

# Tom Hayes: Trial By Fire\*

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## 1. Introduction

As ever, the world of finance is abuzz with sizzling news. Most of it, like the judgment in *Plevin* [2014] UKSC 61<sup>1</sup>, makes pretty grim reading for banks. Similarly, forex fixing claims worth billions are brewing in London – a colossal currency market – because of last month’s \$2 billion payout in New York<sup>2</sup> by household names such as Barclays, HSBC and RBS and numerous others: indeed, the settlement of class action litigation with investors, arising out of the rigging of WM/Reuters 4pm London

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<https://globalcorporatelaw.wordpress.com/2015/08/19/tom-hayes-trial-by-fire/>

<sup>1</sup> <http://www.bailii.org/uk/cases/UKSC/2014/61.html>, *Plevin v Paragon Personal Finance Ltd* [2014] UKSC 61 (12 November 2014)

<sup>2</sup> <http://www.reuters.com/article/2015/08/13/us-forex-manipulation-settlement-idUSKCN0QI2J720150813>

Fix<sup>3</sup>, has been tipped as opening the floodgates. This comes off the heels of May 2015's foreign exchange (forex or FX) rigging penalties of \$5.6 billion.<sup>4</sup> Such events leave little room for doubt that the LIBOR scandal was just the tip of the iceberg because the rigging of the \$5.3 trillion-a-day forex markets completely dwarfs the total \$500-\$800 trillion value of financial contracts underpinned by LIBOR. Citigroup, JPMorgan Chase & Co, Barclays and RBS all pleaded guilty in May in forex related criminal cases. In other news, things are looking dreadful for those charged by the Serious Fraud Office<sup>5</sup> (SFO). In the first LIBOR trial<sup>6</sup>, Tom Hayes, an obscure yen derivatives trader in UBS and Citigroup became the world's first individual to be tried and convicted for benchmark rigging. He got 14 years' imprisonment for his crimes. Against this nightmare sentence, his trial has set a chilling precedent for the 12 others in his shoes who are awaiting trial.

Hayes contended that he was operating in a "grey area" where there were "no rules" and that he had no compliance training, but this did nothing to help him. His predicament gives promise to Mark Carney's maxim that

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<sup>3</sup> <http://www.investopedia.com/terms/w/wmreuters-benchmark-rates.asp>

<sup>4</sup> <http://knowledge.wharton.upenn.edu/article/are-financial-penalties-enough-to-deter-banks-bad-behavior/> - watch excellent video on how the "Cartel" and "Coiled Cobra" rigged the marketplace: <http://www.nytimes.com/video/business/dealbook/10000002761106/the-currency-fix-banging-the-close.html?ref=dealbook>

<sup>5</sup> <http://www.sfo.gov.uk/>

<sup>6</sup> <http://www.telegraph.co.uk/finance/libor-scandal/11625229/Tom-Hayes-First-Libor-trial-to-begin.html>

“the age of irresponsibility is over.”<sup>7</sup> In the case against him, Hayes was described as a “ringmaster” whose avarice knew no bounds. The archetypical Foucauldian fiend, he stood accused of using corruption and accepted making “concerted efforts to influence LIBOR” but argued he “was operating within a system”. Discussing the dilemma’s associated with punishment, in *Discipline and Punish: The Birth of the Prison*<sup>8</sup> Foucault concludes that the offender is “worse than an enemy” and that transgressing the boundaries set by society makes him “nothing less than a traitor, a ‘monster’.” For Foucault this is so because “it is from within society that he [the offender] delivers his blows.” In discussing concept of punishment, Foucault explains that the philosophy underpinning the evolution of the penal system, from one involving public spectacles (displays) such as public torture and execution, to new modern and discreet technologies is to:

*punish exactly enough to prevent repetition.*<sup>9</sup>

The outcome of this pivotal case will serve as a yardstick for future prosecutions against benchmark manipulators and fraudsters. The system had to make an example of Hayes to create a deterrent effect, others will think twice before following in his wretched footsteps.

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<sup>7</sup> <http://www.bankofengland.co.uk/publications/Pages/speeches/2015/821.aspx>

<sup>8</sup> [http://monoskop.org/images/4/43/Foucault\\_Michel\\_Discipline\\_and\\_Punish\\_The\\_Birth\\_of\\_the\\_Prison\\_1977\\_1995.pdf](http://monoskop.org/images/4/43/Foucault_Michel_Discipline_and_Punish_The_Birth_of_the_Prison_1977_1995.pdf), Michel Foucault, *Discipline and Punish: The Birth of the Prison*, London: Penguin, 1977, p. 90.

<sup>9</sup> *Ibid*, p. 93.

## 2. Corporate Cheating

Although he is not a French poststructuralist philosopher like Michel Foucault, not long ago in *The Oxford Handbook of Corporate Reputation*<sup>10</sup> Jonathan Karpoff advanced an equally telling analysis about whether reputation works to discipline corporate misconduct when companies “lie, cheat, steal, mislead, disguise, obfuscate, feign, distort, and confuse”<sup>11</sup> in order to maximise profits. For Karpoff, “few matters of economic policy are as contentious as the extent and consequences of misconduct.”<sup>12</sup> Karpoff emphasises that the efficacy of the regulatory regime was called into serious question in the wake of the global financial crisis.

On the general furor over corporate criminals getting away with lying, cheating and stealing, Karpoff reiterates earlier arguments that “[t]he threat of fines ... has proved laughably inadequate in producing better behaviour.”<sup>13</sup> UBS has paid fines and will no doubt continue to do so but as the LIBOR trial demonstrates, some individual criminal sanctions are also in order. Stressing the importance of the scope and rationale for measuring reputational losses, Karpoff pithily concluded that the “[i]t

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<sup>10</sup> <http://www.sbs.ox.ac.uk/ideas-impact/reputation/news/oxford-handbook-corporate-reputation>

<sup>11</sup> Jonathan M. Karpoff, “Does Reputation Work to Discipline Misconduct?” in Michael L. Barnett and Timothy G. Pollock, *The Oxford Handbook of Corporate Reputation*. Oxford: Oxford University Press, 2012, p. 361.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

is a truism that a firm's reputation matters."<sup>14</sup> For him, a lacuna exists in the knowledge relating to financial misconduct and reputation (or "reputational penalties") in the UK.

As to the financial reputation of firms, reports suggest that misconduct was rife at UBS and it paid Hayes £1.3 million for three years' service, i.e. his dubious methods and criminality. However, his move to rival Citibank was his undoing because the difference in culture culminated in him being reported, by a colleague, for market manipulation. Thereafter, the SFO took the LIBOR matter for investigation on 6 July 2012.

Unlike Nick Leeson<sup>15</sup> who wrecked Barings Bank<sup>16</sup>, Hayes did not bring down a financial institution. Unlike Navinder Singh Sarao, he did not stand accused of causing the "flash crash". But it has nevertheless been suggested that<sup>17</sup> his treachery caused immeasurable loss and damage to the counterparties to his trades. (Arguably, the point is dubious because both the "flash crash" and the collapse of Barings have been measured, as have the "London Whale"<sup>18</sup> losses.)

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<sup>14</sup> Ibid, p. 374.

<sup>15</sup> [https://en.wikipedia.org/wiki/Nick\\_Leeson](https://en.wikipedia.org/wiki/Nick_Leeson)

<sup>16</sup> [https://en.wikipedia.org/wiki/Barings\\_Bank](https://en.wikipedia.org/wiki/Barings_Bank)

<sup>17</sup> <http://www.theguardian.com/business/2015/aug/09/tom-hayes-libor-sentence-holding-bank-bosses-equally-accountable>

<sup>18</sup> See <https://globalcorporatelaw.wordpress.com/2015/07/06/hunter-into-prey-city-watchdog-exposes-its-achilles-heel-part-1/> for my article on the "London Whale" trades and issues that have emerged in enforcement and third party rights in the case of Achilles Macris.

### *3. Case Context*

Sparing no one, Hayes had elected to implicate several others – including his half brother HSBC trader Peter O’Leary – in his 82 hours of conversations with the SFO. Until now it has charged 13 people in the investigation. Hayes was one of three people arrested and interviewed on 11 December 2012 by the SFO and City of London Police. He attended Bishopsgate police station on 18 June 2013 where he was charged with eight counts of conspiracy to defraud.

The following day, a case was opened against him (for conspiracy to commit wire fraud, horizontal price fixing and wire fraud) by the US Department of Justice (DoJ) and the complaint against him<sup>19</sup> (and Roger Darin, a Swiss national) was unsealed<sup>20</sup> in the Manhattan Federal Court on 19 December 2012. The FBI accused him of participating in a scheme, in concert with other crooked individuals, to manipulate yen LIBOR to maximise profits for his trading positions. However, the 35-year-old trader, who managed to avoid American justice, ultimately got his first choice of being tried in England at the Southwark Crown Court<sup>21</sup> over a nine-week period during this summer.

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<sup>19</sup> <http://www.justice.gov/file/498471/download>

<sup>20</sup> <http://www.justice.gov/atr/case/us-v-tom-alexander-william-hayes-and-roger-darin>

<sup>21</sup> <https://courtribunalfinder.service.gov.uk/courts/southwark-crown-court>

Hayes, who is from Hampshire, took the view that he was being ripped off by his employers in UBS who were cheating him on his pay package. This prompted him to join Citibank where he was paid £3.5 million for less than a year's work but subsequently fired in September 2010 because of suspicions over benchmark manipulation. (At UBS he is said to have made £170 million (\$260 million) in profit for his employers but he abandoned the Swiss lender, and made his way into Citibank, when it defaulted on paying him a \$2.5 million.)

For his sins, in relation to the eight counts against him, Hayes was ultimately sentenced to 9.5 years imprisonment for each of counts 1-4, to run concurrently, and to 4.5 years imprisonment for each of counts 5-8, to run concurrently to each other, but consecutively to counts 1-4, resulting in a total sentence of 14 years' imprisonment. At first blush, all this appears to be for the greater good.

The "ringmaster"<sup>22</sup> of manipulation, Tom Hayes<sup>23</sup>, pleaded not guilty in December 2013 to eight charges of fraud: instead, he insisted that he was operating in a "grey area" where there were "no rules" and that UBS distributed "an instruction manual on fixing LIBOR."

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<sup>22</sup> <http://www.bbc.co.uk/news/business-32879690>

<sup>23</sup> <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2013/trader-charged-in-libor-investigation.aspx>

Hayes initially agreed to plead guilty but later, changing his mind, he somersaulted on his plea. He contended that he always acted with “complete transparency” and that LIBOR rigging was an open secret. According to him, all his managers (even the CEO) were well aware of his methods.

Hayes, who was known as “Rainman”, because of coming across as the character in Dustin Hoffman’s 1988 film<sup>24</sup>, said in his testimony that he made confessions of wrongdoing to the SFO to prevent being extradited to the US where he is also facing charges<sup>25</sup> which carry a much greater sentence. “Petrified” of extradition, Hayes explained to the jury:

*the only consideration was getting charged and avoiding extradition ... I didn't think about innocence or guilt.*

But his efforts to charm the jurors through trial tactics failed to reap rewards for him. Neither did his punditry that his prosecution was politically motivated and to his utter shock he was convicted unanimously on all charges.

Apart from failing to hypnotise the jury with his wicked sorcery, he himself elected to forgo one third off his

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<sup>24</sup> [https://en.wikipedia.org/wiki/Rain\\_Man](https://en.wikipedia.org/wiki/Rain_Man)

<sup>25</sup> <http://www.justice.gov/sites/default/files/ag/legacy/2012/12/19/Hayes-Tom-and-Darin-Roger-Complaint.pdf>



sentence by failing to plead guilty at the earliest possible opportunity, which is what he seemed to have done prior to changing his plea: but that was just a ploy to avoid extradition.

To him, “any fucking trade” which paid “today” was good enough. In addition to Rainman, Hayes was also called “Tommy chocolate” because in his social life he preferred to drink hot chocolate rather than beer.

#### *4. Tom Hayes v Navinder Sarao*

Given the timing of Hayes’ conviction and Navinder Singh Sarao’s extradition case, scheduled to take place in September and expected to last several months, drawing analytical parallels in this duo of white-collar crime cases is inevitable.

It is interesting to note, as I have in the past on Sarao<sup>26</sup> (the so-called “flash crash” trader), that the criminal law has effectively become a dead letter precisely because people such as Tom Hayes get lightly sentenced. (Here I advance an alternative analysis, the counter-point.) Sarao was arrested on 21 April 2015. He faces extradition because of charges relating to fraud and commodity manipulation in the US, attracting a sentence of 380 years’ imprisonment (see details below).

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<sup>26</sup> Khan, Asad Ali, *Navinder Singh Sarao: Criminal Mastermind or Sacrificial Lamb?* (April 28, 2015). Available at SSRN: <http://ssrn.com/abstract=2600407>

Because he does not have a spouse or a child, Sarao was initially refused bail because of posing a “quintessential flight risk” but was finally released on 14 August 2015 by Westminster Magistrates’ Court<sup>27</sup> when his bail was reduced from £5 million to £50,000.

His extradition appeal is due to be heard next month and attempts to postpone the hearing scheduled on 25 September 2015 have been unsuccessful. Compared to Sarao, at first blush, Hayes seemed to have gotten off lightly because the numbers are clearly against those resisting extradition to the US. Yet, on proper analysis, it is possible to distinguish these two cases.

It is alleged that the 36-year-old Sarao illegally manipulated the stock market and caused the \$500 billion (arguably even \$1 trillion) market “flash crash” of May 2010 when the Dow Jones Industrial Average<sup>28</sup> plummeted 600 points in five minutes. During the rout, the market, which rebounded in a matter of minutes, lost almost a tenth of its value.

The fresh theory that Sarao single-handedly caused the flash crash is a radical departure from the regulators’ previous position that the crash did not involve manipulation and occurred because of a big sale of

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<sup>27</sup> <http://magistrates-court.co.uk/city-of-westminster-magistrates-court/>

<sup>28</sup> <http://money.cnn.com/data/markets/dow/>

contracts from a large trader. As a result of the momentary wipeout, which only heightened existing anxieties about the financial crisis<sup>29</sup>, the US wants to extradite Sarao to face American justice.

The self-confessed insomniac is accused of profiteering illegally to the tune of £26.7 (\$40 million); which he siphoned off to companies he had incorporated in the Caribbean (one of them traded as “Nav Sarao Milking Markets”).

He apparently made about \$879,000 on the day of the flash crash, not that great a sum of money after all.

An analysis, commissioned by the Commodities Futures Trading Commission<sup>30</sup> (CFTC), of Sarao’s trading activity on twelve particular days revealed that using his trading programme he cancelled twice as many times (99 percent) as other traders (48 percent).

However, he defended himself by telling the UK financial watchdog that he did not want to be picked off by bigger high-frequency trading (HFT) traders and therefore his trading software was custom built by Edge Financial to cloak his orders so that the front running HFT crew would be unable to identify him.

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<sup>29</sup> [https://en.wikipedia.org/wiki/Financial\\_crisis\\_of\\_2007%E2%80%9308](https://en.wikipedia.org/wiki/Financial_crisis_of_2007%E2%80%9308)

<sup>30</sup> <http://www.cftc.gov/index.htm>

In *Flash Boys: Cracking The Money Code*<sup>31</sup>, the impressive Michael Lewis argues that the flash crash occurred “for no obvious reason”<sup>32</sup>. The market may have plummeted inexplicably but it was equally bizarre that:

*A few minutes later like a drunk trying to pretend he hadn't knocked over the fishbowl and killed the pet goldfish, it bounced right back up to where it was before.*<sup>33</sup>

The event was trivial if one wasn't watching “unless, of course, you had placed orders in the markets to buy or sell certain stocks.”<sup>34</sup> For Lewis, the report of the Securities and Exchange Commission<sup>35</sup> – linking the episode on a large sell order of futures contracts by “an obscure Kansas City mutual fund” – was “only true by accident” because “the regulators did not possess the information they needed to understand the stock market.”<sup>36</sup>

So applying the theory proposed by Michael Lewis, it may well be that Sarao has a case to answer in America. (But his legal team insists that a “lone wolf” could not have crashed the market.)

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<sup>31</sup> <http://www.theguardian.com/books/2014/apr/07/flash-boys-cracking-money-code-review-michael-lewis>

<sup>32</sup> Michael Lewis, *Flash Boys: Cracking The Money Code*, London: Penguin, 2014, p. 82.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

<sup>35</sup> <http://www.sec.gov/>

<sup>36</sup> *Flash Boys: Cracking The Money Code*, p. 81.

It is the position of both governments that US/UK Extradition Treaty of 2003<sup>37</sup>, which operates in the UK through the Extradition Act 2003<sup>38</sup>, is necessary to maintain the rule of law and it is “predicated on trust, respect, and the common goals of protecting our nations and eliminating safe havens for criminals.” They say that the treaty is not unfairly balanced in America’s favour because Sir Scott Baker’s review<sup>39</sup> found it to be “fair” and the number of US requests to be proportionate. The government commissioned that report with a view to reviewing the operation of the Extradition Act 2003, with particular emphasis on the operation of the controversial US/UK extradition treaty.

In the numerical assessment set out in Sir Scott Baker’s review, apart from the 10 refused requests out of a total sample of 130 cases, 77 individuals have been extradited from the UK to the US under the treaty and the remaining 43 cases remained pending in the UK, or the persons returned to the US of their own volition (or other circumstances made extradition redundant). Conversely, of a total of 54 UK requests 38 resulted in extradition whereas the remaining 16 cases became redundant.

The difference between Hayes and Sarao is that the former is a white guy who worked global banks whereas the

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<sup>37</sup> [http://www.statewatch.org/news/2003/jul/UK\\_USA\\_extradition.pdf](http://www.statewatch.org/news/2003/jul/UK_USA_extradition.pdf)

<sup>38</sup> <http://www.legislation.gov.uk/ukpga/2003/41/contents>

<sup>39</sup> <http://www.statewatch.org/news/2011/oct/uk-baker-extradition-review.pdf>

latter, who is not white, is from an immigrant neighbourhood in London: so in the grand scheme of things, approaching things from that angle, the punishment imposed upon Hayes is significant indeed. But, equally, the race point can be distinguished. The other important and obvious thing, of course, is that Sarao was his own master. Whereas Hayes, who was a mere puppet, was just trying to please his masters by making money for them – enough for them to roll in. Hayes only made a few million pounds but Sarao was able to “milk” the market for tens of millions of pounds by (allegedly) entering into bogus transactions on the E-mini S&P 500<sup>40</sup>, a stock market index futures contract based on the Standard & Poor’s 500 Index<sup>41</sup> (an index of 500 stocks) which is one of the most popular and liquid equity index futures contracts in the world. As I have said, it is entirely possible to distinguish these two cases: Hayes was probably just obeying his masters’ voice.

The E-mini S&P contract is traded only at the Chicago Mercantile Exchange<sup>42</sup> (CME). Sarao is said to have manipulated the market for E-mini S&P 500 futures contracts on the CME. The drop in the price of these contracts is thought to have contributed to the flash crash. Allegedly a “dynamic layering” scheme was used

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<sup>40</sup> [http://www.cmegroup.com/trading/equity-index/us-index/e-mini-sandp500\\_contract\\_specifications.html](http://www.cmegroup.com/trading/equity-index/us-index/e-mini-sandp500_contract_specifications.html)

<sup>41</sup> <http://eu.spindices.com/indices/equity/sp-500>

<sup>42</sup> <http://www.cmegroup.com/>

to affect the price of E-mini S&P contracts. This involved putting into place multiple, simultaneous, large-volume sell orders at different price points – technically called “layering” – to create the false impression of substantial supply in the market. It is alleged that Sarao placed one-fifth of the sell orders on the day of the crash. And that he never heeded compliance warnings about his trading patterns; in fact, he informed regulators to “kiss my ass.”

Allegedly, Sarao’s sell orders were then modified on a regular basis so that they remained close to the market price but were later cancelled without being executed. The modifications ensured that the sell orders remained at least three or four price levels from the best asking price; they remained visible to other traders, but staying safely away from the best asking price. This activity drove prices down and allegedly allowed Sarao to sell futures contracts only to buy them back at a lower price. On the other hand, when the market moved upwards after the activity had ceased, Sarao allegedly bought contracts only to sell them at a higher price. He is said to have trained in London at a trading arcade operated by Futex<sup>43</sup>. According to Futex, he was not involved in any impropriety<sup>44</sup> during his time there (2003-2008) and was a gifted and hardworking trader.

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<sup>43</sup> <http://www.futex.co.uk/>

<sup>44</sup> <http://www.futex.co.uk/assets/Press-Release.pdf>

Sarao's problems stem from a whistleblower's 2012 report to US commodities regulators that triggered investigations about him and culminated in civil and criminal charges. The affidavit of special agent Gregory LaBerta<sup>45</sup> – the special agent of the Federal Bureau of Investigations<sup>46</sup> (FBI) working alongside the CFTC – in support of the criminal complaint against Sarao is quite telling about exact charges levelled against him. The rogue trader has been charged with four criminal offences on 22 counts which include one count of wire fraud, 10 counts of commodities fraud, 10 counts of commodities manipulation and one further count of “spoofing”. Spoofing is a practice of bidding or offering with the intent to cancel the bid or offer before execution, a bait-and-switch tactic whereby orders placed have no intention of being executed. It is synonymous with fake orders and may potentially hamper the profits reaped by high-frequency traders.

The Americans are adamant that Sarao's actions violated section 1343 (Fraud by wire, radio, or television)<sup>47</sup> and section 1348 (Securities and commodities fraud)<sup>48</sup> of Title 18 (Crime and Criminal Procedure)<sup>49</sup>, Part 1 (Crimes),

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<sup>45</sup> [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/21/sarao\\_criminal\\_complaint.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/04/21/sarao_criminal_complaint.pdf)

<sup>46</sup> <https://www.fbi.gov/>

<sup>47</sup> <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title18/pdf/USCODE-2013-title18-partl-chap63-sec1343.pdf>

<sup>48</sup> <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title18/pdf/USCODE-2013-title18-partl-chap63-sec1348.pdf>

<sup>49</sup> <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title18/pdf/USCODE-2013-title18-partl-chap63.pdf>



Chapter 63 (Mail fraud and other fraud offenses) of the United States Code.<sup>50</sup> Equally, his behaviour is said to have contravened section 6c(A)(5)(C)<sup>51</sup>, relating to prohibited transactions, of Title 7 (Agriculture)<sup>52</sup>, Chapter 1 (Commodity exchanges) of the United States Code and section 13(a)(2)<sup>53</sup>, relating to jurisdiction of states, is also engaged in Sarao's case.

## *5. Benchmarks*

By way of recap, the London Interbank Offered Rate<sup>54</sup> (or LIBOR) is the global benchmark interest rate used to set a range of financial deals. It is the average interest rate at which banks can borrow from one another. Yen LIBOR is the average interest rate at which a large number of banks on the London money market are prepared to lend one another unsecured funds denominated in Japanese yen.

A huge number of investments and trades are referenced to LIBOR. These transactions involve small businesses, large financial institutions and public authorities as well as individuals affected by the interest rates attached to a wide range of contracts including loans, savings rates and mortgages. As noted above, the rate underpins trillions of

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<sup>50</sup> <http://www.gpo.gov/fdsys/browse/collectionUSCode.action?collectionCode=USCODE>

<sup>51</sup> <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title7/pdf/USCODE-2013-title7-chap1-sec6c.pdf>

<sup>52</sup> <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title7/pdf/USCODE-2013-title7.pdf>

<sup>53</sup> <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title7/pdf/USCODE-2013-title7-chap1-sec13a-2.pdf>

<sup>54</sup> <https://www.theice.com/iba/libor>

pounds of investments and contracts both in the UK and around the world. The accuracy of the rate is important to maintaining trust in the financial system.

The Financial Services Act 2012<sup>55</sup> came into effect on 1 April 2013. It made the administration of LIBOR a regulated activity overseen by the Financial Conduct Authority<sup>56</sup> (FCA). The 2012 Act, which was not retrospective, made knowingly or deliberately making false or misleading statements in relation to benchmark-setting a criminal offence.

For example, the 2012 Act, created the offence of making false or misleading statements or creating false or misleading impressions in relation to benchmarks (see section 91<sup>57</sup>).

In our Foucauldian analysis, these developments:

*Constitute a new economy and a new technology of the power to punish.*<sup>58</sup>

Thereafter, on 1 April 2015, numerous other benchmarks became subject to regulation<sup>59</sup> and expanded the power to punish even further. Building on the example of LIBOR, further benchmarks entered into the regulatory perimeter

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<sup>55</sup> <http://www.legislation.gov.uk/ukpga/2012/21/contents/enacted>

<sup>56</sup> <http://www.fca.org.uk/>

<sup>57</sup> <http://www.legislation.gov.uk/ukpga/2012/21/section/91/enacted>

<sup>58</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison*, p. 89.

<sup>59</sup> [http://www.legislation.gov.uk/uksi/2015/369/pdfs/uksi\\_20150369\\_en.pdf](http://www.legislation.gov.uk/uksi/2015/369/pdfs/uksi_20150369_en.pdf)

to widen the net of criminal liability (the benchmarks are WM/Reuters 4pm London Fix, Sterling Overnight Index Average (SONIA), Repurchase Overnight Index Average (RONIA), ICE Swap Rate, LMBA Gold Price, LMBA Silver Price; and, ICE, Brent index).

## **6. Analysis**

Living up to his *Rainman* moniker, Hayes – whose remarkable email correspondence to a broker specified “just give the cash desk a Mars bar and they’ll set you whatever they want” – had been diagnosed with mild Asperger’s Syndrome<sup>60</sup> (autism). Indeed, during his trial, the judge emphasised to the jury that people with the condition only see the world in black and white because they are unable to see shades of grey.

During the trial, the court opined that Hayes’ prowess in understanding “mathematical patterns is a characteristic of Asperger’s”.<sup>61</sup> But at other times, when “a Mars bar” did not suffice, Hayes is said to have paid kickbacks to traders, who were his “mates”, as large as £50,000–£100,000 for benchmark manipulation and evidence of this in the form of a phone call he made was played to the jury at his trial.

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<sup>60</sup> [https://en.wikipedia.org/wiki/Asperger\\_syndrome](https://en.wikipedia.org/wiki/Asperger_syndrome)

<sup>61</sup> <http://www.telegraph.co.uk/finance/financial-crime/11723539/Hayes-says-he-offered-to-plead-guilty-to-avoid-US-extradition.html>

Hayes tried to play everyone. Just like he had gamed the numbers, he thought that he could reach out to the jury's sensitivities and win over their hearts and minds. He tried to extract mileage out of being a fugitive from American justice – extradition to the US entailed a potential 90-year prison sentence – and contended that he was “frozen with fear” over the prospects of being extradited to the US. Going further, in his defence he even proclaimed:

*There is no way I'm the only LIBOR manipulator in the world. I might be the most open about it.*

But his gambit did not work because he failed to win the jury's sympathy which found him guilty on all eight counts of conspiracy to defraud. The jury heard how Hayes repeatedly solicited rival traders and brokers, as well as submitters in his UBS and Citibank, to manipulate Yen LIBOR submissions up or down to suit his needs, often by offering to pay them for their efforts.

Like the jury, an unimpressed and irritated Sir Jeremy Cooke (Mr Justice Cooke) sent out a clear warning to others like Hayes while sentencing him – it was enough to make one of the dozen defendants awaiting trial plead guilty. After all, the learned judge was merely applying the sentencing guidelines.<sup>62</sup> Equally, Hayes himself elected

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<sup>62</sup> [https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive\\_guideline\\_TICs\\_totality\\_Final\\_web.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Definitive_guideline_TICs_totality_Final_web.pdf)

to forgo the third off his sentence by failing to plead guilty at the earliest possible opportunity, which is what he seemed to have done prior to changing his plea: but that was just a ploy to avoid extradition. “The number of counts must drive the sentence up,” he reasoned to set the precedent that there would be no mercy for market manipulators. As his Lordship said:

*The conduct involved here is to be marked out as dishonest and wrong and a message sent to the world of banking accordingly. The reputation of LIBOR is important to the city as a financial sector and the banking institutions of the City. Probity and honesty is essential as is trust. The LIBOR activity of which you played a leading part put all that in jeopardy.*

*The seriousness of the offence is hard to overstate ... A message has been sent out to the world of banking accordingly [that] probity and honesty are essential*

This is hardly surprising because Hayes had jumped into the furnace earlier by informing the authorities that he “made concerted efforts to influence LIBOR” – other admissions, along the following lines, failed to help him either:

*Although I was operating within a system or participating within a system in which it was commonplace, you know, ultimately I was someone who was a serial offender.*

His conviction was secured as a result of cooperation between the SFO and the FCA, the latter is said to have provided “significant assistance” in the investigation.

Equally, aligning their tactics with the SFO, the City of London Police, DoJ, CFTC and other law enforcement also collaborated to secure the conviction.

Whilst working at UBS and Citigroup, Hayes conspired with numerous other individuals to procure or make submissions of rates into the Yen LIBOR setting process that were false or misleading, thereby intending to prejudice the economic interests of others. The offences were committed between August 2006 and December 2009, when he was an employee of UBS, and December 2009 and September 2010, when he was an employee of Citigroup.

The Director of the SFO David Green CB QC was pleased with the outcome of the case and remarked:

*The jury were sure that in his admitted manipulation of LIBOR, Hayes was indeed dishonest. The verdicts underline the point that bankers are subject to the same standards of honesty as the rest of us.*

*This brings to an end one strand of the SFO’s continuing LIBOR investigation. One senior banker previously pleaded guilty and another 11 individuals await their trial.*

It is said that the trial of some of Hayes' alleged co-conspirators is scheduled to begin on 21 September 2015 and a further trial of individuals charged with the manipulation of US Dollar LIBOR is scheduled to begin on 11 January 2016.

At this point, because we are considering the themes of financial misconduct, reputation and crime, it is apposite to apply the culpability codes devised by Roger McCormick in *Seven Deadly Sins: 'Retrospectivity, Culpability and Responsibility'*<sup>63</sup> to the facts above. After all, relying on Omar Little<sup>64</sup>, Michael Lewis himself points out at the outset in *Flash Boys* "a man got to have a code".

The formula of these culpability codes consists of: Case 1: Clustered Criminality, Case 2: Corporate Regulatory Breach, Case 3: Imputed Breach, Case 4: Corporate Regulatory Failure, Case 5: Individual Criminality, Case 6: Corporate Reputational Event and Case 7: Individual Reputational Event.

The assumption is a simple one:

*no business is perfect and not all misconduct is equally evil.*<sup>65</sup>

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<sup>63</sup> <http://foreigners.textovirtual.com/ccp-research-foundation/271/184163/culpability-codes-ccp-insights-rm-april-15.pdf>

<sup>64</sup> [https://en.wikipedia.org/wiki/Omar\\_Little](https://en.wikipedia.org/wiki/Omar_Little)

<sup>65</sup> Ibid, p. 3.

For the avoidance of doubt, logically speaking Hayes should be a part of the Case 1 cohort of which benchmark rigging and tax evasion are classic example. But it may be that he has been allocated personal liability for “going off the rails” under the Case 5: Individual Criminality cohort which insider trading and the “rogue trader” are classic examples of. (Save that he was not working in a bank, Sarao arguably fits in more with Case 5: Individual Criminality rather than Hayes.) Whilst the bank cannot give a guarantee that this will never happen again, it will be expected to have a system to safeguard against the recurrence of such an event; lone wolf behaviour may trigger a fine on the bank, irrespective of the fate of the individual wrongdoer.

Like all benchmark rigging, the forex penalties discussed above are Case 1 events where multi-billion pound settlements are made with regulators but in the same breath there is “no admission of wrongdoing” as such. In ranking conduct events, Case 1: Clustered Criminality is where “there is at least strong suspicion that a crime has been committed and although the culprits may not be immediately clear it seems likely that more than one person was involved.” This article is not written as a rejoinder for Tom Hayes, but the point about everyone else who broke the law like he did nonetheless needs to be answered. We must therefore ask: who are the rest of the culprits? The puppet masters who pulled his strings,



where are they? Why has he been singled out and why has retributive justice not visited them? Surely the dozen people facing trial cannot account for all the criminals in the cluster: as the details emerge, it will be really interesting to learn whether any senior managers are being prosecuted for benchmark rigging.

## *7. Confiscation*

Confiscation proceedings against Hayes have been adjourned to a later date. In relation to confiscation proceedings, it has emerged through a freedom of information (FOI) request the SFO is owed millions because people refuse to pay.

The FOI made by law firm Irwin Mitchell discloses<sup>66</sup> that from 1 July 2012 to 1 July 2015 the SFO obtained 43 confiscation orders. Out of these 21 orders (just under 50%) remained unpaid in full or in part even after the expiry of the deadline for payment. As a result the SFO has started enforcement proceedings in 14 cases and in eight of the 21 orders that remain unpaid the courts have activated a default sentence.

On analysis, the confiscation order against Hayes will exceed £1 million and will break him even further. If he fails to pay out under the terms of the confiscation order,

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<sup>66</sup> <http://www.irwinmitchell.com/newsandmedia/2015/august/sfo-owed-millions-in-unpaid-fines-fifty-percent-of-confiscations-unpaid-in-last-three-years-jq-721684>

he shall under the terms laid down in Serious Crime Act 2015<sup>67</sup> automatically receive yet another sentence of 14 years' imprisonment, but this time without the caveat of early release at the halfway point of his incarceration.

As reported in the press, other convicted of serious fraud like Edward Davenport have paid £13 million to settle their bill with the SFO. Similarly, Virendra Rastogi paid the SFO £5.4 million towards his £20 confiscation order this year subsequent to receiving an addition seven years' imprisonment in 2013 for not paying.

## *8. Comment*

Hayes maintained at trial that he acted with complete transparency to his employers and that his methods were not clandestine. However, his Bloomberg instant messaging chats and other online conversations betrayed him, they incriminated him and demonstrated his massive culpability in wholesale LIBOR-rigging. Yet claiming that widespread cheating was part of everyone's DNA in banking, he nevertheless testified that:

*My managers knew, my manager's manager knew. In some cases the CEO [chief executive officer] was aware of it.*

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<sup>67</sup> <http://www.legislation.gov.uk/ukpga/2015/9/contents/enacted>

Trial by fire must have been a seriously searing experience for Tom Alexander William Hayes who denied acting dishonestly and said that blanket cheating was rampant in all investment banks and his behaviour was not an exception to the rule: if anything, it was the norm. Only recently, the Fair and Effective Markets Review<sup>68</sup> increased the penalties for criminal market abuse from seven to ten years' imprisonment. On the whole, such measures are designed to send a clear signal to the financial services industry that those who transgress the law will face full retribution and will not go unpunished. For example, Elizabeth Corley, who heads the new Fixed Income Markets Standards Board created by the FEMR, even claimed that bankers see misconduct as no worse than driving over the speed limit: she therefore excoriates bad bankers and endorses intensifying criminal sanctions against white collar crime.<sup>69</sup> However, the architect of the new regulatory design, George Osborne, has been alive to the fact that he cannot afford to alienate the City altogether. To pacify the financial elite, he can be seen rowing back from legislating his way out of trouble and has been heard stressing the case for a more laissez-faire approach that competitiveness cannot be sacrificed in the

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<sup>68</sup> <http://www.bankofengland.co.uk/markets/Documents/femrjun15.pdf>

<sup>69</sup> <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11707901/Allianz-chief-too-many-bankers-treat-market-abuse-like-speeding.html>

name of high standards of conduct.<sup>70</sup>

Alive to the fact that the sentence imposed upon Hayes exceeded the jail time a rapist might get, press grandee Joshua Rozenberg still praised the degree of punishment.<sup>71</sup> He argued that it was “in keeping with sentencing guidelines and the principle of deterrence”. But to me, Hayes was a mere pawn in a wider game of chess; he was “cannon fodder” like the disgruntled British youths who have travelled to join ISIS for jihad. His father claimed that Hayes was “at peace with himself”. He equally complained that the points in mitigation<sup>72</sup> advanced in his son’s defence had been chronically undervalued by Sir Jeremy Cooke.<sup>73</sup> He bemoaned that his son’s case produced a strident comparison with the disgraced Pakistani cricketer, Mohammad Amir, who was given an unduly lenient sentence of six months – which was dubbed “callous, vindictive and a disgrace to the justice system” – for his nefarious involvement in cricket corruption.

Addressing the justice gap, Nick Hayes explained that the personal costs were weighty but his son was “not guilty”, that his integrity and self-respect remained intact and the

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<sup>70</sup> <https://www.gov.uk/government/speeches/mansion-house-2015-speech-by-the-chancellor-of-the-exchequer>

<sup>71</sup> <http://www.theguardian.com/commentisfree/2015/aug/04/14-years-in-jail-for-libor-rigging-the-judge-makes-a-persuasive-case>

<sup>72</sup> <http://www.theguardian.com/business/2015/aug/06/tom-hayes-sentence-my-sons-integrity-and-self-respect-are-intact>

<sup>73</sup> [https://en.wikipedia.org/wiki/Jeremy\\_Cooke](https://en.wikipedia.org/wiki/Jeremy_Cooke)

rogue trader would tell his young son the same when he is old enough. However, despite putting on a brave face, Nick Hayes inevitably thought that his son's trial was a travesty of justice and reasoned:

*This is a brutal punishment on a relatively lowly trader in obscure financial derivatives pegged to Japanese yen LIBOR, when the real architects of financial manipulation and skulduggery in Wall Street and the City remain untouched.*

His centrality to the “hub of conspiracy” has been used to justify the sentence, it has also been argued that the more sweets you steal, the more you should be punished. UBS rogue trader Kweku Adoboli – who was convicted of two counts of fraud and sentenced to seven years' imprisonment for his “magic touch” – was recently released from prison<sup>74</sup> after spending just a bit more than three years behind bars for losing \$2.5 billion in unauthorised trading.

The sentence imposed upon Hayes is longer because, unlike Adoboli who was convicted on only two counts, he was convicted on eight counts. Hayes can, however, still find limited comfort in the knowledge that he will serve seven years in custody; but if he reoffends he can expect to

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<sup>74</sup> <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11697031/UBS-rogue-trader-Kweku-Adoboli-released-from-prison.html>

be recalled into custody to serve the rest of the time.

On the other hand, because of the fact that the average jail sentence for terrorists is a mere two years imprisonment<sup>75</sup>, the sentence inflicted upon Hayes can quite easily be described as disproportionate. Insofar as the degree of punishment inflicted is concerned, the sentence is a clear example of a sledgehammer being applied to crack a nut. Indeed, even if his sentence is halved it will still produce the same deterrent effect and accord with Foucault's "punish exactly enough to prevent repetition" maxim: I doubt that Hayes would do it again by acting criminally if got less than 14 years' imprisonment.

In all honesty, to reasonably informed minds, lengthening bankers' criminal liability and keeping them behind bars longer than jihadis is totally out of kilter with commonsense.

In light of the ongoing witch-hunt to bring market manipulators to justice at any costs, trial by fire must surely have appeared to be a miscarriage of justice through the eyes of Tom Hayes and his family.

Indeed, if anything, in comparison to real terrorists whose human rights the judiciary is so afraid to violate, despite his relatively puny crimes he has been burnt at the stake.

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<sup>75</sup><http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150702/debtext/150702-0001.htm>, (see Philip Davies MP's concerns at Column 1637)

It appears that he was tried not in England in the year 2015 but in Massachusetts in the year 1681 and burnt at the stake like the slave Maria<sup>76</sup> who tried to kill her master by burning his house down! Where are the rest of the people who participated in the dishonesty of rigging LIBOR?

To me, by virtue of his show trial (akin to something out of the Middle East, perhaps a foreign/western journalist<sup>77</sup> with a spent bullet in his pocket charged and convicted in Cairo for “damaging national security” for example!), Tom Hayes has clearly borne the brunt for others of his ilk and has been made to *pay* for their wrongdoing. Ultimately, sacrificing a dozen people over wholesale dishonesty only makes a mockery of justice.

**As Foucault said so tellingly of people like Tom Hayes, the offender is “worse than an enemy”.**

**In society’s eyes his benchmark rigging transformed him into “nothing less than a traitor, a ‘monster’.” But then again, as Foucault himself said, how could society not have “an absolute right over him”?**<sup>78</sup>

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<sup>76</sup> [https://en.wikipedia.org/wiki/Death\\_by\\_burning#North\\_America](https://en.wikipedia.org/wiki/Death_by_burning#North_America)

<sup>77</sup> <http://www.bbc.co.uk/news/world-middle-east-31083890>  
<http://www.bbc.co.uk/news/world-middle-east-34096077>

<sup>78</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison*, p. 90.

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