

# TRUTH TO BE TOLD: UNDERSTANDING TRUTH IN THE AGE OF POST-TRUTH POLITICS

## *Abstract*

*The role of human rights in litigation and the pursuit of justice are emphasised in academic writing on court decisions. What is also central to any pursuit of a fair outcome to litigation is that the court determinedly pursue where the truth lies as between the various contending positions of the parties. This article emphasises the centrality of truth to all human processes, including litigation, which seek to achieve a just outcome to controversies. In that regard, some aspects of existing and past Irish law which may not measure up to the pursuit of truth as an absolute value are highlighted and analysed.*

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## Truth and the Law

Every novel has a pivotal point and so does every life. There may be many twists and turns, but usually there is one event generating a realisation or decision that dominates all that comes after. In Tolstoy's *Anna Karenina*, the heroine's dry and unsympathetically portrayed husband, having discovered his wife's affair, suggests that they maintain an outward show of social propriety, but coming home one evening discovers with horror that a military greatcoat hangs in the hall, announcing the presence of the man who has demeaned him to a cuckold, Alexei Vronsky. The next day he goes to visit a famous lawyer in Saint Petersburg. In the lawyer's internal world, his mind roves over protecting his expensively upholstered furniture from moths, and money dominates his thinking: interrupting the consultation for another matter, he snaps at his clerk: "Tell her we don't haggle over fees!" Perhaps the most unattractive character in the entire book, Tolstoy describes the lawyer's eyes as shining like his patent leather boots, his small white haired fingers intertwining and his look of laughter at Karenin's pain, which he must hide by averting his eyes from his client's face but which, nonetheless, issue a malignant gleam. It is not only the capture of such an important client that has fed his humour, but the humiliation of one of Russia's most important public servants who has had to come to him for counsel. But, to the law, which every lawyer and every judge uses as their point of reference: yes, the lawyer says, divorce is available for adultery, issuing the usual dull recitation of basic legal rules, but absent desertion or physical defect, the best route to divorce is adultery and this is most easily achieved not by discovery, as that is too closely scrutinised, but by mutual consent. Despite his faults, Karenin has not been physically unfaithful to his wife; he has just been so soulless and so inhuman as to be impossible to love. And, above all, he wants to keep their young son in his care, an action that breaks Anna's spirit and ultimately leads to the leap between the carriages of a train that rips her body to pieces. But 'mutual consent', the lawyer explains, means that each side, husband and wife, admit physical infidelity with another. That has not happened, but the lawyer is only concerned with the practicalities of getting from the law that which his client wants. Despite Karenin telling him, "[i]t is out of the question in the present case", the lawyer

maintains his advice. After church the next day, the unhappy man writes to the lawyer putting his affairs in his hands: '[w]ithout the slightest hesitation he gave him authority to act as he thought best'.<sup>1</sup>

And there it is: the entire life of a courtroom encapsulated in one scene. The litigants who want something, the law that stands in their way, and facts that can be manipulated, misstated and lied about in order to achieve what people see as fair for them, as right for their cause. And then there is what lawyers call the other side, the defendant or the plaintiff, the applicant or the respondent, who oppose each other and who may not in our age be subject to the religious scruples that make Karenin hesitate, but who battle to make facts fit into the definitions that circumscribe the law and allow courts to make rulings so binding that people may lose liberty or property and find deep unhappiness in substantial measure. Even without the outcome that ultimately defines Anna Karenina's tragedy, every resort to litigation is a deadly business undertaken for the most serious of reasons. Putting aside paranoid self-represented litigants who join in their cases every court official and government minister whom they imagine has wronged them, the litigant for amusement's sake portrayed by Arthur Conan Doyle in *The Hound of the Baskervilles* does not exist.<sup>2</sup> The stakes are too high. 'War is deception', so they say,<sup>3</sup> and no one resorts to law without some measure of the sense of siege that admits of no other recourse than the assault on real or imagined injustice that the law allows them.

But, it is wrong to imagine the law courts only as places of deception. Courts are tasked with searching out untruth and not affirming it and with righting wrongs and not affirming them. Many ringing pronouncements have been made that justice is at the heart of any legal system. While many would agree with Socrates' pronouncement that adherence to justice leads us to follow better and happier lives,<sup>4</sup> no judge would be wise to forget what the unhappy Job pointed out:<sup>5</sup> that the wicked prosper, that no one reproaches them for their sins and that thousands join in the funeral processions of evil men to their well-guarded tombs, where even the earth lies gently over their bodies.<sup>6</sup> While justice is the aim of every legal proceeding, truth is the object of every judicial exercise. The relationship between truth, justice and law is unavoidable. You cannot have one without the other. John Rawls views justice as 'the first virtue of social institutions', with the requirement that laws and institutions, 'no matter how efficient and well-arranged', be reformed or abolished if they are unjust.<sup>7</sup> Truth and justice are linked, with both described as the 'first virtues of human activities', and thus uncompromising.<sup>8</sup>

In Rawls' development of his core concept of justice as fairness, he considered that imperfect procedural justice was 'exemplified by a criminal trial', the trial itself being 'framed to search for and to establish the truth'.<sup>9</sup> In his view, perfect procedural justice was rare 'if not impossible' to achieve,<sup>10</sup> considering that it seems impossible because legal rules cannot be designed to 'always lead to the correct result.' In this way, there may

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<sup>1</sup> Lev Nikolayevich Tolstoy, *Anna Karenina* (Signet Classics 2002) part 4 chapters 1 to 8.

<sup>2</sup> Arthur Conan Doyle, *The Hound of the Baskervilles* (Penguin Classics 2012) chapter 8.

<sup>3</sup> Sun Tzu, *The Art of War* (Pax Librorum 2009) chapter 1.

<sup>4</sup> Plato, *The Republic* (Penguin Classics 2007).

<sup>5</sup> Job 21: 27-33.

<sup>6</sup> *ibid.* To state otherwise is to lie: deceit is no comfort, he proclaims.

<sup>7</sup> John Rawls, *A Theory of Justice* (Harvard University Press 1971) 3.

<sup>8</sup> Rawls (n 7) 4.

<sup>9</sup> Rawls (n 7) 74.

<sup>10</sup> Rawls (n 7) 74.

be miscarriages of justice that arise from a ‘fortuitous combination of circumstances which defeats the purpose of the legal rules’.<sup>11</sup>

Ronald Dworkin developed a theory of law as integrity. Under this theory, propositions of law are true if they figure in or follow on from principles of justice, fairness and procedural due process.<sup>12</sup> The example provided is that in deciding whether the law should grant an individual compensation for an injury, it means deciding ‘whether legal practice is seen in a better light if we assume the community has accepted the principle that people in her position are entitled to compensation’.<sup>13</sup> This theory asks judges to therefore assume:

so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person’s situation is fair and just according to the same standards.<sup>14</sup>

The principle that the law must serve to promote justice, what the Preamble to the Irish Constitution calls ‘true social order’ as a key objective, has to place finding the correct version of the facts as the key in the maintenance of a cohesive society.<sup>15</sup> Bluntly, a fair outcome cannot be reached in a case without finding out which of two competing stories is accurate and without a judge asking himself or herself whether both sides may be wrong or lying. If this is not done, then confidence in the court system may be undermined. Robert Summers argues that ‘without judicial findings of fact that generally accord with truth, citizens would, over time, lose confidence in adjudicative processes as fair and reliable tribunals of justice and as effective means of dispute resolution, both in civil and criminal cases’.<sup>16</sup> Truth is indispensable to doing justice. Courts have recognised this on a number of occasions. *Ó Griofáin v Éire* rejected the proposition that the courts should dispense with the search for the truth in favour of language rights.<sup>17</sup> In a 1966 case, the US Supreme Court stated that the ‘basic purpose of a trial is the determination of truth’.<sup>18</sup> Denning LJ, in an English case, outlined that the judge’s objective ‘above all, is to find out the truth, and to do justice according to law’, with justice best done ‘by a judge who holds the balance between the contending parties without himself taking part in their disputations’.<sup>19</sup> In order for the courts to be able to get to the truth of a matter, policemen and policewomen are trained in finding the truth and are obliged to seek out evidence which not only confirms their suspicions, but also that which might undermine the elements of the case which they wish to make.<sup>20</sup> Lawyers do not have this training, and it is an open question as to whether all have this instinct.

<sup>11</sup> Rawls (n 7) 75.

<sup>12</sup> Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986) 225.

<sup>13</sup> Dworkin (n 12) 225.

<sup>14</sup> Dworkin (n 12) 243.

<sup>15</sup> Constitution of Ireland, Preamble: ‘In the Name of the Most Holy Trinity... We the people... seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, Do hereby adopt, enact, and give to ourselves this Constitution’.

<sup>16</sup> Robert S Summers, ‘Formal Legal Truth and Substantive Truth in Judicial Fact-Finding – Their Justified Divergence in Some Particular Cases’ (1999) 18(5) *Law and Philosophy* 497, 498.

<sup>17</sup> [2009] IEHC 188. But see also *Beaulac v. The Queen and the Attorney General of Canada*, [1999] 1 S.C.R. 768 (Can.), where the Supreme Court of Canada decided otherwise.

<sup>18</sup> *Tehan v. United States ex rel Shott*, 382 U.S. 406, 416 (1966).

<sup>19</sup> *Jones v National Coal Board* [1957] 2 QB 55, 63.

<sup>20</sup> In *Braddish v DPP* [2001] 3 IR 127 (SC) 133, Hardiman J held that the Gardaí are under a duty, ‘arising from their unique investigative role, to seek out and preserve all evidence having a bearing or potential bearing on the issue of guilt or innocence’. See also *Ludlow v Director of Public Prosecutions* [2009] 1 IR 640, 649.

Even still, the function of lawyers as truth-seekers is often misunderstood. The English philosopher Henry Sidgwick compares litigation to war:

thought perfectly right under certain circumstances, though painful and revolting: so in the word-contests of the law-courts, the lawyer is commonly held to be justified in untruthfulness within strict rules and limits: for an advocate is thought to be over-scrupulous who refused to say what he knows to be false, if he is instructed to say it.<sup>21</sup>

Among lawyers, the deceitful, as in other walks of life, may be more successful. But they are not welcome. Lawyers are absolutely forbidden to lie to courts. The Irish Bar Council's Code of Conduct states that barristers must not 'deceive or knowingly mislead the court'.<sup>22</sup> Where a legal argument is being made, it is a fundamental duty to reference every statute and every decided case that is against the proposition put forward as well as those in favour. In the realm of fact, lawyers are no more than mouthpieces: and often for deceitful clients. But it is the clients who are deceitful and not the advocates. Facts are accepted as stated by clients to lawyers; and while these may be doubted to the point of being thought untenable, or even ridiculous, our theory of law says that it is only the judge in deciding the case who can find the facts. Court is the tip of an iceberg of work that has been done in advance by lawyers. Central to preparation is reading the relevant documents and talking through with the clients what facts are to be asserted on their behalf. This is the time for a lawyer to gently question how such facts may be consistent with, for instance, an email sent by that client asserting the contrary, or a letter from the other spouse saying that the children would stay in their house because the client used to tie up them up with the flex of the kettle, or the text of an agreement, or to ask why another witness is taking a different view? Respectfully challenging a client before taking a case is what lawyers are supposed to do. It used also to be a rule of thumb to advise a client not to take a case unless the odds were markedly stacked in favour of success: that means that the facts were likely to come out in favour of what was asserted and that a fair reading of the law provided a worthwhile remedy.

All of this is a policy of attrition, whereby the vast numbers of cases that might be fought by the disgruntled are whittled down to the few that are issued, the fewer that enter the court lists and the fewer still that are heard. It is the imposing walk up the porticoed stone steps of court buildings that brings most people to a desire to rethink where they are going. Is being a judge a sacred function, as the Court of Appeal recently asserted?<sup>23</sup> In London, wandering down The Strand and passing by Edwin Lutyens' building, people visiting and searching for the courts might think to themselves, 'that can't be it, that's a church'. With the gradual dissolution of religious belief in Victorian England, the law became a substitute for individual conscience, and the great architect caught that mood by making his design for the Royal Courts of Justice that of a temple. Court buildings are made imposing as a reflection of their function as temples of truth, even in America where the exteriors must be

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<sup>21</sup> Henry Sidgwick, *The Methods of Ethics* (London 1907) 292 in the chapter on The Classification of Duties – Veracity.

<sup>22</sup> The Bar of Ireland, 'Code of Conduct for the Bar of Ireland' (Bar Council of Ireland 2016) <<https://www.lawlibrary.ie/getattachment/Making-a-Complaint/Code-of-Conduct-for-the-Bar-of-Ireland-adopted-25-July-2016.pdf.aspx>> accessed 10 March 2019. Article 5.16 of the Bar Council Code of Conduct, adopted 25 July 2016: 'Barristers must not deceive or knowingly mislead the court. A Barrister must take appropriate steps to correct any misleading statement made by the Barrister to the court as soon as possible after the Barrister becomes aware that the statement was misleading'.

<sup>23</sup> *White v Attorney General and the Bar Council* [2017] 1 IR 249 (CA).

skyscrapers but the interiors have the cavernous open spaces of church buildings. Where else, after all, can people go in the search for truth?

In a country that consumes news almost as a staple necessity of living, we are fed story after story but we are aware of an inner sense of unease that what is coming out may be only part of the reality. More sensitive people may draw back when massed ranks of opinion-formers turn their columns of newsprint against an individual. Those same sensitive souls may wonder if targeting people irrationally really died out when juries in the 18<sup>th</sup> century made it a consistent practice of acquitting on all charges of witchcraft. Those with a sense of their own frailty and their own flawed lives may wonder at the black and white portrayal of people. We have stories and half-stories, denials and evasions, and the creation of public fronts as a protection against investigation. Sometimes the media fails us. Of these postures, the failure of the media to do any digging into the storm of rumours that surrounded the financial affairs of Charles Haughey illustrate not only that our gods may have feet of clay, but also that there are some things that only a court process can sort out. Those hidden facts, ones surely not incapable of being unearthed had the media done any thorough digging, of fiscal irresponsibility, of a princely lifestyle and of vulnerability to manipulation leading to political favours, were in consequence only uncovered after years of work by two High Court judges, Michael Moriarty and Brian McCracken. While the political system was in Michael Moriarty's words 'devaluing democracy', the system for public calling to account, that is the media, were content with half-truths as an excuse for shying away from their duty.<sup>24</sup> In a court, there are both sides of the story. In a court, only experts are allowed to express an opinion, while witnesses are confined to facts. People swear to tell the truth, without any hidden reservations, and that the truth will be full, not doctored into the part that represents the result they want. Only in a court is everybody interested entitled to speak and only there will a story from a newspaper about a wrong suffered by a flawless character be heard, and only, if there is the patience to stay and listen, can it be found to dissolve once the contrary facts are put in cross-examination by the opposing barrister. The judge is sitting there thinking, as the case is opened, 'how could there be an answer to this?', only to find out that answer a short time later.

There are various ways of going about a court process. The Irish system, over the last two decades, has increasingly suffered from the defect that it has become extremely expensive through the continual and unchecked escalation of legal fees, which undermine the constitutional duty to make access to the courts available to the people. But the fundamental process is fair: both sides are present, allowed the same right to call evidence and to compel witnesses and documents, allowed the same right to cross-examine and to make submissions, while it is ensured that the court has neither an axe to grind with any of the parties nor is in any way enmeshed in the outcome through financial or ideological commitment. There are various ways of doing a court case, but these fundamentals remain. In litigation, experts provide a scientific expertise that the court lacks, and it is only in areas outside the knowledge that ordinary life gives to us that they may be called. Ray Finkelstein, an Australian judge, writing about the possible tensions between the operation of the adversarial system and the search for truth, was of the view that it was in everyone's interests that the court and the parties jointly seek 'impartial expert evidence, rather than having the battle of experts which invariably results from partisan control of the process'.<sup>25</sup> In Australia, a system has been introduced that has enabled the experts giving

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<sup>24</sup> See the Reports of the Tribunal of Inquiry into Payments to Politicians and Related Matters (2006-2011) and the Report of the Tribunal of Inquiry (Dunnes Payments) (1997).

<sup>25</sup> Ray Finkelstein, 'The Adversarial System and the Search for Truth' (2011) 37(1) *Monash University Law Review* 135, 141.

contrary opinions on each side to question each other, without the aid of advocates. That system was the subject of a reform to the same effect in Ireland by amendment to the Rules of the Superior Courts, though it has yet to be exercised.<sup>26</sup>

The control of lawyers' fees is a matter that has been subject to much statutory regulation without any success, making a rethink at the level of principle necessary. One reform in control of costs introduced by the courts' rules committee has been the adaptation of a rule that only one expert may be called on each side. In the pyrite litigation that tied up one judge for 125 days and another for 60, that rule did not apply, and in the case that proceeded to judgment, four witnesses were called as to the state of a building on one side and two on the other, while each side offered four experts on the growth of pyrite in stone; making fourteen altogether.

Another reform is begging to be made but requires statutory intervention. Discovery, the compulsory exchange of written records in search of the golden nugget that will destroy your opponent's case or bolster your own, is out of control. As the courts in the neighbouring kingdom realised the foolishness of requiring people to find every document that might lead to another document that might damage a client's case or uphold that of the opponent, the reform introduced under the Civil Procedure Rules was to remove such a requirement and to require only 'a reasonable search'.<sup>27</sup> A similar rule should be introduced in Ireland. The courts cannot search for the truth if people cannot access the system. To make justice prohibitively expensive or cumbersome is to deny justice.

But what of the judge? Judges are not, as ordinary persons trying to do a difficult job, sacred personages and nor are they gifted with clairvoyance. As Dworkin wrote, in the task of judging and ensuring that justice is achieved, with proceedings conducted in a fair manner and in accordance with procedural due process, judges are just like other people in their community, meaning that 'fairness and justice will therefore not often compete for them'.<sup>28</sup> In *Macbeth*, when it is reported to King Duncan that the traitor Thane of Cawdor has been executed and had 'set forth a deep repentance', he intones: 'There's no art To find the mind's construction in the face. He was a gentleman on whom I built An absolute trust'.<sup>29</sup> Always, in any judicial system, there is the danger of error, for this is a human system, and in this we were warned as to our limitations by the prophet Samuel: 'For God seeth not as man seeth: for man looketh upon the outward appearance, but the Lord beholdeth the heart'.<sup>30</sup> While there are books on truth, the analysis of appearance, and online lectures, at the end of the day, a judge is left alone in decision-making. Deciding someone is a liar is a crushing responsibility. It is all very well to put forward a video of Lance Armstrong denying drug use, accepted at the time, and to offer an expert view that although vehement, there was some aspect whereby he could be seen to be a liar because of some such things as 'a certain rigidity of speech'; or in relation to Saddam Hussein, 'a formal presentation in the context of over-still features'.<sup>31</sup> Experts are valuable in providing such analysis but judges are the ones who have to make the decisions. Research into electronic truth analysis is necessary and judges are assisted by these academic studies. There are limits: bringing to mind the example of John Vann, a serial adulterer, who was able to fool the US Army experts who had him wired to every

<sup>26</sup> Rules of the Superior Courts (Conduct of Trials) 2016, SI 2016/254.

<sup>27</sup> CPR 31. Rule 31.7, duty to make a 'reasonable search' for documents. See also the report of Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (HMSO 1996).

<sup>28</sup> Dworkin (n 12) 256.

<sup>29</sup> William Shakespeare, *Macbeth* (Oxford University Press 1998) act 1, scene 4.

<sup>30</sup> Samuel 16:7.

<sup>31</sup> Aldert Vrij, *Detecting Lies and Deceit: The Psychology of Lying and the Implications for Professional Practice* (Chester 2000).

device then known to man that he did not consort with an under-age girl.<sup>32</sup> Jerome Frank's view is that facts found in a case are '[a]t best ... only what the trial court ... thinks happened... [which] may, however, be hopelessly incorrect. But that does not matter – legally speaking. For court purposes, what the court thinks about the facts is all that matters'.<sup>33</sup> Frank considers that assuming that the truth will 'out' in a case 'ignores the several elements of subjectivity and chance'.<sup>34</sup> In consequence, he describes a trial court's findings of fact as 'merely a guess about the actual facts ... [with] no assurance that [this] will coincide with' the actual facts.<sup>35</sup> This observation is deeply pessimistic. In reality the truth can be found out. Without truth, the judicial function is futile. In comparison with experts, who help towards knowing, maybe it is better that judges realise that they don't know? This alarming thought is not to say that judges guess. That is not the case, as the process of trial reveals facts and facts really help.

How? First of all, facts are rarely isolated; such as in the case of a dispute about what was done or said in a room some few years previously. People come out of rooms and behave consistently or inconsistently with what they claim was said or done in there. There are what are called the facts on the ground, the obvious examples are the fingerprint on the murder weapon confirming that the accomplice is supported in saying that a particular accused committed the crime, the note made in a diary of a phone conversation that was supposed to have happened a week later, the marks of what the defence can allege to be 'rough sex' on the rape victim. Cases throw these things up, and sometimes in startling measure. DNA evidence is now commonplace. It developed in 1984 after a failed experiment with photographic plates by Professor Alec Jeffreys into inherited illness showed a sequence of bars.<sup>36</sup> After several challenges to admissibility in the United States of America had sorted out the basic safeguards, the equipment was made available in Ireland. While it is now central to tissue exchange and blood sample cases, its use came slowly. In a trial in 1994, a young man living in sheltered accommodation was accused of the rape of an elderly woman in a park, solely on the basis that he always took a walk there in the early hours, the time coincidentally when the crime was committed. Being high on the Gudjonsson suggestibility scale<sup>37</sup> he confessed under questioning. The defence asked for a DNA test to be run on the samples, just in case. It turned out that the sample indicated that the DNA came from a completely different person.

There can also be attitudes that influence outcome, in effect ideology, for the police, against the police, for those who suffer accidents, for insurance companies. Judges look for facts. Judges look for minor examples of the DNA support example; and they do occur. While truth is not a monopoly of numbers, judges look to see how a witness's assertion is otherwise supported, not by having told others the same story, but by facts that lead to affirmation, not as to inessentials but as to that which make facts in issue more probable. Some may say that old allegations of child sexual abuse are not provable. But most are not taken to court and, in line with the Scottish courts that do not convict unless there is corroboration, the nasty but doubt-dispelling aspect of these cases is that there is rarely one victim. Several is the rule. In this country, from the aspect of truth and justice, for years, the defence ran the strategy of asking for separate trials for each

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<sup>32</sup> Neil Sheehan, *A Bright Shining Lie: John Paul Vann and America in Vietnam* (Random House 1998).

<sup>33</sup> Jerome Frank, *Courts on Trial* (Princeton University Press 1949) 15.

<sup>34</sup> Frank (n 33) 20.

<sup>35</sup> Frank (n 33) 16.

<sup>36</sup> Robin McKie, 'Eureka moment that led to the discovery of DNA fingerprinting' (The Guardian, 24 May 2009) <[www.theguardian.com/science/2009/may/24/dna-fingerprinting-alec-jeffreys](http://www.theguardian.com/science/2009/may/24/dna-fingerprinting-alec-jeffreys)> accessed 10 March 2019.

<sup>37</sup> Gisli Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (Wiley-Blackwell 1992).

victim's allegation. Fortunately, common sense now generally prevails. Juries will take the view that each such allegation can support the others.<sup>38</sup> This makes sense, and the idea of the law and sense should never be disconnected.

On analysing evidence, it is often the seemingly small details that matter. Memory is a matter of reliving an experience. So does a person giving evidence seem to be reliving something; are there minor details that come out that show the person as part of the events and as behaving in a way that a person who has just experienced what the witness claims to have experienced would act? Evidence which seems to have come out by itself is for that reason much more reliable, and more reliance will be placed on it, than that testimony which is coached or the expert report that has been subject to lawyering.<sup>39</sup> These are age-old questions.

Central to any attempt to know when people lie is the justification for lying. Just as people say, rightly, that a person attacked is entitled to strike back in self-defence, there is a similar justification in our minds that deceit can be used as a shield against a blackguard. From the writer of the psalms to Saint Paul, lies have been held detestable: 'Thou hatest all the workers of iniquity: thou wilt destroy them that speak a lie'.<sup>40</sup> For Saint Augustine's absolute stance, following Saint John, 'no lie is of the truth', that no deceit comes from God. Francis Bacon saw any lie as an affront to God's creation, a denial of our human ability to see the world as it is.<sup>41</sup> Immanuel Kant regarded honesty as an inescapable obligation:

... truthfulness is a duty which must be regarded as the ground of all duties based on contract, and the laws of these duties based on contract, and the laws of these duties would be rendered uncertain and useless if even the least exception to them were admitted. To be truthful (honest) in all declarations, therefore, is a sacred and absolutely commanding decree of reason, limited by no expediency.<sup>42</sup>

Saint Thomas Aquinas, however, added a gloss to Augustine, that not every lie was inexcusable. There was the question of whether there was a duty to speak truthfully to the person seeking information: hence, a murderer intending to kill a person in their own house, who asks a bystander if the victim is at home, can be lied to: for 'no one has a right to a truth which injures others'.<sup>43</sup> Grotius quotes the sages of the Greek era to the effect that 'that which is good is better than the truth' and that 'sometimes the common good requires that even falsehoods should be upheld'.<sup>44</sup>

It is in resort to the common good that democratic societies set up court systems, and with that comes responsibility: no judicial exercise makes any sense unless its object is to uncover the truth. A court should be the one public space where all in society, no matter what their motivation, despite any wrong they may have suffered and no matter what grudge they hold, are under an absolute duty of veracity. In a court, this duty binds the judge as much as the witness, as much as the advocate, for, as Kant states:

<sup>38</sup> *Moorov (Samuel) v HM Advocate* 1930 JC 68.

<sup>39</sup> See Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial* (London 1963) chapter 5.

<sup>40</sup> Augustine, *Treatises on Various Subjects* (New York 1952), volume 14, chapter 14, Psalm 101.

<sup>41</sup> Francis Bacon, *The Essays* (Penguin Classics 1985).

<sup>42</sup> Immanuel Kant, *Critique of Practical Reason and Other Writings in Moral Philosophy* (Chicago 1949) 347.

<sup>43</sup> Benjamin Constant, quoted in Kant (n 42).

<sup>44</sup> Hugo Grotius, *On the Law of War and Peace* (New York 1925) book 3, chapter 1.

“A principle recognised as true ... must never be abandoned, however obviously danger seems to be involved in it.” But one must only understand the danger not as a danger of accidentally doing a harm but only as a danger of doing a wrong. This would happen if I made the duty of being truthful, which is unconditional and the supreme juridical condition in testimony, into a conditional duty subordinate to other considerations.<sup>45</sup>

In seeking the truth, however, every court swims against the tide. According to one study, participants kept a diary of ordinary social interactions over seven days. In about a quarter of the interactions, they admitted lying to about one in three of the people with whom they exchanged what passed for ‘information’. How did they feel about it? Well, that is revealing because discomfort in conscience resonated only when lying to those to whom they felt emotionally close; in other words those they respected and trusted. Less than one in five of those lies were detected. Multiple reasons are advanced by Professor Aldert Vrij as to why people lie: to create a positive social impression, to avoid detection in discreditable conduct, to help a friend, to convince a prospective employer that one has the relevant skills or simply to cause mischief.<sup>46</sup> In so far as people were troubled in conscience in deceiving their loved ones, the flip side of the coin was the lack of trouble in lying on behalf of those close to us. And in reality, and in everyday life, people do that: husbands lie for wives, brothers for brothers, team members for team members. Constituting something as a group having a common interest means that very few will ever break ranks. That applies to criminals, certainly, we call it omerta now, but it is not just omerta, and judges also need to see this as potentially applying to those tasked with doing good, as in the priesthood, or as in enforcing the law, or as in prison officers or policemen and women. It is almost impossible for people to conceive of circumstances where they would never lie, especially to protect themselves, and by extension, their group.<sup>47</sup>

If there is a key to unlocking the path to truth in litigation, it is related to the phenomenon demonstrated by Professor Vrij. The courts must be respected, the judge must be a person worthy of deference, no issue should arise as to why that judge is sitting on that case or why that judge obtained judicial office and, above all else, the law must make sense. The rule of law requires due process with natural justice and fairness at the core of the conduct of proceedings, and an independent and impartial judge.<sup>48</sup> Interaction between the people and the system of justice must be on the basis that the system is to be honoured for upholding what is right and recognised as making rulings only on the foundation of truth and sanity. In the adoption of rules of evidence and procedure, structures are set out for ensuring fair notice of allegations and defences. However, the rules of evidence have to respond in favour of admitting all species of testimony that can reasonably throw light on where the truth lies.

When setting up the Nuremberg Tribunal to try the Nazi war criminals, with judges from civil law, Soviet law and common law countries, no agreement as to the superiority of any system could be reached. Instead, the rule was that the tribunal should ‘admit any evidence which it deems to have probative value’, leaving the weight to be attached to such evidence as a matter for the tribunal.<sup>49</sup> In Ireland, we are hide-bound by common

<sup>45</sup> Kant (n 42) 350 quoting Benjamin Constant.

<sup>46</sup> The relevant studies are cited in Aldert Vrij, *Detecting Lies and Deceit: The Psychology of Lying and the Implications for Professional Practice* (Chester 2000) chapter 1.

<sup>47</sup> Francis Bacon, *Essays Civil and Moral, Of Truth* (London 1910).

<sup>48</sup> Rawls (n 7) 210.

<sup>49</sup> Williams (n 39) 208-9.

law evidence rules. But for each of them, a justification in some sense is possible. We do not admit statements reported to a witness as truth, rather the person who witnessed the event is required to testify; the hearsay rule. We do not allow that repeating a statement to several people and then calling those people to say it was said could in any way bolster testimony; the rule against self-corroboration. We allow for exceptions to the hearsay rule, as in that the declaration of one who is dying has sufficient solemnity, that spontaneous statements of the victim in the course of a crime are unlikely to be untrue, that public records which can be checked and corrected are unlikely to be inaccurate and that people do not generally condemn themselves of discreditable conduct unless that declaration against interest is true, which is the confession exception. What can be a course of worry is where the courts descend into a place or state of self-absorption in legal rules, in other words, where the courts inhabit law-world, as opposed to the real world. This is where perhaps the truth is not forgotten, but neglected.<sup>50</sup> There are instances of this. In the famous English case of *Myers v Director of Public Prosecutions*,<sup>51</sup> the House of Lords ruled in a car theft prosecution that chassis numbers stamped on cars could not be proved through factory records. That was followed in this country in *The People (DPP) v Prunty*,<sup>52</sup> where a kidnapping conviction was overturned because the numbers of the phone boxes from which ransom demands were made had been proved by records internal to the Department of Posts and Telegraphs. While the English case had ruled out any expansion on the exceptions to hearsay, recently the Irish Supreme Court in *Ulster Bank v O'Brien* held that inherent reliability enables that list to be added to.<sup>53</sup>

Changes in the law of evidence reflect where society is moving and perhaps it is right for courts to reflect the wider community. Another way in which a court will not hear the full truth is by people who are privileged asserting that they do not have to produce relevant documents or give evidence on privileged matters. Friedland rightly states that the criminal justice system 'places some barriers and obstacles in the search for truth', and questions the extent to which such barriers are justified.<sup>54</sup> What is being said in acknowledging a privilege is that 'the public interest [in] the proper conduct of the administration of justice ... outweighs the disadvantage arising from the restriction of the disclosure of all relevant facts'.<sup>55</sup> The great American jurist John Henry Wigmore posits four conditions that need to be satisfied before a particular relationship of confidence can override the general principle that the law is entitled to the evidence of all. These conditions are:

1. the communication must originate in a confidence that they will not be disclosed;
2. this element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
3. the relationship must be one which in the opinion of the community ought to be sedulously fostered; and

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<sup>50</sup> Ray Finkelstein, 'The Adversarial System and the Search for Truth' (2011) 37(1) *Monash University Law Review* 135, 136-137.

<sup>51</sup> [1965] AC 1001.

<sup>52</sup> [1986] ILRM 716 (CCA).

<sup>53</sup> [2015] 2 IR 656 (SC). In criminal cases, business records are admissible under the Criminal Evidence Act 1992. Bizarrely, this was never extended to actual business cases! The probable reason for that is that in practice judges will not allow senseless objections on a hearsay ground to interfere with civil cases.

<sup>54</sup> Martin L Friedland, 'Searching for the Truth in the Criminal Justice System' (2014) 60(4) *Criminal Law Quarterly* 487.

<sup>55</sup> *Smurfit Paribas Bank Ltd v AAB Export Finance Ltd* [1990] 1 IR 469 (SC).

4. the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation.<sup>56</sup>

Several privileges have fallen, while some have come and some have been put under doubt. Since 1972, it is no longer possible for a public servant or a Minister to refuse access to documents on the basis of any State interest other than national security,<sup>57</sup> and cabinet confidentiality was removed by referendum after the Beef Tribunal.<sup>58</sup> In the light of duties to report child abuse, and given that the foundation of respect for the value of religion is collapsing, excusing priests from reporting what was said to them in confession may no longer withstand legislation.<sup>59</sup> Certainly, diplomats have no longer any privilege and their communications must be put before a court if the interests of justice require it, as must communications within the Director of Public Prosecutions office about criminal cases.<sup>60</sup> Journalistic privilege is a new development, the idea being that investigations in the public interest must be supported by not requiring journalists to reveal their sources, but not in all cases, as where, it seems, the source has somehow lost the privilege or where the public interest, for instance a terrorist threat, is superior.<sup>61</sup> While that entitlement not to answer questions was recognised first because of Article 10 of the European Convention on Human Rights, the reasoning of ‘the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has for the exercise of that freedom’ would have enabled that development under our Constitution in any event.<sup>62</sup> As with the right of an informer who goes to the police in confidence, the right not to be revealed would seem to be that of the source.<sup>63</sup> The right of journalists not to answer questions is not an absolute privilege, it is fact dependant, but lawyer privilege is not: a person can go to their lawyer and confess to multiple murders and the destruction of the national economy through fraud and corporate chicanery and it will never come out. Why? Again, this is all about society deciding that there are some conversations, even ones highly relevant to court cases, which should never be revealed in court. Most criminal cases end in a plea of guilty to something and that is so because the accused can go to a lawyer and reveal everything. It works. Lawyers perform a public service in teasing out with the client where the facts lie and what the result and likely sentence is predicted to be.

But, in all of this, in civil and criminal cases, some of the relevant evidence is hidden from the judge. Some may wonder about a system of justice, supposedly dedicated to finding truth, where the court only gets part of the truth. A particular issue debated in this country over the last forty years was that of excluding highly relevant and clearly reliable evidence on what some might think to be the basis of punishing the police for misconduct in the course of their inquiries. This entire issue can be covered in a choice legal sauce that confuses many and illumines few. The underlying rationale for excluding evidence is this: here is something which the police have found by breaking the law, and

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<sup>56</sup> John Henry Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little, Brown, and Company 1905).

<sup>57</sup> *Murphy v Dublin Corporation* [1972] IR 215 (SC).

<sup>58</sup> Article 28.4.3° of the Constitution.

<sup>59</sup> The relevant decisions are set out in *ER v JR* [1981] ILRM 125 (HC) and *Johnston v Church of Scientology* [2001] 1 IR 682 (SC).

<sup>60</sup> *Breathnach v Ireland (No 3)* [1993] 2 IR 458 (HC).

<sup>61</sup> *Goodwin v United Kingdom* App no 28957/95 (ECHR, 11 July 2002). See also *Mabon v Keena* [2010] 1 IR 336 (SC), *Walsh v Newsgroup Newspapers* [2012] 3 IR 136 (HC).

<sup>62</sup> *Goodwin v United Kingdom* App no 28957/95 (ECHR, 11 July 2002) at paragraph 65.

<sup>63</sup> *Ward v Special Criminal Court* [1999] 1 IR 60 (SC).

so the law must be upheld, the evidence goes out and the jury must never hear of it. Thus in criminal cases, evidence rules can operate to ‘frustrate findings of substantive truth’ as they are the basis upon which probative evidence can be excluded.<sup>64</sup> This would never be allowed to happen in civil cases, so why in criminal ones where society is directly attacked?<sup>65</sup> When it is a question of the accused condemning himself out of his own mouth, confessions are excluded where they result from oppression or false promises or from tricks such as lies by the police that the accused’s fingerprints were found at the scene.<sup>66</sup> That makes sense. People understand that, perhaps with difficulty when the accused’s statement is full of details that can only have come from a person with first-hand knowledge of the crime.<sup>67</sup> But excluding evidence of firearms or explosives residues that shows a connection to terrorism, or DNA from a blood sample that proves a rape, many sensible people would find that difficult to stomach if the only reason behind it is that the police made a simple mistake in the paperwork or on the search warrant. These situations represented the exclusionary rule in this country until three years ago. That rule was an importation from the United States of America, where the exclusion of evidence obtained through unlawful searches and seizures has a basis in the Fourth Amendment,<sup>68</sup> and resulted in any consequent evidence being characterised as ‘the fruit of the poisonous tree’, and thus excluded. In *The People (AG) v O’Brien*, a case about a wrong address on a search warrant, our Supreme Court unwittingly imported this rule in 1964 on the basis that while mistake should not exclude the evidence in that case, where proof of involvement in a horrible robbery in Kenilworth Square was found in a suspect’s house, if there were deliberate breaches of constitutional rights, these should automatically prevent all evidence resulting from ever being heard by a jury.<sup>69</sup> What was not then foreseen was partly historical and partly a consequence of not realising that sweeping generalisations in judgments at the highest level can spring unexpected results. For twenty years, mere mistake in police work never excluded evidence. Essentially, where there was error, this had to be balanced against the seriousness of the crime and the importance of the evidence. Almost always the evidence was admitted.

With the self-styled IRA campaign in the early 1970s reaching new levels of inhumanity, many historians believe that the police on both sides of the border responded with methods of interrogation which did not meet reliable standards and then perhaps justified themselves like a massed choir in court while the accused, guilty or not, was left isolated.<sup>70</sup> The accusation that the Gardaí had a ‘heavy gang’ was strongly aired after the investigation into the Sallins mail train robbery in March 1976. Do courts react to the history going on around them? This is uncertain. The law, to take an instance, on the enforcement of contracts did not become in any way more challenging due to the Commercial Court having to deal with hundreds of cases of banking irresponsibility. Perhaps it is coincidence with earlier history that in November 1976, the Supreme Court

<sup>64</sup> Robert S Summers, ‘Formal Legal Truth and Substantive Truth in Judicial Fact-Finding – Their Justified Divergence in Some Particular Cases’ (1999) 18(5) *Law and Philosophy* 497.

<sup>65</sup> *Kennedy v Law Society of Ireland (No 3)* [2002] 2 IR 458 (SC).

<sup>66</sup> *The People (DPP) v Barry Doyle* [2018] 1 IR 1 (SC) summarises the relevant law.

<sup>67</sup> But that too is taken into consideration as to admission: *The People (DPP) v Quilligan and O’Reilly (No 3)* [1993] 2 IR 305 (SC) 333, 344.

<sup>68</sup> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<sup>69</sup> *The People (AG) v O’Brien* [1965] IR 142 (SC).

<sup>70</sup> Jonathan Bardon, *A History of Ulster* (Colourpoint Creative Ltd 1992); Martin Dillon, *Political Murder in Northern Ireland* (Penguin 1973); Martin Dillon, *The Shankill Butchers: A Case Study of Mass Murder* (Arrow Books Ltd 1989); Martin Dillon, *The Dirty War* (Arrow Books Ltd 1990); Martin Dillon, *Killer in Clonntown* (Arrow Books Ltd 1992); Martin Dillon, *Stone Cold: The True Story of Michael Stone* (Arrow Books Ltd 1992); Liam McNiff, *A History of the Garda Síochána* (Merlin Publishing 1997).

decided in *The People (DPP) v Madden* that failing to release someone from custody in the middle of confessing to a crime should result in all of the confession statement being excluded.<sup>71</sup> The trend continued up to its high point in 1990 with *The People (DPP) v Kenny*, where any error, inadvertent or not, would mean that any evidence from a search, an arrest or a sampling would never get to the jury trying the accused.<sup>72</sup> Shortly after, the horrible campaign by the IRA more or less ended.

But, for a further 25 years, that rule prevailed. What happened in court was never even the tip of the iceberg. So many cases fell to the rule at investigation stage or were abandoned in the Director of Public Prosecutions Office. The original Supreme Court ruling in 1964 had never foreseen that deliberate breach of law, as they saw it, would become accidental breach equals exclusion of the apparent truth. Nor did they know that constitutional rights would expand into such things as the amorphous right to privacy in business and family life, especially where your business was drug dealing, so that a woman staying in a hotel room, subject to the usual intrusions of cleaning and room service, could successfully assert that evidence of cocaine packages in the hotel bathroom should be hidden from the jury.<sup>73</sup>

Pressure built up to change this law, but it is one of the instances where it might be fair to wonder why the matter was left to the courts to change when Government could have proposed a constitutional amendment similar to the Canadian Charter of Rights and Freedoms, which states that evidence should never be excluded save where to admit such evidence would be an affront to the administration of justice.<sup>74</sup> Many criticised the decision of the Director of Public Prosecutions to bring a prosecution against a judge in 2004 when pornographic images of children were allegedly found on his personal computer at home.<sup>75</sup> The problem was that since the warrant to search had been executed an hour or so outside the seven day limit set down by law. Some claimed that bringing the case was a hopeless misuse of court time. That is perhaps not an opinion that could reasonably be held, especially since it highlighted the arbitrary nature of a rule that prevented the court analysing evidence in pursuit of the truth. After many attempts to bring a suitable case to the Supreme Court, eventually the issue was confronted in 2014 in *The People (DPP) v JC*, leading to a ruling a year later that abolished automatic exclusion for mistake in police investigations. Now a court may only exclude evidence on a basis that is pretty similar to the Canadian rule.<sup>76</sup>

Many people would wonder about a court system that is ostensibly engaged in disciplining police at the expense of those who had come to court as victims of crime to seek some vindication for events, which in the worst cases can come as no more than a minor consolation for people whose family members have been murdered or who are living with the consequences of sexual violence. Police discipline is separable from a court process that seeks the truth. If you try to make a court do both functions at the same time, then disrespect sets in and police motivation for lying will increase. This will

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<sup>71</sup> *The People (DPP) v Madden* [1977] IR 336 (SC).

<sup>72</sup> *The People (DPP) v Kenny* [1990] 2 IR 110 (SC).

<sup>73</sup> *The People (DPP) v Elizabeth Yamanoah* [1994] 1 IR 565 (CCA).

<sup>74</sup> *Canadian Charter of Rights and Freedoms*, Article 24(2) of the Charter provides: 'Where, in proceedings ... a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute'. See *Canadian Charter of Rights and Freedoms*, s 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11.

<sup>75</sup> 'Outcome of case inevitable, says judge', *The Irish Times* (Dublin, 24 April 2004) <[www.irishtimes.com/news/outcome-of-case-inevitable-says-judge-1.1309411](http://www.irishtimes.com/news/outcome-of-case-inevitable-says-judge-1.1309411)> accessed 10 March 2019.

<sup>76</sup> *The People (DPP) v JC* [2017] 1 IR 417 (SC).

make courts an object of derision and the very kind of institution that people would feel justified in lying to; and for the very best of motives, ironically, in order to achieve justice for the wronged!

We speak in the oath given to witnesses of a court seeking the whole truth. We are not immune from criticism. Self-criticism is best. In the Irish courts at present, there is a disturbing contrast with what happens in any ordinary civil case, breach of contract, compensation for accident, and in criminal cases. In every civil case, a judge will hear both sides. There will be no ruling when the plaintiff has finished the case seeking damages that the defendant has no case to answer.<sup>77</sup> The judge will only decide the case when both sides have been heard; plaintiff and defendant. The judge will expect to hear both sides before making a decision. Nor will the judge admit a document from one side or permit a witness's evidence to be undermined on the basis of what the other side says only in a document but is not prepared to get into the witness box to be cross-examined. Any such notional process, any reasonable person might think, would defy fairness? But in criminal cases, this is the kind of logic that prevails.

In criminal cases, however, a jury often hears only part of what is supposed to be the truth. The accused has a right to silence and this right prevails right the way from any question asked by investigating detectives through to the trial process. Unlike in a civil case, where it is expected that the defendant will back up assertions by evidence, the accused man is entitled never to speak.<sup>78</sup> This derives from the theory that a prosecution is an intrusion by the State into the private life of a citizen and therefore it is up to the prosecution to prove everything and the accused must have a right never to speak.<sup>79</sup>

That is not argued against here. The problem, rather, is that under Irish law, a criminal trial may be unbalanced against a fair hearing of both sides by the accused making a statement of innocence, usually to the police on arrest. It is an acute problem in sexual violence cases. Up to 1984, it was the right of the accused to address the jury at the end of the case without having to take an oath or affirmation and present his testimony for cross-examination by the prosecution. This was called the unsworn statement from the dock. That was considered unfair. The Criminal Justice Act of that year abolished it.<sup>80</sup> This had also been abolished in England and Wales by the Criminal Justice Act 1982.<sup>81</sup> Effectively, it has come back but without the jury even having, as in the unsworn statement, the chance to hear the accused's voice from the dock. The ordinary rule against admitting a mere written statement is that only a statement made by an accused person against his interest, an admission of guilt in other words, is allowed into evidence. This original rule is described by Diane Birch in the following manner:

[t]he rule that a hearsay statement from the accused could be admitted in evidence was, prior to these decisions, carefully circumscribed, by the idea that to be admissible it had to be a confession. As Eyre C.B. said in *R. v. Hardy*, (1794) 24 State Trials 199, 1093 said: —Every man, if he were in a difficulty, or in the view to a difficulty, would make declarations for himself. These declarations if

<sup>77</sup> *Hanafin v Minister for the Environment* [1996] 2 IR 321 (SC).

<sup>78</sup> *R v Leckey* [1944] KB 80, 86 where the Court of Criminal Appeal said that '[a]n innocent person might well, either from excessive caution or for some other reason, decline to say anything when charged and cautioned, and, if that could be held out to a jury as ground on which they might find him guilty, he might obviously be in great peril'.

<sup>79</sup> *O'Leary v AG* [1995] 1 IR 254 (SC).

<sup>80</sup> Criminal Justice Act 1984 s 23.

<sup>81</sup> Criminal Justice Act 1982 s 72.

offered as evidence would be offered upon no ground which entitled them to credit.<sup>82</sup>

In an English case in 1988, *R v Sharp*, the House of Lords held that if the accused had made a statement of part admission and part denial, that had to be read as part of the prosecution case.<sup>83</sup> Birch describes such statements, known as mixed statements, as '(evidentially) sauce for the goose [and] sauce for the gander too'.<sup>84</sup> The *Sharp* case had affirmed the decision in *R v Duncan*,<sup>85</sup> where the court had said:

Where a mixed statement ... is under consideration by the jury in a case where the defendant has not given evidence, it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies. It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence.<sup>86</sup>

In *R v Aziz*,<sup>87</sup> an attempt to persuade the House of Lords to reconsider its decision in *Sharp* was unsuccessful. What does mixed mean? In a murder case: 'I killed the deceased but he provoked me'. In a rape case: 'Yes, we had sexual relations but she consented'.

In Ireland, in 1994, it was decided by the Court of Criminal Appeal in *The People (DPP) v John Clarke* that where an accused person admits to sexual activity with the alleged victim, since that proves part of the prosecution case, that a narrative to police investigating a charge of rape in which he says that everything was done consensually, has to be read by the prosecution as part of its case.<sup>88</sup> While the trial judge had drawn the jury's attention to the fact that a 'statement made to the guards is not in the same category as evidence in the case ... as a statement made on oath subject to cross-examination', the Court of Criminal Appeal found:

The true position in law, as established by [*The People (Attorney General) v Crosby* (1961) 1 Frew 231], and which we take this opportunity of reiterating, is that once a statement is put in evidence, as in this case by the prosecution, it then and thereby becomes evidence in the real sense of the word, not only against the person who made it but for him as to facts contained in it favourable to his defence, or case. A jury is not bound to accept such favourable facts as true, even if unrefuted by contrary evidence, but they should be told to receive, weigh and consider them as evidence. It appears that the learned trial judge's approach was to draw a distinction between the incriminating parts and the exculpatory parts of

<sup>82</sup> Diane Birch, 'The Sharp End of the Wedge: Use of Mixed Statements by the Defence' [1997] *Criminal Law Review* 416, 416.

<sup>83</sup> [1988] 1 WLR 7.

<sup>84</sup> Birch (n 82), 416.

<sup>85</sup> (1981) 78 Cr App R 359.

<sup>86</sup> (1981) 78 Cr App R 359, 365.

<sup>87</sup> [1996] 1 AC 41.

<sup>88</sup> [1994] 3 IR 289 (CCA).

the original statement. For some time this approach held sway in England but it appears now that it no longer prevails.<sup>89</sup>

Thus, the defence need never speak, need never be cross-examined and yet can assert untested fact. In Scotland, there is no such rule: that practice is not allowed.<sup>90</sup> And there is a good reason for this. It can be argued to be inherently unfair to try a case on the basis that a woman asserting rape must give live evidence in court and must be questioned twice, once by the prosecution and once by the defence, but the man denying it can just recount to the police in the privacy of a Garda station a salacious narrative of how everything between the alleged victim and him was consensual.

This issue was also considered by the Court of Criminal Appeal in *The People (DPP) v Anthony O'Reilly* where the accused on arrest had given an exculpatory statement:<sup>91</sup>

As this Court held in [*Clarke*] such a statement is evidence in the real sense of the word, not only against the person who made it, but in his favour as to facts contained in it that may assist his case. A jury is not bound to accept any such facts as true. Instead they are to weigh them and consider them as evidence, bearing in mind that such evidence has not been subjected to the important scrutiny of cross-examination on behalf of the prosecution and has not been given on oath; [*Crosby*].<sup>92</sup>

In *McCormack v The People (DPP)*,<sup>93</sup> the ability of an accused to give a self-serving statement specifically in the context of rape and sexual assault cases was further considered, outlining that in such cases, the accused may use Garda interviews to 'reiterate, for instance, that his encounter with the alleged victim was consensual'.<sup>94</sup>

This issue therefore is particularly significant in rape and sexual assault cases. The last major national study on sexual violence, *The SAVI Report: Sexual Abuse and Violence in Ireland* was published in 2002. It examined the incidence of sexual violence, with 24% of men reporting that they had experienced abuse of a sexual kind in childhood, along with 21% of women. 26% of adult women reported sexual abuse, and 13% of male adults.<sup>95</sup> More recent figures are unavailable, with it being likely that the incidence of sexual violence has not dramatically changed. A second comprehensive national study on sexual violence is planned to commence in 2019.<sup>96</sup> Statistics in this context demonstrate a low level of reporting, high level of attrition, and low conviction rates. In another study in 2009, the level of attrition in rape cases was found to be 82%, with convictions in 8% of cases.<sup>97</sup>

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<sup>89</sup> [1994] 3 IR 289 (CCA) 303.

<sup>90</sup> Peter Charleton and Stephen Byrne, 'Sexual Violence: Witnesses and Suspects A Debating Document' (2010) 1(1) *Irish Journal of Legal Studies* 1, 21.

<sup>91</sup> [2009] IECCA 30.

<sup>92</sup> [2009] IECCA 30, [6].

<sup>93</sup> [2008] 1 ILRM 49 (HC).

<sup>94</sup> [2008] 1 ILRM 49 (HC) [5].

<sup>95</sup> Hannah McGee, et al, *The SAVI Report: Sexual Abuse and Violence in Ireland* (Liffey Press in association with the Dublin Rape Crisis Centre 2002) <<http://www.drcc.ie/about/savi.pdf>> accessed 10 March 2019.

<sup>96</sup> Ian Begley, 'CSO to undertake five-year sexual violence survey' *Irish Independent* (Dublin, 21 November 2018) <[www.independent.ie/irish-news/cso-to-undertake-five-year-sexual-violence-survey-37550478.html](http://www.independent.ie/irish-news/cso-to-undertake-five-year-sexual-violence-survey-37550478.html)> accessed 10 March 2019.

<sup>97</sup> Mary-Louise Corr, et al, 'Country Briefing: Ireland' (Child & Woman Abuse Studies Unit 2009) <<https://cwasu.org/wp-content/uploads/2016/07/Ireland.pdf>> accessed 10 March 2019. This was part of a wider research project entitled 'Different systems, similar outcomes? Tracking attrition in reported rape cases across Europe'

In Central Criminal Court in 2017, there were 95 incoming rape and serious sexual assault cases.<sup>98</sup> Of these, 21 did not proceed to trial, thus 74 cases remained. An exculpatory statement made by the accused to the effect that the complainant had consented was put before the jury in 23 cases. In only three of these 23 cases, the accused gave evidence and was cross-examined.<sup>99</sup>

In 2016, there were 96 such incoming cases. Of the 51 cases that proceeded to trial and had concluded at the time of writing, in 15 of these the accused gave evidence and was cross-examined.<sup>100</sup> An exculpatory statement made by the accused to the effect that the complainant had consented was put before the jury in 16 cases. In only five of these, the accused gave evidence and was cross-examined.

If you want to ask yourself, is this fair? It is easily tested. Can a legal system be regarded as searching for the truth if one side had to give live testimony but the other could just submit a self-serving statement and not be cross-examined?<sup>101</sup> Where the matter was reversed and the person saying that the accused raped her was able just to sign a statement that would be put before the jury without her live testimony, while the accused that denied rape would have to get into the witness box and answer intrusive questions, one would wonder where the search for the truth lay?

The procedure of admitting an unsworn statement and using it as evidence without cross-examination should by law come with a warning from the judge that it is unsworn and untested and that questions by barristers are not evidence. But, it is all very well for lawyers, who have tidy legal minds, or are supposed to have anyway, to draw these nice distinctions where men and women with no legal training are the people deciding on guilt or innocence.

If one had to attempt a summary on the interaction of truth and the law, it could be asserted that every judge knows that justice does not stand alone as a virtue to strive for but that nothing approaching justice can be attained without the truth. A court case is not like an opinion piece in a newspaper, or a report of apparent fact in the media. The trial process involves the coming together of all of those facets of assertion in favour of and against any question. That does not happen on a talk show. It is not a shouting contest, and empty claims are readily exposed. While we rely on the media for information and for entertainment, a trial is a serious focus on where reality is to be found.

Nothing is more important than that the judge considers it an inescapable duty to have no immovable preconceptions, no animus towards any party, and will listen and will apply only what the law determines as the outcome of the fact-finding. Court cases are the citizens' resort to the assertion of the truth and the hope of a remedy. Without a justice system, a society is nothing. People see the judiciary as a collective body, even

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(Child & Woman Abuse Studies Unit 2009). For a full review of the particular pitfalls associated with the legal rules applying to sexual violence cases, see Charleton and Byrne (n 90), cited above.

<sup>98</sup> The statistics gathered relate to cases incoming to the Central Criminal Court which bear a 2016 or 2017 bill number.

<sup>99</sup> Statistics relating to cases with 2017 bill number obtained in November 2018 from Frieda McElhinney, registrar in the Central Criminal Court.

<sup>100</sup> Statistics relating to cases with 2016 bill number were gathered in December 2018 by the authors.

<sup>101</sup> Any such administrative procedure, of requiring oral testimony from one side but accepting only written statements from the other, would be condemned; see chapter 12 of Gerard W Hogan and David Gwynn Morgan, *Administrative Law in Ireland* (4th edn, Round Hall/ Thomson Reuters 2010).

though it is almost 200 different individuals. The problem there is that a ruling lacking common sense by any one of us reflects on all the rest. This is not just from the point of view of some misplaced sense of position or entitlement, but rather the opposite: that judges are expected to have sense and to find the truth. In making this demand, the people are asking for no more than is their due. The judiciary is there to serve the people. It is a basic facet of human nature that a person undermined by a crime wreaked on them or by a civil wrong feels that there must be some forum to which all can have resort and where people are duty bound to a higher calling. That calling is the truth.

In court there are no conditions; there no one is relieved of the duty, or lessened in their duty to tell the truth by circumstance. By social consent, a court is the one place where everyone is under obligation to tell the truth. The concomitant obligation of the judiciary is to pay heed to the harm that rulings of law or of fact alien to sense can do.

That danger is only avoided by self-criticism. The job of the judge is not only to seek after the truth objectively in any case before the court, but it is also to seriously question the system of justice in an attempt to identify and address its flaws. In that way, a judge may seem like the geese disturbed by the invading Gauls scaling the Capitoline hill. But sounding an alarm that the law has potential flaws proceeds on the basis of knowledge and not mere emotion. Law reform has good intentions, but can lead to unintended consequences. The Criminal Justice Act 1984, which abolished the unsworn statement from the dock, was a good reform. But common law developments have resulted in the return of unsworn statements in another guise; through the accused giving a statement to Gardaí. An accused may choose to not give evidence at trial and thereby a statement to Gardaí to the effect that a sexual act was consensual must be put to the alleged victim who must give evidence in every case. The statistics in this context from recent years in relation to this can legitimately give rise to debate. This may be regarded as a potential injustice in the manner in which rape and sexual assault trials are conducted. Since equality of arms is a principle of human rights law, it may be reasonable to wonder at a system that enables what is unsworn and untested by cross-examination to be treated as much as evidence as that which the complainant asserts in live testimony.

Poor judgement can turn the court system into a place to be distrusted; a forum that is not part of the sane pursuit of reality, a position that puts the judiciary in the public mind as pursuing foolishness. Failure to analyse the existing law on the basis of its utility in seeking the truth and in administering justice through balanced procedures can undermine trust in the law. The strength of our legal system is not only the law, but trust. Where that trust is lost through senseless rulings or through the necessity to administer laws that reasonable people may doubt the sense of, then it must be recognised that this can, at worst, put the court system into the position of being seen the meddler in peoples' lives. The task of the court system is to justly solve problems: and that is what it should be seen to be. Like the people who tell the truth only to those they trust, and those who feel obliged to the truth only where that duty is not forced out of them by an intruder into their lives, by the courts not pointing out legal flaws and not putting truth at the centre of judicial activity our judicial system then become more likely to be the body of choice to whom lies are easily told.