, 231.

[23] *R v Soneji* [2005] UKHL 49, [2006] 1 AC 340 (HL) at [65], per Lord Carswell (emphasis added).

[24] *Australian Capital Television v Minister for Transport and Communications* (1989) 86 ALR 119 (FCA) at 146, per Gummow J.

[25] *Soneji* at [61], per Lord Carswell.

[26] *Soneji* at [15], per Lord Steyn.

the question quickly becomes 'what intention should be imputed to Parliament'?[27] This can go one of two ways. The imputation might be entirely fictional. Take Canada. There, the courts are told to ask whether 'it would be seriously inconvenient to regard the performance of some statutory direction as an imperative'.[28] That inquiry, of course, is 'blatantly result-oriented'.[29] Alternatively, 'imputation' might be overstating matters; it may just be a genuine inquiry into legislative intention. Take Australia. There, the courts are told to ask whether 'it was a purpose of the legislation that an act done in breach of the provision should be invalid'.[30] This purpose should be construed in light of 'the language of the relevant provision' and 'the scope and object of the whole statute'.[31]

Let's return to our initial task. Can the temporal view be revised to explain why some errors, despite arising at the outset of an inquiry, are nonjurisdictional? Here's a possible revision, in line with the modern approach. An error is jurisdictional if (i) as a matter of imputed intention, Parliament wishes for the error to lead to total invalidity, and (ii) the error arises at the outset. As we saw, there are two possible ways to understand (i).

To start, consider the Canadian formulation. It fleshes out (i) to rule out errors for which, given the facts, a finding of invalidity would be seriously inconvenient. Such errors are not jurisdictional. On this view, we cannot know whether an error is jurisdictional until we know the *consequences* of that error. But jurisdiction gets at a different question. Did

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[27] *Soneji* at [15], per Lord Steyn.

[28] *British Columbia (Attorney General) v Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re)* [1994] 2 SCR 41 at 123.

[29] *Re Vancouver Island Railway* [1994] 2 SCR at 123.

[30] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [93] (HCA).

[31] *Project Blue Sky* at [93].

the authority, while making its decision, exercise a power it possesses? This comes prior to the consequences of the decision. Whether an agency had the power to act cannot retroactively turn on the consequences its act happened to cause. So the Canadian formulation cannot help us.

Now consider the Australian formulation. More promisingly, it says we should look to purpose. But it goes awry in identifying *which* purpose is relevant. It fleshes out (i) to rule out errors arising from legislation which doesn't have, as one of its purposes, the invalidation of acts in breach of its requirements. Not all statutory requirements, however, will evince a clear intention as to what should occur if the requirement is breached. Now I don't wish to overstate this point. Recall the extreme example I offered to illustrate the objection. Suppose Parliament required the authority to provide lunch to its members before making a decision. To my mind, it is not too far off to say Parliament could not possibly have intended for this requirement to invalidate whatever decision the authority ultimately reaches.

Even so, I think we can do better. Claims about what Parliament 'could not possibly have intended' is conclusory. Something else must be doing the work to allow us to reach that conclusion. What could it be? The answer lies, not in the *general* purpose of the legislation, but the purpose of the *particular* statutory provision with which the authority's act is inconsistent. That is, we should look to the purposes for which the norm—like providing food before a meeting—is imposed. This brings up another important difference between my proposal and the Australian formulation. The answer lies, not in the *absence* of a purpose, but in the purposes which the statutory provision *possesses*.

Again, recall the task at hand. What about the provision's purpose could allow the temporal view to accommodate the possibility of trivial errors? It cannot be the absence of a purpose to invalidate acts which commit this error. For, as we saw, many particular provisions will not evince a clear intention on this remedial point, one way or another. Indeed, that is what motivates the Australian formulation to go up a level of generality. The lack of intention at the level of a particular statutory provision explains the Australian focus on the purposes of the general legislative scheme.

Here's my answer. Some statutory provisions have a purpose which is wholly tangential to the purpose of the authority's inquiry. Return to the example of needing to provide food. The purpose of this provision may be to ensure the decisionmakers are comfortable. But this is collateral to the inquiry's purpose. Suppose it concerns the possible creation of an environmental regulation—say, to require the use of carbon-capture devices to reduce factory emissions. Many possible reasons could bear on this decision, on either side. On one hand, such a requirement could impose a serious financial cost on factory owners. On the other hand, it could reduce emissions, and thereby reduce the nation's carbon footprint. Additionally, it could contribute to cleaner air, enhancing the quality of life of those who reside near factories. In any event, the need to supply food before the inquiry is tangential to the inquiry's purpose, which is to weigh these competing considerations to arrive at a decision. Even though it is temporally related to the inquiry—here, the food must be provided *before* the inquiry begins—it is not substantively related to that inquiry's purpose. Failing to provide food is therefore collateral to the proceedings themselves. Such an error cannot take the decisionmaker outside its jurisdiction.

Unless, of course, the legislature expressly provides for that outcome. It could say the decisionmaker lacks jurisdiction without lunch. Doing so only makes sense if the legislature thought lunch was necessary to reach a legitimate decision or, alternatively, as a coercive technique to compel the authority to provide lunch. Neither possibility challenges the nonjurisdictional nature of collateral errors. The first possibility simply reveals an epistemic disagreement. The legislature thought, perhaps mistakenly, that this sort of error is *not* collateral. The court may need to respect the legislature's assessment and act as if it were true. The second possibility envisages the deprivation of jurisdiction as a coercive tool to induce compliance. If so, the error itself remains nonjurisdictional. But, exceptionally, that error has the effect of depriving the decisionmaker of jurisdiction. This consequence is required by statute, triggered by the commission of the error.

We are now in a position to offer the following amendment to the temporal view. An error is jurisdictional if (i) it arises at the outset of the inquiry, but (ii) it does not pertain to a collateral matter, the purpose of which is tangential to the purpose of the inquiry. So revised, the temporal view accommodates the possibility of trivial errors. It therefore answers the first objection.

2.6 Serious errors

The temporal view, even with this change, remains vulnerable to the second objection. Recall the second objection points to serious errors which arise during proceedings. The thought is some errors, whenever they arise, must be jurisdictional. The example I gave earlier was of bribery. Suppose a judge takes a bribe while the trial is ongoing. Under the

temporal view, this error is not jurisdictional. For proceedings have already begun. But this is unintuitive.

It is therefore tempting to reject the *Bolton* approach wholesale. But there is a straightforward solution to the problem. We could revise Lord Denman CJ's formulation in the following way. Jurisdictional errors either arise, *or could arise*, at the outset of the inquiry. But nonjurisdictional errors only ever arise during, or at the conclusion of, the inquiry. The idea is some errors, but not others, are able to arise at a preliminary moment in time. Return to bribery. It is possible to receive a bribe after proceedings have begun. But it's also possible to receive a bribe beforehand. So bribery *could* arise from the outset of the inquiry. It therefore goes to jurisdiction.

On this approach, whether an error is jurisdictional no longer turns on the contingent facts of how the error, in a particular case, arose. Rather it turns on the kind of error. Here's the key question. Which ground of review covers the putative error? The answer, I argue, determines whether the error is jurisdictional.

This brings up the grounds of review. What are they? In the *GCHQ* case, Lord Diplock suggested 'one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review'.[32] Those grounds, in turn, are 'illegality', 'irrationality', and 'procedural impropriety'. Illegality refers to error of law; that is, whether the agency acted on a mistaken view of the governing legal context. Irrationality refers to whether it acted so unreasonably as to run afoul of the legal test in *Wednesbury*.[33] Procedural impropriety refers to both the requirements of natural justice as

[32] *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9, [1985] AC 374 (HL) at 410.

[33] *Associated Provincial Picture Houses v Wednesbury* [1948] 1 KB 223.

well as any statutory procedural requirements. Within this head Lord Diplock also included the doctrine of legitimate expectations. For he understood the law, at the time, to only protect expectations going toward procedure. Things have now changed. The doctrine now protects substantive expectations, too. So nowadays most understand the doctrine to be a separate ground—or, indeed, multiple grounds.[34]

Lord Diplock's articulation of the grounds of review came long after *Bolton* was decided. But with its help, we can fully grasp the genius of *Bolton*. For the temporal test reveals a crucial difference which separates the various grounds of judicial review.

First consider *illegality*. As we saw, it concerns mistakes an authority might make about the governing legal framework. Such errors could arise at any point. Such mistakes can occur at the outset, during, or at the conclusion of its inquiry.

Next up is *irrationality*. It is whether an authority's decision is reasonable. To know it is not, we must first have a decision. So this kind of error can only occur at the conclusion of its inquiry.

Finally take *procedural impropriety*. Here things gets difficult because numerous grounds fall under this label. Bribery is one. Such an error can occur at any point of the inquiry. Another is the failure to give a hearing. This error goes to how an authority reaches its decision. So it can only arise in the midst of conducting its inquiry.

How do these observations relate to the temporal view? Again, I propose to revise the temporal view as follows. Previously, it asked whether the *error* arises from the outset of proceedings. What I suggest is to ask, instead, whether the *kind of error* is something which

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[34] Rebecca Williams, 'The Multiple Doctrines of Legitimate Expectations' (2016) 132 *Law Quarterly Review* 639; but see Farrah Ahmed and Adam Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73 *Cambridge Law Journal* 61.

could arise from the outset of proceedings. And by 'kind of error' I mean the ground of review which covers the particular error that is alleged.

This allows us to further develop the temporal view in the following way. An error is jurisdictional if (i) it is an instance of a kind of error, in the sense of ground of review, which could arise at the outset of proceedings, but (ii) it does not pertain to a collateral matter, the purpose of which is tangential to the purpose of the inquiry. So revised, the temporal review is able to address both objections.

2.7 Time, again

Now I will try to motivate this account of jurisdiction. Why should you embrace the revised temporal view? Because it reflects some important differences between jurisdictional and nonjurisdictional errors.

Some errors are categorical. If committed the act is never acceptable. So no question of justification arises. Other errors are different. Their commission might nonetheless be justified. Such noncategorical errors are 'errors' so far as they go against a legal control on an administrative act. Those controls reflect the law's settled view that a particular reason against action is sufficiently weighty to warrant judicial review. An error is noncategorical, however, if it does not automatically render the act, all-things-considered, legally unsupportable. Such errors reflect defeasible reasons. The law should recognise them. For some reasons, though weighty, can be defeated by countervailing reasons.

That errors can either be categorical or not is one important distinction. Now consider another. Some errors come *prior* to an authority's act. It pertains to whether the authority can even begin to form a view. Crucially this is distinct from how it arrives at that view, or

what view it reaches. Rather it is about the legal conditions which must be satisfied for an agency to permissibly act in a given area. Someone must enforce those limits. And in our constitutional order, it is the High Court which normally discharges this function.

These errors come prior to an evaluation of what an authority did. For they concern the conditions an authority must satisfy to even be in a position to act. Now the authority, had it been able to proceed to its inquiry, could have come across good reasons to support its action. No matter. The question is whether the law permitted it to start the inquiry in the first place. It did not. And so the authority's acting for those reasons is also impermissible.

Not all errors are like this. Some concern the appropriateness of how an authority chose to act. When an authority acts, it presumably does so with a view toward achieving an end it considers valuable. The reasons which support that view may, in principle, defeat the reasons for the legal control on the authority's action. That the judiciary should intervene is therefore not a foregone conclusion. And this brings up comity. The authority acts on reasons which it considers important. The courts should not immediately dismiss the agency's determination. Having the final say doesn't license a flat refusal to respect the views of other bodies which exercise public power.

So there are two kinds of errors: categorical and noncategorical. And the difference between the two, in turn, lies in how the error stands in relation to what the authority did. Categorical errors are analytically prior to an evaluation of an authority's act. That the authority could have arrived at weighty reasons for its decision is immaterial. By contrast, noncategorical errors form one aspect of an authority's impugned action. But there are other aspects to its action, too. These two aspects stand side by side. Then the question is whether the action is permissible, all-things-considered.

All this is rather abstract. But it tracks the more concrete test for jurisdiction which I set out earlier. As we saw, the test holds that errors going to jurisdiction either arise, or could arise, at the outset of an agency's inquiry. Those errors which are only able to arise later are nonjurisdictional. To make things even more concrete, let us pick out two examples which clearly fall on different sides of this test.

First consider this scenario. Parliament has set up the Investigatory Powers Tribunal to adjudicate matters regarding the United Kingdom's various intelligence services. Now suppose the tribunal purports to adjudicate an ordinary contract between two private parties. This, of course, is an error which arises at the outset of the inquiry. The issue was always a private contractual matter. It falls outside the tribunal's jurisdiction. *Any* decision it could make from this point onwards is unlawful.[35] The error is therefore categorical. Now suppose the tribunal, while conducting its inquiry, comes across good reasons for why it should grant damages to the claimant for breach of contract. Yet those reasons cannot save the tribunal's decision. For the tribunal only came across those reasons *by* conducting its inquiry. Yet it is precisely that—proceeding to its inquiry—which is unlawful.

Now consider a different scenario. A local authority must decide whether to tear down an old nursing home to build a factory. Constructing this factory will significantly contribute to the local economy. It comes to the conclusion it should allow this new building project to proceed. But the local authority previously promised a pensioner it would permit her to reside in the nursing home for the duration of her life. So the pensioner has a legitimate expectation in the continued survival of the nursing home. Now this is

[35] There is, of course, the separate issue of the operation of a statutory provision which appears to oust judicial review. After *Privacy International* [2019] UKSC 22, though, we know that no effective ouster clause yet exists for the Investigatory Powers Tribunal.

certainly something the local authority must consider. Its decision to construct the factory, however, is not a categorical error. For, depending on the facts, its decision may well be justified. We must know more; the presence of the pensioner's legitimate expectation is not enough. Further, this error arises *after* the local authority starts upon its inquiry. Simply considering whether to allow the construction is not, in itself, erroneous. The local authority, during its deliberative process, may come across good reasons in favour of construction. Those reasons would bear on whether its ultimate decision is erroneous.

2.8 Procedure

Those two scenarios are as clear an example as I could think of to illustrate my account of jurisdiction. But I should also address the hard cases. Here I will focus on one such case—the process requirements which the courts impose under the head of procedural fairness.

These requirements go to how an authority must reach its decision. Here's a common requirement: to afford a hearing to the affected parties before reaching a decision. But notice something important. A hearing is something the authority's decisionmaking process must include. Omitting it is therefore an error. But the error is one which arises during the deliberative process. For part of what must be decided is whether a hearing is appropriate, to whom, and how it should be conducted. All this is part of the inquiry; the inquiry does not presuppose them from the start. So the error of failing to give a hearing, when it is indeed erroneous, occurs after the start of the inquiry. It follows that the error, under my account, is nonjurisdictional.[36]

[36] Criminal trials are a notable exception. There a hearing is *constitutive* of the deliberative process. To be sure, a judge could have thoughts about the issues prior to a hearing. But the formal inquiry into the defendant's potential guilt has yet to begin. That only occurs when the defendant (or her representative)

But this raises a serious worry. It stems from the thought that these procedural requirements, whatever else they might be, are somehow prior to an authority's power in a normative sense. The older language of 'natural justice' may well encourage this view. To evaluate this concern, however, we must tease apart the many things which the label of 'jurisdiction' is meant to entail.

Perhaps the most significant is the issue of retroactive validity. Here the question is whether an authority's decision, if it came from a procedurally unfair process, is invalid from the start. That they are was at the heart of the House of Lord's reasoning in *Ridge v Baldwin*.[37] I will address this important issue in the next chapter. There I will defend the view that, notwithstanding this decision, procedural requirements should be understood as nonjurisdictional.

For now, though, I want to offer some positive reasons in support of this claim. As Lord Mustill recognised in *Doody*, it is to the 'decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made'.[38] It follows, as Lord Woolf MR noted in *R v Lord Saville of Newdigate Ex p A*, that the public authority 'is master of its own procedure and has consideration as to what procedure it wishes to adopt'.[39] At the same time, the cases do not speak with one voice. In *Osborn*, Lord Reed seemingly rejected the thought that authorities possess a discretion

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is before the court. This is why, in this context, the hearing arises at the start of the inquiry. Those who purport to convict a criminal defendant without a hearing, therefore, commit a jurisdictional error.

[37] [1963] UKHL 2, [1964] AC 40.

[38] *R v Secretary of State for the Home Department Ex p Doody* [1993] UKHL 8, [1994] 1 AC 531 at 561.

[39] [2000] 1 WLR 1855 (CA) at [38].

to determine which procedures to adopt. As he put it, 'the court must determine for itself whether a fair procedure was followed'.[40]

But are these cases truly inconsistent? There is some room for doubt. Consider the sentences which directly precede Lord Reed's remarks. Addressing some obiter comments in a previous case, Lord Reed worried they 'might be read as suggesting that the question whether procedural fairness requires an oral hearing is a matter of judgment for the board, reviewable by the court only on *Wednesbury* grounds'.[41] And that cannot be right. Under *Wednesbury* a court reviews an agency's decision as to what outcome to ultimately adopt. And this, of course, is a different kind of decision to one concerning which procedure to adopt. Assimilating the two is not required to think both grounds are nonjurisdictional. So what Lord Reed rejects is the suggestion that procedural fairness and irrationality are the same ground of review.

To be sure, Lord Reed goes further. The key passage, once again, is 'the court must determine for itself whether a fair procedure was followed'. But this, viewed in isolation, is ambiguous. It allows for either a thin or thick reading. In one sense, any time a court applies a legal standard, it determines for itself whether the standard is satisfied. A court must, for instance, ask for itself whether the decision is *Wednesbury* unreasonable. That the agency fell short of this standard is a decision of the court. Viewed in context, though, this thin reading seems implausible. For Lord Reed took himself to conclude that procedural fairness, unlike *Wednesbury*, requires an independent determination. But this brings up a puzzle. What could he have meant?

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[40] *Osborn v Parole Board* [2013] UKSC 61 at [65].

[41] *Osborn* at [65].

The thick reading says there is something about the nature of procedural fairness which distinguishes it from review of the exercise of a discretionary power. One possibility is procedural fairness gives rise to a categorical error. Just like an agency can either begin its inquiry or it cannot, the thick reading insists procedural fairness admits of only one permissible choice. But this would be a radical departure from *Roberts*, where Lord Woolf found an 'implied power of an administrative body to enhance the fairness available to a person who otherwise would be adversely affected'.[42] If *Roberts* is right, there is more than one permissible option. All procedural fairness does is set a minimum floor under which an agency cannot travel. But this fails to distinguish it from *Wednesbury*. For that, too, establishes a minimum floor, albeit an extremely low one.

This reading suffers from a further flaw. Even the setting of a minimum floor is not susceptible to categorical analysis. That the Investigatory Powers Tribunal interferes in a private contractual matter is enough to know it acts unlawfully. The same cannot be said in the procedural fairness context. 'The rules of Natural Justice—or of fairness—are not cut and dried. They vary infinitely.'[43] Fairness, like reasonableness, is inevitably sensitive to the context, and the reasons a decision maker might come across while conducting its inquiry. Just knowing it failed to disclose relevant information, or organise a hearing, is not enough. Take the disclosure of information during a legally required consultation process. For instance, suppose an agency fails to disclose internal reports containing information bearing on what its ultimate decision ought to be, for which it is legally required to consult.

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[42] *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738 at [65].

[43] *R v Home Secretary Ex p Santillo (No 2)* [1981] QB 778, 795, per Lord Denning MR.

Whether this failure constitutes unfairness turns on 'the circumstances of the case'.[44] It should, for instance, be assessed in light of 'the nature of its subject matter' and 'the practical realities as to the way in which administrative decisions involving forming judgments based on technical considerations are reached'.[45] The basic point is that fairness is a matter of 'proportionate process'.[46]

I therefore conclude there are good reasons to think procedural fairness has more in common with reasonableness than Lord Reed supposed in *Osborn*.

[44] *R (Edwards) v Environment Agency (No 2)* [2006] EWCA Civ 877, [2007] Env LR 9 at [91].

[45] *Bushell v Environment Secretary* [1980] UKHL 1, [1981] AC 75 at 95, per Lord Diplock.

[46] Timothy Endicott, *Administrative Law* (5th edn, Oxford 2021) 137.

3 Nullity

This chapter consists of eight sections.

First, I introduce the notion of a legal nullity. This provocative idea is often evoked. I consider it in light of *Miller II*.

Second, I lay out two different views of voidness. The simple view treats voidness and nullity as equivalent. The relativity view, by contrast, is more complex. It says an act can be void for some people, but not others. If so, legally flawed acts are never nullities.

Third, I criticise the relativity view. It assumes that, absent a judicial remedy, the presence of a legal flaw in the exercise of public power is irrelevant. Such remedial reductionism is something we should resist.

Fourth, I criticise the simple view. It says all legally flawed acts are nullities. The rest of this chapter is dedicated to rejecting that proposition, with a focus on natural justice.

Fifth, I introduce the *Durayappah* case. It asks an important question about the duties of natural justice. Who are they owed to? The case tries to give an answer. But its reasoning reveals cracks in the notion that a decision taken in breach of natural justice is a nullity.

Sixth, I address head-on the leading case of *Ridge v Baldwin*. It is poorly reasoned. I then propose a positive argument, based on overcompensation, as to why we should understand the error in *Ridge* to be nonjurisdictional.

Seventh, I offer a solution to the overcompensation problem. Partial invalidation is available for nonjurisdictional errors. This allows the courts to better tailor damages to vindicate the applicant's interest in natural justice.

Finally, I look beyond natural justice. The overcompensation problem affects the tort of false imprisonment as well. In *Lumba*, the majority sought a solution in private law. I criticise this, and argue for a public law approach instead.

3.1 Disappearing ink

In late August 2019, Boris Johnson advised the Queen to prorogue Parliament. And so, on 10 September, around an hour after midnight, the Queen's representatives entered the House of Lords. The Lady Usher of the Black Rod went over to the House of Commons. Their presence, she informed the Commons, was desired in the Lords chamber. Pandemonium erupted. The speaker of the Commons, John Bercow, protested.

> I will play my part. This is not, however, a normal Prorogation. It is not typical. It is one of the longest for decades, and it represents, not just in in the minds of many of my colleagues but for huge numbers of people outside an act of Executive fiat.[1]

Nonetheless the speaker went over the Lords, as did many Conservative MPs. And there, in the Queen's name, Parliament was prorogued. Or so you might have thought.

Later the Supreme Court, in *Miller II*, held that the prorogation was unlawful.[2] What followed from this? Here is how Lady Hale and Lord Reed described it.

> [The advice] was outside the powers of the Prime Minister to give it. This means that it was null and of no effect … It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect and should be quashed. This led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect.[3]

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[1] HC Deb 9 September 2019, vol 664, col 646.

[2] *Miller II* at [61].

[3] *Miller II* at [69].

Just like that, it was as if the ink on the page, which recorded the Queen's order, simply vanished. We could imagine a court saying the Queen prorogued Parliament, but she was wrong to do so. Then it could seek to unwind the consequences of prorogation. But that is not what *this* court said. According to the Supreme Court, the prorogation never occurred.

What an extraordinary statement. For Parliament did not sit for two weeks. Until the ruling, nobody would have thought Parliament was still in session.

But this doesn't capture the whole picture. For, according to the Supreme Court, the Queen acted on advice which Boris Johnson could not give. So his advice was wrong from the start. It could never supply a justification, in law, for any of the acts which followed. So each of those acts, up to and including what the Queen's representatives said before Parliament, was always defective.

Nor was this, in *Miller II*, a mere technicality. John Bercow had declared, before the prorogation occurred, that any such prorogation would be illegitimate. It was, in his words, an 'act of Executive fiat'. Many agreed with him. And yet he was willing to go along with the prorogation proceedings. He would participate in the pomp and circumstance. For he, like all those who opposed prorogation, knew it wasn't the end of the story. *They would have their day in court*.

The Supreme Court vindicated their faith. But its reasoning extends far beyond this case. It says to treat unlawful orders, decisions, and rules as having never existed. But there is no limit to the number of people who could, at the time, be wrong about the law. They could then have relied upon the order to do countless other things. No matter—none of it exists, or ever did exist, before the eyes of the judges. At least, that is what *Miller II* said. Any unlawful act, it seems, is a nullity.

Not surprisingly, the courts, in practice, have shied away from this conclusion. Consider *Peachey*.[4] A group of landlords, unhappy with their tax liability, brought a challenge. They argued the rating authority overvalued their flats. The authority, they alleged, took into account an irrelevant consideration. So they sought to quash the rating list. The court turned them away; the judges held the list was lawful. But what if it wasn't? Had the list been a nullity, the authority couldn't assess any rates before coming up with a new list. This risked administrative chaos. That, the authority argued, was a reason to deny the claim. Lord Denning MR dismissed this in his obiter remarks. He said there was no risk of upheaval, for the court could limit its intervention to only have prospective effect.

So the *Peachey* case complicates the picture. Unlawful acts are, in principle, nullities. However, a court can, exceptionally, depart from this principle. Now I do not doubt the importance of ensuring orderly administration. And, in any event, Parliament has since legislated to expressly confer the sort of remedial discretion Lord Denning MR supposed.[5] But is that all? For my part, there is a lingering sense that something more can be said on Lord Denning MR's behalf. Principle, not just policy, supports his position.

To do so, I want to do is challenge an assumption which underlies modern English administrative law, including *Miller II*: that all unlawful acts are nullities, and therefore void from the start.

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[4] *R v Paddington Valuation Officer Ex p Peachey* [1966] 1 QB 380.

[5] Judicial Review and Courts Act 2022 (UK), s 1(1); Senior Courts Act 1981 (UK), s29A(1).

3.2 Two views on voidness

To start, it might be helpful to pin down what voidness means. But the phrase is ambiguous. It admits of at least two senses.

To start, consider the simple view. It takes the phrase to mean what it says on the tin. An act is void when it lacks any legal effect. This describes a pre-existing feature of the challenged act. Void acts are void before anyone comes to challenge it in court.[6]

The worry is this downplays the significance of judicial proceedings. If we want a remedy, we must go to court. What's more, courts deny remedies for all sorts of reasons, not all of which bear on the merits of the case. The applicant could lack standing. The time period for bringing a claim could have lapsed. And so on.[7]

All this is true. But some sceptics go further. They say the significance of remedies, and the need for courts to issue them, are fatal to the simple view. Here's William Wade.

> It makes no sense to speak of an act being void unless there is some person to whom the law gives a remedy. If and when that remedy is taken away, what was void must be treated as valid, being now by law unchallengeable.[8]

This leads Wade to adopt a reductionist account of time limits.

> The purpose of the Limitation Act, expressed technically, is to extinguish remedies. But in substance its purpose is to turn what is unlawful and void into what is lawful and valid after the limitation period expires.[9]

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[6] See, for example: *South Australia v Commonwealth* (1942) 65 CLR 373, 408 (HCA), per Latham CJ.

[7] The subject-matter of the case might render it nonjusticiable, for instance, or the defendant might be immune from suit.

[8] H W R Wade, 'Unlawful Administrative Action: Void or Voidable? Part 1' (1967) 83 LQR 499, 512.

[9] Wade, 'Void or Voidable? Part 1' 515.

Hence Wade dismisses the simple view. Soon I will challenge the truth of his claims. If I'm right, the dismissal is undermotivated. But first I want to describe the edifice he puts in place to replace the simple view.

This brings us to his alternative proposal. As Wade puts it, voidness is 'relative'.[10] We must always ask: void against whom? On this view, acts are void when they are devoid of legal effect to the beneficiaries of court-issued remedies. Nothing about voidness, then, implies any benefit to third parties. For they might not be entitled to a remedy.

Notice how far we've come from *Miller II*. There the Supreme Court described void acts as being nullities. This language is evocative. It suggests the void act never occurred. But we do not typically think of occurrences (or acts, or events) in relative terms. There is something odd about saying an act exists for one person but is a nullity for another. This is why, on the relativity view, unlawful acts are not nullities. It accepts that unlawful acts possess a legal existence. Those acts just happen to be susceptible to a remedy which a court may, or may not, issue in the future.

3.3 Against the relativity view

To motivate this revisionism, the relativity view adopts an unsound perspective on remedies. It insists the availability of remedies wholly determines the legal position. So foreign officials, who enjoy diplomatic immunity, lack a duty not to murder. For the state cannot prosecute them. Similarly, victims of tort, who run afoul of a limitation period, lack a right to compensation. This sort of reductionism is unfortunate. It fails to capture an

[10] Wade, 'Void or Voidable? Part 1' 501; Paul Craig, *Administrative Law* (9th edn, Sweet & Maxwell 2021) 753.

important feature of the law. Foreign officials remain under a duty not to murder, because the reasons not to murder apply just as much to them as anyone else. It is just, for reasons quite apart from the wrongness of murder, the state has compelling prudential reasons not to detain foreign diplomats. And courts may have reasons to deny tort claims upon the expiry of a limitation period, even if the particular victim is just as deserving of compensation. For instance, the limitation period may reflect general system-wide concerns of legal certainty. Collapsing the distinction between substance and remedy obscures this dynamic.

The distinction has specific doctrinal implications. For instance, the common law has long imposed controls on penalty clauses. They consist of agreements to pay a fixed sum upon breach of contract, rather than the sum payable under the general law of damages. In English law, such agreements are unenforceable when the agreed sum is wholly disproportionate to the innocent party's legitimate interests.[11] The unenforceability of these clauses stops the innocent party from securing a judicial remedy. But the existence of these clauses may still be legally significant. For instance, if money is already paid under a penalty clause, the breaching party probably lacks a restitutionary claim to claw back the money.[12] This reflects an important difference. Sometimes a party asks the court to take positive action to assist them. So they assert a legal fact to obtain a remedy. Other times a party seeks to stop the court from giving a remedy to someone else. So they assert a legal fact to avert an adverse result.

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[11] *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67 at [32], per Lords Neuberger and Sumption.

[12] Robert Stevens, *The Laws of Restitution* (Oxford 2023) 148.

A similar difference arises in public law. Here's one way to challenge a public authority's decision. Bring an application for judicial review before the High Court. This asks the court to intervene and issue a remedy on our behalf. But often the legal status of government action will bear on other issues. For instance, the government may bring an enforcement proceeding against me. But the rules it seeks to enforce may be legally invalid, and if so I cannot be held liable. Conversely, I may wish to bring a tort claim against a government official. But it can only succeed if their acts are not legally authorised. In this way, the success of various proceedings hinge on collateral issues of public law.

This mode of collateral challenge exposes the error of Wade's remedial reductionism. Suppose the state prosecutes me for a crime. In response, I point out the crime is, as a matter of law, a nullity. It never existed. And so the court dismisses the charge. But dismissal of criminal charges is not a remedy. So Wade was wrong to say 'it makes no sense to speak of an act being void unless there is some to whom the law gives a remedy'.[13] For an act may be void, and therefore incapable of supporting a prosecution, even if no court is willing to issue a remedy.

You may worry this is too pedantic. For by 'remedy' Wade could have meant any kind of judicial action. Let's reformulate the relativity view along these lines. On this revised view, an act is void if courts should act in a manner inconsistent with the act. This appears consistent with the way collateral challenges work.

But this consistency is superficial. Consider time limits. An applicant has, at most, three months to challenge a decision through judicial review.[14] By contrast, the tort of false

[13] Wade, 'Void or Voidable? Part 1' 512.

[14] Civil Procedure Rules (UK), 54(1).

detention is subject to a six-year limitation period.[15] This brings up a problem. Suppose I am unlawfully detained, released, and then—five years later—I decide to bring a tort claim for unlawful detention. The decision to detain me is no longer susceptible to judicial review. Yet officials might nonetheless be liable in tort. This seems inconsistent with the relativity view. For the three-month period has expired. And that should validate the decision. In response, you may wish to combine both time limits. This version of the relativity view would say the decision is validated (for some purposes) upon three months, and validated (for other purposes) upon six years.

But this badly distorts the picture. Perhaps one could try to explain the three-month limit for judicial review as pertaining to the impugned act's validity. But the six-year limit is the general limitation period for tort claims. So it also applies, in precisely the same way, to wholly private disputes. That this would have the effect of validating government action, as a matter of public law, is surprising.

It is also worth reflecting on why the relativity view is committed to this remedial explanation of validity. It starts from the premise that unlawful acts are not nullities. So they possess a legal existence. This means we are reliant on courts to dislodge these acts. Only judicial remedies can save us. And if those remedies never come, then these acts will continue to exist indefinitely. Hence there is no point in denying their validity.

On this view, detention pursuant to an unlawful decision was, at the time, legally authorised. If so a suit for false imprisonment asks the court to do something extraordinary. Under the guise of a private law claim, it asks for what is, in effect, a public law remedy.

[15] Limitation Act 1980 (UK), s 2.

It wants the court to retrospectively deprive a decision of the legal force it once possessed. Only then could the claim in private law proceed.

It is puzzling why the law would permit this blatant circumvention of its three-month time limit for judicial review. If the relativity view is correct, such claims ask the court to both strip an act of legal effect and apply tort principles to impose liability for damages. A successful claim accomplishes what a public law remedy would do *and more*. Yet, when compared to judicial review, the tort claim comes with a far more generous time limit.

The simple view can better explain this generosity. It says a suit for false imprisonment *only* asks the court to apply tort principles. The unlawful decision was a nullity. So it never authorised the detention. While adjudicating the tort claim, the court simply ignores what is, in any event, a nullity. Since all it does is adjudicate the tort claim, the applicable time limit is the general six-year limitation period for torts.

3.4 Against the simple view

The simple view, however, has problems of its own. It says void acts are nullities. But when are acts void? According to orthodoxy, whenever those acts are unlawful. Once we take these two claims together, we arrive at a startling conclusion. Anything which bears a flaw in public law is a nullity.

And here, I think, we find the germ of truth in the relativity view. For this cannot be right. Modern developments in public law have exploded the ways in which an act could be unlawful. When this occurs, it is often natural to describe the act as a breach of duty. But not a nullity. Convincing you of this is the task for the rest of this chapter. To do so, I shall focus on natural justice. In *Ridge v Baldwin*, the House of Lords held all decisions

taken in breach of natural justice are nullities. It is as strong a rejection one can find of my position. By dislodging it, I hope to clear the way for a more fruitful alternative.

Before I do so, however, I want to clarify my position. So far I have mostly sought to defend the simple view from the challenge posed by the relativity view. That was not in vain; there is much, I think, to like about the simple view. Its equivalence of voidness with nullity captures something important about the nature of *some* public law flaws.

Those flaws are the ones which take a public authority outside its jurisdiction. Unsurprisingly, I happen to think this corresponds to the revised temporal view. Such errors concern features about an inquiry which could obtain from the very beginning. Take the Employment Tribunal. Suppose it purported to decide a public law question with no connection to employment. The tribunal never had the power to hear this case. This is a flaw which arose, or could arise, from the moment the case reached its desk. And describing what it ended up doing as a nullity reflects this.

It follows that jurisdictional errors do not turn on how a decision affects a particular individual's interests. The authority may well have chosen to act in a way which favours the individual. No matter. For it was erroneous to even begin the inquiry.

To see this, return to the Employment Tribunal. There are good reasons for limiting its jurisdiction to employment matters. For instance, we may think the tribunal's expertise is limited to that area. But this factor is insensitive to how its decision affects a particular applicant's interests. The tribunal lacks expertise in nonemployment matters, whether or not it decides cases in a way which favours a particular applicant. The language of nullity captures this feature of jurisdictional error. It frames the issue in terms of an act's legal

existence or nonexistence. And that cannot depend on the identity of the parties. An act either exists, or not, for everyone.

Not all public law flaws are like this. Some are nonjurisdictional. Consider the right to a hearing. A breach of this right can only occur while an inquiry is ongoing. It is not something which can precede an inquiry. This presents a serious problem for my view. The right to speak in one's own defence is at the heart of natural justice. So its breach, you may think, must be jurisdictional.

It is not.

3.5 Being owed natural justice

I want to start with the *Durayappah* case.[16] The issue arose from what is now Sri Lanka. At the time, its third-largest city was Jaffna. And it was in political turmoil. Its municipal council was two and a half years into its term. Already, the council was on its fourth mayor. More seriously, some accused the council of maladministration, bribery—even thuggery.

Then the Minister of Local Government stepped in. Under the law:

> If … it appears to the Minister that a municipal council is not competent to perform, or persistently makes default in the performance of, any duty or duties imposed upon it … the Minister may, by Order … direct that the council shall be dissolved.[17]

The minister sent a commissioner to investigate. The commissioner had access to the council's minutes. But he did not speak to the councilors. Upon receiving the commissioner's report, the minister dissolved the council.

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[16] *Alfred Thangarajah Durayappah of Chundikuly v W J Fernando* [1967] 2 AC 337 (PC).

[17] Quoted in [1967] 2 AC at 347.

Durayappah was Jaffna's mayor when this occurred. He wanted to keep being mayor. So he brought a challenge before the Privy Council. Durayappah argued the dissolution of the council was a nullity. Happily, that meant he was still mayor, too.

Where did the minister go wrong? Well, the minister relied upon the commissioner's report to dissolve the council. And the commissioner, when putting the report together, never gave the council an opportunity to speak on its behalf. This, Durayappah argued, was a violation of natural justice. The Privy Council agreed.

Yet it advised the Crown to deny Durayappah's challenge. For, despite the breach of natural justice, he was no longer mayor. How could this be? The answer lies in the status of the minister's order. If it was a nullity from the start, the council would have continued to exist. So Durayappah would be entitled to seek a declaration, telling the world he never stopped being the mayor of Jaffna. But, according to Lord Upjohn, that is not what occurred.[18] For the minister's mistake was his failure to listen to the council. And that kind of error does not nullify the order of dissolution. This meant Durayappah was, indeed, no longer mayor. He was just a private person who happened to be affected by the council's dissolution.

To be sure, the court could take the positive step of *quashing* a currently valid order. But notice the difference. If an act was always a nullity, it is void whether the council, the mayor—or anyone else, for that matter—likes it or not. All the court does, through a declaration, is recognise this fact. If the act is legally effective, however, the court must confront an altogether different issue: whether to exercise its power to quash the order.

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[18] [1967] 2 AC at 352-55.

A court should do so if necessary to vindicate a valuable interest. Among the interests worthy of protection is the opportunity to make representations to an authority. But this is only valuable, we might think, if the person wishes to speak. An authority owes its duty to listen to those who have a right to speak. But those who hold this right can waive it. And if so, the authority does nothing wrong by proceeding to make a decision.[19]

But the minister in *Durayappah* did not have to hear the mayor out. 'If the mayor were to be heard individually he could only deal with complaints against the council with which ex hypothesi the council itself did not wish to deal.'[20] Who the minister needed to hear from, but did not, was the council. It follows that the mayor lacks an interest which warrants protection from the court. Hence he is not in a position to ask the court to quash the order.

All this, however, rests on a crucial premise: that the minister's act, in breach of natural justice, was not a nullity. In other words, it was valid, albeit vulnerable to the court's quashing power. But you may wish to reject the premise. This is the lesson many draw from *Ridge v Baldwin*.[21] The true lessons are murkier.

3.6 Revisiting *Ridge*

The *Ridge* case starts with a sordid scandal of the highest order. For some time, Scotland Yard suspected the Brighton police force of corruption.[22] Then Alan Bennett, who ran a

[19] [1967] 2 AC at 352, per Lord Upjohn.

[20] [1967] 2 AC at 355, per Lord Upjohn.

[21] [1964] AC 40 (HL). See also *Andrews v Mitchell* [1905] AC 78 (HL) at 83, per Lord Davey (describing a failure to comply with natural justice as striking at 'the root of the jurisdiction'.).

[22] James Morton, *Bent Coppers: A Survey of Police Corruption* (Warner Books 1994) 95-101.

seedy club known around the world as the 'Bucket of Violence', came forward. He confessed to bribing Brighton police officers to gain information. The ensuing investigation led to a high-profile conspiracy trial. The accusations went all the way to the top. The chief constable of Brighton was implicated. His name was Charles Ridge.

At the trial, a jury convicted two of the officers under Ridge's command. Ridge himself was acquitted. But he did not escape entirely unscathed. While sentencing the two convicted officers, the trial judge—Donovan J—excoriated Ridge. As he put it, Ridge lacked 'the professional and moral leadership' which the public were entitled from 'the chief constable of Brighton, now acquitted'.[23] The trial judge made clear his remarks were 'based not on disputed allegations but on facts admitted in the course of the trial'.[24] But Donovan J did not stop there. As he put it:

> It is not difficult now, however, to foresee the use to which the incidents I mentioned … may be put for the purpose of discrediting the officers of that force when they give evidence in future prosecutions, and the results in some cases may be unfortunate. This prospect and this risk will remain until a leader is given to the force who will be a new influence, and who will set a different example from that which has lately obtained.[25]

Those ominous words sparked swift action. The watch committee which supervised the Brighton's police force met the very next day. And at the meeting, they resolved to summarily dismiss Ridge as chief constable. For Ridge was 'negligent in the discharge of his duty and is unfit for the same'.[26]

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[23] As quoted in *Ridge v Baldwin* [1964] AC 40 (HL) at 44.

[24] [1964] AC at 44.

[25] [1964] AC at 45.

[26] [1964] AC at 45.

They could have asked him to resign. But they chose to dismiss him instead. This meant Ridge lost his pension rights. The loss was especially painful given his long record of service: 33 years as a Brighton police officer. And they did all this without giving Ridge a hearing to speak in his defence.

Before the courts, Ridge argued a set of regulations gave him the right to a hearing prior to dismissal. But it wasn't entirely clear whether the regulations applied. In any event, Ridge argued his dismissal was in violation of natural justice. If the regulations didn't apply, the common law could 'supply the omission of the legislature'.[27]

The House of Lords agreed. And I think they were right. But their lordships kept going. Lord Reid, in particular, went on to say 'a decision given without regard to the principles of natural justice is void'.[28] This meant the decision was 'a nullity'.[29] What is surprising, however, is how thin the argument is for that proposition. Lord Reid's argument rested entirely on an appeal to precedent—and, in particular, on *Wood v Woad*.[30] But he offered no substantive argument for his position. Neither did Lords Morris[31] or Hodson.[32]

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[27] *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180, 143 ER 414 at 420, per Byles J.

[28] [1964] AC at 80.

[29] [1964] AC at 81.

[30] As cited in [1964] AC at 80.

[31] [1964] AC at 125.

[32] [1964] AC at 136.

So we are still in want of an explanation.[33] To try and uncover it, let's turn to *Wood v Woad*.[34] Wood was a member of a mutual insurance society. The society insured ships against loss. After suffering damage to his ship, the plaintiff sought an indemnity from the society. The society refused. For the society alleged Wood's conduct was suspicious. And so it ejected the plaintiff from the society.

Wood went to court. He alleged the society 'wrongfully, collusively, and improperly' expelled him to avoid paying the indemnity.[35] And so he sought damages. The court refused. Kelly CB gave the leading judgment. As he pointed out, the society failed to give Wood a hearing. And this meant the society's expulsion was a nullity.[36] Since the expulsion never occurred, Wood suffered no damage. Hence he lacked a cause of action. But why is the society's expulsion a nullity? Here, Kelly CB is unclear. Sometimes he refers to the lack of a hearing; other times he says the decision was made in bad faith.[37]

Luckily, Kelly CB did not give the only judgment. Amphlett B expressly rested his decision on the society's fraud. Wood's expulsion was therefore a nullity, but this meant he

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[33] The older cases are not much better. See *Spackman v Plumstead District Board of Works* (1885) 10 App Cas 229, per Lord Selborne ('There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.').

[34] (1874) LR 9 Ex 190.

[35] Quoted in (1874) LR 9 Ex at 201-02.

[36] (1874) LR 9 Ex at 198.

[37] cf (1874) LR 9 Ex at 196 with (1874) LR 9 Ex at 198 ('In my opinion, there is enough on this record to show a collusive and unlawful exercise of power on the part of the committee').

suffered no damage.[38] By contrast, Pollock B thought Wood failed to allege fraud, and rejected his claim on that basis.[39]

Cleasby B dismissed Wood's suit on yet another basis—and his reasons are the hardest to reconcile with *Ridge*. Cleasby B began by recognising that the society has the power to expel members 'on suspicion'. And this, he accepted, 'is ordinarily a most unsafe ground to act upon'.[40] But here, it was given this power for 'it is deemed essential that they should so act'.[41] And hence:

> The result of their determination is … an exercise of discretion; and can we try the question of whether their 'suspicion' was just and reasonable? I do not think their office exposes them to an action on the case for their conduct in executing it.

In other words, the committee had the power to expel members on suspicion. And Cleasby B did not think the members of that committee were personally liable to pay damages for how they exercised its power. *But this presupposes the committee had the power to make its decision.* The decision was not a nullity.

At the same time, Cleasby B acknowledged that fraud would strip the committee of jurisdiction. But:

> I have no hesitation in saying that the declaration omitted [sic] the word 'fraudulently' is intentionally framed so as to not place the plaintiff in the position of being compelled to prove mala fides, and on this ground I think the nonsuit was right … On that ground, it appears to me that we ought not to hold that a cause of action is alleged in the declaration.[42]

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[38] (1874) LR 9 Ex at 203-04.

[39] (1874) LR 9 Ex at 202.

[40] (1874) LR 9 Ex at 200.

[41] (1874) LR 9 Ex at 200.

[42] (1874) LR 9 Ex 200-01.

Had Wood alleged fraud, he might have had a case. But he did not.

To sum up, Kelly CB and Amphlett B thought the society acted in bad faith. So their decision was a nullity. By contrast, Pollock B and Cleasby B thought the society's decision, *if* fraudulent, would be a nullity. But Wood's allegation did not rise to that level. And so, taking all the judgments together, the lesson I draw from *Wood v Woad* is acts done fraudulently, or in bad faith, are nullities.[43] Those acts are void from the start.

This, however, doesn't help *Ridge*. For nobody doubted the Brighton watch committee's good faith. But I did not go into the weeds of *Wood v Woad* just to say the authorities cited by their lordships in *Ridge* do not support their sweeping proposition—although I mean to say that, too. Rather, *Wood* illustrates an important distinction. There is a difference between fraud and failing to give a hearing. This distinction, I argue, helps us see why *Ridge* is a cautionary tale, not a lesson to follow.

Fraudulent acts are nullities. This is common ground. And it makes sense. Fraud is pretending to do one thing while doing another. Those who make decisions in bad faith pretend to exercise their power. They pretend to discern the decision which they have reason to make. Such pretence is not an exercise of a legal power. Since the authority never exercised its power, its fraudulent decision was void from the start.

In *Ridge*, Lord Reid thought the same was true for decisions which fail to give a hearing. But why? This is distinct from whether Charles Ridge should have gotten a hearing. I think he should. Nor is it, as Lord Evershed pointed out in dissent, merely a

[43] But see *Smith v East Elloe Rural District Council* [1956] AC 736 (HL) at 739, per Lord Radcliffe ('An order, even if not made in good faith, is still an act capable of legal consequences.').

question of whether the watch committee's decision should survive unscathed.[44] I think not, at least in principle. Here I'm concerned with a separate question. Was the decision a nullity?

The facts of *Ridge* expose the uncomfortable implications of this extreme position. By the time of his dismissal, Charles Ridge was utterly disgraced. A High Court judge publicly announced he was unfit for duty. Nobody seriously suggested he could have stayed put. Lord Reid acknowledged 'it may well be that no reasonable body of men could have reinstated the appellant'.[45] And, indeed, Ridge's lawyer conceded he could 'on the principle of respondeat superior have expected to be asked to resign'.[46]

It would be outrageous for Ridge to still be Brighton's chief constable. Yet this is precisely what follows from insisting his dismissal was a nullity. It foists a chief constable, whom everyone accepts is unsuitable, upon Brighton. And it does so despite the watch committee's efforts to dismiss him. We should insist on something truly compelling to justify this result. Fraud, I think, could supply that justification. Suppose someone had bribed the watch committee to fire Ridge. And so the watch committee had only pretended to deliberate on whether to dismiss Ridge. In those circumstances a court should insist that no dismissal ever occurred. The whole point of conferring this power upon the committee is to enable it to act on the reasons to dismiss certain constables. A committee which acts fraudulently cannot live up to this purpose.

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[44] [1964] AC at 92.

[45] [1964] AC at 68.

[46] [1964] AC at 53.

But Brighton's watch committee had, in the process of their inquiry, come across compelling reasons to dismiss Ridge. So that is what it decided to do. Everyone accepts this conclusion was in good faith. What the committee failed to do was give Ridge an opportunity to speak on his behalf. And this was unfair. First, a hearing would have let Ridge try to undercut the reasons the committee thought they had, or introduce new reasons which count against dismissal. Second, we may think, quite apart from what Ridge might have done, there is something wrong with refusing to hear him out. Dismissing him without a hearing offends his dignity.

Notice something important. What we have are powerful arguments for why the court should, in principle, do *something* on behalf of Ridge. But neither rationale—not the instrumental benefit of considering new evidence, nor the noninstrumental wrong to dignity—support Ridge's dismissal being a nullity.

First, the instrumental benefit. Perhaps a hearing would have produced a better, more reasoned conclusion. If so the decision was not as good as it could, or should, have been. But this, alone, does not show the committee's decision was so defective as to not have been a decision at all. Imperfect decisions are still decisions.

Second, the noninstrumental wrong. Here the problem lies in the mismatch between the wrong and the nature of the proposed legal response. The reasons not to wrong another's dignity are important. But they are different from the reasons for keeping someone as chief constable. Indeed, the nature of the wrong, according to the noninstrumental argument, has nothing to do with the merits of the decision. Had Ridge deserved to keep his job, it would at least be intelligible for the courts to ensure he remained chief constable. But that is not what the noninstrumental argument holds. Rather it says

Ridge deserved to have a hearing, irrespective of whether he deserved to keep his job. If so, the law should tailor its remedial response to give redress for this distinct wrong.

As it turns out, Ridge did not wish to keep being chief constable. He was willing to resign—and as soon as the House of Lords ruled in his favour, he did. Declaring his dismissal a nullity turned back the clock and gave him the opportunity to resign. This meant he could keep his pension, which is what he really wanted.

Ridge's prompt resignation alleviates some of the issues with declaring his dismissal a nullity. But three problems remain.

First, Lord Reid's rationale is not limited to these circumstances. It may well be that, in another case, the applicant would not be willing to resign.

Second, on any view, Ridge secured an unjustified windfall. For, given the timing of his resignation, Ridge was chief constable at all times between the committee's attempt to dismiss him and the eventual judgment. The salary he thereby accrued is more valuable than the pension payments he would have received over the same span of time.[47] Yet Ridge did not do the work of chief constable during this period. Nor was he fit to hold the office. So he is owed salary for work he neither did, nor should have done.

Third, the full value of Ridge's pension rights is disproportionate to the wrong. Failing to give him a hearing may warrant some compensation. But not his full pension. The same issue is present in *Cooper v Board of Works*.[48] Cooper was in the middle of building a house when the board razed it to the ground. A statute empowered the board to demolish construction sites if the builder fails to give seven days' notice before starting work.

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[47] [1964] AC at 139-40, per Lord Devlin.

[48] *Cooper v Board of Works for Wandsworth District* (1863) 14 CBNS 180, 180 (CP), 143 ER 414, per Erie J.

According to the board, Cooper never gave notice. Cooper disputes this, but admitted to only giving five days' notice. Either way, this meant the board had the power to demolish his home. But it failed to give him a hearing. And that breached natural justice. So the court allowed Cooper to recover the full value of his property. This was better than getting a hearing. At a hearing, Cooper might have persuaded the board to stay its hand. But maybe not. The board could then proceed with demolition, without needing to pay damages.

Perhaps the court should just tell the public authority to make a fresh decision after providing a hearing. But this, too, raises a couple of problems.

First, there are likely to be substantial financial costs of seeing the matter through. For the applicant is likely to challenge any adverse decision following a hearing. The public authority may therefore have significant incentives to acquiesce.

Second, the applicant's inevitable challenge may well have a point. For, given the commencement of adversarial proceedings, the public authority might not be in a position to make a fair decision. Take *Cooper*. The board would need to hold a hearing, after having demolished the house, about whether it should demolish it. Put another way, this requires the board to determine whether it should pay damages.

3.7 Overcompensation: natural justice

What, then, is the appropriate remedy? I think it is a measure which aims to compensate for the wrongful violation of natural justice. And that may well be less than the full value of what the applicant lost. So, for example, Cooper may have deserved some money given how the board treated him. But he did not deserve to recoup the full value of his home.

Similarly, Ridge, however unsympathetic he might be, may have deserved something. But not the full value of his pension rights.

Is there a way for a court to reach this result? Not if *Ridge* is right and a breach of natural justice renders a decision a nullity. For then the ordinary principles of private law liability apply with full force. What Cooper lost, in the eyes of private law, is his half-constructed home. And what Ridge lost is his pension rights.

Nor can the courts, as things stand, refuse to disturb the unlawful act while awarding an appropriate sum in damages. There is no freestanding basis to award damages for breach of a public law duty. So the general principles of liability in private law must do the work. But this means the unlawful decision, so far as it authorises what would otherwise be a breach of private law, must give way.

The solution lies in partial invalidity. This, I suggest, is possible for nonjurisdictional errors, like failure to give a hearing. When faced with such errors, the courts could choose to partially quash the decision. The aspects of the decision which a court has not quashed, the thinking goes, can operate to restrict the extent of damages liability.

Confronting this possibility is a powerful objection in principle. 'There are no degrees of nullity.'[49] Now that much is surely right. What about validity? Here we find much the same point. Finnis says this.

> A purported rule is either valid or invalid. There are no intermediate categories (though they are intermediate states of affairs, e.g. voidable laws, which now are valid, or are treated as valid, or are deemed to be valid, but are liable to be rendered or treated as or deemed invalid) … the lawyer aspires to be able to say of every rule that, being valid, it is a legal rule, or, being invalid, is not.[50]

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[49] *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 (HL) at 170, per Lord Reid.

[50] John Finnis, *Natural Law and Natural Rights* (Oxford 1980) 279.

This binary conception of validity has obvious attractions. I do not seek to challenge it directly. The source of the problem, I think, is infelicitous use of language. For 'valid' is an adjective, a feature something possesses. By contrast, 'validate' is a verb, an action someone takes. And the two may depart from each other.

Suppose an official 'validates' a document. Doing so might *affirm* its authenticity. Or it could *make* the document authentic.

First, affirmation. It serves an epistemic role. Validation, in this sense, signals an official has checked the document. And that is evidence which supports a belief in the document's authenticity. But the evidentiary significance of the affirmation comes in degrees. The validation can be better or worse evidence.

Second, constitution. It serves a practical role. Validation, in this sense, is constitutive of authenticity. It thereby gives us new reasons to treat the document differently. For instance, validation may permit us to enter the country. But this effect, too, could come in degrees. Some acts of validation could entitle us to enter the country through a fast-track process, while other acts may only let us enter through a slower route.

All this can be true without challenging the conception of validity as a binary property. Even if rules are only valid or invalid, a court may invalidate a rule to a greater or lesser degree. The property of being valid refers to whether a higher rule identifies it. That property is binary; the higher rule either identifies it or it does not. By contrast, the act of invalidation could aim to deprive a law of legal effect. But there are many kinds of legal effect, and some acts can affect more of it than others.

If I am right, speaking of validity and validation risks confusion. For it is suggestive of a tight connection between the two. This misleads. It is therefore to the law's credit that

it refers to quashing orders. This is clearly evocative of an action. But the courts often describe the effect of a quashing order as 'invalidating' the impugned decision. It would be a mistake to suppose quashing must therefore be binary.

Rejecting this thought allows us to better tailor the remedy to the nature of nonjurisdictional wrongs. When Cooper's house was torn down, the relevant wrong was *not* the deprivation of his property. After all, even Cooper concedes he only gave five days' notice. And this just wasn't enough time under the statute. Rather the wrong lies in the disrespect to his dignity. But this is an intangible harm. It is not plausibly commensurate with the value of his home. By partially quashing the board's decision, the court could reduce the damages which were available to Cooper under the tort of trespass.

3.8 Overcompensation: detention

What partial quashing seeks to address, at bottom, is overcompensation. And natural justice is not the only area where this problem crops up. Indeed, it was so acute in the *Lumba* case that it quickly became the centre of attention.[51] Each judge correctly perceived the problem of overcompensation as a pressing issue in the case. Unfortunately the majority sought to address it in the wrong way. Helpfully, their reasoning illustrates why the distinction between jurisdictional and nonjurisdictional errors is inescapable.

Lumba is a citizen of the Democratic Republic of Congo. While in the United Kingdom, he was imprisoned for a series of crimes. As his sentence was drawing to an end,

[51] *Walumba Lumba (Congo) 1 and 2 v Home Secretary* [2011] UKSC 12.

the Home Secretary informed Lumba of the government's intention to deport him. After his release from prison, Lumba was detained pending deportation.

According to the government's publicly published policy, there is a rebuttable presumption in favour of releasing foreign national prisoners pending deportation. But a rather different, unpublished policy was in effect at the same time. And that policy imposed a 'near blanket ban' on releasing foreign prisoners.

Given this disparity, the majority held the secret policy underlying Lumba's detention was unlawful.[52] The majority also held fast to what they say *Anisminic* established. Any error of law renders an executive act a nullity.[53] So Lumba's detention lacked a lawful basis. The success of his claim for false imprisonment therefore seemed inevitable.

But this is an uncomfortable conclusion. Lumba, even under the published policy, should be detained. There was a significant risk he would commit more crimes, abscond from deportation, or both. And that would suffice to rebut the presumption of release.

This raises a tempting suggestion. Since the government would have detained Lumba under the published policy, the failure to publish did not cause any additional detention. So Lumba has nothing to complain about. But this fails to grapple with the nature of the underlying tort. The tort of false imprisonment is actionable per se. It does not require proof of damage. So Lord Dyson, for the majority, dismissed this argument from causation.[54]

Rightly so. If I were to lock you in your room, I cannot escape liability by arguing you would have stayed in your room regardless. Nor can I escape liability by arguing someone

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[52] *Lumba* at [34]-[37].

[53] *Lumba* at [66].

[54] *Lumba* at [62]-[64], per Lord Dyson; at [197], per Lady Hale.

else would have imprisoned you, had I not done so. The basis for the tort is the wrongful restraint of liberty. And this occurs when I prevent you from leaving. If I cannot show lawful authority to do so, that is the end of the matter. I am liable for false imprisonment.[55]

But then Lord Dyson did something puzzling. To dismiss the causation argument, he paid special heed to the nature of the tort of false imprisonment. This includes its being actionable per se. But then, at the remedial stage, he effectively snuck in the same causal inquiry he previously rejected through the backdoor. According to Lord Dyson, Lumba suffered no loss because the government would have detained him regardless; the detention was therefore 'inevitable'.[56] Therefore the majority awarded nominal damages only.

To be fair, there is a distinction between the elements of a cause of action and the assessment of loss. Lord Dyson's point is that, even for torts actionable per se, the purpose of the remedy is to redress loss. Now this distinction is sound, so far as it goes. But he does not grapple with a key issue. At both stages, the question is which test of causation to adopt. The tort of false imprisonment is actionable per se. So the claimant need not demonstrate a detriment to his interests. But the putatively tortious act must still cause imprisonment. And, if we adopt a strict but-for test, this fails on the facts of *Lumba*. If the unlawful (because unpublished) policy did not exist, the published policy would control. And Lumba would still be detained. Again, this is not a question of needing to prove damage. The point is the unlawful policy did not cause *imprisonment*, irrespective of how harmful the imprisonment was.

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[55] *Lumba* at [65], per Lord Dyson.

[56] *Lumba* at [95], per Lord Dyson.

This cannot be right. But that is because the strict counterfactual test is incompatible with the nature of the tort of false imprisonment. And so, for purposes of the tort, 'causing' imprisonment must take on a noncounterfactual sense. That the claimant would have been detained nonetheless is irrelevant. But this raises an important question. Why didn't this same noncounterfactual approach to causation apply at the remedial stage to assess loss?

It should, for the nature of the tort necessarily affects the proper approach to causation. This point is well made in *Kuwait Airways*.[57] Unfortunately Lord Dyson briskly dismisses the case as concerning 'questions of causation in relation to cases of successive conversion by different tortfeasors'.[58]

The case arose in the wake of Iraq's invasion of Kuwait. Upon occupying Kuwait, the Iraqi government expropriated Kuwait Airways' planes. Afterwards it transferred those planes to an Iraqi airline. Kuwait Airways brought a claim in damages for conversion against the Iraqi airline.

It is common ground that, by the time the Iraqi airline took possession, Kuwait had already lost its planes.[59] They were not going to get the planes back. Further, the Iraqi airline, once it received the planes, had no way of returning them to Kuwait Airways. But none of this mattered.

> By definition, each person in a series of conversions wrongfully excludes the owner from possession of his goods. This is the basis on which each is liable to the owner. That is the nature of the tort of conversion.[60]

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[57] *Kuwait Airways v Iraqi Airways (Nos 4 and 5)* [2002] UKHL 19, [2002] 2 AC 883.

[58] *Lumba* at [94], per Lord Dyson.

[59] *Kuwait Airways* at [2], [13], per Lord Nicholls.

[60] *Kuwait Airways* at [82], per Lord Nicholls.

And also:

> In the case of conversion, the causal requirements follow from the nature of the tort.[61]

Given the nature of conversion, taking another's property suffices. That someone else would have excluded the owner from possession, had you not taken it, does not matter. This is true, both for establishing actionability and for assessing the extent of damages. This meant substantial damages were possible.[62]

The same analysis applies to the tort of false imprisonment. To be actionable, it suffices to place total restraints on the claimant's movement. Counterfactual causation does not matter. It is irrelevant whether the defendant would have detained the claimant anyway. But then the *Lumba* majority, without explanation, said something else at the remedial stage.

Surprisingly, Lord Dyson cites *Murray v Ministry of Defence*[63] in support of this peculiar inconsistency.[64] In that case, Lord Griffiths said 'if a person is unaware that he has been falsely imprisoned and has suffered no harm, he can normally expect to recover no more than nominal damages'.[65] But subjective awareness of imprisonment has nothing to do with counterfactual harm. It does not concern the position the claimant *would have* been in. Rather it concerns the nature of the claimant's actual experience. Lord Griffiths's point

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[61] *Kuwait Airways* at [129], per Lord Hoffmann.

[62] *Kuwait Airways* at [86], per Lord Nicholls.

[63] [1988] 1 WLR 692 (HL).

[64] *Lumba* at [96].

[65] [1988] 1 WLR at 703.

was, given this subjective experience, the qualitative harm of imprisonment was nominal. But *Lumba* concerned a different issue. There Lumba's actual experience consisted of the harsh conditions of prison. But, as a counterfactual matter, the defendant would rightly have subjected him to that experience regardless.

How the majority resolved the overcompensation problem in *Lumba* is therefore unsatisfactory. The original sin is the emphasis on what would, *in fact*, have happened to the claimant under the lawful policy. Rather the majority should have focused on a normative question: what *could* the government do? Here, it undoubtedly had the authority to detain Lumba. The existence of this alternative jurisdiction should have guided the court's resolution of this case.

The majority shies away from this approach because, as Lord Dyson said, it would 'put the clock back to the pre-*Anisminic* era'.[66] By this, he means he cannot fathom abandoning the modern orthodoxy that an impugned act, if it possesses any public law flaw, is a nullity. But even the majority cannot stomach the full implications of this proposition. For instance, consider the public law flaw of *Wednesbury* unreasonableness. Taken seriously, the modern, 'post-*Anisminic*' orthodoxy would insist *Wednesbury*, like any other ground of judicial review, is always available to establish a claim for false imprisonment. But their lordships, across the board, urge caution on this front.[67]

Distinguishing between the various grounds of review would have allowed the court to resolve the overcompensation problem as a matter of public law. The error in *Lumba*

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[66] *Lumba* at [87].

[67] *Lumba* at [73]-[74], per Lord Dyson (cautiously describing the suggestion as based on obiter dicta); [191]-[193], per Lord Walker (rejecting the broad interpretation of this suggestion); [203]-[204], per Lady Hale (expressly declining to decide the point); [354]-[356], per Lord Brown (in dissent, pointing out that no false imprisonment case has succeeded on pure *Wednesbury* grounds).

was the failure to publish a policy. On my account of jurisdiction, this is nonjurisdictional. For a failure to publish can only arise once there is a policy to publish. And this necessarily occurs after the start of the inquiry.

That this error is nonjurisdictional is intuitive. After all, the Home Secretary possessed an alternative basis for detaining Lumba. And this amounts to a *power* to do so, albeit one which wasn't appropriately exercised. The failure to publish a policy, which was in any event unnecessary, does not strike at jurisdiction. So long as the detention was within jurisdiction, there is no false imprisonment.[68]

[68] In his dissent, Lord Brown also says not every breach of a public law duty results in false imprisonment: *Lumba* at [342]. But rather than identify a unifying principle which explains *when* false imprisonment arises, he would prefer for the law 'to develop in this area in a pragmatic way on a case by case basis': at [358].

4 Choice

This chapter consists of six sections.

First, I use a US Supreme Court case to illustrate two issues: the analytical priority of certain issues and the significance of post hoc explanations. An issue is analytically prior when its resolution affects how other downstream issues should be resolved. And post hoc explanations refer to arguments an agency failed to consider at the time, which might nonetheless support its decision.

Second, I explain why the extent of an authority's jurisdiction is insensitive to how the authority chooses to exercise its power. It follows that jurisdictional issues take priority over nonjurisdictional issues. And that post hoc explanations are only acceptable for jurisdictional matters.

Third, I take a closer look at analytical priority. The doctrine of legitimate expectations provides a good illustration. Before asking whether an expectation should be satisfied, a court should first address whether the expectation is of ultra vires action.

Fourth, I take a closer look at the significance of post hoc explanations. An authority can possess jurisdiction despite being ignorant of its source, or to what extent it reaches. So post hoc explanations can establish jurisdiction.

Fifth, I assess the Canadian approach to post hoc explanations. It distinguishes between the inferral and substitution of reasons. Post hoc explanations can do the former but not the latter. I argue this distinction is unsound.

Sixth, I address the statutory duty on courts to refuse relief if it is highly likely the outcome for the applicant would not be substantially different. I discuss some problems with this duty, and show why my approach is preferable.

4.1 DACA

Millions of immigrants arrived in the United States via unlawful means. Many of them came as children. America is all they know. Nor are they at fault for their unlawful arrival.

In 2012, the Obama administration implemented a policy, known as DACA (Deferred Action for Childhood Arrivals), to lessen the precarity of these child migrants' situation. It ordered immigration authorities to defer removal proceedings for all eligible DACA recipients. Such deferred action also led to a suite of knock-down benefits, including eligibility for work authorisations and welfare entitlements.

Later, the Trump Administration moved to rescind the policy. In its initial memorandum, it argued this was necessary due to DACA's dubious legality. To support this, it relied on the Attorney General's view that DACA shared the same legal flaws as a separate policy, known as DAPA (Deferred Action for Parents of Americans). This policy expanded deferred action to the parents of American citizens, even if they entered the country as adults. Previously, a federal court relied on those flaws to find DAPA unlawful. These flaws centred around the policy's knock-down benefits. Those benefits included the work authorisations and welfare entitlements, but not the deferring of removal proceedings themselves. In the government's view, DACA seemed doomed to share the same fate. For it, too, allowed for similar benefits. The memorandum therefore framed the rescission as getting ahead of this legal problem.

The rescission was challenged in court. At first instance, the court was sceptical of the memorandum's reasoning. It said the memorandum inadequately explained its conclusions. So the court prompted the government to provide additional reasons to save its policy.[1] In response, the government put forward a second, updated memorandum. This time, it gave three arguments. First, DACA was unlawful. Second, there were, in any event, serious questions of its legality, and the government wished to avoid questionable policies. Third, the policy sent the wrong message with regard to the enforcement of immigration law, which outweighed the reliance interests of the program's recipients.

The case, *DHS v Regents*, went up to the US Supreme Court.[2] There, the government continued to insist DACA was unlawful. To do so, it went beyond the issues it previously articulated. The knock-down benefits might be unlawful—but so, too, was the deferral of removal proceedings. True, officials have discretion as to whether it is appropriate to bring a case. But that is a case-by-case determination. Introducing a categorical rule, automatically deferring removal for *all* DACA recipients, went beyond its authority.

None of this mattered. The majority declined to address these issues. For it found two flaws with how the government went about the rescission.[3] Those errors, it held, were enough to quash the rescission and revive DACA. First, the initial memorandum failed to consider alternative means to achieve its aims. According to the initial memorandum, the rescission was in response to a specific legal flaw: the conferral of knock-down benefits.

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[1] *National Association for the Advancement of Colored People v Trump* (2018) 298 F Supp 3d 209 (DDC) at 249.

[2] *Department of Homeland Security v Regents of the University of California* (2020) 140 S Ct 1891.

[3] *Regents* 140 S Ct at 1910-13.

But the government could potentially have stopped those benefits while continuing to defer removal proceedings. Second, the initial memorandum failed to consider the reliance interests of the DACA beneficiaries.

To be sure, as the court recognised, the second memorandum addressed these flaws. It said the deferment of removal proceedings, irrespective of the knock-down benefits, sent the wrong message. And that this issue outweighed any reliance interests. But these points, the majority held, was an ex-post rationalisation.[4] So the second memorandum introduced new rationales which went beyond the original memorandum. This meant it was inadmissible. It could not cure the flaws in the original memorandum. The DACA rescission was therefore quashed.

The *Regents* case raises two problems. First, the proper sequencing of issues. What comes first—the legality of DACA, or the legality of DACA's rescission? The court assumed the latter. It began by assessing the quality of the rescission process. There, it found a failure to consider a couple crucial issues. This led the court to quash the rescission. It did so without addressing the government's contention that DACA was itself unlawful. Second, the significance of after-the-fact rationalisations. The second memorandum was only introduced after the government sought to rescind DACA. It contained new arguments to defend the policy. Those arguments, presumably, did not motivate the officials who crafted the rescission. This led the court to throw out the second memorandum.

At first glance, these two problems are discrete. Which issues are analytically prior, and the significance of post-hoc explanations, seem to have nothing to do with each other. This is wrong. Both are addressed by a distinctive feature of jurisdiction. Whether an act

[4] *Regents* 140 S Ct at 1907-10.

falls within an authority's jurisdiction is insensitive to a subset of that authority's subsequent choices. By this I mean the choices an authority makes, which it could *only* have made after it begins its inquiry into the relevant issue.

This ties the two problems together. Each arises from the government's subsequent choices. First, the sequencing of issues. The government chose to try and rescind DACA. This choice came five years after DACA was first implemented. Second, the use of post hoc rationalisations. The government chose to include some arguments, and not others, in its first memorandum. And then it later chose to attach a second memorandum to buttress its stated rationale for the policy.

The significance of these choices depends on the ground of review. Whether a policy runs afoul of a jurisdictional ground should not, in principle, depend on the government's choices. But those choices may well be decisive to nonjurisdictional grounds.

This distinction addresses both problems raised by the *Regents* case. First, priority. Whether the government had the power to adopt DACA is a jurisdictional question. The answer does not depend on how the government chose to rescind the policy. Those later choices may, or may not, be unlawful. The officials who made them might have breached a legal duty. This does not affect the existence of a jurisdictional basis for DACA. Either it exists, or it does not. It should therefore have satisfied itself of DACA's legality first, before moving on to the legality of DACA's rescission. Second, post hoc rationalisations. The quality of the government's rescission process is a nonjurisdictional question. The answer, quite obviously, depends on how the government chose to rescind the policy. For that is precisely what is at issue. This supports the court's exclusion of the second memorandum. It was crafted after the decision was made. So it could not have formed part of the

decisionmaking process. The second memorandum is therefore irrelevant to the quality of that process.

Return to *Regents*. This time, suppose the court were to consider DACA's legality. If so, yet another ex-post rationalisation problem would arise. The government's first memorandum raised worries of DACA's legality as the basis of its rescission. But those worries were limited to the conferral of knock-down benefits onto DACA recipients. Those benefits are what supposedly made the policy unlawful. Before the Supreme Court, however, the government's position was not so restricted. Their lawyers argued all aspects of DACA—the knock-down benefits, yes, but also the deferral of removal proceedings themselves—were ultra vires. This is a departure from the government's position at the time it sought to rescind DACA. It therefore looks like an after-the-fact rationalisation of its position regarding DACA's legality.

But that question—whether DACA is lawful—is jurisdictional. So such rationalisations are, in principle, acceptable.[5] True, the government chose to adopt a narrower position when crafting its policy. It chose to rely on arguments which only targeted the legality of DACA's knock-down benefits. Those choices, however, are irrelevant to whether a jurisdictional ground is made out. It should not matter, either way, what arguments the government chose to include in its memorandum. If DACA is unlawful, it is unlawful—whether or not the government appreciated it at the time it sought to rescind.

This bears on how *Regents* should have been decided. Suppose the court were to limit its analysis to the knock-down benefits. And suppose the court finds those unlawful. If so,

[5] Strictly speaking, if the arguments in this chapter are correct, these rationalisations are 'acceptable' in a tangential sense. The lawfulness of DACA is a jurisdictional question. Hence the court neither accepts nor rejects a rationalisation. It simply considers the rationalisation, so far as it does, as evidence bearing on the lawfulness of the policy which is being rationalised.

they would fall away. But this leaves the deferred removal—the core of DACA—untouched. The court could then turn to the nonjurisdictional assessment of the government's attempt to rescind the policy. And here, as the majority pointed out, the process of rescission contained a serious flaw. The government failed to consider a partial rescission. It did not ask whether it could revise its policy, so as to keep deferred removal while jettisoning the knock-down benefits. And that was enough to quash the rescission.

Now suppose the court were to consider the full extent of DACA's legality, as I argue they must. And suppose the court found it unlawful in its entirety. If so, the quality of the rescission process would be moot. The government's failure to consider retaining deferred removal would not matter. This is because deferred removal would itself be unlawful. It would no longer be an available option for the government to consider. At any rate, this was, in my view, a possible conclusion for the court to reach. What makes it possible is the priority of jurisdictional issues, coupled with the availability of after-the-fact explanations.

4.2 Jurisdiction and choice

So far, we came across two questions. Which issues should a court address first? And when should courts consider a government's post hoc rationalisations of its actions? I also gave my preliminary answers. Courts should address jurisdictional issues first. And they should only consider post hoc rationalisations for jurisdictional issues.

Those answers follow from my general account of jurisdiction. Having jurisdiction, I have argued, consists of the right to start proceedings. Hence, it is insensitive to how those proceedings go. Before assessing how well a public body conducted its inquiry, there is a prior question: should the public body have conducted an inquiry in the first place? A public

body has jurisdiction when it is the right decisionmaker to consider the underlying issue. A flaw in jurisdiction, then, is something which should stop a public body's inquiry from the start. Without jurisdiction, proceedings should not have begun.

If so, courts should decide jurisdictional issues as a preliminary matter. Given a jurisdictional flaw, the act is void. Everything that comes next is therefore moot. Whether the public body arrived at its decision in the appropriate way—by following the right procedures, or considering the relevant things—is irrelevant. These issues concern how a public body should go about its decision. But jurisdiction goes to whether the decision was its to make. And without a decision to make, there is no issue of which procedures to follow, or considerations to mull over. Similarly, whether the public body took the steps to successfully rescind its act is irrelevant. If an act is void from the start, there is nothing to rescind.

This also explains why courts should consider post hoc explanations for jurisdictional issues. The public body may have been ignorant of those arguments when making its decision. That failure occurred during the decisionmaking process. But jurisdiction gets at a prior issue. It concerns whether the process should have occurred at all. Perhaps it should, even if the public body did not, at the time, appreciate why. Conversely, nonjurisdictional issues concern how a decision is made. It assumes the existence of a power to make a decision. What it evaluates is the manner in which that power was wielded. It looks to identify flaws in the exercise of power.

As applied to the *Regents* case, this analysis supports the three conclusions I reached earlier. First, whether the President has the legal authority to implement a categorical deferred removal rule is a jurisdictional question. So the court should start by considering

DACA's legality, before asking whether the government followed the appropriate process to rescind it. Second, the extent of the President's power to categorically shield a group of immigrants from deportation is a jurisdictional question. It should not depend on which arguments find their way into a policy memorandum. So the court should consider the full extent of DACA's legality, even if the government failed to it in the past. Third, whether the government considered the relevant issues when making its decision is a nonjurisdictional question. A memorandum which comes after its decision does not form part of the decisionmaking process. It should be excluded when assessing the quality of the rescission process.

4.3 Priority

In *Regents*, the court scrutinised DACA's rescission without first addressing whether DACA was ultra vires. This provides an especially striking illustration of why courts should address jurisdictional issues first. If DACA is void, there is nothing to rescind.

The underlying principle, however, extends beyond rescission. Suppose a statutory scheme provided for payments to enable lower-income students to attend private school. Then Parliament repeals the legislation. No statutory basis for continuing those payments exists. Yet the government assures worried parents it will continue making these payments. Are those payments thereby lawful?

The answer should be obvious. No. The government can *say* it will continue making those payments. But this cannot somehow un-repeal the legislation. What the government says is one thing; what the law permits is another. On behalf of the parents, we could say the government's assurance led the parents to expect payments to continue. Disappointing

this expectation may well be painful. Given this, the government should not have said what it did. Making promises which are impossible to honour is wrong. The wrongness of the assurance, however, does not make the payments lawful. Quite the contrary—the assurance is wrong precisely because it promises to do something unlawful.

For now, the courts have agreed. 'Any expectation must yield to the terms of the statute under which the Secretary of State is required to act.'[6] The courts can sometimes require a public body to confer a substantive entitlement upon the applicant.[7] But only if the public body has jurisdiction to confer that entitlement. The doctrine of legitimate expectation does not extend to ultra vires action.[8] Call this the ultra vires bar.

Why? The most well-known defence of the ultra vires bar comes from Lord Greene MR. Here's what he said.

> Accepting … that the Minister had no power under the regulations to grant a tenancy, it is perfectly manifest to my mind that he could not by estoppel give himself such power. The power given to an authority is limited to the four corners of the power given. It would entirely destroy the whole doctrine of *ultra vires* if it was possible for the donee of a statutory power to extend his power by effecting an estoppel.[9]

This, however, is not really an argument. It asserts that, absent the ultra vires bar, the doctrine of ultra vires would be destroyed. What we need, however, is an explanation.

At first, the explanation may seem self-evident. Lord Greene MR refers to a minister who *gives* himself a power. Typically, gifts are intentional. This raises the spectre of officials who knowingly give unlawful assurances. Enforcing those assurances would

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[6] *R v Education Secretary Ex p Begbie* [2000] 1 WLR 1115 (CA) at 1125.

[7] *R v North and East Devon Health Authority Ex p Coughlan* [1999] EWCA Civ 1871, [2000] QB 213.

[8] *R v Director of Public Prosecutions Ex p Kebilene* [2000] 2 AC 326 (HL) at 368, per Lord Steyn.

[9] *Minister of Agriculture and Fisheries v Hulkin* (1948), unreported . The passage is quoted in *Minister of Agriculture and Fisheries v Matthews* [1950] 1 KB 148 at 154.

allow these officials to circumvent the law. Whenever officials want to do something, but find they lack legal authority to do it, they could just bind themselves to do it regardless.

It is easy to see the disastrous consequences of permitting the government to act in this way. But this, alone, does not justify the ultra vires bar. For two reasons. First, the ultra vires bar is overbroad. What this rationale justifies is a rule which prevents the enforcement of assurances to do unlawful things *knowingly*. But courts should still protect assurances whose unlawfulness is inadvertent. For officials should not be incentivised to circumvent the law. Yet accidents happen, and enforcing accidental assurances may not have a harmful effect on future incentives. Second, it misdirects costs. Preventing officials from acting in this way may further the public interest. But why should individuals bear the cost of such a rule? The adverse consequences of the ultra vires bar should fall on the bad faith officials, not those misled by their false assurances.[10]

For these reasons, the ultra vires bar, in its present form, cannot be justified on pragmatic grounds. It cannot just be a way of deterring official misconduct. Such a rationale, if taken seriously, should lead to a more nuanced approach. It supports tailoring the ultra vires bar's scope to ensure it only covers acts which are capable of being deterred. At minimum, reasonable mistakes made in good faith should fall outside its reach. And, even for deterrable assurances, we must weigh the value of deterring conduct with an individual's competing interest to the assurance's enforcement. There are surely cases where the deterrence value of refusing enforcement will be marginal. And individuals will

[10] Relatedly, the law already prohibits officials from acting in bad faith, and that surely covers the giving of knowingly unlawful assurances. In ordinary circumstances, a finding of bad faith would suffice to deter officials from consciously circumventing the law in this way.

sometimes have an overwhelming interest in the assurance's enforcement. All this counts against a categorical rule.[11]

But this, I think, misreads Lord Greene MR. Properly understood, he is not making a pragmatic argument based on deterrence. It is, rather, an argument from principle. 'The King hath no prerogative, but that which the law of the land allows him.'[12] Here, the *Case of Proclamations* gives effect to a key aspect of the rule of law. The government must have a legal basis for the powers it purports to exercise. Discarding the limitation would thereby entail a remarkable conclusion. What the law authorises would need to depend on what the government says. This flips the *Case of Proclamations* on its head. It is not that the government lacks a power unless it is what the law provides. The law, rather, provides for the powers the government says it has. And that cannot be right.

None of this assumes bad faith on the government's part. The worry is not limited to the government intentionally misrepresenting the law. Rather its source is the aspiration that our public bodies wield a limited suite of powers. This, I think, is what Lord Greene MR meant by 'the whole doctrine of ultra vires'. As a matter of the rule of law, public power should be limited. Those limits should exist *prior* to the exercise of those powers. And these limits should be established by law. It follows that the government's beliefs, sayings, or doings are irrelevant to the extent of its powers. The limits on its powers already exist; what the government believes, says, or does, comes later.

The doctrine of legitimate expectation illustrates this dynamic. Say a statute empowers an official to demolish a home. But the resident has a legitimate expectation in the home's

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[11] Paul Craig, 'Representations by Public Bodies' (1977) 93 LQR 398, 420; *Rowland v Environment Agency* [2003] EWCA Civ 1885, [2004] 3 WLR 249 at [100]-[103], [114]-[120], per May LJ.

[12] *Case of Proclamations* (1611) 12 Co Rep 74 at 76.

survival. Suppose demolition would be abusive under the circumstances. If so, the demolition cannot proceed. To keep going would be unlawful.[13]

That the demolition would be abusive is a *negative* reason. It counts against demolition. But this, alone, does not reveal a positive reason. It doesn't explain what counts in favour of fulfilling the assurance. What is the positive reason? The clue lies in how the abuse is often described. It is, we say, an abuse *of discretion*. The positive reason is therefore provided by the following premise: the government should exercise its discretion in ways which do not breach its duties. In some instances, this will mean the government must act in ways which satisfy the assurance. Doing otherwise would abuse its discretion.

Things, however, are different when the assurance concerns ultra vires action. For there is no discretion to abuse. To abuse a power, there must first be a power. And there is no legal basis for that power. This is why the courts cannot enforce assurances to do ultra vires action. Under the doctrine of legitimate expectations, an assurance can render unlawful what would otherwise be lawful. What it cannot do, however, is render lawful what would otherwise be unlawful.[14]

To recap, the courts are right to recognise an ultra vires limit on the doctrine of legitimate expectations. As a general rule, authorities should keep their word. Their assurances can lead others to expect them to engage in a particular course of action. Disappointing the expectation would be wrong. But an authority may, either mistakenly or

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[13] And, if the demolition already occurred, any entitlement to redress would come from private law. Given the public law unlawfulness, the demolition may breach the resident's entitlement under, for instance, a lease or license.

[14] This is why Christopher Forsyth is wrong to suggest that, even though estoppel cannot require ultra vires action, a doctrine founded in abuse of discretion could: 'The Provenance and Protection of Legitimate Expectations' (1988) 47 *Cambridge Law Journal* 238, 257-58.

in bad faith, promise to act in ways which exceed its jurisdiction. And, if so, that expectation must be disappointed because the authority cannot lawfully fulfill it.

4.4 Ignorance

The extent of an authority's jurisdiction is not up to that authority. It is insensitive to what the authority chooses to do. But the underlying principle goes both ways. What an authority does cannot expand its powers. Nor, however, can it narrow them.

Take the facts of the *Philpot* case.[15] Ronald Philpot, a police officer, was accused of abusing his wife. A professional misconduct investigation followed. While this was ongoing, the police chief made some interim changes. Philpot was reassigned to the control room. This ensured the absence of any public-facing role. And he was ordered to have no contact with his wife. Philpot thought this latter restriction went too far. So he applied for judicial review.

The police chief imposed the restriction under Regulation 11 of the Police (Conduct) Regulations 2020. That was a mistake. Regulation 11 confers a power to suspend officers from duty. It empowers the police chief to restrict what Philpot does as a police officer. But not his private life. So it cannot extend to limiting Philpot's contact with his wife. At the same time, Regulation 6 of the Police Regulations 2003 envisages certain restrictions on an officer's private life. And the Police Reform and Social Responsibility Act 2011 confers a broad power of 'direction and control'.[16] Taken together, they provide a legal basis for

[15] *R (Philpot) v Commissioner of Police for the Metropolis* [2022] EWHC 1852 (Admin), affirmed in [2023] EWCA Civ 66.

[16] Police Reform and Social Responsibility Act 2011 (UK), s 4(3).

the restriction. Philpot's wife, in the context of his misconduct investigation, is a material witness. And the police chief has the power to restrict an officer's contact with witnesses, which extends to his private life.

That is not what the police chief said, however, when he imposed the restriction. At the time, he referred only to Regulation 11. And, again, this was the wrong place to look. It did not confer the power he was looking for. He was ignorant of the actual source of his jurisdiction. The question is whether this should matter. Did the police chief act unlawfully?

This sort of question raises three issues. It might be helpful to distinguish them. First, whether courts should rely on arguments which neither party presented. Government officials might be unaware of the relevant statutory provision. Or they might have political reasons to avoid certain legal arguments. They could, for instance, paint the government in a bad light. Despite their silence, a court might become aware of an alternative legal theory to support the impugned action. Should the court deny judicial review?

Second, the procedural propriety of a party bringing up an argument it previously failed to raise. Sometimes a litigant will wish to alter their legal strategy in the midst of proceedings. Or pursue an appeal with arguments it had failed to raise below. The delay, however, risks unfairness. It may require the counterparty to rush an inadequate response. This may disrupt the orderly process of litigation by encouraging brinksmanship.

Third, what it means to review the 'legality' of government action. It could refer to the quality of its deliberations. If so, the court should review the adequacy of an official's professed reasons at the time the impugned act took place. Alternatively, it could refer to

the existence of a legal basis for what the government did. If so, the court should review the possible ways in which the law supports the impugned act.

Here, I'll focus solely on the third issue. I will say, in the *Philpot* case, the challenge goes to the existence of a legal basis, not the quality of deliberations. Hence the court should, in principle, assess whether the decision was lawful on the alternative ground that it restricts contact with a material witness. But this is subject to two qualifications. They correspond to the first two issues I raised earlier. First, the court may need to stick to the parties' submissions. Going on its own motion circumvents the crucible of adversarial proceedings. Second, the court may prevent the parties from raising new arguments, especially if substantial briefing on the issue has already concluded.

Those issues aside, public authorities should be permitted to rely on post hoc arguments to assert the existence of jurisdiction. In the *Philpot* case, the key question was whether the police chief had the power to stop Philpot from contacting his wife. The answer was yes. He acted within his jurisdiction.

4.5 Reasons and results

In *Alberta Teachers' Association*, the Canadian Supreme Court reached a similar conclusion.[17] But for different reasons. It may be helpful to distinguish them. That case concerned an investigation by the Information and Privacy Commissioner into the Alberta Teachers' Association (ATA). According to the law,[18] the investigation must either be

[17] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* 2011 SCC 61, [2011] 3 SCR 654.

[18] Personal Information Protection Act 2003 (Canada), s 50(5)

completed within 90 days, or notice of an extension must be given to the parties with an anticipated completion date. It is clear that, *if* notice is never given, the investigation must be completed in 90 days. The question is whether the notice itself must be given within those 90 days, or if it suffices to give notice before the investigation finishes. The case raises the issue because, for 22 months, the investigation continued without notice. Afterwards, notice was given. Then the investigation continued for 7 more months. A total of 29 months passed from start to finish. Did the delay, without notice, deprive the commissioner of jurisdiction? Crucially, the ATA did not raise the failure to give notice before the commissioner. Instead, it first raised the issue during judicial review proceedings.

The Canadian Supreme Court said a decision on timeliness was implicit in the investigation's conclusion. The Commissioner, after all, found against the ATA—even though it failed to give notice for 22 months. Had it thought the law required notice after 90 days, it would have terminated the investigation. But that is not what occurred. It gave notice after 22 months. Then it took another 7 months before finding the ATA liable. It must have decided, albeit implicitly, that the law permitted this course of conduct.

The Canadian Supreme Court took a similar approach in *Edmonton East*.[19] Capilano owns a shopping centre in Edmonton, Alberta. For tax purposes, the city assessed its value at $31 million. Capilano thought this was too high; it complained to the Assessment Review Board.[20] It wanted a reduction to $22 million. In response, Edmonton asked the board to increase the valuation to $45 million. Capilano expressed concern about the city's change.

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[19] *Edmonton (City) v Edmonton East (Capilano) Shopping Centres* 2016 SCC 47, [2016] 2 SCR 293.

[20] Under the Municipal Government Act 2000 (Canada), s 460.

It argued the city should not be permitted to substitute what is, in effect, a wholly new assessment. However, Capilano did not challenge the board's power to increase the valuation. The board decided to increase the valuation to $41 million.

The board's decision—to increase the valuation—implicitly asserts the existence of the power to make its decision. And so, like in *Alberta Teachers' Association*, the court undertook to review the soundness of this implicit position. As it happens, the majority agreed with the board. The statute confers a power to make a 'change' to the valuation.[21] And the ordinary meaning of change encompasses both increases and decreases.[22]

This approach, however, lies uneasily between two poles. On one hand, it maintains that what the court assesses, during judicial review, is the quality of the decision's reasons. On the other hand, it deflates the notion of a 'reason', in this context, to simply the possession of a legal power. Put another way, it treats as the relevant reason for the decision, in this context, as simply 'the existence of a legal power'. By pitching the analysis at this high level of generality, the court is able to claim the decision implicitly contains this reason. This is possible, because whenever a public body proceeds to a decision, it is implicitly committed to the view that it had the power to make the decision. For the decision, by seeking to require conduct, purports to exercise a power to bind others.

But this is artificial. If the court is concerned with whether the power exists, what the public body took to be a reason should be irrelevant. Either the law provides for that power, or it does not. Alternatively, if the court is concerned with the quality of the public body's

[21] Municipal Government Act 2000 (Canada), s 467.

[22] *Edmonton* at [45].

decisionmaking process, the bare assertion of a power does not go very far. For, again, any decision implicitly asserts a power to make the decision.

The *Lukács* case illustrates this tension. Lukács submitted a complaint to the Canadian Transport Agency regarding how Delta treats its obese passengers. Delta recommends such passengers to purchase additional seats, and might ask them to take a later flight when it is full. But Lukács is not obese himself. So the agency rejected his complaint as lacking standing. To say this, it adopted the standing rules applicable to the ordinary courts. Lukács lacked private interest standing because he was not personally aggrieved. And he lacked public interest standing because his complaint did not go to the constitutionality of legislation or administrative illegality.

The Canadian Supreme Court rejected the agency's decision.[23] The agency has a broad discretion to hear complaints. The narrow standing rules that govern judicial proceedings, if applied to the agency, would go too far in limiting the range of claims.[24] Before the court, however, Delta did not contest this. It accepted there was no jurisdiction to adopt such narrow standing rules. Despite this, Delta argued the agency had the power to dismiss Lukács's claim. It asked the court to look beyond what was said. Like in *Alberta Teachers' Association*, there were additional reasons, implicit in the decision, to deny standing to Lukács.

But the agency had given express reasons for their decision, premised on a detailed articulation of the standing rules for judicial proceedings. Given this, any alternative reasons would contradict the agency's expressly stated position. A court may supplement

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[23] *Delta Air Lines v Gábor Lukács* 2018 SCC 2, [2018] 1 SCR 6.

[24] *Lukács* at [19]-[20].

an agency's reasons, but it cannot delete the reasons it gave and substitute fresh reasoning in its stead. Hence, *inferring* reasons from an agency's decision is acceptable, while *substituting* reasons is not. The majority gave three reasons to support this distinction. First, the court lacked the power to replace reasons. Second, such an approach undermines the vital role of reasons in administrative law. If administrative bodies are to give reasons, they must do so in an 'intelligible, justified, and transparent way'.[25] Third, it would require the court to assume the role of the agency and develop procedural rules for the agency to apply. This is in tension with the need to defer to the agency.[26]

The distinction the court tries to draw is unconvincing. Let's take the three points in turn. First, the worry of 'replacing' reasons. The court clearly believes it has the power to *reject* reasons. And so the issue must lie with the possibility of adding reasons, in the vacuum left by the rejected reasons. But this does not square with *Edmonton East*. There, the court felt free to engage in a sustained analysis of the statutory language. It considered the meaning of 'change' in light of the broader statutory scheme. Now, at a high level of generality, it is true the tribunal assumed the existence of its power to alter the valuation. But it failed to refer to the statutory provision regarding the power to 'change' valuations, let alone analyse it. It is artificial to assume such arguments, in full, were in the board's contemplation. And, if not, the court's analysis must have added to its reasons.

Second, the worry of undermining the role of reasons. The logic appears to be that, if an agency is to give reasons, it should do so well. But why should an agency which fails to

[25] *Lukács* at [27].

[26] *Lukács* at [28].

give any reasons be held to a more lenient standard? This gives rise to perverse incentives. It encourages the agency to *not* give reasons, rather than risk giving bad reasons.

Third, the worry of needing to create procedural rules. True, the court should not needlessly take it upon itself to create procedures for the agency to apply in the future. But this does not justify quashing the agency's decision. For the court could have recognised the agency's power to deny standing to Lukács. To do so, of course, the court must identify certain features of Lukács which could ground a denial of standing. And it must explain why these features are not so widely shared as to overly restrict standing. But it did not have to go beyond Lukács's circumstances. There was no need to consider the full range of reasons which could justify a denial of standing. So the court did not need to come up with a complete scheme of procedural rules.

I conclude the Canadian Supreme Court's distinction between the inferral and substitution of reasons is unsound. It seeks to reconcile two potential aims of judicial review. First, to assess whether the public body's decision falls within its power to bind others. Second, to assess how well the public body arrived at its decision. The problem is these two aims are not easily reconciled. The extent of a legal power does not turn on an agency's reasons, while the quality of its decisionmaking is all about those reasons.

The Canadian Supreme Court disagrees. 'It is a more organic exercise—the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes.'[27] Hence, it does not 'advocate two discrete analyses—one for the reasons and a separate one for the result'.[28] Things, it says, are more

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[27] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, [2011] 3 SCR 708 at [14].

[28] *Newfoundland* at [14].

nuanced. But this does not follow. Suppose the two issues—an agency's reasons, and the result of its decision—go toward the same inquiry. It is all, as the court says, to establish a range of permissible options. But this does not answer *how* a court is to assess either an agency's reasons or its results. These two things, as the court recognises, are different things. Before they can be 'read together', the court must know what exactly it is reading. And that, in turn, may require it to start by conducting two discrete analyses.

The difference between these two analyses lies, as we saw, on the relevance of post hoc explanations. When assessing an agency's reasons, the court must ask how the agency reached its decision. When assessing the result, however, the court is not so limited. Failing to keep these two separate risks confusion. Take *Lukács*. There, the court declined to assess whether the agency had the power to deny Lukács standing. For the agency's proffered rationale, that he failed to satisfy judicial requirements of standing, was inadequate. But this goes to the quality of its reasoning, not the result. What the court did in *Lukács* cannot be characterised as an organic combination of reasons and results. It looked, instead, at the reasons, while discarding the relevance of outcomes altogether.

To recap, Canada considers both reasons and results, but in a way which fails to appreciate the distinctive qualities of either. So it has trouble explaining why post hoc explanations are sometimes, but not always, relevant. To do so, it relies on a distinction between inferring reasons and substituting them. The distinction, however, is unstable.

Other legal systems deny this problem even exists. They say post hoc explanations are essentially either always, or never, relevant. Germany says they are almost always

permissible.[29] By contrast, the United States says they are almost always impermissible.[30] Here, I agree with Canada. Only a pluralist position can explain why post hoc explanations are *sometimes* permissible. Unlike Canada, however, I have argued for two discrete analyses. They correspond to two types of issues.

First, some issues are jurisdictional. If so the question concerns whether the decision is the *result* of an agency's legal powers. In other words, does the decision fall within the extent of an agency's jurisdiction? Since this looks to a result, the use of retrospective justifications is permissible. The sole issue is whether the decision comes from a legally recognised power, regardless of how it came about.

Second, other issues are nonjurisdictional. If so the question concerns whether the agency's *reasoning* was acceptable. In other words, did the agency appropriately exercise its power? Since this assesses the quality of a mode of reasoning, the use of retrospective justifications is impermissible. The sole issue is whether the decision arose in the right way, regardless of how it could have turned out.

4.6 Harmless error

Let's return to the *Philpot* case.[31] Recall that Philpot was accused of abusing his wife. So, while the investigation was ongoing, the police chief sought to prevent him from contacting her in any way. To do so, the police chief tried to rely on a particular source of power. But it was the wrong place to look; it did not cover his actions. This, however, should not matter.

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[29] Administrative Procedure Act (Germany), § 44.

[30] *Security and Exchange Commission v Chenery* (1943) 318 US 80 at 95.

[31] [2022] EWHC 1852 (Admin).

The police chief may have made a mistake. But whether the law elsewhere granted him the power is a jurisdictional question. And, as it turns out, the law does grant him the power to restrict Philpot's contact with his wife. So the restriction was lawful.

That, however, is not how the High Court dealt with Philpot's case. Rather, Lang J held the police chief's mistake rendered his decision unlawful. But this was, in the end, a Pyrrhic victory. For, in 2015, Parliament amended[32] the Senior Courts Act to insert the following provision:

> The High Court—
> (a) must refuse to grant relief on an application for judicial review, and
> (b) may not make an award under subsection (4) on such an application,[33]
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.[34]

Given a correct view of the law, it was highly likely the chief would have placed the same restriction on Philpot. The mistake was, in effect, harmless error. And so Lang J refused to grant relief.

There is something odd about this. The court said—declared, even—that the police chief's decision was *vitiated* by his error. As Lang J put it, there was 'a material error of law, which vitiated the decisions made'.[35] What the court could not do, given the statute, is grant relief. So Lang J withheld a quashing order. Yet she noted the decision's invalidity, regardless. The decision was invalid, even though no relief was awarded. Now this, on its

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[32] Criminal Justice and Courts Act 2015 (UK), s 84.

[33] Under s 31(4) of the Senior Courts Act 1981 (UK), the courts are permitted to award monetary awards on an application for judicial review if the application included a claim which would otherwise entitle the applicant to such relief.

[34] Senior Courts Act 1981 (UK), s 31(2A).

[35] *Philpot* at [53].

own, is perfectly intelligible. There is nothing confusing about a court declining to award a remedy, despite the existence of facts which might otherwise justify it. Take, for instance, an accident which satisfies all the elements of a tort. Any possible claim might still be time barred; a limitation period could prevent a court from awarding relief. What is odd, however, is the assumption that the police chief's decision is legally valid. The court had, after all, just described the decision as vitiated. There is some dissonance here.

After his application for judicial review, Philpot was left empty-handed. What would happen if he chose to ignore the police chief's decision? Consider this possible scenario. Suppose the police misconduct panel says Philpot did *not* abuse his wife. So he did not commit the misconduct he was accused of. While awaiting this decision, however, Philpot went ahead and contacted his wife. And that, the panel finds, was itself misconduct. Philpot disobeyed the police chief's order. So they dismiss him from his post.

Under the law, the panel's decision is subject to an appeal to the Police Appeal Tribunal.[36] Suppose they affirm. But Philpot disagrees. So he brings another application for judicial review against their decision. Philpot is back in front of the High Court. There, he makes the following argument. He was dismissed for disobeying the police chief's order. But there was no such order to obey. It was, after all, vitiated—to use Lang J's language. The order was invalid. So he did nothing wrong.

Philpot should not succeed. But why? The statute requires the refusal of relief if the outcome would substantially be the same had the *conduct complained of* not occurred. And Philpot's complaint pertains to the tribunal's finding that he disobeyed an order. His complaint is not about the order itself. It is that, since the order is vitiated, he should not be

[36] Under the Police Appeals Tribunals Rules 2020, as provided for by the Police Act 1996 (UK), s 85.

dismissed for ignoring it. And it is impossible to say this issue made no substantial difference to the outcome. In this hypothetical, the tribunal accepted he did not abuse his wife. The only basis for his termination was his failure to comply with the police chief's supposed order. If the order was ineffective, there was no basis to terminate Philpot. He should still have his job. In response, you might echo his failed application for relief the first time around. The legal flaw with the police chief's order made no difference, and so the statute requires the court to deny relief. This time, however, Philpot is not challenging the order. He is challenging the Police Appeal Tribunal's decision to terminate his job.

This argument, you might worry, does not quite work. For we could just interpret 'conduct complained of' in a broad sense. To challenge the tribunal's decision, Philpot must say the police chief's order is invalid. There must be some reason for this. The police chief must have done something wrong. And, by bringing it up, Philpot's complaint encompasses that wrongful conduct.

What has stood in Philpot's way, time and again, is the statutory provision which prohibits relief if the outcome would substantially be the same. But the statute only requires the refusal of relief *on an application for judicial review*. What happens when the issue arises outside this context? Now this probably won't help Philpot. For two reasons. First, police officers work under a statutory regime, rather than an employment contract.[37] They are office holders, not employees. So they cannot bring a claim, in private law, for unfair dismissal. For there is no contract to breach. Second, the misconduct panel, as a quasi-judicial body, benefits from judicial immunity.[38] So it is largely safe from collateral suit.

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[37] *Attorney-General for New South Wales v Perpetual Trustee* [1955] AC 457 (PC) at 489-90.

[38] *Heath v Commissioner of Police for the Metropolis* [2004] EWCA Civ 943 at [45], partially overruled with respect of EU law in *P v Commissioner of Police for the Metropolis* [2017] UKSC 65.

A problem remains. For, outside of Philpot's case, there remains the live possibility of collateral proceedings. Let's put things in more general terms. Suppose an applicant challenges an order, due to a legal flaw. According to the court, the error vitiates the order. But it refuses relief because the outcome would largely stay the same. Later, the applicant is prosecuted for disobeying the order. During her prosecution, she seeks to rely on the order's illegality as a defence. Can she?

Yes. Again, the statutory bar on relief only applies to judicial review proceedings. It does not apply to criminal prosecutions. So the defence should be available. Only if, however, the court is right to say the error vitiates the order. And here we find the source of the problem. In *Philpot*, we saw a particular sort of legal flaw. The police chief relied on the wrong legal basis to make his decision. He looked in the wrong place to ascertain his powers. And that kind of error, I want to say, does not necessarily vitiate his decision. The decision is valid, so long as a jurisdictional basis exists—even one which eluded the decisionmaker. It is therefore safe from collateral attack. Not because relief must be refused *notwithstanding* the order's invalidity, but because the order was valid all along.

5 Principle

The Commercial Court publishes a series of fascinating vignettes of its former judges. Among them is Lord Diplock. This is what the court said about him.

> In seventeen years as a Law Lord, Diplock sat on more than five hundred House of Lords and Privy Council appeals in almost every area of law. It was in the Lords that his interest in judicial review, peculiar in someone so clever, but possibly triggered by his Privy Council practice, became prominent. But his decisions also included a fair proportion of altogether more intersting [sic] and intellectualy [sic] challenging commercial cases.[1]

This was surely meant in a humorous spirit, but it articulates a depressing thought—that the law of judicial review is unintellectual, or at least intellectually uninteresting. Unfortunately, the resort to pragmatism has given succour to this slander. Quite often, legal analysis in this area read as if it came from the Law Commission. Starting from a fresh slate, it asks: what would the law have to be, so as to facilitate the desired result in this particular case?[2]

There is another way. In many quarters of law, what Lord Goff called 'the search for principle' is warmly regarded.[3] The law of judicial review should be no exception. Resort to technical concepts, applicable over a diverse range of circumstances, is not a historical anachronism. Rather it reflects a deep feature of normative reasoning. The particular circumstances of a case, to be sure, reveal salient reasons which a court should consider

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[1] The Commercial Court of England and Wales, 'William John Kenneth Diplock, Baron Diplock of Wansford (1907-1985)' <https://www.commercialcourt.london/kwk-diplock> accessed 3 July 2023.

[2] A glaring example being the importation of the second-tier appeals criteria to judicial review in *R (Cart) v The Upper Tribunal* [2011] UKSC 28 at [52]-[56].

[3] Robert Goff, *The Search for Principle* (British Academy 1984).

before rendering judgment. Think of the plight of an individual litigant. Or the fear of adverse consequences to the administrative scheme. But other reasons apply more generally. Yet they risk being overshadowed by the particular. Here, conceptual modes of reasoning offer a useful corrective. They focus attention on the identification of considerations that apply across a wide range of cases. This is the value of the search for principle.

All this, of course, assumes the relevant legal concepts reflect genuine reasons. Some worry this assumption is unwarranted. From such worries rise a common critique: that conceptual reasoning betrays an empty formalism. Often this may well be true, though I tend to be more sceptical than most.

Not, though, for the concept of jurisdiction. There lies a rich resource, which we can harvest to articulate a principled approach to several important issues in administrative law.

This thesis is therefore a work of moral and political philosophy. My interlocutors, however, were mostly judges in the midst of discharging their solemn duty to decide the cases before them. The facts of their cases were my examples, and their reasoning my foil. Why?

Here's something I *don't* mean to do.

> Sometimes our firm intuitions as to how the examples should be answered will cause us to modify, or even abandon, our principles … In law, we are lucky enough to have many thousands of real-world examples, from different jurisdictions and times, where intelligent people of sound judgement have given a verdict as to the right result, often independently of one another. This enables us to test our principles of justice against actual cases.[4]

[4] Robert Stevens, *The Principles of Restitution* (Oxford 2023) 18.

I have said most of the leading cases in this thesis were wrongly decided, or at least wrongly reasoned. So judicial intuitions, as far as they go, count against my arguments.

Here's something that comes closer to what did motivate me.

> The book makes extensive use of literary examples, some developed at length … I have never been a much of a fan of stripped-down thought experiments of the kind favoured by many contemporary moral philosophers … For the most part, they deliberately eliminate any hint of background story. They treat problems about what some generic agent is to do now as touched on only occasionally, and in strictly demarcated ways, by the way in which the agent came to be facing those problems, the role she is occupying, and the place that her actions have in the wider story of her life.[5]

Not to say, of course, that the great cases of administrative law are comparable to the great works of literature. But these cases squarely confront the issues which arise from the twin need to (i) confer legal powers upon officials so they can govern, and (ii) enforce the limits of those powers, and subject their exercise to legal controls. Each concern officials in a particular institutional context, seeking to defend their acts as a permissible exercise of power.

Thinking about these cases, then, struck me as a promising way of getting at the nature of what it means to hold a power, and to be supervised in the exercise of the power. That is what this thesis has tried to do.

The second chapter proposed a way to flesh out the concept of jurisdiction. It concerns the powers which administrative agencies wield. Such powers are limited, and it is the role of the courts to enforce those limits through judicial review. But those limits are not uniform. Some go to the *extent* of the power. Others go to how that power is appropriately *exercised*. The former denies that the agency possessed jurisdiction; the latter accepts it did, but quashes the decision for an error within jurisdiction.

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[5] John Gardner, *From Personal Life to Private Law* (Oxford 2018) 10-11.

The third chapter illustrated one way this distinction matters. Acts outside jurisdiction are a nullity. Erroneous exercises of jurisdiction, however, are simply liable to be invalidated.

The fourth chapter offered another illustration. It showed the analytical priority of jurisdictional issues over nonjurisdictional ones. And it argued that courts should consider post hoc explanations when deciding on jurisdictional questions. Such explanations, however, should be discarded for nonjurisdictional questions.

Together, these chapters tried to show the promise of the search for principle in administrative law. It should not be left to the private lawyers alone. Indeed, principle is perhaps even more important in public law. The powers of the state should be wielded in accordance with principle. This applies to the government, of course. But for the courts to intervene, and stop the government in its tracks, is itself a striking exercise of public power. It should be done in principled fashion.

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