CBQ

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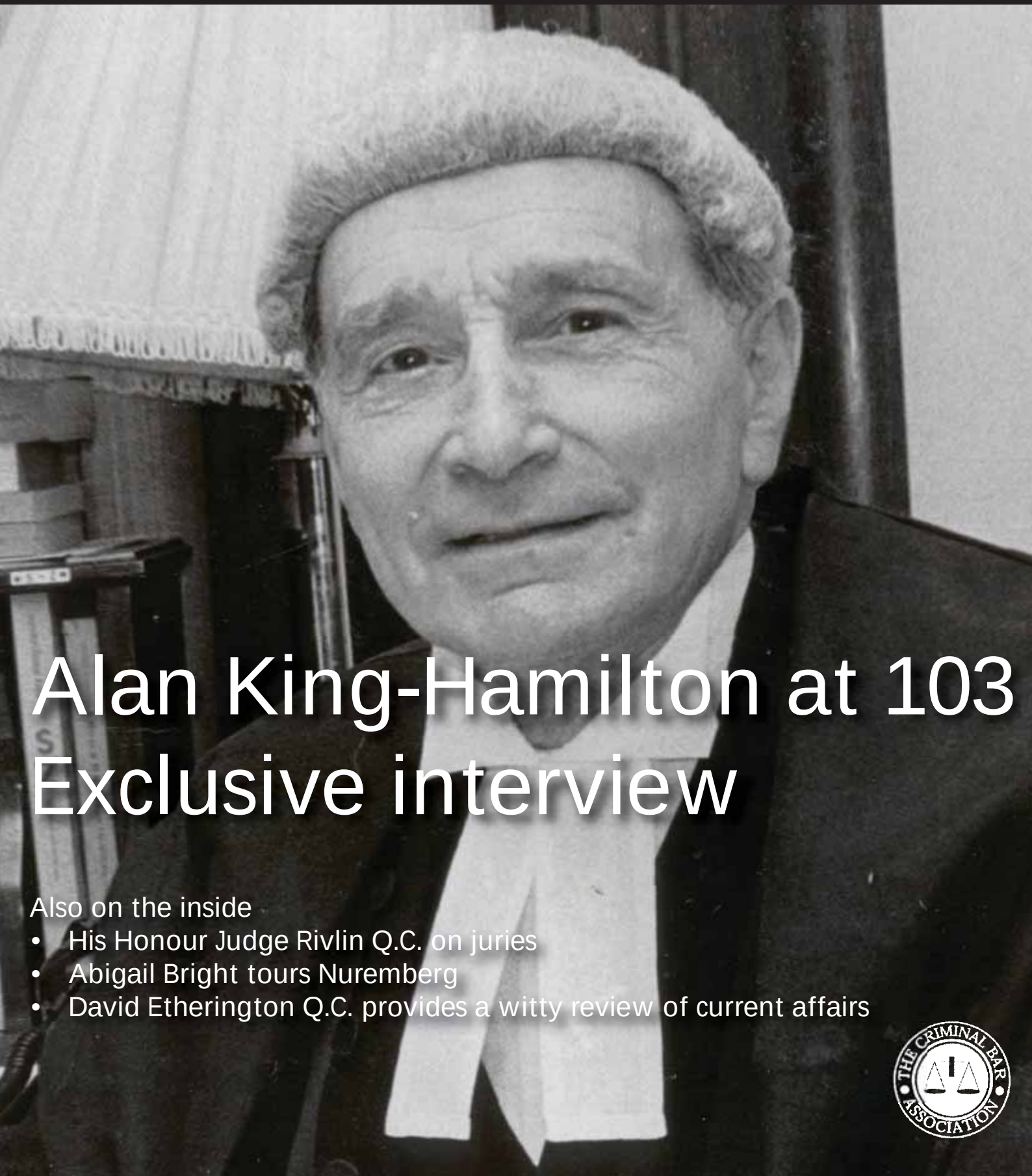
TEMPLE CELEBRATION SPECIAL



Alan King-Hamilton at 103 Exclusive interview

Also on the inside

- His Honour Judge Rivlin Q.C. on juries
- Abigail Bright tours Nuremberg
- David Etherington Q.C. provides a witty review of current affairs

THE CRIMINAL BAR ASSOCIATION

The Editor

This is the beginning of the Temple's year-long celebration of the granting of its Royal Charter by James the First 400 years ago. The first edition of the year recognises that historic landmark, by printing in full the influential and far reaching speech by His Honour Judge Geoffrey Rivlin Q.C., Master Reader of Middle Temple and exclusively publishing the intriguing interview with Alan King-Hamilton, also a Bencher of Middle Temple, who was 103 years old in December last year and who has amazingly lived for a quarter of the Temple's Charter!

At the time when our profession is under constant attack from those who simply do not recognise the valuable public service that criminal barristers supply to the country, it is essential that all the influential and respected bodies which make up the representation of criminal practitioners are recognised for the work they do and the important role which they will play in the year ahead.

Central to this are the Inns and their historic axis of representation between the profession and the Bar Council. They cement the community of the Bar, the pastoral, educational and collegiate which engenders the most important thing that we are going to need in the time to come, unity.

The Inns also provide a valuable service in support and encouragement of new entrants to the profession. On my regular visits to Middle Temple Hall to dine, I am always struck by my conversations with students, how enthusiastic and determined they are to pursue a career at the Bar. Interestingly, 75 per cent of those I speak to express an aspiration to come to the Criminal Bar. These are intelligent and informed young people who are obviously aware of the difficulties currently facing our profession. This does not seem to have put them off and I am convinced one of the reasons for this are the superb facilities and support provided to them by their Inns.

The reality of the struggle which we face, given what can only be described as ignorance of many who should know better in politics, will become only too apparent when people begin practicing but we have a huge debt of gratitude to the Inns for providing us with a wealth of talent to grace the job, all of whom I know have a very bright future at the Criminal Bar.

Congratulations to the Temple for its first 400 years. Who knows where we will be after the next four centuries?

John Cooper

The views expressed here are not necessarily the views of the Criminal Bar Association.

A message from the Chairman

We may think life is difficult at the Criminal Bar of England and Wales at the moment but a fairly cursory look around other jurisdictions makes our concerns seem almost trivial. The events in Pakistan, Burma and Zimbabwe were truly shocking. The apparent ease with which the rule of law can be derailed where there is untrammelled power and a seemingly complete disregard for any real system of democracy must at least make us count our blessings compared with others. So far at least.

It would be very wrong, however, to dismiss our concerns as unimportant. The fact that we are fortunate enough to live in a jurisdiction where the rule of law is upheld does not mean that the system cannot be threatened by more subtle means. The constant battle to insist on the fundamental importance of the right to trial by jury and the struggle to maintain a level playing field for all advocates in the face of what appears to be a deliberate intention to set different standards for some can have a debilitating effect on us all. Nobody likes to feel they are involved in a war of attrition.

It is still a surprise to me that we need to struggle this way. Whilst we may still be a long way off the public considering us to be public servants in the same way as the medical and teaching professions, I do not really understand why there is the apparent animus towards us on the part of the Government. We provide an absolutely essential role in representing and prosecuting those charged with the most serious of crimes with the most serious of consequences whatever the outcome. I am confident that members of the public asked whether they would wish to be represented by a barrister or a solicitor in the event of them or a member of their family facing a criminal trial would say a barrister (after they had asked what the difference was, that is).

I sometimes think that the reason for the animus is because we are lucky enough to be doing a job which involves long hours and hard work but is extremely enjoyable and can be very rewarding. Perhaps they think that should be enough. We shouldn't expect to feel valued and appreciated as well, after all, we defend criminals don't we? It's almost as if our very existence is felt to be related to rising levels of serious crime.

We are still struggling to make our voice heard in all the different areas of change we are facing. The extent of the VHCC scheme and the significantly reduced rates of pay within that scheme, the ever-increasing use of Crown Advocates regardless of the CPS/Bar agreed protocol, the unnecessary listing of mentions, the disparity in rates of pay for prosecuting some cases compared with defending them, the extent of the one case one fee regime and its date of implementation. These are all matters of great concern

to us all. The patience and tenacity of those who have been negotiating on our behalf on these issues is, to my mind at least, extraordinary and there are signs that we are at last being listened to. It is so very dull to be constantly fighting, though. The deluge of criminal justice statutes continues unremittingly and it is struggle enough to keep up with them as well as continuing to participate in the seminars and conferences which are essential to our continuing education but which take place, on the South-Eastern Circuit at least, mostly in the evenings and weekends.

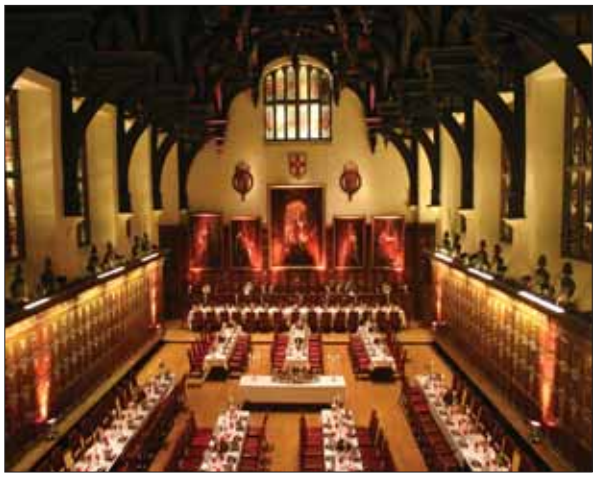
Why are we bothering? Wouldn't it be easier to bow down and accept the mediocrity of all cases being prosecuted by Crown Advocates and all cases being defended by State Defenders? For some, perhaps it would but not, I think, for the vast majority of us. Unlike many of those who profess to some knowledge of how the criminal justice system works, we actually know the value of the service the independent Criminal Bar provides to the public. We wouldn't have any doubt about who we would want to represent someone that we knew who became involved in the system. We would also want it prosecuted fairly and competently by someone of experience and ability because that is the only way a fair result is likely to be achieved. We would want the judge who tried it to have confidence in the ability and integrity of those who appeared before him or her and we would want the jury to feel that they had participated in a process which may be sometimes tedious, sometimes exasperating, sometimes upsetting but valuable and entirely worthwhile.

The only way that we are going to continue to ensure that this system continues is if we believe in it and believe in ourselves. It is essential that we continue as a strong, independent, diverse and specialised group of professionals. It is essential that we continue to strive for excellence and maintain our independence if we are to ensure that the rule of law in this country remains as strong and as well-regarded as it is today.

There, I feel much better now. Enjoy the rest of this excellent issue of the CBQ.

Sally O'Neill Q.C.
Chairman CBA

Criminal Trials:The Duty of Decision


Middle Temple

We exclusively publish the full text of a paper delivered by His Honour Judge Geoffrey Rivlin Q.C. in Middle Temple Hall*

I want to talk about fraud trials, and my belief that they should continue to be tried by judge and jury, but first, the phrase: "The duty of decision". It involves a short story about a different kind of case altogether, although the lessons from this case are there to be learned for all time. We begin moments before 9am on January 28, 1953, when Albert Pierrepoint entered the condemned cell at Wandsworth Prison and led a young man called Derek Bentley a few yards to the gallows. It was a very bad day, and not just for Bentley.

The first to feel the backlash was Pierrepoint himself. At one time the popular executioner of the Belsen war criminals, he now found himself the object, not of admiration, but of public scorn and derision, for he had just hanged a young man aged 19, with an IQ of 66 (and a mental age of 11), convicted on the basis of joint enterprise of the murder of a policeman who had been shot by another youth too young to be hanged. It was an execution which, as the Speaker of the House of Commons acknowledged, left many with a deep sense of injustice.

The trial judge had been Lord Goddard, the Lord Chief Justice. The Court of Criminal Appeal was manned by three judges highly experienced in criminal cases; and the Home Secretary, who despite the pressure for clemency, recommended that the execution should go ahead, was another highly experienced lawyer, Sir David Maxwell Fife, who as Lord Kilmuir, was to become Lord Chancellor.

45 years later, in July 1998, this case came before another Lord Chief Justice, Lord Bingham. He presided over the Court of Appeal, called upon by the Criminal Cases Review Commission to review the safety of this conviction. In his judgment Lord Bingham used these words, which have stayed with me ever since: "It is with genuine diffidence that the members of this Court direct criticism towards a trial judge widely recognised as one of the

*Middle Temple, Reader's Address, November 6, 2007.

outstanding criminal judges of this century. But we cannot escape the duty of decision. In our judgment, the summing up in this case was such as to deny the appellant that fair trial which is the birthright of every British citizen."[1]

Looking back on this case, we find that a succession of lawyers, charged with the most serious and dramatic responsibilities that could be shouldered in the justice system, were involved in one way or another in this disaster—although, by the standards of the time, I am sure that all those concerned will have honestly believed they were doing the right thing. Lord Goddard may have been the first and worst; but we should not forget the trial lawyers and the judges in the Court of Criminal Appeal, for no point was taken in that court that the trial had been conducted unfairly, and no point was taken that Lord Goddard had not even directed the jury as to the standard of proof required in a criminal trial. Finally, we have the Home Secretary, himself a lawyer of considerable distinction.

Anyone reading the summing-up will understand that in view of the directions given to them the jury could hardly have acquitted, but in one important respect they got it right. If it had been left to them, Derek Bentley would not have hanged, because their verdict in his case was "Guilty, with a recommendation to mercy"; and they at least were entitled to think that Bentley's life would be spared. I say this because in one of his many admirable papers on the criminal law, Master Sir Louis Blom-Cooper was able to point out that this was the first time within memory that such a recommendation had been ignored.[2] And so, how did many great criminal lawyers get it so badly wrong? The answer is, I believe, a frighteningly mundane and simple one—"because that's what they do and that's what we do". We always do our utmost to get it right, but as our heavily overworked Court of Appeal knows only too well, sometimes we get it right, and sometimes we get it wrong.

It is with this in mind that I would like to talk about the prospect of *trials* by judge alone—not sentencing. With apologies to Donald Rumsfeld, when it comes to the generally thankless task of *sentencing* one might say that:

> "Everyone knows when you've got it wrong, and they are probably right. Never will everyone say you've got it right, but when some say you have got it right, and some say you have got it wrong, they will all be wrong, because there is no right."

In this country we have trial by jury for all indictable, i.e. usually, the more serious criminal offences. Section 43 of the Criminal Justice Act 2003 is intended to create an exception to this: if implemented, it would permit the prosecution to make an application to the court for a case of alleged fraud to be conducted without a jury, provided the complexity or the length of the trial (or both) is likely to make the trial "so burdensome to the members of the jury hearing it that the interests of justice require that serious consideration be given to a judge-only trial". The order for a judge only trial may not be made without the approval of the Lord Chief Justice, or a judge nominated by him. The recent Frauds (Trials without a Jury) Bill (2007) sought to implement s.43, but although it was passed in the Commons, it was rejected in the Lords. This was the third time that the Lords had rejected this section, and the Attorney-General at the time, Lord Goldsmith Q.C., threatened that the Government would have this Bill go through, even if it meant invoking the Parliament Act to do so—a threat which has not been removed.

There have been so many major changes to the criminal law in the past few years, and so many complicated new provisions, that we now have a criminal justice system that lawyers struggle to understand, let alone the general public. With this in mind, there is in any event a strong argument for saying that this proposal is an irrelevance and a distraction that we could well do without. Be that as it may, it is a deeply worrying and exceedingly important distraction; and it calls for serious thought, for I fear that judge-only trials are likely to be unworkable under our present system, and that they would harm the criminal justice system in general and the reputation of the judiciary in particular. If we ignore the danger signs now, I feel sure that we will regret it later.

As it happens, I believe that the positive case in favour of the retention of jury trials, both on constitutional, social and general "justice" grounds, is in any event, far stronger than the advantages that might be gained by judge-only trials—even if they might be workable. Our judges may still seem to be drawn from a relatively narrow band of white, middle-aged males, although this is changing; but the fact that in a mixed, multi-racial society tens of thousands of women and people drawn from ethnic minorities are called to serve as jurors is an important

Southwark Crown Court

safety valve, which amounts almost to a justification in itself. We might also have in mind that whatever we may do to broaden the diversity of the judiciary in terms of gender, race or social background, it will rightly, but inevitably, continue to be seen as representing an "educated elite".

I am aware of certain high-powered opinion in favour of judge-only trials, at least in principle, and this makes me cautious. Some fraud trials have been too long and expensive and this has done harm to the reputation of the criminal law, but times are changing, and I am concerned that the practical difficulties of judge-only trials under our present system have not been thought through.

I am not alone in this. Of course I cannot speak for all other trial judges, and I would not presume to claim that not one of them favours judge-only trials; but I do not know one who does, and I do have the permission of the judges based at Southwark Crown Court, which is now the Receiving Court for all serious fraud cases in London, to say that they are all strongly opposed to judge-only trials in fraud cases. In the early part of this year, Robert F. Julian, a New York State Supreme Court Justice, with the co-operation of Lord Justice Thomas, then our Senior Presiding Judge, conducted a survey which involved questioning nine judges around the country who try serious fraud cases. These included three judges who sit at Southwark. He then wrote a valuable article entitled "Judicial Perspectives on the Conduct of Serious Fraud Trials", which has been published in the October edition of the *Criminal Law Review*[3]. He reported: "All nine judges expressed strong support for juries, voicing both a high level of agreement with jury verdicts, and a firm belief that juries have the capacity to understand properly litigated complex fraud cases. Each judge interviewed also voiced his principled belief that trial by jury should continue in all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serious fraud cases. Many of the judges expressed significant concerns about the actual and perceived fairness of judge-only trials." May I say that I am delighted and honoured that Justice Julian and his wife are present this evening as my guests. The point is that one would, I think, have to be living in a locked and darkened room to be unaware of the strong body of opinion shared by many trial judges, and both branches of the legal profession, that we should preserve juries for trials of all indictable crime. Let us then look a little more closely at some of the matters to be considered.

1. The application

Section 43 permits only the prosecution to make the application. I happen to agree that for a number of good reasons a *defendant* should not have the opportunity to influence his mode of trial, not least being the difficulties that would be created in a multi-handed case when individual defendants might have quite different views about who should try them, and street-wise jurors may believe that a defendant who chooses trial by jury is responsible for their situation, and resent the defence. Nevertheless, under the section there will be a perception of imbalance—a lack of even-handedness, and even the emergence of an Alice in Wonderland "equality of arms" argument. All this will be unfortunate, and is likely to work against the reputation of the justice system.

2. Generally

Section 43 confines the application for "judge-only" cases to "serious or complex" fraud. I make the simple but nevertheless central point that these days many criminal cases may be described as serious or complex, and potentially burdensome to a jury, and they are by no means all cases of fraud. Some multi-handed terrorist, murder and drugs trials now last for many months—far longer than most fraud trials, and they can be just as complex, if not more so. Should a long murder trial involving several defendants, cut-throat defences and a myriad of issues pertaining to each, and detailed, contested expert evidence be regarded as any less complex or burdensome than a serious fraud case? I do not know if there is any conscious, hidden agenda, but it seems to me that the only true logic of s.43 is that if we had judge-only trials in fraud cases, this would be seen as a further step along the way to saying that any case regarded as burdensome to a jury should be tried by a judge-alone.

In any event, this is surely not the right time to make this change. Lessons have been learned, and in recent times great effort has been devoted to promoting the effective judicial case-management of all trials, in particular those of length and complexity, and I am sure that judges detect a change in the attitude towards these cases. The culture is now to accept, even in some cases to welcome, case-management as a necessary part of the criminal justice process. The "Protocol on the Control and Management of Heavy Fraud and other Complex Criminal Cases" and the new Criminal Procedure Rules impose positive, comprehensive duties of case management, designed to tackle the concerns about long jury trials. All this is working its way through the system, and there are encouraging signs that it is succeeding.

Then there is the Fraud Act 2006, which came into force on January 15, 2007. This is designed to simplify the law relating to "Criminal liability for fraud and obtaining services dishonestly". There is now a simpler, general offence of fraud, and it is enough to say that this Act contains more provisions that are intended to simplify the law, and make life easier for judges and juries. This is a welcome development indeed, and should be seen as a further step along the road to improving and strengthening jury trials in fraud cases.

3. The conduct of a trial

It is trite that, to say of someone that he has acted as "judge and jury" is to accuse him of bias or unfairness. No such accusation is levelled at the judge in civil proceedings, but one can see why: first, the standard of proof is significantly lower, the fact-finding exercise is therefore likely to be simpler, and easier to explain and justify, and, most importantly, easier to accept; second, the public is not normally involved in the same way; and third, the consequences are of a different order. An adverse finding in a case of serious crime will be loss of liberty, quite possibly for years, with the threat of much more to come in confiscation proceedings.

It has been claimed by some that the arguments in favour of judge-only trial in fraud cases are so powerful as to hardly admit any to the contrary. If this is so, why is it that so many judges and lawyers with experience of criminal cases find it impossible to believe that by abolishing the jury system, we will improve the quality of our justice? The answers are revealed when we look more closely at what would actually be involved in judge-only trials. In this regard, I hope I will be forgiven if I do not put into the equation the Diplock "judge-only" Courts, which operated in Northern Ireland. It seems to me that what might be acceptable in a country where there are soldiers on the streets, and judges are escorted to and from court, is thankfully a world apart from the situation we occupy at present.

One of the most serious problems with the prospect of judge-only trials is that of bias—or perceived bias. I fear that far too little weight (if any) has been given to the fact that we operate under an *adversarial system* in which the parties, and not the judge, are regarded as responsible for laying the evidence before the court. Under the present system, a judge is not expected to enter the arena, but he expected in appropriate circumstances to have some input into the trial process.

There is Court of Appeal authority for each of the following: if the judge sees that the charge is wrong, he is entitled to have it put right; if he believes that an essential piece of documentation should be exhibited, he is entitled to call for it; if he


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feels that the prosecution has neglected to ask a vital question, he is entitled to ask it. Indeed, the Court of Appeal has gone beyond that, and expressed it in terms of the judge's *duty*. I quote from a judgment of the court:[4] "If the presiding judge perceives the risk of a case going off on a wholly wrong basis, whether because of some legal technicality which has been overlooked, or because of some lacuna in the evidence, it is not incumbent on him to grit his teeth, remain silent and watch justice miscarry—for it is no less a miscarriage of justice when an accused person escapes conviction through inefficiency or carelessness on the part of the Crown than when he is convicted as a result of a comparable error on the part of the defence. Rather it is the duty of the judge to ensure that criminal proceedings are tried fairly and efficiently, and to intervene as necessary to ensure that goal is achieved." This judgment was delivered by another Master of this Bench, who is now a Law Lord. This Inn is now honoured to have so many of them, that it may intrigue you to guess at which one it was!

The point is, however, a serious one, for although a criminal judge should not enter the arena to take up sides, nor is he expected to sit it back and ignore matters such as these; but if he intervened in this way in a judge-only trial how could this not be interpreted as him assisting the prosecution, and desiring that the outcome should be a conviction? This would be an ever-present problem in the conduct of a trial; but everything becomes so much worse when one goes on to consider the admissibility of evidence.

As it is, judges must now exercise a very wide range of discretionary powers in their conduct of criminal cases. These duties of decision are so extensive that in many cases they may shape the whole course of the trial. Here is a list of some of the important decisions in relation to the admissibility of evidence which a judge is typically called upon to make in a criminal trial:

1. Applications by the prosecution not to disclose evidence to the defence on the grounds of Public Interest (PII applications).
2. Other defence applications for the disclosure of material in the possession of the prosecution, but which it chooses not to use or disclose (The "Unused").
3. Abuse of process hearings.
4. Trial management, and powers of severance, both of counts and defendants.
5. The well-known "s.78" decisions, balancing the relevance and probative value of evidence against its prejudicial effect.
6. Bad character.
7. Hearsay.
8. Applications to read evidence under the Criminal Justice Act 1988.
9. The admissibility of confessions.

In each of these many cases, or, worse still, in combination, a judge routinely sees material which is prejudicial—sometimes, deeply prejudicial—to a defendant. All of this has the potential to compromise his fact-finding responsibilities—or at the very least, it will be *seen* to do so.

We may have considerable, justifiable faith in the professionalism of the judiciary and its ability to decide cases on admissible material only; but surely even judges cannot believe that this capacity is infinite. Do we really subscribe to the conceit that, whatever we may see or hear, we can always, at will, completely disregard it, and erase it even from our sub-conscious, when deciding grave issues of fact? Even if some of us possess this magical facility, can we expect that those who appear in our courts as lawyers, or the public, or—most importantly—defendants, will believe it too?

In the very recent House of Lords appeal of *Abdroikof*,[5] their Lordships held that where the jury's verdict depended upon a decision as to whether a police sergeant or the defendant was telling the truth and one of the jurors was a policeman who shared the same local service background as the sergeant, it could not be said that the defendant was being tried by a tribunal which was and appeared to be impartial. In the course of his lead judgment, Lord Bingham said "The criminal trial jury has now, as it has had for centuries, the immense responsibility of deciding the all-important issue of guilt in the most serious criminal cases coming before the courts of England and Wales. Upon its integrity, that of the trial process to a large extent depends. Upon its reputation for independence and impartiality public confidence in the integrity of the system also, to a large extent, depends." The all-important test adopted by the court was this: "whether a fair-minded and informed observer would conclude that there was a real possibility that the trial was biased". With respect, I cannot see how a judge-only trial, with all the modern features of judicial discretion and decision-making that I have outlined, could possibly hope to survive this test, but even if it were to do so, surely we should recognise the dangers of miscarriages of justice if judges of fact do come into possession of so much prejudicial material.

The problem is not new. When a past Law Commissioner who is now a High Court Judge, tried to come up with a solution to this problem, he was constrained to suggest that "a judge who has ruled, pre-trial on admissibility in respect of other matters, should withdraw from the trial if he has had sight of material which has been ruled inadmissible". With respect, is this realistic? I suppose a judge could withdraw from a case at any stage

(however unsatisfactory and costly that may be), but the fact is that these problems can and often do arise well into a trial. If we go down this road, it will be all too easy for trials to be disrupted or de-railed. This will undo all the good work in progress to make cases manageable.

4. Length, complexity and dishonesty

I do not have time to say much about the burden we currently place on juries. The demands upon a jury can sometimes be surreal and unreasonable. We have a traditional and touching faith in a jury's instinctive ability to "sniff out" dishonesty, but we must recognise that this can be no substitute for the requirement that the tribunal of fact in any major trial must be able to sustain concentration over a period of many weeks and, in some cases, understand and assimilate difficult evidence. For too long we have neglected to move with the times, and develop and improve our procedures and management of trials. We are looking into new areas such as plea bargains, and hopefully we are in the process of helping and trusting juries more.

Section 43 also provides that when considering an application for a judge-only trial a judge 'must have regard to any steps that might reasonably be taken to reduce the complexity or length of the trial'. We have been told that the current thinking is that judge-only trials may be considered in cases estimated to last about six months or more, although I venture to suggest that no single trial need last that long; but what will happen when the prosecution who applies for judge-only trial is accused by the defence of "packing" the case with so much material, or so many defendants, as to ensure a trial of that length? And what will happen when, as is now routinely the case, major criminal cases are for obviously good reasons split up into possibly two or three segments, with one main longer trial to be followed perhaps by another, or other, quite short trials? Will this mean that in the same series of cases there will be some judge-only trials followed by reasoned judgments, and in others, simple jury verdicts? The possibilities are endless. Perhaps I might be accused of having too much time on my hands to think of them, but I assure you they are there; or may it be that, unhappily, Parliament has not been given enough time and has not received the assistance it needs to understand and absorb the implications of their proposals?

Complex fraud cases are now usually prepared and presented to a very high standard, with excellent graphics to aid understanding. The real difficulty in these cases, I believe, is that of *length* rather than complexity—the burden of a trial which (as the points made in counsel's final speeches often reveal) has actually lasted far longer than was necessary. It is the length of *any* trial, let alone fraud trials, that is most likely to give rise to what is, perhaps, the strongest argument in favour of judge-only trials—that of unrepresentative juries. One perennial problem faced by a court in fraud cases is that of the prosecution putting too much into the melting pot. As it happens, one genuine, if entirely fortuitous, advantage of a jury trial is that it actually imposes an inherent discipline to reduce the case for the sake of the jury. The length of a civil trial before a judge-alone will to a significant extent be driven by costs. A criminal trial before a judge alone would have neither of these incentives. Judges would be expected to cope with more, not less. Even those who favour judge-only trials recognise that they may last just as long, if not much longer, than jury trials.

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The fact is that when all is said and done, in any fraud trial a jury is almost always going to have to decide two things: whether the prosecution has proved (a) that a fraud has been committed and (b) a defendant has been a party to it, and has behaved dishonestly. Dishonesty is and ought to be a simple concept. People who commit fraud face imprisonment. Surely, if the ordinary man in the street cannot be expected to understand that something is criminally dishonest, then it ought not to be a crime.

Just one further word about dishonesty. There is an important, well-established legal test of dishonesty to be applied in certain circumstances. Now 25 years old, it has been used in countless cases, and it works; but I fear it must have been overlooked by those who have drafted s.43. Where, as sometimes happens, it is the case for the defence that the defendant's actions, even if proved, did not involve dishonesty on his part, *two* questions must be answered:[6]

1. Was what the defendant did dishonest by the ordinary standards of reasonable and honest people? In this regard, the jury must form their own judgment of what those standards are.

2. Must the defendant himself have realised that what he was doing would be regarded as dishonest by those standards? In deciding this, the jury must consider the defendant's own state of mind at the time of the events.

We might remember that the first question was specifically designed by the Court of Appeal for *juries* to decide—a question intended to ensure that when it comes to dishonesty, the ordinary man and woman in the street (and not judges) should set the standard. One important advantage of this, as the Serious Fraud Office knows very well, is that juries have been prepared to condemn as dishonest conduct that some "City experts" have excused as the institutionalised practices of City life. Give this task to a judge-alone, and you may be sure that the experts will be back in action.

5. Reputation of fraud trials

We are all aware of some high-profile fraud cases that have resulted in acquittals, and the publicity that has received. In contrast to almost all other types of case, when this happens, there is a media outcry, the outcome being described as a *failure* on the part of the prosecution, rather than the result of a fair trial. We might understand that fraud trials are, by their size and nature, bound to be more vulnerable to criticism. They are expensive to investigate and to mount, and yet defendants are not seen to such a threat to society as those engaged in violence. In the minds of some, the expenditure is only justified by a conviction. Then, it would be naive not to recognise that, as the press and television also invests heavily in reporting high-profile cases and making feature articles and programmes which can only go out following a conviction, they too have a motive for lamenting over acquittals. Acquittals against the odds? Here I mention two things, which hardly dare speak their names, but they may apply to any case, and can to some extent be guarded against.

- In 1998, Lord Irvine of Lairg, when Lord Chancellor, introduced his Department's booklet, *Modernising Justice*, with the words: "The Criminal justice system exists to help protect us from crime, and to ensure that criminals are punished…" The trouble with this statement is that it almost certainly represents the perception of juries, but it certainly does not represent everything that the criminal justice system is about. Juries may accept that it is in the interests of justice that guilty defendants are convicted, but like most judges they do not believe that every guilty defendant necessarily deserves punishment. In some cases, possibly mistakenly, they might foresee the inevitable harsh sentence that would follow a conviction as an impending *injustice*.
- Then it is also possible that another, very human element has played a part in some cases: "Some crimes become innocent, and even glorious by their sheer impudence, or number and enormity." This penetrating observation was made by a French philosopher, La Rouchefoucauld, over three hundred years ago[7]. The fact is that some substantial and high-profile cases and defendants, by virtue of the very attention they receive in a process that drags on too long, become "celebrated". Other cases may also involve so-called "celebrities". I do not doubt that jurors have on rare occasions been affected by such considerations. If you are thinking that judges could never be accused of the same thing, just remember the cases of *R. v Jeremy Thorpe* and *Archer v The Daily Star*.

These matters bring me to another confidence-related topic, which I think is by no means merely speculative, and is, I believe, of real importance.

6. Confidence in the judiciary

In an age in which the spotlight can shine very harshly upon public servants, we might consider what would be the "shelf-life" of a judge sitting on these trials, who would even on the strength of one or two cases quickly (and no doubt unfairly) acquire the reputation of being prosecution or defence minded. Recent experience of the intense personal examination and speculation surrounding a very senior judge, Lord Hutton, conducting a major Public Inquiry should warn how great will be the expectations upon the "trial judge" in an adversarial setting, how intense and personal will the observation of him be, and how sour may be the reaction to his findings. Somehow, as if by magic, the verdict of a jury, unexplained as it is, and however unexpected or unpopular, never results in the same questioning and personal backbiting. The culture of the public acceptance of the findings of 12 ordinary men and women may have grown over the years by chance, but is a precious asset that we can ill-afford to lose. At least Lord Hutton could not be accused of deciding which charges to try, what material

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should be disclosed, which evidence he should hear, whether a defendant was guilty, and, if so, what sentence he should serve.

If we had judge-only trials I imagine the same thing would happen as occurred in the Hutton Inquiry. It would no doubt begin with congratulations from some quarters, and self-congratulation from others. Then, after a while, as is the way of things, when findings of fact are unravelled and proved to be wrong, and appeals and re-trials allowed, or unpopular verdicts entered, it will all end in tears. This is not some imagined, doomsday scenario. Judges know from their own experience how easy it is for one judge to disagree with another as to whether a fact is established beyond all reasonable doubt. In his book *The Judge*, Lord Devlin described the difficulties of fact finding. He said in terms what we already know, that "In difficult cases he [i.e. the judge] cannot be right every time." We must be aware, then, that when we do get things wrong, as we surely will, the victims of our findings and the media will, quite rightly, be relentless in investigating and exposing our mistakes. The trial judges concerned will be pilloried, and lose the confidence of the public, and doubts will spread as to the safety of other 'judge-only' convictions. This brings me directly and finally to:

7. The form of verdict

The current, fashionable argument deployed in favour of s.43—is that the judge-only trial must be best, and fairest, because the judge will have to explain his reasoning in a judgment, with all that entails. This has taken on the mantle of the final, unanswerable reason in support of judge-only trials—a new kind of "fairness" that we have never had before, but my experience as a trial judge tells me that in criminal cases the advantages of a simple Guilty or Not guilty verdict from an anonymous tribunal of "ordinary people" are enormous.

No one could object to reasoned judgments in principle, but the difficulty with them in criminal trials is that they would be bound to spread beyond the answers to the series of simple questions which we presently give to juries, and which surely suffice as reasons in themselves. Judges will be required to review the evidence, and express their views not only about the conduct of the defendant, but also, inevitably, make findings and comment on the evidence and conduct of prosecution witnesses, and others referred to in the case, who are not called as witnesses. They will not be expected to duck them. The result will be that many people—victims of crime, innocent persons on the periphery, and even those not before the court at all—such as the allegedly "guilty minnows" whom the prosecution have chosen not to prosecute—will all be at risk of adverse and very public judicial pronouncement. These will be tasty morsels indeed for any media sharks circling in the waters nearby, yet the process and the result of all this will be profoundly unfair.

It is another "no win" situation: there will be a justifiable outcry if judges do not make findings of fact where a defendant has employed the tactic "attack is the best form of defence"; yet, as all of these people will be unrepresented and without redress, there will be a justifiable outcry if they do. And what about an acquitted defendant? Will it be fair for him to be acquitted, and yet face pungent criticism of his conduct?

And the practical consequences of all this? It may be a spur to some defendants to fight a case, in the hope that by doing so their accusers will eventually turn tail and run, or even "go down" with them. Even more serious is the danger that it will act as a deterrent to those who might otherwise be willing to come forward and assist in the investigation of crime. Who, in the course of his business or career, does not have something he would wish to hide, and which ruthless fraudster would not know this, and be prepared to exploit it to his advantage?

The chief advantage of a reasoned judgment is now said to be that the defendant will know what detailed findings of fact are being made against him, as if, under the present system, he does not already know this perfectly well. This is said to give a fairer opportunity to appeal. I question this, but if it were so, why then just fraud? This argument must surely be equally valid and cogent for every single criminal case, however long or short it may be.

8. Conclusion

As is the way of things, the execution of Derek Bentley was followed by all sorts of excuses and justifications. In his biography of Lord Goddard, his clerk Arthur Smith shuffled blame onto to the Home Secretary saying: "the announcement by the Home Secretary that Bentley would not be reprieved came as a shock, because the Chief thought all along that Bentley must be reprieved." Lord Kilmuir, in his autobiography, sought to derive solace from the fact that shortly after the execution he attended a Conservative party meeting in Bangor, and when Bentley's name was mentioned, he received what he described as "a spontaneous outburst of applause from the hall".

After many years in the criminal law, which has been such a huge privilege, I would be gratified indeed if I could think that I might help in some way to avoid such happenings in the future. The use of the Parliament Act has been described as the 'nuclear option' in our constitution. No form of trial is perfect, but it is distressing to think that the nuclear option in our constitution might be used to remove what is manifestly the safest and fairest form of adversarial trial we have managed to devise. I think that at the least, if we were ever to seriously contemplate such a change: First, we must make an honest and transparent move away from our adversarial system. Second, we must find practical, workable solutions for the problems concerning the conduct of these trials that I have mentioned; and third, but by no means least, a judge should never sit alone to try indictable crime; he should always sit with other judges – otherwise the cost to the criminal justice system will not just be great, it will be prohibitive.

The "word on the street" is that s.43 judge-only trials will be conducted by a judge sitting alone. If this is correct, there may be one small consolation—which is that the duty of decision will almost certainly fall upon High Court judges, and in this we should wish them very well.

1 Lord Bingham C.J. in *R. v Derek Bentley* [2001] 1 Cr.App.R. 307 at p.334.
2 "Pleading for Mercy" *Modern Law Review*, March 1964.
3 *Criminal Law Review* October 2007, 751–768.
4 *R. v Saville*, unreported 1992, 4181/W2/91.
5 *R. v Abdroikov* [2007] UKHL 37.
6 Lord Lane C.J. in *R. v Ghosh* 75 Cr.App.R. 154.
7 At the time of going to press there are signs that the French Rogue Trader Jerome Kerviel may prove to be an example of this.

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The pictures of Southwark Crown Court appear by kind permission of Southwark Crown Court.

His Honour Judge Geoffrey Rivlin Q.C. is the Senior Resident Judge at Southwark Crown Court.

An evening with Alan King-Hamilton

It was a dark and wet night when I ventured into the depths of Hertfordshire to meet Alan King-Hamilton.

Upon arriving at his house, I was soon seated comfortably in an armchair, a glass of whiskey in my hand to be taken on an amazing sweep of conversation stretching back to the First World War and the General Strike as Alan King-Hamilton, who was 103 on December 9, 2007, reminisced.

> "One of my earliest memories is watching two German zeppelins being shot down during the First World War. I recall my father holding me up at the window as the night sky was lit up with flames. The airship folded into a 'V' shape and fell to the ground. The man that shot it down got a V.C., but in reality it was so large he could not miss—his name was Leafe Robinson but the zeppelins were heavily defended with machine guns."

King-Hamilton's memory starts to click into gear with the colour of events as if they only happened yesterday.

> "I went up to Cambridge in 1923. In 1926 I became a temporary Special Constable in Hyde Park during the General Strike; the park became a depot for the distribution of food. I sat next to a sailor with fixed bayonet as we helped to make sure that food was distributed. As a result of that I had to do an extra year at Cambridge", adding that he still retained the truncheon which he carried in 1926.

King-Hamilton's father was a solicitor but more memorably was one of the founder members of the AA. "His number was eleven and when he died the Automobile Association allowed me to keep it" he told me, adding " I gave up driving when I was 95".

He took silk in 1954 and at that time had a 95 per cent civil practice. "The only criminal case I had done up to then was as a junior at the Middlesex Guildhall".

At this point, he shows me a black and white photograph of Lord Denning. "I was led by him earlier on in my career", he explains and clearly admires the former Master of the Rolls, "he could not always get others to agree with him when he was in the House of Lords and wanted to be on his own", he smiles.

> "I was surprised when I was appointed as a judge in 1964 as I had done so little crime. I pondered whether I should take it, I decided yes and I am glad that I did, I never regretted it."

During his judicial career, Alan King-Hamilton presided over some of the most notorious trials of the second half of the last century, but I could not help but ask him about the so-called 'Gay News' trial in the summer of 1977, a case alleging an obscene blasphemous libel centering around a poem about Jesus Christ, published in Gay News. "It was a difficult summing up to prepare but I felt as if I had an influence over my left shoulder, I felt that I was being guided to put it helpfully to the jury".

Despite the controversy over the case, Alan King-Hamilton is satisfied that he presided over the proceedings fairly. "The previous prosecution was back in the early 1920's and did not give me much help", he smiled.

He recalls the long trials of the era, one lasting five months, the numerous large volumes of documentary evidence, and the long nights they entailed: "I made a bed up in the Bailey and worked through the night. Sometimes I used to meet up with a High Court Judge in the middle of the night who was doing the same thing".

> "At 80 years of age I decided that I had had enough. I went to see the Lord Chancellor, Lord Hailsham, and we had an amiable chat for ten minutes, then I left", he recalls of his retirement.

But his impressive energy and enthusiasm after his retirement, still evident to this day as he shows me around his home, meant that Alan King-Hamilton still had time to present 'Case on Camera' for Yorkshire Television and work as an arbitrator trying civil cases for a year or so.

King-Hamilton still has a keen interest in the profession, his grand-daughter is also at the Bar, naturally practicing in crime. "A good quality advocate must have an attractive voice, be concise and have the ability to put arguments clearly so that the jury can follow it straight away", he advises.

During his career, Alan King-Hamilton met personalities as diverse as the Dalai-Lama and the "charming" Princess Diana and saw many changes in the Criminal Justice System, including the abolition of the death penalty, commenting that "I was relieved that I did not have to work with it. Thank God".

As we parted company, I could not help but feel that the last three hours had been a unique experience, a man whose life experience had trammelled the uncertain times of the First World War to the present day, 103 years. I wanted to ask him what his secret was, but he was keeping that one close to his chest.

John Cooper had been in conversation with Alan King-Hamilton.

Nuremberg

Abigail Bright takes us on a tour of this important city.

As a discrete and discerning group, lawyers should surely be better accommodated in terms of travel itineraries. Football fans have favourite haunts, likely to include their team's home-ground and the place of birth of a favourite player. Followers of fashion are lured to Covent Garden. Connoisseurs of good food and wine have Lambs Conduit Street. Why shouldn't lawyers, too, have their own honey-pot stomping grounds? How does a tour of the block of flats that gave rise to the *High Trees* case sound? What about supping from a bottle of beer in Paisley to commemorate a certain pesky snail in a bottle? Does a cruise on the *Wagon Mound* grab you? Would a tour of the factory in which that now notorious carbolic smoke ball was manufactured hold your interest?

Somewhere wholly different from the transience of the guided tour is the city of Nuremberg (*Nuernberg or Nürnberg*). The courtroom in Nuremberg holds an enduring fascination for criminal lawyers—whether because of its historic marking of an international moment, or its appeal to the rule of law above politics.

From November 20, 1945, to October 1, 1946, the first and most notorious trials took place at Nuremberg—the trial of the major war criminals, before the International Military Tribunal. In those first trials, twenty-four of the most important captured leaders of Nazi Germany stood trial. A second series of trials of lesser war criminals was conducted under Control Council Law No.10 at the US Nuremberg Military Tribunals. Among these were, so-called, the Doctors' Trial (*USA v Karl Brandt et al*) and the Judges' Trial, also known as the Justice Trial (*United States of America vs. Josef Altstötter, et al.*). Those latter trials (the third of the subsequent Nuremberg proceedings) inspired the film, *Judgment at Nuremberg*, in 1961, directed by Stanley Kramer. The drama and gravity of those trials, though imaginatively captured on the big screen, can not quite be distilled except in person. Heavy with history and the weight of precedent, Nuremberg demands a visit by anyone contemplative of the radical, unprecedented indictments that put Herman Goering, Rudolph Hess, and Joachim von Ribbentrop, among many others, on trial.

Infamous for its 1935 Nuremberg Laws, which defined, based on heredity, who was a Jew, and privileged German citizenship only for so-called "ethnic Germans", Nuremberg is still consciously reconciling itself with its historical baggage. The Nuremberg Laws formed the basis for the plans that were made, on January 20, 1942, for the "Final Solution of the Jewish Question". The law was used to determine who would be subject to transportation from Germany, and the Nazi-occupied countries, to the concentration camps in the East. Since the war crimes trials, Nuremberg has traded on, and cultivated, its boutique reputation for more innocuous associations. Gingerbread cookies, crafts and toys, Nürnberger *bratwurst*, and the Christmas market, are all of international repute—though not such as to displace the momentous occasion of Nuremberg's contribution to international due process.

Nuremberg as inheritance

The international community was, perhaps inadvertently, on the cusp of a new world legal order in the run up to preparations for the Nuremberg trials. Nuremberg was conceived, at the time, as a wholly extraordinary legal process instituting trials for war criminals, alongside, of course, the Tokyo war crimes tribunals that indicted members of the Japanese military following the Second World War. We have since witnessed the UN-sponsored special international criminal tribunals in Rwanda and Yugoslavia, in addition to progress won in the special courts in Sierra Leone, Lebanon, Cambodia and East Timor. The ethos of legality is now firmly entrenched, though it is regrettable that there is no permanently established war crimes court. (Currently, tribunals have to be sponsored by an organisation like the UN or a national government, with problems of organisation and jurisdiction attaching to their *ad hoc* nature.)

Lawyers will also be interested in the Janus-faced implications of the Nuremberg trials. Criminal laws were freshly conceived and first articulated at Nuremberg for the purpose of indicting certain contemptible individuals; these laws were, in large part, wholly new, radical additions to the criminal calendar. Invariably, they were applied retrospectively—not prospectively, in a forward-looking way—shaping the proceedings as Janus-faced. Retrospective application of law at Nuremberg brought with it a revisionist and partial rehearsal of history. The catalogue of 'crimes' featured several spurious charges on the indictment. Against Goring, these included certain curious so-called crimes: "responsibility for the 4-year Economic Plan"; "planning for aggressive war"; "responsibility for the creation of the *Luftwaffe*", and "defence of German cities against air attack".[1] Contemporaneously, these acts amounted to nothing more sinister than the asserting of State sovereignty. Construed in the light of the bombings of Coventry and Rotterdam cities, however, the acts were conceived as "crimes of aggression". Importantly, in relation not least to the unravelling situation in Darfur, the international community is still not agreed as to what constitutes the crime of aggression. A fiercely contested term, "aggression" has yet to become a term of legal art. Classifications of other crimes, including genocide, continue to provoke deeply entrenched disagreement among the international institutions.

An alternative city break

Nuremberg also deserves to command the lawyer's interest for a different reason – as an overlooked, exciting city break. Culturally flourishing and vibrant, the city of Nuremberg is one of the travel industry's best kept secrets. Admirers of the music of Wagner and the work of Renaissance artist Albrecht Dürer—whose house is one of the main tourist attractions in the city—will not be disappointed.

Dating back to the year 1050, Nuremberg was, for around five hundred years, the unofficially acknowledged capital of the Holy Roman Empire. Thanks to the lavish patronage its merchants

once gave to the arts, the city has long held a central place as an artistic focal point of Germany. Effortlessly blending Gothic, Renaissance, and (later) Baroque architecture, Nuremberg is a heady mix of rival, bold styles. One of the earliest cities to welcome the Renaissance, Nuremberg was the cultural focal point in fifteenth and sixteenth century Germany. Since Jews had first been exiled in 1670, Nuremberg was to be re-born several times over in terms of its political and military associations. The administrative Bavarian state having once been the location of choice for high-official Nazis, the Palace of Justice in Nuremberg was deliberately chosen as the site of the war crimes trials. A numbers of reasons account for this decision. Ideologically, the city of Nuremberg had been inextricably bound up with the Nazi party's Nuremberg rallies. Huge symbolic value lay in rendering Nuremberg the witness to Nazi demise. Practically, the Nuremberg courthouse was mostly undamaged, and it offered a sizeable courtroom (to house the many defendants, their representatives, and, of course, a hungry waiting press). Crucially, too, there was access to a prison. Pragmatically, Nuremberg was also sited in the American zone (American troops were stationed in the city until 1992).

Nuremberg castle

The castle in Nuremberg (*Kaiserburg*) grants a spectacular view of the whole city of Nürnberg, with its burnished red roof-tops. The development of the city started with the founding of the castle. Originally the residence of the Emperor-Kaiser Heinrich III, the burgeoning city quickly gained ascendancy as an important centre of trade and commerce. The castle is the first glimpse of Nuremberg's history the tourist sees, located as it is opposite the main rail station. The original city of Nürnberg was established within a defensive brick wall, fortified by forty-six towers, surrounded by a water moat, and another outside wall. Five main gates led into the city, four of which are still standing, including the Kings's Gate (*Königstor*). The tour of the castle lasts about an hour, though time can easily be leisurely whiled away there. The aptly named Deep Well is the last adjunct of the tour. Climbing up the steep steps to the top of the Sinwell Tower is a small feat, but rewarding once accomplished—the panoramic vantage point is unrivalled.

The house of artist Albrecht Dürer, who lived between the years 1471–1528, the court painter for Kaiser Maximilian I, has been preserved as the best example of a Renaissance house in Germany. Dürer's house is located very close to the castle—its unmistakable style can be seen from the Sinwell Tower.

The Palace of Justice

The next stop on the discerning lawyer's Bavarian travels certainly must be the Palace of Justice. The Nuremberg trials took place in courtroom number 600, in the eastern wing of the Palace of Justice (*Justizpalast*), at Fürtherstrasse 122. Use is still made of courtroom 600, in which Nazi leaders had sat and listened to testimony against them all those years ago. Today, courtroom 600 is reserved as an arena for the most serious crimes—usually murder trials. The courtroom has somewhat changed since the court's former war tribunal days. In particular, the courtroom has been refurbished and reduced in size. (A wall was removed during the trials, to create more space, but has since been restored.) There have been important changes in terms of the lay-out of the court. Historic pictures of the Nuremberg trials must now be inverted for accuracy. The judges' bench is no longer situated in front of the large window. Now located where the witness box was once placed during the trials, the restless shifting of bench and box is itself a quiet historical movement.

The entire trial proceedings of the Nazi leaders facing judgment at Nuremberg were relayed on television screens and shown to the world, predating by half a decade the controversy and hype attaching to televising of the O.J. Simpson and Michael Jackson trials. Over the course of 221 days, witness testimony at Nuremberg poured forth, given by over 200 witnesses, against the 22 defendants facing trial. (The testimony was later published several times in books, and the trial transcripts are available online.) As the Nazi leaders were led into the Palace of Justice, the bodies of an estimated 20,000 German civilians lay in shallow graves under the ruined buildings scattered across the old city. At the time of the trials, the city of Nuremberg had still not been cleared of the rubble strewn in its streets. The courthouse had itself not fared well during the war, sustaining damage resulting from Allied bombing. Restoration of the courthouse was secured by the forced labour of remaining defeated German citizens, who had been captured before the commencing of the trials. Ninety per cent of the city of Nuremberg had been destroyed by Allied bombing action, with its historical importance to Hitler centrally in mind. Nuremberg, like Dresden, was, in the Second World War, Germany's equivalent of Coventry.

The legacy of Nuremberg is profound, and reverberates more widely than any single judgment or the crimes of any one convicted defendant. The rules of warfare have since been entirely changed. It is now wholly illegitimate to extract reprisals against hostages or Prisoners of War. Forced labour is outlawed, and partisans are given equal status with regular soldiers. Orders which would constitute the commission of a crime need not be obeyed, and moreover, it is not viable to maintain a defence of “just obeying orders”. The crimes that were exposed at the Nuremberg trials have since been incorporated, as minimum guarantees and standards of human conduct, into international law.

St Sebald and St Lawrence churches

Step outside of the old city and into the suburbs for a view of St Sebald Church (*Sebalduskirche*), built during the thirteenth to fifteenth centuries, which commands nothing less than awe. In the center of the church, the grave of the city saint, depicting scenes of his life. St Lawrence Church (*Lorenzkirche*), constructed during similar periods, features, among its number of exquisite treasures, the *Tabernacel* by Adam Kraft, and *Greeting Angels* and *stations of the cross leading up to the church* by Veit Stoss. Now that you're in the suburb of St John, follow the main street and turn left. The next street you'll come across is *Burgschmietstrasse*—turn right and walk until you stumble across *Johannisstrasse*. The few remaining timber-framed houses in that area are adjoining *St. John's cemetery*. Many of Nuremberg's best loved sons and daughters are buried in the cemetery grounds. On your right is now *Lindengasse*. Turn left after a few steps, into a cramped alley passage called *Riesenschritt*. You'll be greeted by the entrances to the beautifully restored baroque gardens. These small gardens are called *Hesperidengaerten*. At the other end of *Risenschritt*, take the opportunity to be romanced—wander through the intricate lanes of Gross—and *Kleinweidenmuehle*. Along the river, conclude your ramblings through the park by ending up back in the city.

Former Nazi Party rallying ground

The National Socialists made Nuremberg the unofficial capital of their empire, which became known as the Third Reich (the Second Reich constituting unification of the German states in 1871.) On April 20, 1945, the date of Hitler's 56th birthday, the city was captured by three divisions of the American Seventh Army, following a sustained battle lasting for several days. On the opposite side of the city to that in which the Palace of Justice is found, in what feels like a whole other world away, is the Zeppelin Field. It was here that Hitler had once addressed wild, cheering crowds, while the German Army had paraded in all its glory. Having come to power in 1933, the Nazis designated Nuremberg the location for their annual party rallies. A set of enormous buildings were planned, to further project the Party into the national consciousness, though only a fraction were ever built. The rallies would be preceded by a performance of Wagner's opera, Die *Meistersinger von Nürnberg*, the story of Hans Sachs, widely regarded as Hitler's personal favourite.

Historians spend lifetimes working out how the Nazis commanded such a hold on the German nation, and whether the "great man" theory is a plausible, fruitful explanation for their rapid rise to Olympian heights of power. Similar thoughts are likely to puzzle, bemuse and hold as hostage even the most lackadaisical (non-lawyerly) of tourists. Standing in awe of Tiān'ānmén Square, Beijing, is perhaps the most comparable experience, in terms of evaluating the power of personalities in politics.

Visits should start at the (perhaps sinister-sounding) "documentation centre" on site, which offers insights into how the Nazis rose to power and the organisation of the party rallies. The entry ticket is modestly priced at €5, including an audio guide, is valid in all *municipal museums*. The audio guide is highly recommended for non-German speakers. The rally grounds extend over a large area, so plan for at least a couple of hours if you want to tour the area. Getting to the Grosser Strasse represents a long walk, and there is not much especially exciting to see, though the modern long road does glimpse at the brutal efficiency of the former regime. While industrial business parks are now located along the road, a couple of footpaths preserved for wooded trails are an enjoyable, redeeming feature.

Useful websites include: Museum of Nuremberg (Museen der Stadt Nurnberg), available at http://www.museen.nuernberg.de/fehler.html; the Harvard Law School Library has approximately a million online documents relating to the Nuremberg trials, at http://nuremberg.law.harvard.edu/php/docs

Abigail Bright *is currently working on retrospectivity of law in respect of the Nuremberg trials, at Balliol College, University of Oxford.*

1 Keesing's Contemporary Archives 1946–1948 (Weekly Diary of World Events).

The State of the Nation

David Etherington Q.C. addresses his mind to a wide range of issues.

David Etherington Q.C.

Here I am on a cold afternoon watching the *Grand Slam of Darts*. I love darts and snooker. It is curious how the competitors in these essentially combative encounters manage to play matches in a sportsmanlike way, declaring fouls against themselves in snooker for instance, whilst those in the more middle-class games of tennis and cricket (I pick but two examples) invariably wait for "the decision" nowadays.

Do I sound like a grumpy old man? I think so. Indeed I find the television series of the same name is more documentary than comedy to me now. Yes, it has happened at last. I have aged into a Grumpy Old Barrister or GOB for short.

GOBs love historical dramas. I am following *The Tudors* avidly despite its irritating opening observation about only knowing the full story by starting at the beginning. If this is the case, or worth saying, then one wonders what happened to poor old Henry VII. Perhaps no-one learns about him any more in the gruesome National Curriculum.

Anyway, this series is about Henry VIII. It is heavily detailed on fact and historical nuance and comprehensive in its approach. I wish it had been made when I was doing History 'A' Level. It would have saved many hours of G.R. Elton. Of course, everything now has to have a new angle to stand a chance of being commissioned for digital-age television. This version replaces the traditional image of Henry VIII as a touch on the large side with a slim and sexy Henry. In part, this does reflect a truth. Henry *was* reasonably "fit" as a young man although he had a tendency to put on the pounds and nothing wrong with that.

It does, however, seem to me unfair to fat actors to remove one of the limited parts in the repertoire to which they can lay claim. I was rather fat when I went up to Oxford in 1973 and remember being paid a visit in my rooms at Keble by a fellow actor when I graduated from college drama to *OUDS*. He was a large lad called Michael and I did not know him particularly well. The purpose of his call was soon made clear. "I do the fat parts in Oxford" were his first words after the preliminary introductions. I felt a degree of menace behind his statement. It took several large drinks to persuade him that I was only looking for "plump" roles.

Back to *The Tudors*. Sam Neill makes a superb Cardinal Wolsey. Watching the unfolding of the hostility against him from the Duke of Norfolk and others I was conscious of how deep-seated is the hatred against a man who makes it to the top from the bottom. This prejudice runs through the classes. It is present at each point of our history. This was also the great secret that dared not speak its name about the Grammar Schools. It was one thing for the Etonian to go on to great things: whilst this causes stirrings against unfairness, it is unfairness within the natural British order of things. The sight of the boy next door doing things which your own child could not achieve is something else and causes true fury and resentment. It had to end in tears for Cardinal Wolsey and Thomas Cromwell (apologies to those on the Nat Curr for spoiling the anticipation).

So, good news for David Cameron. Indeed, I take the failure of the Conservatives to call for Alastair Darling's resignation over the "Discs" debacle as a sign they must be increasingly confident of final victory. Rods and Backs come to mind.

All GOBs hate the modern information era. The 'Discs' debacle fills them with all the horror of presentiment. The young are merely contemptuous: using *discs* in 2007?! I have a degree of sympathy. I am always losing things. I am only too familiar with that first cold feeling when the object is not where you expect to find it followed by pathetic bursts of optimism as you go to new places where you suddenly think it may be. I remember a friend and colleague going through hell many years ago. A lay client took Polaroid pictures of his no-fault accident. He sent them to the Solicitor. The Solicitor sent them to counsel without copying them. Do I have to go on?

I also feel sorry for the government. The desire to computerise their departments is entirely understandable. They are doubtless like putty in the hands of the IT salesmen. I purchased a system called *The Paperless Office* in the 1990s. Anyone visiting my rooms at 18 RLC will see for themselves how successful that was. I could, however, just throw it away. The government invests millions in these systems (and, like all systems, they will be out of date within a year) and cannot put them out with the other recyclable rubbish.

The sheer size of modern administration does demand a powerful degree of electronic storage. One of the terrifying aspects of our democracy is the sheer amount of law spewed out in Statutes, Instruments, Orders and the like. I subscribed to "Current Everything" about twenty years ago and had to cancel the order after six months as my flat was nearly full with what was sent to me. The Tudors and Stuarts (at least until William and Mary) only met their Parliaments when they needed money. Now governments sit and plan every year how much new legislation (with its attendant Instruments and Orders) they can squash into one parliamentary year. New Labour and Conservative vie with each other as to how much they can legislate with the all the principled enthusiasm of ad-men trying to spike their opponent's product with one that will wash even whiter and at even lower eco-friendly temperatures. And this is before we take "Europe" into account…

What do they imagine it all achieves? Do they think their audience follows it all? For instance, sentences as a deterrent are difficult to quantify when they are changed every five minutes and the

Criminal Law placed into such flux that even judges and senior practitioners are increasingly lost in the morass.

We have now moved into a new phase. Much of the rabid tone of recent years has now been replaced with an Orwellian desire to bring in changes for their own sake and to prove it can be done. What else could justify a politically dangerous and academically flawed desire to introduce Identity Cards or extend detention without charge to 56, 58 (pick any number you like) days? The IT world doubtless likes ID Cards and the Commissioner of the Metropolis wants longer pre-charge detention. At least their reasoning is obvious: more money on the one hand and more time for the over-pressed form-filling police force on the other.

ACPO has recently announced its support for the re-classification of Cannabis as a Class B drug. This debate is a microcosm of our times. Poor old Cannabis, ever since *Reefer Madness*, is the drug they love to hate because it conjures up all the demons of liberal youth: promiscuity, rebellion and apathy. It is true that there are now stronger strains and indeed it was also true when amidst general support it was "downgraded" to Class C. It is true that it can trigger mental illness in a minority of susceptible people. This has been recognised for many years. So, how did our government lead the nation on this issue?

It downgraded Cannabis from Class B to Class C. It then upgraded all the penalties in Class C (except for simple possession) to Class B. Presumably this was not done because new horrors had been discovered about all Class C drugs but to appease the *Daily Mail*. Thus, there was hardly any change in the law at all—save that simple possession of Cannabis now only attracted a two year maximum with implications for powers of arrest. Then the press (including those papers which had supported downgrading) started running the scare stories. Constancy was never their long suit of course.

If Cannabis is upgraded to Class B, then all that will change is the maximum penalty for simple possession will increase to 5 years imprisonment. However, the ACPO spokesman on the radio made clear it was not simple possession that the police wished to criminalise: it was those dealers. He said it was important to send out the right signals. How the mess I have described above constitutes the "right signals" is hard to fathom. The young are far more savvy about drugs than ACPO, GOBs or any other grouping of the middle-aged and elderly. They understand that the black and white world of Class A, B and C, wicked dealers and innocent users is a world away from reality. The downgrading of cannabis did at least make its usage less glamorous and use has apparently declined. But, hey, as our late leader would have said, the fact a policy may be having some effect is no reason not to change it.

Well, it is now dark and colder outside. Phil Taylor has won the darts. There are still some constants in the world. And, if we GOBs cannot stop our modern political leaders legislating in an avalanche of chop-change measures initiated by a fickle media, we can at least enjoy making them squirm when they mess it up. So, I am reasonably confident of at least an *enjoyable* New Year. That Henry had the right answer.

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