WEASEL WORDS AND DOUBTFUL MEANINGS: A STUDY IN THE LANGUAGE OF LAW "REFORM"

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> "This is the tricky one.
> The effect of the bill will be to abolish trial by jury in at least half the cases that currently come before the courts and will to a significant extent abolish the presumption of innocence.
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> Our strategy should therefore be to insist that the bill does not diminish the liberty of the subject but amplifies it; that the true liberty of the subject consists in the freedom to walk the streets unmolested etc., etc., secure in the knowledge that if a crime is committed it will be promptly and sufficiently punished and that far from circumscribing the liberty of the subject this will enlarge it.
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> I would try not to be shrill or earnest. An amused tolerance always comes over best, particularly on television. Paradox works well and mists up the windows, which is handy. 'The loss of liberty is the price we pay for freedom' type thing."
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> (*Irwin, once the cynical exam obsessed history teacher is now a Minister, privately advising his own MPs in Alan Bennett's* The History Boys).[1]

The History Boys is, of course, fiction. No proposal with the effect described, at least directly, has been put forward in Ireland or, as far as I know, in the United Kingdom. But a number of measures tending to the results mentioned exist: for example, the practise in creating new offences, of making many of them triable

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[1] Bennett, *The History Boys* (Faber and Faber, London, 2004) p.3.

summarily only, or of giving only the prosecution the right to opt for jury trial has greatly circumscribed the citizen's right to trial by jury. This is so notably in cases of direct conflict between the citizen and the Gardaí, now more common than previously by reason of the Public Order legislation. Of course, this may be a perfectly defensible development, but it has been introduced without any discussion at all, merely by a change in administrative practice. And the presumption of innocence, which cannot be abolished because it is guaranteed in several international conventions, has, in the opinion of Ms. Claire Hamilton, the leading Irish academic authority, been gravely undermined.[2]

It is, of course, beyond the scope of a judge to discuss the merits or demerits of specific legislative proposals, even those still a twinkle in someone's eye. I do not do so here. In any event, a judge's opinions on legal topics are always "subject to hearing argument". Instead, inspired by Alan Bennett whose play, which has furnished my epigram, was performed in Dublin in mid-October 2007, I call attention to the reductive, assumption-laden, distorting and subliminally misleading language in which discussion on criminal law reform, not always excluding politically-led discussion, is often conducted in contemporary Ireland.

Over the past number of years, and even earlier, I have become gravely concerned about the tone and content of, and the context in which, debate and discussion on criminal law topics has taken place. It is, in the first place, one of extreme oversimplification and populism. Hamilton goes so far as to say that some parliamentary contributions on this subject are indistinguishable in both their content and their style from articles in the tabloid press.[3]

To criticise the language of the debate is not to ignore or disparage the need for laws to be kept constantly under review, still less the grave concern felt over the rise of gangland shootings and other aspects of crime. These are serious problems which

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[2] See Hamilton, *The Presumption of Innocence and Irish Criminal Law* (Irish Academic Press, 2007).

[3] See Hamilton, *The Presumption of Innocence and Irish Criminal Law*.

require rigorous, focussed, fact-and-figure based debate, not sloganeering or self-interested vocational or ideological demands for more power for the State, fewer rights for citizens and an ever more all seeing "Big Brother". Many steps in these directions have already been taken, without bringing about any reduction in crime rates. No-one, of course, demands these things in so many words: instead, like Mr. Irwin in the quotation above, they use vague, emollient or misleading language to cover measures which have these effects. If we do not insist on the use of clear unambiguous language in public debate, we risk waking up on some not-too-distant day to find our criminal law has changed dramatically, perhaps in an undesired way, while our attention was elsewhere.

"Justice for Victims" is another phrase, indisputable in itself, but often used as a code for the same sort of control- model measures. Surely *all* participants in the criminal process deserve justice. It is salutary to remember the words of former President (and more recently UN High Commissioner for Human Rights) Mary Robinson SC, speaking in the still more fraught context of the post-2001 terrorist threat:

> I am particularly concerned that counter-terrorism strategies pursued after 11 September have sometimes undermined efforts to enhance respect for human rights. Excessive measures have been taken in several parts of the world that suppress or restrict individual rights including privacy, freedom of thought, presumption of innocence, fair trial, the right to seek asylum, political participation, freedom of expression and peaceful assembly. (…) Ensuring that innocent people do not become the victims of counter-terrorism measures should always be an important component of anti-terrorism strategy.[4]

Two developments in particular are notable in Irish public discourse on criminal law topics. The first is a tendency to

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[4] Introductory statement by Mary Robinson, United Nations High Commissioner for Human Rights, Commission on Human Rights, 58th Session, 20 March 2002, Item 4.

presume that those charged with an offence are guilty of that offence. This was perfectly exemplified in a campaign slogan used in the course of the recent general election which promised "tougher bail for criminals". The fact is, of course, that in our system those seeking bail are typically not criminals: they are persons resisting being imprisoned, perhaps for years, pending the resolution of the question of whether they are criminals or not. But the slogan clearly suggests, intentionally or otherwise, that the question of their guilt can be taken for granted. In this, it was typical of much public discourse. Despite the confusion which public discourse like this both induces and reflects, it is easy to imagine the outrage in Ireland if untried Irish defendants seeking bail in the United Kingdom or the United States attracted the headline "Irish Criminals seek Bail."

The difficulty with this assimilation of the state of being accused with the state of being guilty is that, in a system dominated by such an approach, it is difficult to find any intellectual scope for a proper acquittal. Accordingly, a state of mind grows up in which only convictions are a meaningful result of the criminal process; acquittals have therefore to be regarded as a malfunction or, at best, as meaningless.

The second fundamental flaw in public discourse on criminal law topics arises from the first. The rights of accused persons are no longer seen, as they were as recently as the 60s and 70s, as civil or human rights, but as a cluster of technicalities which for some reason, not fully or properly understood, has grown up for the protection of "criminals", in the overbroad sense identified above. They are not rights which attach to you or me or other respectable members of society: they are the "rights" of others, outsiders, outlaws. They serve no useful purpose and should be extirpated from the criminal justice system. The euphemism attached to this process is "rebalancing the criminal law". This term conceals an unproved assumption and has been very assiduously fostered in public discourse for that reason.

One does not set out to rebalance something already regarded as properly balanced. One sets out to rebalance something which is malfunctioning, which is out of kilter, which is not working appropriately. Accordingly the persistent use of the term "rebalancing" involves an assumption, which is rarely

thought necessary to stand over by rational argument, that the criminal justice system is already gravely out of balance. No evidence for this assumption has been produced. Irish judicial statistics are so poor and so patchy that they are a positive incentive to a public discourse based on vague impressions and scaremongering, as opposed to hard facts and figures. We do not for example know what the overall conviction and guilty plea rate is in Ireland or how it differs as between jury trial and summary disposal.

There has been a huge amount of criminal law "reform" in the past 25 years. As Professor Dermot Walsh has observed, in a striking phrase which I shall quote below, it has been all in one direction: all directed at assisting the Gardaí and the prosecution and at handicapping the defendant. Every defendant, no matter how technical the offence or how good his previous record, is treated as though he were, at least potentially, a gangland crime boss and his rights duly attenuated. Last year, the Minister for Justice set up a committee to advise on the "rebalancing of the criminal law". It was a remarkable feature of this committee that not a single member was a practicing criminal lawyer: none had significant experience of either the prosecution or the defence of criminal cases to conviction or acquittal. It is not necessary that such a committee be composed entirely of criminal lawyers, but it is necessary that there should be some input into a committee on the "rebalancing" of the criminal law from those who know how that law works in practise, and from both sides. Would any Minister dare to set up a committee on defamation law without media representation? Or a committee on agriculture with no farming representation? Or on cancer care with no oncologist?

The omission to include a practising criminal lawyer on the committee is part of a general tendency to disparage and hold up to contempt lawyers who specialise in criminal work. Due to a combination of political and media abuse, the work of criminal lawyers, especially defenders, is caricatured and the term "criminal lawyer" has acquired a connotation close to that of "shyster". When it is desired to praise a criminal lawyer, as in the case of the late Patrick Finnucane and Rosemary Nelson, both of whom were practising criminal lawyers, they are transmuted into "civil (or human) rights lawyers". But the designation is rarely

accorded to ordinary criminal lawyers going about their day-to-day work.

Another feature of recent public debate has been the near total absence of rigorous *parliamentary* opposition to law reform proposals. The tabloid school of scaremongering has been so effectively practised that it would appear that many public representatives, even those with a tradition of concern about civil liberties, are afraid of suffering political damage if they are seen to stand up for "criminals' rights" as it would no doubt be misrepresented.

I thought of these and other topics of the same sort recently when I read an opinion piece in the *Irish Times* by the columnist Breda O'Brien,[5] the headline of which read: "Falsely accused also have right to just process".

This article deals with two cases which indeed require great attention. The first is the certified miscarriage of justice case of *D.P.P. v. Nora Wall*.[6] There, Ms. Wall was sentenced to life imprisonment, and a co-accused, Mr. McCabe, who has since died, to twelve years imprisonment, for rape based on alleged eye witness testimony which was later *admitted* to be false. The witness, as a young girl, had been a pupil of Ms. Wall and bore her some ill will arising from that relationship. Equally disturbing, according to Ms. O'Brien, was that although the rape allegation was made up, Mr. McCabe had "confessed" to it. This has never to my knowledge been explained. The State had failed to disclose to the defence information which might have led any reasonable person to doubt the testimony of the alleged eye witness. Ms. O'Brien also discusses another case of a false allegation of the same sort, child sexual abuse. On this occasion, the falsity of the allegation was demonstrated by the conviction of the complainant for making a false accusation. Ms. O'Brien summarises the position, in relation to the kind of case on which she is primarily focussed as follows:

> Today, anyone suggesting that the rights of the accused must be protected, especially when the allegations seem

[5] O'Brien, *Irish Times*, Saturday, 23 June 2007, p. 24.
[6] [2005] I.E. C.C.A. 140.

> very dubious, is bound to be accused of being an apologist for child abuse.

In the course of her article Ms. O'Brien refers to the Arthur Miller play *The Crucible*, which concerned the Salem witchcraft trials of the late 17th century where a large number of apparently quite improbable allegations were accorded credence, and twenty defendants hung for witchcraft, in a fit of mass hysteria in the Massachusetts of 1692. The play was written in the United States during the McCarthy era and is widely regarded as a critical commentary on that later fit of mass hysteria during which many innocent American citizens were ruined.

It is interesting that one of the judges in the Massachusetts witch trials later recanted the guilty verdicts and publicly apologised: one of the witnesses, a child at the time, recanted years later her "accusing several persons of a grievous crime, whereby their lives were taken away from them, whom now I have just grounds and good reason to believe, were innocent persons".[7]

The headline to Ms. O'Brien's piece was presumably the work of a sub-editor rather than herself. It proclaims the right to "just process" of the *falsely* accused. But the purpose of the legal process is to discover *whether* the defendant is or is not guilty. Until this has been done one cannot say whether or not the accusation is or is not false. The corollary of this is that due process must be extended to *all* accused, *i.e*. that they must be presumed innocent. But the *Irish Times* shrank from saying this, no doubt to avoid being "accused of being an apologist for child abuse." We have no problem in applying the presumption of innocence in principle, for example to the mother of Madeleine McCann or to champion jockey Kieran Fallon, but the language I have quoted suggests that we do not apply it naturally or easily to people accused of crime here in Ireland. Or, at least, that many politicians and media people don't. This headline is a good example of "weasel words"; an insupportable confining of the right, to due process to the "falsely accused", done out of fear of

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[7] See Francis, *Judge Sewall's Apology: The Salem Witch Trials and the Forming of an American Conscience* (Harper Collins, 2005).

contradicting the new orthodoxy that accused persons are criminals.

It is, you may think, a strange thing that the opinion that "the falsely accused are also entitled to just process" is made the subject of a major headline. Surely it is a truism that all accused persons are entitled to due process: surely, indeed, that guarantee is written into the Constitution?

Twenty years ago when Irish society was gripped by the fate of the Birmingham Six, the Guildford Four and the Maguire Seven, those principles would, I think, have been widely acknowledged. But even in those days there was a contradiction in our attitudes: miscarriages of justice, lies or other short-cuts by the investigators – these were things which took place in other countries, by corrupt or racist police – and were smugly criticised here, where, of course, everything was perfect.

The fact is that, during much the same time as these miscarriages of justice were unfolding, so too, in Ireland, was the Sallins mail trail robbery case which led to massive settlements and grave damage to the reputation of our policing and criminal justice systems. But we have never, as a country or as a community, internalised the lessons of that event or of the other declared miscarriages of justice which have taken place since.

Some participants in public debate do not scruple to teach people to think, as in the slogan quoted above, that there is no meaningful distinction between being accused and being convicted (so that an applicant for bail may be thought of as a "criminal") and that no respectable or mainstream citizen will suffer if we tinker with the "rights" of these "criminals" in the trial process. This is a pernicious falsehood, most fundamentally, for the reason identified by Justice Marshall of the United States Supreme Court in *U.S. v. Salerno*,[8] in a passage I quoted in my judgment in the recent *Shortt* miscarriage of justice case:[9]

> Honouring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence

[8] 481 U.S. 739 (1987).

[9] *Shortt v. The Commissioner of An Garda Siochána & ors.* [2007] I.E.S.C. 9.

> protects the innocent; the shortcuts we take with those whom we believe to be guilty only injure those who are wrongfully accused and ultimately ourselves.[10]

Marshall J. knew what he was talking about. Thurgood Marshall was Chief Trial Counsel to the National Association for the Advancement of Coloured People (NAACP) for many years. In that capacity he defended many black defendants on rape and murder charges in the Deep South, in circumstances reminiscent of those described in Harper Lee's *To Kill a Mockingbird*. The great-grandson of a slave, he served on the US Supreme Court from 1967 to 1991, the first African-American to do so.

The criminal law is, or should be, our gold standard of procedural fairness. The Constitution sees it in this way. We rightly adopt less exacting standards for less exacting or less important work, but even these standards will be debased if the gold standard is debased. Those respectable citizens who can reasonably hope that they will never be directly affected by the criminal law, that their legal dealings will all be in such areas as tax or social welfare law, health and safety, tort or contract and administrative law through the impact of State agencies on them, will nevertheless find that their position, and the standard of procedural fairness to which they are entitled, will be gravely coarsened if the principles applying to criminal law are undermined. They will find, quite simply, that, in a general way, the position of the State will be strengthened and the position of the individual weakened. Take Frank Shortt FCA for example; who would have thought a 60-year-old Fellow of the Institute of Chartered Accountants could be framed on drug charges?

Wrongful convictions, of which we have had our fair share in modern times, inflict appalling damage on individuals and their families. They also debase the entire criminal justice system. For example, to take the case of *D.P.P. v. Nora Wall*,[11] which Ms. O'Brien wrote about, what is one to make of a system which permits a woman to be convicted of rape and sentenced to life

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[10] 481 U.S. 697 (1987).
[11] [2005] I.E. C.C.A. 140.

imprisonment one week, only to be released on bail the next and ultimately completely exonerated?

The State has, so far as I know, failed wholly to examine the certified miscarriage of justice cases such as *Meleady & Grogan*,[12] *Wall & McCabe*,[13] and, most recently, *Shortt*[14] so as to learn what shortcuts precisely we are prone to and where they have gone wrong.

In the latter case, having quoted Justice Marshall's passage about "shortcuts", I continued as follows:

> It occurs to me that the principal shortcut to which we in this jurisdiction have sometimes been prone is that of according a very high degree of credence to garda evidence, simply because it comes from a garda source. This, in turn, is based on an instinct to trust material from this source because experience suggests it is usually reliable. Indeed, it is often hard to see what members of An Garda Síochána would have to gain by lying. Like most lawyers of my generation I have not infrequently heard trial judges, in cases where there was a conflict of evidence between gardaí and defence witnesses, inviting the jury to consider what the gardaí would have to gain by lying, thereby 'putting their careers on the line', or some such phrase.
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> If this case and others like it teach anything, it is that it does no favour to an institution like the gardaí to accord their members a special level of presumptive credence. On the contrary, this attitude offers a temptation to unscrupulous gardaí who may assume that, most of the time, the public, the media, judges and juries will accord credence to the garda account, even if it is in certain ways rather improbable. This case plainly demonstrates that some gardaí will lie, simply to benefit their own careers, and lie again, even on oath, to avoid the consequences of having told the first set of lies, and so on.

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[12] *D.P.P. v. Meleady & Grogan* (No. 3) [2001] 4 I.R. 16.
[13] *D.P.P. v. Nora Wall* [2005] I.E. C.C.A. 140.
[14] *Shortt v. The Commissioner of An Garda Siochána & ors.* [2007] I.E.S.C. 9.

The notion of rebalancing also requires to be explored and the need for it rigorously established by facts and figures. For example, what, precisely are the combined rates of conviction and pleas of guilty in all the trial courts from the District Court up? There are no satisfactory statistics in either of these regards but I would estimate the combined rate at 90 to 95 per cent. Notwithstanding that we have had over the last 20 years what Professor Dermot Walsh has called "a flood of pro-police and pro-prosecution [statutory] innovation", the myth is still propagated that the prosecution are at a grave disadvantage. This is simply false. The prosecution have never had available to them more powers, of detention and interrogation, of compulsory scientific testing and of video filming, especially in public places, as they now have. Over the years since 1984, when it was first introduced, ever-increasing reliance has been placed on interrogation in custody with no lawyer or other third party present. This is always going to be psychologically traumatic and has in fact led to a number of false confessions, here and in other jurisdictions. But, to judge by the statute book, it is our tool of choice for implicating suspects or getting them to implicate themselves. The maximum period of detention allowed for this purpose in non-terrorist cases has increased from 12 hours to seven days. Do we really want a Chinese-style conviction rate of 99.9 per cent.? Or does that figure suggest that State allegations against citizens may be too weakly tested?

Compared with the unreliability of methods such as police interrogation and eye witness identification, everyone must surely welcome the advent of less debatable scientific or technical methods of detection, from DNA analysis to video tapes. But these, in order to be useful, must be the servants of impartial justice and not simply tools of the prosecution. Far too often it occurs that when the defence go looking for a public or even a police video tape of a public place it transpires to be no longer available. Equally, items of clothing or other pieces of real evidence may not be readily available for independent forensic testing on behalf of the citizen or his family rather than the State. This could be provided for by law. It should no longer be possible to dispose of real evidence – such as a motor vehicle – after it has

been professionally examined on behalf of the prosecution but before the defence have had such an opportunity.

CROSS CHANNEL INFLUENCES

Some of the developments mentioned above of course have been influenced by developments abroad. The English book and, more recently, film *Taking Liberties*[15] chronicles what it sees as the dramatic attack on civil liberties which has taken place in the neighbouring jurisdiction. The well known *Observer* journalist Henry Porter wrote the foreword to the book in which he said:

> Concentrate we must on the subject of Taking Liberties. The erosion of freedom in Britain, the manner of its theft and the combination of paralysis and fecklessness in the institutions are meant to protect us, is of compelling importance to each one of us. We have arrived at a moment in British history which most of us thought would never come. We took it for granted that we lived in a country where all but a few extremists shared a sense of miraculous good fortune about our system of rights and personal liberty. We used to lecture foreigners that Britain was a place where all men and women were born free and everyone could do what they wanted unless it was specifically outlawed by statute. Our freedoms were so ancient, so much part of the make up of every Briton that we did not even require the insurance of a Constitution or a Bill of Rights. Lesser nations might need these democratic systems but they were much younger, and they had to control the dark authoritarian impulses of their characters. But we, on the other hand, had freedom in our blood.
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> I was just as guilty of this complacency as anyone else. Whatever George Orwell's speculation in *1984*, it seemed impossible to me to envisage a British government, as we have now, attacking so many rights at once and promoting a society in which individual privacy will be so thoroughly compromised. I never

[15] Atkins, Bee and Button, *Taking Liberties Since 1997* (Revolver Books, London, 2007).

> thought I would hear a British Prime Minister - let alone a Labour Prime Minister - almost boast of his view that civil liberties arguments were made for another age. Much important - and I suppose more depressing - I never imagined that my countrymen would meet such an onslaught with so little resistance, so little sense of what they were losing.

One of Mr. Blair's long series of Home Secretaries, a former Glasgow Communist, said in August 2006:

> Sometimes we have to modify some of our freedoms - in the short term - in order to prevent their misuse.[16]

I imagine that neither Comrade Stalin nor his dreaded chief prosecutor Andrei Vyshinsky, would dissent from that sentiment. According to his Wikipedia biography, the former Home Secretary now deals lightly with his Marxist past. " I used to be a Communist. I used to believe in Santa Claus." But one would need to believe in Santa Claus *and* the tooth fairy to believe that any "modification" of our freedom will be temporary: history teaches quite the opposite. Nor, of course, would Alan Bennett's Mr. Irwin, quoted in very similar terms above, disagree with the former Minister. More academically, a Downing Street "Policy Working Group on Security, Crime and Justice, Technological Advances" posed the question:

> To what extent should the expectation of liberty be eroded by legitimate intrusions in the interests of security of the wider public?[17]

That question was answered in the short-term by a survivor of the 7th July London bombings who said:

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[16] "Sometimes we may have to modify some of our freedoms", *The Guardian*, 11 August 2007. Available at www.guardian.co.uk.

[17] See "Ministers plan 'Big Brother' police powers", *Sunday Telegraph*, Sunday, 4 February 2007. Available at www.telegraph.co.uk.

> I expect extremists, terrorists, murderers to attack my liberty. I do not expect my government, my democratically-elected government to do the same.[18]

In fact, both the former Minister and the Working Group had been fully and delicately answered more than two centuries previously by Benjamin Franklin who said:

> Those who give up essential liberty to purchase a little temporary security deserve neither liberty nor security.[19]

In November 2006, the former British Prime Minister Tony Blair announced two measures, the combined effect of which was to put in the hands of the Government in Britain an unprecedented amount of information on the activities and movements of virtually every citizen. These are firstly a biometric "Smart" ID card which would be required for virtually every dealing with the public authorities and public services and would contain a vast array of readily traceable information on individuals including medical information. The second is the rolling out of a remarkable countrywide system of "number plate reading cameras", ostensibly to ensure that road tax is paid. Speaking of these Mr. Blair said:

> We need to lift our sights a little. I don't think, in the debate so far, that we have even begun to explore the benefits that you will see in say ten years time.[20]

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[18] See "Give me Liberty…", Saturday, 4 March 2006, on 'Rachel from North London', an online web log (or "blog") which provides political and personal commentary. Available at http://rachelnorthlondon.blogspot.com/.

[19] Pennsylvania Assembly, Reply to the Governor, Tuesday, 11 November 1755. This phrase is also found in *An Historical Review of the Constitution and Government of Pennsylvania* (London, R. Griffiths, 1759), attributed to Franklin.

[20] See "Speech by the Prime Minister on 6 November 2006 about identity cards" on the 'General Publications' section of the UK Home Office Identity & Passport Service website. Available at http://www.identitycards.gov.uk/news-publications-general-speech.asp.

These and similar developments are the subject of an excellent and very informative article recently published in the Economist, entitled "Learning to live with Big Brother".[21] This is a level of intrusion into the lives of the citizens of which few lawyers understand the scope. It is important that the law, its administrators and practitioners, becomes fully aware of these developments and the evolution in the law necessary to deal with them. According to an RTE television news piece on the same topic, 10% of all the fixed video cameras *in the world* are watching Britain's citizens, on behalf of their government.

Even in Britain, not everyone is a cheer leader for these developments. Boris Johnson MP says on his website:

> Why should they [the Government] have all this information? Why should they know? What do they want with it? Why don't they just butt out of it?[22]

Mr. Blair justified these and other suggestions with the proposition that traditional civil liberties concerns are simply outdated and that the contemporary citizen has struck a new bargain with the State based on the proposition that he values security much more than liberty. Indeed, because he trusts New Labour, in Mr. Blair's view, he values liberty hardly at all and is in any event confident that the State run by Tony Blair or Gordon Brown will permit as much liberty as is good for it. This, ironically, is what another Labour "luvvey" Baroness Helena Kennedy QC has described as "the myth of the benevolent State".

I firmly believe that the citizen would not be well advised to leave himself defenceless before the State, and that the law has a major role in intervening at the gritty parts, where friction arises between the individual and the State. I further believe that it is an important role of lawyers, academic as well as practising, to explain the advantages to a law based society rather than one which proceeds simply on the basis of "trust us". This involves, of course, a scrupulously detailed examination of the actual as

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[21] *The Economist*, 27 September 2007. Also available at http://www.economist.com/world/international/displaystory.cfm?story_id=9867324.

[22] See http://www.boris-johnson.com.

opposed to the claimed requirements of "security", "crime", and "international obligations". Four years ago Messrs. Bush and Blair stood together outside the White House and invited acceptance based on trust of their shared view that "The people in there [Guantánamo Bay] are bad guys." In other (Irish) words, "I know what I know". This is another carefully crafted phrase, but it means only "I sincerely believe what I've been told and you should too". "I know what I know" may be a perfectly valid justification for an executive or political action, and is often the only one which can be offered. But it has no place in the due course of law, which proceeds upon evidence and not otherwise.

I am prepared to accept that all these people are quite sincere in their views, but a law-based society requires evidence, and not merely sincerity, before someone loses his liberty, perhaps for many years. Or do we still believe that?