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Promoting Change in the Legal System — A Memoir

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‘Promoting Change in the Legal System’ was the title of my Inaugural Lecture given here 45 years ago. I decided to revisit that subject, but with a slightly altered title reflecting a different perspective—‘Promoting Change in the Legal System—A Memoir’. Having reached the status of ‘ancient’, I hope I will be forgiven for basing my remarks tonight largely on my own experience.

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When Professor David Kershaw, the Dean, very kindly said that the Law School wanted to take note of my 90th birthday, I offered to give a lecture. I was delighted when he agreed and feel very honoured to do so in the presence of so many colleagues and friends.

‘Promoting Change in the Legal System’ was the title of my Inaugural Lecture given here 45 years ago.[1] I decided to revisit that subject, but with a slightly altered title reflecting a different perspective—‘Promoting Change in the Legal System—a Memoir’. Having reached the status of ‘ancient’, I hope I will be forgiven for basing my remarks tonight largely on my own experience.

And there is a moral in this tale.

I was a law student at Cambridge for four years in the mid-1950s. In those years nothing suggested that I might later become involved in legal system reform. We were a very docile, supine lot.

After Cambridge I had a year at the Harvard Law School, followed by a year working in the litigation department of Sullivan & Cromwell, one of the great Wall Street law firms.

Both of those years, in different ways, were formative. In particular, in that second year I came to the conclusion that the American unified legal profession was in some important ways preferable to our divided profession.

Those two years also changed me. I felt that I clicked into a different gear—becoming more energised, more engaged. Speaking about our two systems at a Sullivan & Cromwell Litigation Department lunch I heard myself say that when back in the UK I would be active in making the case for fusion of the two branches of the legal profession.

My intention had been to go to the Bar, but under the influence of the US experience, I thought that a practising lawyer should be in direct relationship with the lay client—which meant being a solicitor. I gave up my scholarship and student membership of Lincoln's Inn and became an articled clerk with Ashurst Morris Crisp & Co, a well-known City firm—at what was then the mouth-wateringly high salary of £800 a year. (Today the firm pays trainees £50,000 a year.)

By far the most enlivening experience during my articles was when the firm generously released me for a couple of months or so to act, pro bono, as legal adviser to Tony Benn. He had been expelled from the House of Commons on succeeding to the Stansgate peerage, but was re-elected in the resulting by-election. The Election Court hearing challenging his re-election took ten days. Benn represented himself. It was a layman and an articled clerk against two QCs, a junior barrister and solicitors. We had a strong legal argument, that, with the right judges, I thought had a fair chance of succeeding. Benn was on his feet for a total of 22 hours and never put a foot wrong. An astonishing performance. But the judges were not up for (or should I say up to) the challenge.

Two years later the Peerage Act 1963 enabled Benn to renounce the peerage and he served another 38 years as an MP before retiring, as he said, to spend more time on politics.

My other personal experience of litigation was after I had joined LSE—again an unusual and high-profile case. It was brought by Norbert Fred Rondel, a colourful character well known to Her Majesty's courts and prisons. On its facts his case was completely hopeless, but it raised the important question of law whether a barrister could be sued for negligence—in this instance, for negligence as an advocate. In the High Court Rondel represented himself. In the Court of Appeal I represented him. Solicitors at that time did not have the right to appear as advocates in the higher courts, but, instead of instructing counsel, I submitted an American style 116-page written brief, something previously unknown here. The written brief was referred to frequently during the legal argument, but Lord Justice Dankwerts, in his judgment, said it was wholly irregular and should not be regarded as a precedent. So far as I know, it remains a one-off.

For the appeal to the House of Lords, despite offers to act pro bono from 14 QCs, I instructed Louis Blom-Cooper, not then yet a silk. Rondel attended, splendidly attired in top hat and full morning dress hired for the occasion from Moss Bros. We won a partial victory, the law lords holding that a barrister *could* be sued for negligence, but not for negligence in the course of advocacy.[2] It was another thirty years before they decided that barristers could also be sued for negligence in the course of advocacy.[3]

It was not long after starting as an article clerk that I realised that I actually should be an academic. Studying and writing about the operation of the system was not going to be possible whilst working in a busy firm. Also, the profession at that time was deeply

conservative. My speaking or writing critically about the legal profession was unlikely to be welcomed by any solicitors' firm employing me.

The obvious place to be was the London School of Economics. Jim Gower, the Dean (then called Convenor) advised that if I was going to engage in criticism of the profession, I had better first complete my professional qualification—advice that I followed.

I started at the School in 1963, exactly 60 years ago, and was here for the next 35 years. It was the ideal place. The LSE is a wonderful home for many types of academic. For me, it was perfect, in its location, in the lawyer and non-lawyer colleagues and, above all, for its sceptical, critical tradition.

My main academic subject was the operation of the English Legal System: the courts, juries, the legal profession, legal services, civil and criminal procedure, police powers, law-making by the legislature and the judges, process, the functioning of the working parts of the system. I used to say that my field is the pathology of the legal system.

Two books for students developed out of that teaching—on the legal system (10 editions over 34 years) and on the law-making process (8 editions over 40 years). Their aim was to tell it like it is.

Like any other academic, I wrote articles for various legal journals, but there is one that has a special place in my heart. The first of, to-date, 225 articles for the weekly *New Law Journal* was in October 1967, 56 years ago. The most recent was last Friday, 13 October.

My work during those years had another dimension—communicating with the general public, which I regard as a proper additional function for academics—provided, of course, they fully perform all their academic functions and responsibilities. The year I joined the LSE I was lucky to become Legal Correspondent of *The* Guardian—a position I held for 25 years. Over those years I wrote over one thousand four hundred pieces—news stories, editorials, op-ed pieces, comments on judicial decisions and pending legislation, obituaries, whatever. I would phone my piece to a copy-taker—an early example of remote working. I never cancelled a lecture or class. That was an iron rule. Frequently, a piece or an event would lead to a radio or TV interview.

That journalism and media work hopefully contributed to public understanding of the working, and the non-working, of the legal system.

I have over the years, both as an individual and with others, proposed a considerable number of legal system reforms. I have also on occasion opposed reforms proposed by others—for instance, the civil litigation reforms proposed 25 years ago by Lord Woolf which I thought would make a bad situation worse. I was pretty much a lone voice.

The proposal I count as the most useful in terms of its result and certainly most significant for me personally, was the article in the May 1977 issue of the *Criminal Law Review* that led to the setting up of the Royal Commission on Criminal Procedure.

The article was entitled 'The Criminal Process—A Subject Ripe for a Major Enquiry'. It related what had happened to the 1972 report of the Criminal Law Revision Committee on Evidence in Criminal Cases. That report had run into such a storm of criticism that even its uncontroversial recommendations could not be implemented.

I suggested that, five years on, it was time for a fresh inquiry to re-examine the issues in a wider context. I itemised the principal problem areas, but my main point was that the terms of reference of the previous report had been to review only 'the law of

evidence in criminal cases'. By contrast, the Thompson Committee in Scotland, which reported in 1975, had been asked 'To examine trial and pre-trial *procedures*' in criminal cases. I suggested that 'the unsatisfactory nature of the 1972 report was in part attributable to the Committee's limited remit'.

I sent a pre-publication copy of my article to Roger Darlington, Political Adviser to the Home Secretary Merlyn Rees, and invited him to talk about it over lunch at the LSE on 4 April.

The establishment of the Royal Commission on Criminal Procedure was announced by Jim Callaghan, the Prime Minister, a little over two months later, on 23 June.

The common view is that the impetus for the setting up of the Philips Royal Commission on Criminal Procedure was Sir Henry Fisher's report on the *Confait* case, which had a much narrower focus than my article**.** Thirty years later, Roger Darlington sent me copies of six diary entries he had made between the day of our lunch at the LSE and the Prime Minister's announcement. His email ended, 'It is quite clear your proposal was influential in creating the Commission.'

The Philips Royal Commission's report resulted in two very important pieces of legislation—the Police and Criminal Evidence Act 1984 (PACE), which transformed many aspects of policing, and the Prosecution of Offences Act 1985, which established the Crown Prosecution Service.

PACE, from the start, became a major part of my working life. I was involved in training police officers on the new rules before the Act went live. The first edition of my book on PACE was published in 1986 as the Act came into force. The 9th edition was published in March of this year. I have been a member of the Home Office's PACE Strategy Board since it was established 20 years ago. My assessment of how PACE is working was published last year in the *Criminal Law Review*.

One could say, all that and much more flowed from lunch with Roger Darlington at the LSE.

The year before the article which led to the setting up of the Philips Royal Commission, another article I had in the *Criminal Law Review* triggered the setting up of another Royal Commission. The 36-page article was entitled 'Costs in Crown Courts—A Study of Lawyers' Fees Paid out of Public Funds'. It ended with a call for an inquiry whether there could be better criminal legal aid services for the money—or, absurd though that sounds today, better legal services for less public money.

My article was published in January 1976. The Prime Minister, Harold Wilson, announced the setting up of the Royal Commission on Legal Services five weeks later, on 12 February. How did that come about?

I had sent a pre-publication copy of the article to Bernard Levin, *The Times'* columnist who sometimes cast his beady eye on the affairs of the legal profession. The night of 6 January, on a plane from New York, I picked up someone's copy of *The Times* and saw, to my considerable surprise, that Levin had used my study as the basis for an excoriating attack on lawyers. (He began his article in his characteristic low-key way: 'Mr Michael Zander, a person of loathsome aspect and dubious character who spends much of his time annoying barristers, has just done it again.') That evening I had a somewhat heated 25-minute BBC TV debate with Sir Peter Rawlinson, then Chairman of the Bar Council.

The next day Jack Ashley MP wrote to the Prime Minister, using my study as the peg, urging him to set up a Royal Commission. His Early Day Motion calling for a Royal

Commission was eventually supported by over 100 MPs. Meanwhile, I worked on mustering a campaign. I got *The Times* and *The Sunday Times* to write leaders. Other national and local papers also weighed in. I got the Society of Labour Lawyers and the Legal Action Group to pass resolutions supporting the call for a Royal Commission. I got several legal and trade union people including Lord Goodman, Harold Wilson's legal adviser and Jack Jones, Secretary-General of the Transport and General Workers Union to write to the Prime Minister. And on 4 February I went to see the Lord Chancellor, Lord Elwyn Jones, who, I had been told, was strongly against the campaign. I did not succeed in persuading him but, in the event, his opposition and that of the Attorney General, Sam Silkin, was neutered when it transpired, quite unexpectedly, that both the Bar Council and the Law Society had succumbed to the pressure. They issued a joint statement saying—I imagine through gritted teeth—that they welcomed a public inquiry. At that point I wrote a *Guardian* editorial—commending their statement.

Given the opposition of the two key Ministers, the Lord Chancellor and the Attorney-General, I think that the critical factor in the success of the five-week campaign was the fortuitous and fortunate presence of two good friends in crucially relevant positions. One was Bernard (later Lord) Donoughue, a former LSE colleague and best man at my wedding, who was Head of the Policy Unit at No 10. (I am delighted he is here this evening.) The other was Anthony (later Lord) Lester, who at that time was political adviser to Roy Jenkins, at the Home Office. Anthony Lester asked me to send him a note for the Home Secretary making the case for a Royal Commission on legal services. I hastily prepared a memo listing issues that would justify inquiry by a Royal Commission: the division of the profession into barristers and solicitors, the monopolies and restrictive practices, the effect of scale fees, the unmet need for legal services, the absence of any overall responsibility for the provision of legal services. As my three-page note was being typed, Bernard Donoughue called to ask me to send him a copy for the Prime Minister. I later learnt that it was sent to all Cabinet members by the Prime Minister (or was it actually by Bernard Donoughue?)

[For what Lord Donoughue said about this in the Q&A, see the post-script.]

For the profession, the three crucial issues were: maintenance of the divided profession; maintenance of the solicitors' monopoly over conveyancing; and maintenance of the Bar's monopoly of the right to appear as an advocate in the higher courts. In its report, the 15-person Royal Commission said that all three were in the public interest. On the divided profession the Commission was unanimous; on conveyancing it divided 10-5; and on barristers' rights of audience, the Bar won only narrowly by 8-7.

Was the campaign to establish the Royal Commission therefore pointless? Despite losing on three very important topics, I did not think so. There were over 100 recommendations in the report that I thought were worth supporting.

As to conveyancing and the rights of audience, in 1985 licensed conveyancers were permitted to undertake conveyancing in competition with solicitors and in 1993 solicitors won the right to qualify for the right to appear as advocates in the higher courts. So in time the recommendations of the Royal Commission on those two topics were set aside.

As to the divided profession, it was obvious that fusion of the two branches was not going to happen, and I stopped banging on about it. Our divided system has great merits—above all, the easy availability to solicitors and therefore their clients, of the

expertise available at the Bar both in advocacy and in all the different branches of the law.

I was also involved in the third Royal Commission on legal matters in my time—as one of the Commissioners.

The Runciman Royal Commission on Criminal Justice was established in 1991 in the wake of a slew of serious miscarriages of justice culminating in the case of the Birmingham Six.

Being a member of the Commission was an extremely rich, intense and rewarding experience. A Royal Commission is a weighty and serious way to go about system reform. (A lecture I gave 30 years ago about the process, the report and reaction to the report was re-published last month by the *Criminal Law Review*.[4])

The Commission made 352 recommendations most of which were uncontroversial and most of which were implemented. The most significant outcome of the Commission's report was, of course, the establishment of the Criminal Cases Review Commission (or CCRC).

The Law Commission is currently considering whether there is anything wrong with the statutory provisions for referral of cases by the CCRC to the Court of Appeal. In my view there is nothing wrong with those provisions.

The problem is not the CCRC or the referral provisions. The problem is the Court of Appeal which, since 1907 when it was established, has refused to recognise that its role, given by the legislature, includes being sometimes asked to review jury verdicts, even though there is no new evidence. Section 4(1) of the Criminal Appeal Act 1907 provided: 'The Court of Appeal shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence.'

The Court's deference to the sanctity of the jury's verdict is constitutionally wrong. Since 1907, the constitutional sanctity of the jury's verdict has applied only to a verdict of acquittal. Juries do sometimes go wrong. The Donovan Committee in 1965 and the Runciman Royal Commission in 1993 made proposals aimed at getting the Court to act as the original framers intended. In vain. The Court remained unmoved. I am pessimistic as to the prospects of the Law Commission doing better than Donovan and Runciman.

I was involved in two developments that I regard with especial satisfaction. One was the establishment of law centres. I came across the concept during a summer in the US on a Ford Foundation grant to investigate legal innovation as part of President Lyndon Johnson's so-called War on Poverty. In an article in September 1966, I recommended state-funded neighbourhood law firms providing free services in areas of high poverty, as a desirable addition to our legal aid system. The Lord Chancellor's Legal Aid Advisory Committee invited me to discuss the suggestion, but in its next annual report the Committee said it had not been persuaded and the Law Society said it was strongly against the idea. However, in December 1968 a report by the Society of Labour Lawyers recommended the establishment of what it called law centres. The report, entitled *Justice for All,* published as a Fabian pamphlet*,* was prepared by a committee of which I was a member and I mainly wrote the report. Nineteen months later, on 17 July 1970, I was present at the well-attended formal opening of the first law centre, in a converted butcher's shop in North Kensington.

I believe the introduction of law centres was a significant development in the provision of legal services in poor neighbourhoods. What impact they have actually had is currently the subject of a four-year oral-history joint research project by the Oxford Socio-Legal Centre, the British Library and Queen's University, Belfast.

The other cause in which I was especially glad to have been involved, was the campaign started in 1968 by Anthony Lester, which 30 years later resulted in the Human Rights Act 1998. I traced the history of that long campaign in the 40-page first chapter of my pamphlet *A Bill of Rights?* which ran to four editions over some twenty years. Apart from that pamphlet, my main contribution was perhaps behind closed doors helping to persuade some doubting senior Labour Party politicians. I was a member of the Human Rights Sub-Committee of the Home Policy Committee of the Labour Party's National Executive. I drafted a paper which urged the incorporation of the European Convention on Human Rights (ECHR) into UK law. The paper was approved by the Sub-Committee, chaired by Shirley Williams. It was then approved for publication, first by the Home Policy Committee and then by the National Executive, not as Labour Party policy, but as a Discussion Document. It was launched in February 1976 at a press conference by Shirley Williams, Peter Archer, the Solicitor-General and myself. That, I believe, was the nearest the Labour Party came to support for incorporation of the ECHR until a speech 17 years later, on 1 March 1993, by John Smith, the then leader of the Labour Party, in which he said: 'The quickest and simplest way of achieving democratic and legal recognition of a substantial package of human rights would be by incorporating into British law the European Convention on Human Rights'.

It was gratifying to be told later that John Smith said that my pamphlet had helped him reach that conclusion.

If one is serious about achieving change, one needs to take any and every opportunity that is offered. One such is to take the trouble to respond to official inquiries by submitting evidence and/or by commenting on the report. Over the years I submitted a dozen such memoranda. I was surprised when I recently looked, to find that these several memoranda together ran to over 800 pages.

Sometimes I also sent the product to relevant opinion-makers. In one instance a then future Lord Chief Justice asked for five additional copies of my 75-page document.

Is it worth all the effort? I would say, always. One never, never knows what will have an impact.

In February 1968 I sent Roy Jenkins, then Chancellor of the Exchequer, a pre-publication copy of an article entitled 'Restrictive Practices among Lawyers' saying I did so because the article made a suggestion relating to the forthcoming Finance Bill.

The suggestion was that he move to abolish barristers' immensely valuable tax exemption for post-cessation earnings—from which they greatly benefitted on retirement, appointment to the bench or death. I explained that the Bar was the only profession that computed profits for tax purposes on a cash rather than an earnings basis. The Revenue had failed to get barristers onto an earnings basis because technically barristers have no legal right to their fee—they are paid an honorarium for which they cannot sue. This, of course, is a pious fiction. The official guide to *Conduct and Etiquette at the Bar* stated: '[I]t is a fundamental rule of the profession that a barrister holds himself out as practising for fees, and should not, in the absence of special circumstances, refrain from charging a fee'.

Apart from being significantly beneficial to the Exchequer, abolishing the exemption, I suggested, could encourage the Bar to allow partnerships, Partnerships would make it easier for the young to get started, thereby lessening the importance of contacts and private means.

The abolition of barristers' tax exemption for post-cessation earnings was included in that year's Finance Act.

Is there some general principle for achieving system change? I think there is. It was explained by Mort Sahl, the American satirist, who told of calling out to President Kennedy's motorcade as it went by: 'What do you want us to do, Mr President?' The cry came back: 'Even more.'

Or, to put it in different terms, one should not assume that someone else will do what needs to be done.

One should also not assume that the relevant authorities know about one's reform proposal. Or if they know, that they will do anything about it.

One must be active in promoting the proposal by whatever means one can muster as an individual or better still with others. It requires action and persistence. Encourage the setting up of an appropriate committee, be a member of the committee—and volunteer to draft the report. Enlist well-regarded bodies to give support. Alert the lay and the legal press—ideally pre-publication. If it concerns government, send the material not only to the Minister but also to the junior Minister and the senior officials dealing with the matter. In the internet age the actual sending is much easier than it was before. The trouble now may be that so much material gets sent that decision-makers may not actually notice what one wants them to notice. So further efforts have to be made.

Frequently, perhaps normally, one's initiative will be resisted or just ignored. A very important rule is not to accept a reverse as final. If a proposal is not accepted this year, it may be in two or five or ten years' time. One learns to take a long view. That certainly was my experience in regard to the legal profession's restrictive practices which I addressed critically in 1968 in my first book, *Lawyers and the Public Interest.* It took a decade or two, but gradually they mostly fell away.

Sometimes the passage of time in itself alters thinking about an issue.

Of course, some kinds of change are easier to achieve than others. It is easier to change rules than human behaviour. It was one thing to get the Bar Council to abolish the 'two-thirds rule' under which the junior barrister had to be paid a fee equal to two-thirds of that paid to the leader. It was more difficult to have solicitors use that change to negotiate fees related to the actual value of junior counsel's work. Likewise, the fact that the Two-Counsel rule (requiring that a QC/KC appear in court with a junior barrister) was abolished did not mean that there were many leaders appearing without a junior.

Academics are supposed to engage in research. In my day empirical research by academic lawyers was very rare. But since the main focus of my work on the functioning of the English legal system was process, empirical research was obviously indicated and, despite lacking any training in social science methodology, some 20 of my publications were based on such research. Fortunately, the LSE Statistics Department was always there to provide guidance and help.

Some of the studies were conducted with students. I ran the general introductory first week course for law-freshers and in some years I used a day of that week to give the

students a glimpse of a real-life issue. At other times I also had students from other London law schools and Bar students, who volunteered to take part in the study.

We looked, for instance, at bail decisions by magistrates and found that in the great majority of cases the court had little or no information about the accused's home, employment, family, or other relevant circumstances. That led to proposals for a system for such information to be provided routinely. Another year, pre-PACE, the students administered a questionnaire to police station desk sergeants as to how they handled requests by suspects for legal advice. The most common answer was by merely giving the suspect the ordinary telephone directory or the Yellow Pages directory.

We looked to see whether defendants given custodial sentences had had legal representation. Contrary to the received official wisdom at that time, the studies showed that in the magistrates' courts the **majority** were unrepresented. That got some attention, or at least, whether coincidentally or not, the number of grants of criminal legal aid in magistrates' courts subsequently increased considerably. At my suggestion, JUSTICE set up a committee of which I was a member. The Committee's report, which I mainly wrote, recommended duty solicitor schemes—which eventually led to the national duty solicitor system.

In the mid-1960s it was said that our legal aid system, at that time often described as the best in the world, had basically dealt with the problem of any unmet need for legal services. A Ford Foundation-supported study I conducted with LSE colleagues Professor of Social Administration Brian Abel-Smith, and Rosalind Brooke, showed that that was far from the case. The study was based on structured interviews with 1,600 residents of three of London's poorest boroughs, their names randomly drawn from the electoral register—at the time the first study of its kind on either side of the Atlantic.

By far my most ambitious empirical study was the *Crown Court Study* which I conceived and conducted as a member of the Runciman Royal Commission on Criminal Justice. It was one of the 22 research reports published by the Commission. The study was based on crown court cases completed nationally in a two-week period—some 3,000 cases, including over 800 trials. Different, very lengthy, questionnaires were completed by the judges, the barristers, the solicitors, the CPS, the police, the jurors, the court clerks and the defendants. For the barristers, for instance, there were nearly 200 questions. For the judges there were 89. For the jurors there were 81. There was a very high response rate. My 250-page report was packed with information about the working of the criminal trial system which fed into the Royal Commission's discussions. Unfortunately, since that was before online accessibility, all that information has now been largely forgotten. Some might still be of interest.

Respondents, amongst many other questions, were asked to evaluate the performance of other actors. Most were surprisingly positive. Three-quarters of convicted defendants, for instance, thought their barrister had done a good or even a very good job. Four-fifths of the 8,000 jurors thought the jury system was good or very good.

Research can be to explore and illuminate an issue simply to enlarge knowledge. Or it can be motivated by a sense that there is, or at least may be, something wrong that requires attention. Research may also be conducted out of concern about actual or threatened change.

In 1970, Lord Parker, the Lord Chief Justice, announced that hopeless applications for leave to appeal in criminal cases could be penalised by ordering that part of the time spent appealing would not count towards the sentence. The news of this warning must have flashed around the prisons since the number of applications for leave to appeal dropped dramatically. Up to March 1970 they had been running at the rate of 12,000 a year. Within a short time of the announcement applications for leave had fallen to a rate of about 6,000 a year—and they remained at around that lower rate. Prisoners are probably not aware that the power is hardly ever exercised.

Lord Parker's statement was based on the assumption that prisoners would have received the legal advice guaranteed by the Criminal Justice Act 1967. They were to be penalised for going against the presumed advice that there were no grounds of appeal. A Nuffield Foundation grant enabled me to test that belief. Interviews with 132 prisoners who had applied for leave to appeal showed that some indeed did so despite advice from counsel that they had no grounds of appeal, but others had had no advice and some who had been advised to appeal received no professional assistance with the drafting of their grounds.

The study led to a Saturday meeting in the chambers of the Registrar of Criminal Appeals, presided over by Mr Justice George Bean, at which all the relevant interest groups, including even the Home Office and the Treasury, were represented. I was there too. The outcome was a Practice Note issued by the Lord Chief Justice and a guidance pamphlet issued by the Registrar. Under the new rules, amongst other changes, before leaving court, the barrister was required to sign a statement as to whether there were grounds for appeal and if so, either to leave a draft or state that it would be sent to the solicitors within 14 days.

In 1972, Sir Robert Mark, Commissioner of the Metropolitan Police, giving the annual BBC TV Dimbleby Lecture, expressed concerns about a system that resulted, he said without any evidence, in professional criminals being disproportionately successful in getting acquitted. To test that proposition, I conducted a study of cases tried at London's two main criminal courts, the Old Bailey and the Inner London Crown Court. The sample consisted of the number of consecutive cases that produced 100 acquittals in both courts. Sir Robert Mark was good enough to arrange for me to be given the criminal record (if any) of the 1,400 or so defendants in the sample. The study showed the **opposite** of what Robert Mark had said. Although the jury would not have known anything about the defendant's prior convictions, for whatever reason, the worse the criminal record, the **lower** the acquittal rate.

Research is a vital part of sensible change, but it is not **always** advisable. I am, for instance, against research involving the recording of real-life jury deliberations. There are various reasons why one could take that position. Mine is that I believe any potential benefit is outweighed by the danger that trial by jury might be thought not to be working well because of perceived shortcoming revealed in the process of jury deliberations. I do not think the potential benefits of such research justify the risk of reducing—and perhaps undermining—public confidence in the jury system.

What has certainly changed for the better is the use of empirical research as a fulcrum for legal system change.

Empirical legal system research by both lawyer and non-lawyer academics is now more common than it was in my day and there are important academic research institutes engaged in the work. I hope it is not invidious to pay tribute to the major contribution made, for instance, by Professor Cheryl Thomas and her Jury Project at

UCL or Dr Vicky Kemp of Nottingham University with her series of police custody studies.

Ten years ago the New York Center for Court Innovation helped to create the Centre for Justice Innovation in England. The English Centre conducts research into how things work and how they could work better and promotes evidence-based, innovative justice policy reforms.

In 2013, the Cabinet Office launched the *What Works Network* which today has ten centres operating in a variety of fields, one of which is policing. The aim is generating evidence, translating the evidence into relevant and actionable guidance, and helping decision-makers act on that guidance. There should be a *What Works Centre* for the justice system

I end these remarks with warning words for any would-be reformer of systems, written more than a hundred years ago by F M Cornford in his 20-page gem of a book, *Microcosmographia Academica Being a Guide for the Young Academic Politician,* still available for a very modest sum, from Amazon Books.

Cornford, a Cambridge classics don, described what one is likely to be up against. Addressing the young academic reformer he warned that nothing is ever done 'until everyone is convinced that it ought now to be done, and has been convinced for so long that it is now time to do something else.' All important questions are so complicated, and the results of any course of action so difficult to foresee, that certainty or even probability is seldom, if ever, attained. It follows that the only justifiable attitude of mind is suspension of judgment. It is then only necessary to persuade others to be equally judicious and to refrain from plunging into reckless courses which might lead them heaven knows whither.

This is relatively easy, especially by appeals to the Principle of the Wedge and the Principle of the Dangerous Precedent. The Principle of the Wedge is that you should not act justly now for fear of raising expectations that you might act still more justly in the future—raising expectations which you are afraid you will not have the courage to justify.

The Principle of the Dangerous Precedent is that you should not now do an admittedly right action for fear that you, or your equally timid successors, will not have the courage to do right in some future case, which is essentially different, but which superficially resembles the present one. Every public action which is not customary is either wrong or, if right, is a dangerous precedent. It follows that nothing should ever be done for the first time.

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Bernard Donoughue in the Q&A after the lecture at the LSE on 19 October 2023 (as later corrected by him):

I want to add a few words about that episode in 1976 about that Commission of enquiry. I was the Prime Minister's senior policy adviser at No 10—and it was nearly lost. I remember Elwyn Jones, the Lord Chancellor, coming into No 10, looking very agitated and going in to see the Prime Minister. Harold Wilson told me afterwards that he had insisted that Wilson should reject the proposal because he had promised the legal profession that he would—and so he had to have it. I argued the case with Harold and he said get the case together and that is when I contacted Michael to provide me with the arguments. It was brilliant. I put it to Harold who was still a bit afraid to contest the Lord Chancellor, but he came round and then I got a message from the Lord Chancellor commanding me to attend at his office the next morning. [Laughter] I told

Harold and he said, ‘Command him to attend your office next morning to see you and Joe Haines’. Which is what happened. I spoke to Joe Haines, Harold’s brilliant press adviser, formerly of the *Daily Mirror*. He was the No 1 person for Harold. Harold ALWAYS took his advice. I spoke to Joe and he already knew about it and knew of Michael and then I found when I spoke to Harold that he knew all about Michael because he was a keen *Guardian* reader and he knew all about Michael’s stuff and was a great admirer. I said to Joe, if we set this set up—we knew that Harold was going to resign in 6 weeks—if we can get this set up, you’ll be gone but I will see to it that you are a member of the Commission. We saw the Lord Chancellor the next morning and told him that he had to restore his relations with the profession because they were not going to win on this one. And that is exactly what happened.’

[Joe Haines *was* one of the 15-person Benson Royal Commission on Legal Services: MZ]

References

[1] M Zander, ‘Promoting Change in the Legal System" (1979) 42 MLR 489–507

[2] *Rondel v Worsley* [1967] 1 QB 443; [1969] 1 AC 191

[3] *Hall v Simons* [2002] AC 615

[4] M Zander, "Reform of the Criminal Justice System: The Report of the Runciman Royal Commission" (2023) (10) *Crim LR* 626–638

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