Human Rights Living on Death Row

CBQ

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Cybercrime

Balancing Human Rights in an online context

Leveson and Rivlin

The "F word" – Fusion

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FEATURED IN THIS ISSUE

VIEW FROM THE EDITOR

Extending the Word

EDITOR
John Cooper QC

With the Summer done and dusted this Edition of *CBQ* heralds the new term.

We welcome the new "Head Master" Tony Cross who lays out his considered thoughts for his term of Office in this Magazine. In the instant and diluted world of the social media and daily updates, vital though both are, there is still a place in my opinion for the hard copy page in a magazine or newspaper which allows thoughts to breathe and develop.

For this, if for no other reason the primary objective of *CBQ* for the decade plus during which I have been editing it is to provide comment, argument and explanation in a format which allows all of them to be fully developed and I encourage the growing number of barristers who have mastered the art of 140 characters to provide *CBQ* with a little more than that and use it as a medium to articulate their point of view.

As always, there is a wealth of helpful and informative writing in this issue, including: Felicity Gerry QC on cybercrime and keeping the Internet free; Catriona Murdoch and Harriet Smith on America's policy of execution; Richard Gibbs asks why is the Human Rights perception with the general public so negative and Dan Bunting on the recent Leveson and Rivlin Reviews.

Enjoy the read.

25 Bedford Row
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Laying the Foundations

CHAIRMAN'S COLUMN

Tony Cross QC

"Football in the first line is an immediate turn-off for many people. I didn't read the rest," said one correspondent in response to my first Monday message (which in fact wasn't much of a message at all - more of a request to respond to Leveson and Rivlin).

Welcome to the world of the CBA. I'm sorry I upset an angry barrister. I'm sorry that I upset some solicitors earlier this year with my contribution to the blog. I dare say that I will not please all Members of the CBA during my time as Chairman. I do promise one thing, like Burnley FC in their fight for survival in 2014-15, I shall be doing my best. All I ask in return is that you read to the end before passing judgment.

The Fight for Survival

It has been a great privilege to have practised at the criminal bar these past 32 years. I started in a tiny set, the runt from a breakaway litter, in Manchester (which ultimately produced three silks, and a number of Judges), before moving on to Preston and now this past decade at Lincoln House in Manchester. What little talent I had was nurtured by Chambers and importantly by solicitors who entrusted me with their work. These were solicitors who took pride in their instructions (the majority), and their choice of advocate, who frequently came to conferences themselves, who employed experienced outdoor clerks, who knew their "counsel." These solicitor firms had an extensive menu of barristers to choose from and loyalty to a particular barrister would only go so far. Choice of Counsel was for them a matter of supreme importance. Then the modern day beauty parade was unknown. The cold reality of life at the junior bar was the stern word from the Clerk, "Mr Smith doesn't think you're ready for that yet Sir!"

Then in the early 80s, young men and women were able to set out on a career, knowing that all else being equal with hard work and talent they might progress. Do not think for one moment that I ignore the many failings that existed in those halcyon days - of course there were many.

Like many of my vintage across all circuits my career progressed and what a privilege it was over the years that followed to be led by some of the greats of the Northern Circuit, some still with us some sadly departed; the list is extensive and not exhaustive (forgive any omissions), Openshaw, Poole, Henriques, Grindrod, Rowe, Smith, and the Mighty Mick Maguire, and by a host of silks still in service to this day. And for each that led me I saw silks for co-accused and for the prosecution. I sat alongside Juniors that were experienced in the way of homicide and fraud; Juniors who could craft an admission or produce a skeleton and take a witness. Juniors who could be relied upon by their Leaders for a note of the "relevant" evidence but Juniors who quite simply knew what they were doing because they had been trained to do what was required of them. These were Juniors whom you trusted for advice. They had been chosen by the solicitor with one purpose in mind, serving the best interests of their client. Juniors chosen by the solicitor sometimes to counter-balance the "weight" of the Leader. Of course (and see above there were failings even then – from time to time one saw incompetency but always testable against the benchmark of the excellent).

And how we learned from these Masters. Our education, training, our pupillage, our membership of Chambers gave us the skillset to progress. But the work was the vital element without the opportunity of this quality instruction then all would have been pointless. All would have meant for nothing.

The work, the prep, the cons, observing liaison amongst Counsel was the final building block built upon the strong foundations of education, pupillage and chambers.

From time to time for the select few around the Circuits this happy coincidence of these factors still exists but for the majority these past few years it has gone. Is it a coincidence that standards of advocacy and preparation have declined? Of course the scale of remuneration has played a part but I agree with Sir Bill Jeffrey "legal aid fee rates are neither the whole story nor none of it".

My Manifesto

Jeffrey: "As it exists now, the market could scarcely be argued to be operating competitively or in such a way as to optimise quality. The group of providers who are manifestly better trained as specialist advocates are taking a diminishing share of the work, and are being beaten neither on price nor on quality.

Solicitors are bound, for good reason, to be influential in the choice of advocate. The fact that there are now internal commercial interests at stake makes it even more important that the process by which an advocate is assigned should be above reproach."

I promised that I would do my damndest to allow barristers of talent to do the work currently being done by others. Until publicly funded work is done by the most able then justice for victims and defendants is being denied.

There was a time when every big case had the best Leaders and Juniors. When every case of weight had the best teams usually served by the best solicitors. Is that the position currently? In some cases of course it is. Some solicitor firms have no HCAs. They know of the real value of the specialist bar. My cry is not a cry for war with HCAs; it is a cry for war against injustice. Currently the Bar are being denied the opportunity to compete for all work for a variety of

differing reasons. This must change and together with Nick Lavender QC and his successor Alistair MacDonald QC I am determined to press for structural changes to ensure that the Bar get an opportunity to obtain these briefs, prosecution and defence alike.

Recently I received an email from a Barrister of seven years' call. This is his plea in part:

"I am a barrister practising in criminal law. I am seven years' call. Of all the problems facing people in my position, the one which I consider to be the most serious is rarely, if ever, highlighted in the public debates about the future of the Bar. All of the best work, the work which could potentially further my career, is being done by so-called in house advocates. The vast majority of them are not employed on a salary. They are effectively freelance advocates who pay their instructing solicitors a percentage of the advocacy fee. Most of them do this very openly. It is in the interests of solicitors' firms to instruct them for obvious reasons. The net result is that solicitors with whom I had built up relationships through years of hard work are now telling me that they have been ordered not to brief barristers in chambers anymore. I have been approached by solicitors asking me to enter into arrangements whereby they will guarantee me work if I pay them a percentage of my fee. I have always refused. They have invariably found other people prepared to do that work and no longer instruct me.

My contemporaries at the Bar tell me they are suffering from the same problem.

The net result of this is that the decent junior work is being briefed to advocates not on the basis of their ability but because they are paying for it. Those of us who choose not to compete in that way are inevitably hamstrung in obtaining work. We are left to fight for the scraps.

If the *status quo* continues, I do not see how I will be able to take my practice forwards and gain the kind of experience which might allow me to achieve the ambitions I had when I joined the profession."

This is but one "horrid history" that has found its way into my pigeonhole these past few weeks.

But the story of our young member emphasizes the reality the very existence of the Bar is under threat.

Can the Status Quo be Changed?

Thanks to our efforts last year we now enjoy a much better working relationship with government. They know that the best method of delivery of high quality legal services rests with the criminal bar. They know that from our ranks come the vast majority of the judiciary. They know that we can deliver what we promise.

Our first task is to level the playing field. We must restore the competitive element to the selection of Advocate. We should welcome the competition from HCAs but this competition must be fair. Why should the public purse be lightened by the use of "straw" juniors? How galling and distressing it must be for senior juniors to walk the corridors of Crown Courts across the land and for them to see Silks leading advocates that they know full well they have the brief for no other reasons than an economic one.

The time has come to deal with this issue. The public are beginning to lose the services of talented Barristers who find themselves excluded from the work. I am sick and tired of hearing tales of men and women who have provided excellent service to clients and solicitors alike being told. "We are going to take our work in-house, join us or lose it." The only motivation for such actions is economic and no more.

It is time to face this challenge. Those best qualified, those most able, those most suited; those who can serve the interests of justice both short term and long term must have the opportunity of doing work which matches their ability. Our campaign begins in September.

Bill Jeffrey said that there was no turning the clock back. I disagree. My belief is that there is an overriding consensus amongst lawyers and the Judiciary that the Bar is best and best able to secure a cost effective CJS serving the defence and the prosecution.

Make no mistake about it we are engaged in a fight for the survival of the Criminal Bar. My belief is that the next 12 months will be a critical time for us.

The following months will bring the initial report by Leveson LJ and by Rivlin. At the risk of one request too many please, please respond to both consultations. It is as important to respond, as it was to demonstrate against the cuts.

We must not forget how invaluable the work of the CBA is to the CJS in other ways. Last year saw us concentrate on fees for obvious reasons. This year I hope to bring to the fore the splendid work of our other committees in particular education under the stewardship of James Mulholland QC. Our short film, "A question of practice" which the CBA project-led on the questioning of young and/or vulnerable witnesses and defendants now forms a cornerstone of both judicial and advocate education. Later this year I expect to announce exciting opportunities for appropriately experienced and qualified members of the CBA to progress their career in the fields of homicide and serious sexual offences.

Challenging Year

2014-15 promises to be a challenging time for me, the first Chair of the CBA from outside London. I will worry about my whippets and racing pigeons as I am on yet another Pendolino bound for another meeting in London. Happily, the Premier League fixture list has been kind and I shall miss no Burnley home or away fixtures whilst attending Saturday morning Bar Council meetings.

I know from my experience that the 12-month term of office of a CBA chairman can seem like a lifetime. I already feel as though I've done my bit.

I look forward to my year and reflect on the last when I made many new friendships through the CBA amongst them Nigel Lithman, a leader who did what he had been trained to do. He led. I shall miss our daily conversations. I am proud to have had the opportunity of working with him.

I hope that Mark Fenhalls QC and I will prove to be as effective a partnership. I know that I will receive invaluable support from Max, Mike and Nigel and above all my officers and Executive and I hope from you, the membership. ■

Tony Cross QC

Cybercrime

Preface

Child abuse online and keeping the Internet free – a job for the Bar

Contributor

Felicity Gerry QC

In December last year, (previous) Policing Minister Damian Green, launched a US-UK taskforce to counter online child exploitation. He indicated that this would involve "drawing on the brightest and best minds from across industry, law enforcement and academia to tackle the dark web, catch abusers and make it much more difficult to access child abuse images online". Interestingly, he did not mention specialist practitioners who not only have experience in this complex area but also have the balance to ensure that, whilst cybercrime of any sort is prosecuted, it is prosecuted fairly and at the same time, freedom on the Internet is protected.

Interpol describes Cybercrime as a "fast-growing area of crime. More and more criminals are exploiting the speed, convenience and anonymity of the Internet to commit a diverse range of criminal activities that know no borders, either physical or virtual". The abuse of children is therefore a transnational organized crime, based on grooming, exploitation and violence. It also engenders a moral panic that is harnessed to justify Draconian laws. It is an emotive topic that drive legislation such as the controversial Data Retention and Investigatory Powers Act (DRIP) on the storage of data which went from draft to law in just eight days, with very little debate. *Wired.co.uk* reported that Campaign group Liberty intend to challenge the law, arguing that it is incompatible with art.8 of the European Convention on Human Rights (the right to respect for private and family life) and arts.7 and 8 of the EU Charter of Fundamental Rights (respect for private and family life and protection of personal data). They also reported that legal director for Liberty James Welch said: "It's as ridiculous as it is offensive to introduce an 'emergency' law in response to an essay crisis. The court ruling that blanket data retention breached the privacy of every man, woman and child in the UK was more than three months ago. The Government has shown contempt for both the rule of law and Parliamentary Sovereignty, and this private cross party stitch-up, railroaded onto the statute book inside three days, is ripe for challenge in the courts." The excuse for such legislation is usually terrorists and/or paedophiles and controlling the dissemination of child abuse on the Internet is a global priority. However, it is a complex task which doesn't warrant emergency legislation and shouldn't be used to create a surveillance state. I was recently part of a team that reviewed the draft cybercrime law for Cambodia for the ABA-UNDP

International Legal Resource Center (ILRC). Not only was it our view that the draft cyber law for Cambodia had been drafted to target human rights activists/NGO's and, if enacted, it is a dangerous instrument, we also concluded that globally there is a dangerous drift from the common standards of achievement anticipated by *The Universal Declaration of Human Rights*. The preamble recognises that "the equal and inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world". The Declaration emphasizes the need for "a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society." Our report demonstrated that those common standards are not being achieved in an online context and there is an immediate need for global cooperation on cyber law.

That said, controlling the dissemination of child abuse on the Internet is a global priority but it is a complex task. The Internet embodies a key underlying technical idea of *open* architecture networking. What is built is ever openly interlinking. There are generally no constraints on the types of network that can be included or on their geographic scope. It has been embraced across the world and has been developed as much by the user community as by the technological developers. That Internet community is not a separate community. Child abuse occurs online by live link and children are abused in order to provide sexual and abusive images to those who seek to view and download that material. Drafting new laws is a skill which the Bar possesses and ought to be used.

Balancing Human Rights in an Online Context

Several nations have attempted domestic laws to "deal with" the Internet with varying degrees of success, some as determined censors. These approaches rarely originate from the concept of human rights. There is direct censorship and control by some governments but for the most part, they place the responsibility for enforcing "law and order" in the hands of the trade organizations who stand to gain from their enforcement. The level of policing required is inordinate and complex but needs to be provided for and enforced in a balanced way. The freedom that the internet allows is a human right just as it is a human right for a child not to suffer abuse. In the *Report Of The Special Rapporteur On The Promotion And Protection Of The Right To Freedom Of Opinion And Expression*, Frank La Rue sets out the context of cybercrime as follows:

"States are obliged to guarantee a free flow of ideas and information and the right to seek and receive as well as to impart information and ideas over the Internet. States are also required under international law to prohibit under its criminal law the following types of content: (a) child pornography; (b) direct and public incitement to commit genocide; (c) advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence; and (d) incitement to terrorism. However, the Special Rapporteur reminds all States that any such laws must also comply with the three criteria of restrictions to the right to freedom of expression, namely: prescription by unambiguous law; pursuance of a legitimate purpose; and respect for the principles of necessity and proportionality".

The use of "child pornography" is an unfortunate phrase that ought to be replaced with "child exploitation online" but, aside from semantics; it is in this context that the piecemeal laws of the UK must operate.

UK Laws on Online Abuse

On a practical level, it is worth remembering that, of itself, pornography is not necessarily illegal. The test under the Obscene Publications Act is whether or not material is obscene or tends to deprave the viewer. There are also offences relating to prohibited images involving sadism and bestiality in s.63, CJIA 2009. For the purposes of the law on child abuse online, in England and Wales, there is currently no offence of online grooming although meeting a child after sexual grooming is an offence contrary to s.15 of The Sexual Offences Act 2003. This, of course, needs to change. In relation to online images of child abuse the law is largely contained in the Protection of Children Act 1978. Here a child is defined as being under 18. Where age is not known, a child's age is determined from the evidence as a whole upon which expert evidence is not admissible as judging the age of a child is within the ordinary experience of a juror. In relation to the physical elements of the legislation, put shortly, s.7 of the same Act interprets photograph to include moving images and digital data. Computer images are therefore "photographs" within the meaning given in s.1. Downloading images (moving or otherwise) from an Internet source is provided for in s.7(2) and (4)(b) and to do so constitutes *making* an indecent image as provided for in s.1.

The prosecution have to prove that the images made were indecent. In deciding whether each image was indecent, the jury should be directed in accordance with the test set out in *R. v. Stamford* [1972] 2 QB 391, applying recognized standards of propriety (see also *R. v. Neal* [2011] EWCA Crim 461). This is an objective test. The jury should be directed to consider the question of indecency by reference to an objective test, rather than applying their wholly subjective views to the matter. Whether the making of the images was intentional or accidental is not relevant to whether the images are indecent.

The mental element of the offence is not specified in s.1. At the point of the download and in the context of most cases, the mental element is relevant to two issues:

(i) Whether all or some of the images were made by way of bulk download and accordingly the Appellant had no knowledge he had made the images (*R. v. Harrison (Neil John)*[2008] 1 CrApp R 29, CA which dealt with "pop-up" images).

(ii) Whether the appellant had taken such steps in ascertaining the age of the females shown in the image such that his knowledge or belief was that it was NOT likely that the image was one of a child (*R. v. Smith (Graham Westgarth)*; *R. v. Jayson* [2003] 1 CrAp R 13, CA.)

No prosecution should proceed merely on the basis that if the images are indecent, the defendant is guilty. It is issues such as this that the task force (and the general public)

need to understand. The prosecution must prove that the defendant intentionally or knowingly "made" the indecent photograph. The issue was recently considered by the Court of Appeal in *R. v. George Steen* where convictions for making indecent photographs of children were quashed where there was material which required the Judge to give directions on the possibility that the defendant might have downloaded the images without knowing that they involved children. The court said that was a potential defence which had to be left specifically for the jury to determine – in fact it relates to an inability by the prosecution to prove an essential element of the alleged offence and it applied to both downloading and importation. The purpose of the law is to catch abusers, not those who are affected by technology.

Defences

It is a statutory defence to s.1(a) and 1(c) for the defendant to prove the child was aged 16 or over and that they were married or civil partners or living together in an enduring relationship at the time, whether the photograph showed the child alone or with the defendant, but not if it was distributed or shown to any other person. Legitimate reason is also a defence to s.1(1)(a) and (b) but it is difficult to envisage a situation where a defence of legitimate reason could succeed. In some cases defendants have claimed academic or personal research. The court is entitled to treat such suggestions with scepticism and much depends on the images and the circumstances in question. Ultimately, it is a question of fact whether the reason for taking or making, etc such material is legitimate.

Encrypted Images

For those who download and encrypt indecent images, it is a criminal offence if a suspect refuses to give the password for the encrypted files to the Police on questioning which carries up to six years' imprisonment (or a fine or both on indictment). The law is contained in Regulation of Investigartory Powers Act 2000 ss.49 to 54.

Section 49 applies where police have material in their possession after exercise of statutory duty and they believe person has encryption key – they serve a s.49 notice and failure to comply with that notice is an offence under s.53. .

It has been widely reported that former singer Ian Watkins, sentenced for sexual offending was in possession of encrypted indecent images. It is not clear if such a notice was served on Watkins and, if not, why not.

The sentencing remarks state that Watkins encrypted level 4 and 5 sexual images of children on his computer and that the code "I FUK KIDZ" was cracked by GCHQ. News reports suggested the total amount of material involved was an enormous 27TB. To put that in context, 1TB is equal to about 17,000 hours of music of 320,000 high resolution photographs. This is not an uncommon figure for cases of this type. His appeal against a sentence of 29 years for physical and online offending was refused.

Sentencing

The Sentencing Council Guidelines came into force on 1/4/14 deals with a category of production as follows: Production includes the taking or making of any image at source, for instance the original image.

However, making an image by simple downloading is treated in the guidelines as possession for the purposes of sentencing.

It is vitally important that the jury are given proper directions on making a decision as to whether images are indecent or not. Trying to direct a jury on categories or scales of images is unhelpful but sentencing will differentiate between penetrative and non-penetrative activity and images which show sexual activity with an animal or sadism.

The maximum penalty for each image is 10 years but the guidelines have regard to principles of totality and quantity of images downloaded. Again, there is a need for balance.

The Dark Net

The dark net is effectively anonymizing technology which is being increasingly used by all sorts of people legitimately and otherwise. Young people in particular are keen to avoid surveillance by the State. The dark net is not new to anyone who prosecutes or defends these cases.

In a relatively recent case which I prosecuted, a defendant who ran a fanzine style website for a relative who was a musician had a secret communication facility embedded within it through which indecent images of children had been exchanged. It was difficult at that time to prove who was responsible. Like the Rolf Harris case, those charges were not pursued. The defendant was sent for trial on other matters.

It is issues of identification that will need to be dealt with if such cybercrime is to be successfully prosecuted and care has to be taken to ensure that innocent people are not caught by technology that can automatically download images without the users' knowledge. The dark net was the subject of a recent report by the International Centre for Missing and Exploited Children. The report recognized the dangers of such technology but also the value:

"The digital economy and anonymizing technology hold great promise and societal value, from offering financial tools to the world's unbanked, to protecting dissidents and journalists from unjust government reprisal," said Rubley. "But these benefits are clouded by those who use and exploit the digital economy to commit illegal acts. While these are all complicated issues, we believe that a regulatory framework can grow the digital economy – and confront those who seek to exploit it for illicit purposes."

There is clearly a need to improve the law on global online abuse, but in the maelstrom of publicity surrounding global sexual abuse by celebrities and others, it will be important for law makers to maintain balance by targeting the abusers, understanding legal principle and keeping the internet free.

The Bar in the UK and the US is uniquely placed to assist the task force. It only remains for the Government to ask. ■

Barrister, Felicity Gerry QC
Co-author of *The Sexual Offences Handbook*, the 2nd edn is available for pre-order from Wildy's now.

Living on Death Row

Preface

Living on Death Row in Texas and America's policy of execution

Contributors

Catriona Murdoch and Harriet Smith

There are advocates, many more experienced and knowledgeable than the authors of this article, who are currently highlighting the innumerable abhorrent facets of the death penalty: the miscarriages of justice and execution of the innocent; the delay between sentence and execution (the ECHR has stated that such delay may be tantamount to torture); the incompetent defence lawyers; and the botched concoctions of drugs used in the lethal injection causing long and painful executions, to name but a few. This article will focus on the living conditions on death row, in Texas in particular, in the context of America's policy of executing those with intellectual disabilities.

The 2002 landmark case of *Atkins v. Virginia* created an exemption to the death penalty for the "mentally retarded" now termed "intellectually disabled" in most American states. Previously 44 inmates with intellectual disability ranging from severe to borderline cases have been executed between 1984 and 2001. The Supreme Court concluded that the execution of mentally retarded persons is excessive punishment, as the principles of retribution and deterrence cannot apply to those with limited personal culpability. The Court adopted the medical profession's three-pronged clinical definition as the threshold test but left individual States to set their own standards in defining intellectual disability, resulting in a wide variance of State practices and a controversial, rigid cut-off for IQ's over 70.

Texas followed the ruling in Atkins but supplemented the test for intellectual disability with what are known as the Briseño factors, which narrow the determination of the adaptive functioning element of intellectual disability. The Texas Court of Criminal Appeals prefaced their additional criteria by reference to John Steinbeck's fictional character Lennie from *Of Mice and Men:* "[M]ost Texas citizens might agree that Steinbeck's Lennie should, by virtue of his lack of reasoning ability and adaptive skills, be exempt." No other state uses non-diagnostic factors and they have been widely criticized by American health professionals such as The American Association on Intellectual and Development Disabilities (AAIDD) and The American Psychiatric Association.

The controversial and utterly subjective Briseño factors, which must be satisfied are as follows:

(i) Has the person formulated plans and carried them through or is his conduct impulsive;
(ii) Does his conduct show leadership or does it show that he is led around by others;
(iii) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable;
(iv) Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject;
(v) Can the person hide facts or lie effectively in his own or others' interests; and
(vi) Putting aside any heinousness or gruesomeness surrounding the capital offence, did the commission of that offence require forethought, planning, and complex execution of purpose.

In May this year the Supreme Court delivered another significant decision for death row inmates with intellectual disabilities. In *Hall v. Florida* it held Florida's bright-line rule (defendants with an IQ of above 70 were automatically held not to have a disability and could thus be executed lawfully) unconstitutional. Now, if an inmate's IQ falls between 70-75 then lawyers are afforded the opportunity to offer additional clinical evidence of adaptive deficits. The Supreme Court found that Florida's statute and practice disregarded established medical practice by holding IQ as conclusive evidence of disability.

Texas' use of the Briseño factors is also contrary to established medical practice. The AAIDD wrote in their recent brief in *Chester v. Thaler*, another case involving the Briseño factors: "[The Texas] impressionistic 'test' directs fact-finders to use 'factors' that are based on false stereotypes about mental retardation that effectively exclude all but the most severely incapacitated."

The authors of this article are currently working on the appeal of Mr Bobby Moore who has languished on Texas' death row for 34 years. For the majority of those 34 years Moore has been in a standard segregation cell, 6 x 8 feet in size, with a narrow slit window and no ventilation. As shown in the photos of his cell, he sleeps next to his toilet - which leaks.

Moore, known mainly by his prison number 000663, as is standard practice in Texas, is the most recent applicant to successfully obtain a finding of intellectual disability from the district courts. Moore was sentenced to death for the second time in 2001 after a Federal Court granted a new sentencing hearing due to ineffective and constitutionally deficient performance of Moore's trial counsel. Atkins was decided the following year and a writ of *habeas corpus* was filed in 2003 requesting a determination of Moore's intellectual disability. A mere 11 years later a hearing was scheduled to consider evidence supporting a sub-average general intellectual functioning – seven IQ scores ranging between 57 – 75, and multiple examples of significant limitations in adaptive functioning, which were present before he was 18 years old. Aged 13 Moore was adjudged to possess a reading level of five years below is his chronological age and needed help with simple mathematics and time-telling.

In February this year Moore's attorney argued that Moore's adaptive deficits exceeded the threshold for a diagnosis of intellectual disability, finding poor conceptual abilities, inadequate social skills and that he is devoid of practical competences, including living independently and learning from harmful experiences (eg, despite contracting ptomaine poisoning he continued to eat from rubbish bins). The finding was supported by three medical experts. Accordingly, the Texas Court of Criminal Appeals now has to decide whether to reform the judgment of death to one of life in prison, or remand the matter for new trial so that a jury can determine the issue of intellectual disability. Moore awaits the outcome of the appeal.

In order to succeed in an 8th Amendment claim, establishing that life on death row equates to torture or cruel and unusual punishment, you must satisfy two elements: first, deprivation of a basic human need, the extreme deprivation of any "minimal civilized measure of life's necessities" (it is not enough to allege a 'totality of conditions' argument, it will only be unconstitutional if there is deprivation of one or more basic human need), this is known as the objective element; second, deliberate indifference on the part of one or more defendants, known as the subjective element.

It is difficult for those not directly involved in the death penalty, either through knowing someone currently facing a state-sanctioned execution, or through a career in the field, to keep the catastrophe of death row in mind. A subject so morose that perpetually or even periodically thinking of it would be akin to watching famine appeal adverts on repeat. There are countless aspects of death row, and indeed prison life in general, to which those currently and heedlessly enjoying their liberty cannot imagine. Yet there are the smaller losses that are not often mentioned, those sidelined in the context of other grave issues, losses such as the lack of human touch. When being sentenced to death in America, it is unlikely you would realise that along with the end of your life, you may never touch a loved one again.

As you read this article, consider the last person you touched affectionately. In addition to being in segregated cells for 23 hours each day, death row inmates in Texas are not allowed physical contact with visitors. Segregation cubicles are used and conversations are done in small booths *via* a phone. There is no group physical recreation, inmates are exercised in isolation cages. They may be next to other death row inmates and can converse but cannot touch. Meals are passed through the slot in an inmates cell, no touching occurs. For those on death row, human touch is not considered one of life's necessities.

The courts have interpreted the concept of necessities at times narrowly. In one case solitary confinement in a lightless cell, limited bedding and minimal food did not constitute cruel and unusual punishment in the context of the Eighth Amendment. Yet in one successful Eighth Amendment claim it was held that: "[Solitary confinement] units are virtual incubators of psychoses - seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities." Similarly, in another case it was held that the "isolation and idleness of Death Row … create an environment 'toxic' to prisoners' mental health." Despite this recognition, the conditions on death row are not amended for those with intellectual disabilities.

The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment concurred with the last two cases and stated: "Given their diminished mental capacity and that solitary confinement often results in severe exacerbation of a previously existing mental condition, the Special Rapporteur believes that its imposition, of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment …"

Life's necessities may be difficult to define, may vary between individuals, particularly as between those with and without intellectual and mental disabilities. However, what is clear is that the deprivation of human contact and its concomitant effects is a base deprivation of human need and one which violates the US Constitution and the other International Conventions to which America has signed and ratified. ■

Harriet Smith LLM, Caseworker at Amicus and the Law Offices of Patrick McCann, Texas Attorney at Law. Catriona Murdoch, Barrister, 1 Crown Office Row Chambers. Caseworker at Amicus.

Human Rights – Why So Wrong in the Public Perception?

Preface

(Cade) "I thank you good people; there shall be no money; all shall eat and drink on my score, and I will apparel them all in one livery, that they may agree like brothers, and worship me their lord. (Dick) The first thing we do, let's kill all the lawyers. (Cade) Nay, that I mean to do."

Contributor

Richard Gibbs

The most oft quoted line from Shakespeare by lawyers? Quite probably, but without wading into the details of Shakespearean prose and it's literal rather than theatrical meaning, it is pretty obvious that the Bard thought that lawyers were a pretty disagreeable bunch and if it were advocated that we be put to the sword, few would protest. Outside of our own ranks, the cold hard reality is that this is probably still the prevailing sentiment amongst many of the public but how much more vehement is the sentiment when attached to that fascinatingly amorphous phenomenon, European law and more pertinently the European Courts?

The ECtHR

If there's one thing more likely that European Courts to incite anger amongst many members of the public, it is probably the inferences they draw from the phrase "human rights" and whatever the rights and wrongs of such perceptions, perhaps we lawyers – as a breed – could do worse that recognize the general irritation that such concepts create amongst the wider, lesser informed public. So when we add the words "European", "human" and "rights" together with "court" it is hardly surprising that the essence of Shakespeare's words in Henry VI reach a new peak.

Much has been written from a political perspective regarding the rectitude, democracy and legitimacy of the European Courts generally and I do not propose to rehash those arguments here, but perhaps we would do well to take an objective approach to the operation of the European Court of Human Rights (ECtHR) with a view to ensuring that the decisions handed down from the court are viewed in a more holistic and objective light.

Perhaps I should declare something of an interest, or at least an influence. I am writing this article whilst sitting in France following a late night discussion with two French lawyers and a civil servant in a hotel bar; that unparalleled focus group of informed opinion. All three, in their various ways, expressed surprise bordering on bewilderment at the frenzy which the rulings of the ECtHR seem to engender in the UK. One of them simply wrote this off as part of

the wider perception held on the continent that the UK is drifting – slowly but inexorably – toward exit from the EU, but the others simply felt that those of us on the other side of *le manche* fail to understand the light in which ECtHR decisions should be viewed. The essence of their view is that the English legal system fails to see the court and it's rulings for what they are; the French widely view them as commentaries on the way in which the French legal system and political apparatus operates, to be adopted, acknowledged – or rejected – as the French system sees fit.

Putting to one side the fact that many continental legal systems are happy to adopt, almost unaltered, rulings of the ECtHR into domestic law without the attendant political controversy that those of us in the UK are used to, is there something in this? The UK has a long and proud history of intellectual independence regarding jurisprudence in general, but why is it we get somewhat edgy when it comes to matters European?

Prisoners' Votes

Let me make clear; I am agnostic about whether prisoners should have votes as a general issue – I am genuinely undecided and have heard excellent arguments on both sides, but sidestepping the central argument for one moment, the issue provides a brilliant paradigm through which to view an occasion that the UK properly thought through a ruling of the ECtHR and adopted the sort of view and approach toward it that the French feel should be the norm.

In February 2011, *The Times* reported that up to £143m would have to be paid by the UK government to serving prisoners for the fact that they had been denied the vote whilst incarcerated. This followed a ruling by the Strasbourg Court that the blanket ban by the UK on prisoners voting was in contravention of the 1951 European Convention on Human Rights (ECHR). The question at the time was whether the UK Parliament would resist this; about a fortnight before the matter appeared in *The Times*, the Commons had resisted this heavily.

At this point, if the matter had taken place in France, there would have been no argument; the French National Assembly would have given the collective equivalent of a Gallic shrug and carried on regardless, especially if it sensed French public opinion to be on its side. It would have noted the comments of the judges in Strasbourg and then got back to examining in detail the next way it could retard the growth of the French economy, politely ignoring the legal machinations of Strasbourg.

In Britain however, we descended at that point into paroxysms of self doubt, political science and general head scratching; on the one hand we didn't like the idea of MP's canvassing HMP's for votes but on the other, we didn"t want to be breaking the law. Had anyone at that point decided to go back to basics – at the point the Commons voted to reject the ECtHR ruling – they would have found that art.3 of Protocol 1 of the ECHR requires member states to "provide for free elections which will provide for the free expression of the opinion of the people." By voting the way it had, the Commons had just done that, surely? The response could simply have been – "thank you for your view, we have decided to continue as we are." It's what the French would have done and most other EU nations, but there was a collective timidity about our approach which tainted everything which stemmed from it.

But Look What Happened

In February 2011, the commentariat were awash wish the suggestion that somehow the roof was about to fall in if this approach were adopted. Yet last week when the lawyers for about 10 prisoners denied the vote through the continued policy of the UK took the matter back to Strasbourg, the ECtHR adopted a radically different approach; they decided no to demand compensation or ever to order costs. In essence, the issue is a dead duck as the judges have reasoned that against the implacable will of elected representatives of a member state, they can do nothing. There is surely a range of lessons to take from this.

Reform/opting Out of the Remit of the ECtHR

The ambit of what falls to be determined under European Human Rights legislation is absurd; it has recently sought to rule on night flights out of Heathrow airport for example. What on earth has that got to do with human rights? Regarding the prisoners votes issue, the court ruled that the UK had not considered the matter when in fact parliament debated it in 2000. So there are questions over both its scope and competence and this is a problem that Strasbourg needs urgently to address if it is to expect its decisions to hold water. As Lord Neuberger has said, it's decisions are at present inconsistent and that is not acceptable.

This raises the question of what the UK will do if the ECtHR fails to reform, but that is perhaps an argument for another day, save as to say that there must be a question mark over the utility of remaining in any structure that is so questionable in its ability. The Human Rights Act 2003 was designed to bring rights home to London from Strasbourg; it could always be amended to increase this ambit at Strasbourg's expense; something Paris and Berlin could very well support.

Follow the French?

In the meantime however, it is quite feasible for us to draw lessons from both the failure to order compensation of British prisoners in the ECtHR's climb down last week and my impromptu lesson in European law and politics in that La Rochelle bar; recognize that when push comes to shove, the court in Strasbourg in its current guise should always be acknowledged but not necessarily slavishly followed. The theory behind the institution is impeccable but the reality of its operation leaves so much to be desired that there is much to be said for adopting a more Gallic attitude. It has long been said that in Britain we gold plate European directives and court rulings; the French do not and seem to labour under far less difficulty, existentially and perception wise than we do. As I left the hotel bar last night, my French lawyer companion suggested that we should continue to cover ECtHR decisions in a thick and solid substance, as France often does, but even my GCSE French enabled me to determine that this was not gold he was advocating but something rather more organic. ■

Barrister
No 5 Chambers

Fusion

Preface
Reports on the Bar

Contributor
Dan Bunting

On May 7, 2014, Sir Bill Jeffrey published the first of the two reports into the Criminal Justice System requested by the MoJ (the second being the much wider one by Sir Brian Leveson which is a *Review of Efficiency in Criminal Proceedings*).

This was initially welcomed by the Bar Council (in terms that was seen as perhaps a slightly hubristic response), but over the summer the various representative bodies of both branches of the profession have been giving it more detailed consideration. These fuller responses should be out shortly.

Summary

The full review is not particularly lengthy, and is well worth a read in full. There were some nice things that were said about the high quality on display from many advocates. Also, concern was raised by Sir Bill that the current system was not operating properly and some firms are putting profit before the best interests of the clients.

This triggered the above stated reaction from the Bar Council. It may be that they had not read the small print, as the rest of the report was certainly not "pro-Bar". Although the "f word" (fusion) is not mentioned, it is certainly there in the background. Going forward as we are now, Sir Bill states, is not an option.

He is not prescriptive as to how the professions should change, but change they must in his view. The most likely outcome is by having a common legal training and qualification, before some people specialise as advocates, presumably after many years in practice. Although the Bar Council may see some hope that there is a role for them in such a changed landscape, it is unlikely that they will have any part to play in the long run.

The Leveson Review

This has been set up to review the current system and the Criminal Procedure Rules with a view to reducing the number of hearings, streamlining the process and "*maximum efficiency is required from every participant within the system*" (whatever that may mean).

The Review has been subdivided into three groups – Case Management, Listing and IT, and "The Trial". Practitioner bodies will be represented in the sub-groups. Although they will be taking views from anyone, it is not a user-friendly process, at the moment at least.

This is potentially a huge opportunity for all parts of the profession to have input into a Review which has the scope for wide-ranging ramifications. How radical Sir Brian will be, and whether the MoJ will listen, are both open questions. There is a concern that any suggestions that involve an expenditure of money will be quietly shunted to the side, even if it has the capacity to save money in the long run.

The Criminal Justice System is lagging behind many other sectors in its use of IT, and there is a huge scope for efficency savings there. This will require an injection of money to obtain though, and it will not be cheap. A cynic would doubt that this is something that the MoJ would want to announce in an election year.

What About Rivlin?

The third review is that chaired by Geoffrey Rivlin QC. It has been set up by the Bar Council and its terms of reference are :

> "Having regard to the interests of justice and the current state of public finances, to consider and formulate proposals for the future of the criminal justice system and the role of barristers in that system".

> … the current system was not operating properly and some firms are putting profit before the best interests of the clients.

It should be noted that this has not been approved by the MoJ, and they have not stated that it is something that they will take into account. For that reason there is a danger that it will be just the bar talking to itself. At the very least, however, it should have some useful material to feed into Leveson.

Funding Implications

Sir Bill was not asked to comment on, and didn't in any great detail, the fee structure that is the focus of so much of lawyers attention at the moment.

Although there is a hope in some quarters that Sir Brian will look further into this, it is unlikely that he will want to be drawn into that debate (as his recent ruling in the Operation Cotton judgment shows). So, whilst it is important for all lawyers to get involved, don't do so in the expectation of improving your bank balance.

Conclusion

The summer is often a quiet period and, whilst the travails of legal aid lawyers have been off the front pages after a turbulent six months, behind the scenes there has been much activity dealing with the above reports. They all have the capacity to impact hugely on our profession – don't let them go past without your input. ■

Barrister, 2 Dr Johnson's Buildings

List of Events Autumn 2014

Tuesday 14th October 17.15	Kalisher Lecture and Dinner Old Bailey Lord Thomas (LCJ)
Tuesday 4th November 17.15	Old Bailey Lecture Old Bailey Mr Justice Sweeney
Tuesday 2nd December (Bursary Awards) 17.15	Old Bailey Lecture Old Bailey Professor John Spencer QC
Saturday 6th December	Autumn Conference Vulnerable People In the CJS Inner Temple
Spring/Summer 2015 Events are in development	
Friday 15th May 2015 (proposed)	CBA Annual Dinner Middle Temple

It is that time of year again when the best new films get a preview at the prestigious London Film Festival.

The showpiece runs from the October 8 to October 19 and during that time the Festival will screen a total of 245 fiction and documentary features, including 16 World Premieres, nine International Premieres, 38 European Premieres and 19 Archive films including two Restoration World Premieres.

An intriguing example of the latter is the Imperial War Museum restoration, German Concentration Camps Factual Survey (1945/2014), following the original filmmakers' directions and drawing on 17 hours of footage documenting the horrors discovered following the liberation of concentration camps in 1944 and 1945. It provides a valuable wake up call in the face of the modern day atrocities being inflicted on people in conflict countries today.

The Festival opens with the European Premiere of *The Imitation Game* about one of the World's greatest innovators and the pioneer of modern-day computing, Alan Turing, who is credited with cracking the German Enigma code and for whom a recent campaign for recognition occupied much of the Social Media.

Another European Premiere is Michael Winterbottom's *The Face Of An Angel* about an American student charged with the murder of her British housemate and the World Premiere of Tom Harper's House of Commons set political thriller *War Book*.

Add to this heady mix offerings such as Eran Riklis' *Dancing With Arabs*, a timely piece about life on either side of the Palestinian-Israeli divide and Rebecca Johnson's *Honeytrap* based on the 2008 case of Samantha Joseph, dubbed the "honeytrap killer" I think that it is safe to say that this October, London is going to be the hottest ticket in town. ■

JCQC

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