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The Justice Game

Geoffrey Robertson

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For my mother and father

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Preface

> I could tell you a lot about the law . . . we got a man to argue for me tomorrow who wouldn't have me to dinner in his house. But I have paid his price and he will be at my side for as long as it takes.
>
> Mr Schultz, *Billy Bathgate*, E. L. Docterow

In 1989, on an Amnesty International mission to Vietnam, I was told in several villages the same story, about a farmer who one day vanished. The local communist party chief had the farmer's enemy arrested and executed for murder. Years later, the farmer was found tending ducks in another village. This story was repeated as a parable for political change – a demand, if not for democracy, at least for a legal system independent of the State. In the same year in England, where such a system had existed for centuries, its justice was being called into question by the dawning realisation of the wrongfulness of the convictions of the 'Birmingham Six', the 'Guildford Four', Judith Ward and others. The message of these miscarriages was more complicated, but essentially the same: they had been caused by State agencies – police and prosecutors and Home Office scientists – who had been so blind to the possibility of innocence that they had withheld, as irrelevant, information consistent with it.

This book is an attempt to explain why justice matters. It matters because we have an elemental need for reassurance that there is some chance of winning a legal contest against the powers that be. Most of us will never find ourselves accused of crimes we did not commit, or oppressed by Whitehall or by the most mighty in the land, or wish to publish something so shocking that public opinion

will want to string us up. What we need to feel is that should this (heaven forbid) ever happen, we can turn to a legal system which will give us a reasonable chance of victory – preferably not posthumously. Justice is *the* great game precisely because its rules provide the opportunity of winning against the most powerful, and against the State itself. This does not mean that David will necessarily slay Goliath, but that laws of battle will prevent Goliath from sidling up and hitting him on the head. They arm David with a slingshot, a *possibility* of victory.

I have sought to explain this by recounting actual cases, the method by which law itself develops as it narrows down from precedent to precedent. These were hard cases, although some made good law and others exemplify the need to make law better. No human trial system is infallible: compromises must be made, in doing the best we can. The minimum which the law must offer is a possibility of success to those up against it, irrespective of their wealth or indeed their guilt. That applies to all defendants on criminal charges, especially when those charges are brought to protect the State in the name of national security or national morality. It must apply to those who challenge the State to obtain ‘rights’ which have been denied them – rights as basic as to know how their children have died or as paradoxical as to be treated with decency on the way to the gallows. Law is erroneously regarded as a tool for oppression: in this book I have tried to show how it can serve as a lever for liberation.

That was not what I had been taught at Law School, which dunned into me that law was a system for applying rules made by legislators or by judges to facts elucidated by evidence, through which process a just result would be achieved. We were dubious enough in the sixties about this ‘slot machine jurisprudence’ to be taken in by a most charismatic and controversial judge, Lord Denning, whose slogan was ‘I must do justice, whatever the law may be’. His

invitation to tear up the rule book in order to reach popular results suited the iconoclasm of the time. That it was dangerously simplistic only became evident years later, as I sat in courtrooms in Singapore and Kenya and South Africa, listening to his idiosyncratic judgments being quoted by State prosecutors as warrant for locking up dissidents without trial, as threats to national security. Denning played Prospero to lawyers of his generation, creating the result his own opinionated mind believed 'just' through the alchemy of obscure precedents he found in the common law: his prejudices were his principles. 'Trust the judges' became his motto, and although my cases show that judges usually favour liberty more than governments do, they need advocates to push them and principles to protect them.

'Law is the wisdom of the old,' says Auden, but neither law nor lawyers strike me as repositories of any sort of wisdom at all. What we normally distil is convenient sagacity: ways around statutes, the likely outcome of precedents, the tactics which may triumph at trial. At a functional workaday level, the law is a mechanism for reducing the level of grievance in a society. It serves to let blood, mostly with clinical skill although sometimes by leeches whose conduct has inspired most of the lawyer jokes through the ages. We get results for clients by constructing arguments which win the day because they are judged better than the arguments offered by the other side. If that seems a weary, jobbing definition, it is less cynical than the one offered by the American realist school of jurisprudence, that 'law is what officials do in fact'. The whole point of law, it seems to me, is that it offers the possibility of establishing that what officials do is, in fact, wrong. The value we call 'justice' is the description applied to (or withheld from) the result of an actual case, although it more accurately describes the rules by which the case was decided or settled. These rules are ordained by the State:

whether they are just depends on whether they provide for the possibility of beating the State at its own game.

This book begins in 1970, with the State's first cack-handed attempts to punish some excesses of the sixties, such as the crude effusions of the underground press. This political use of the law culminated in the sledgehammer prosecution of Duncan Campbell under the Official Secrets Act and the wrongful conviction for blasphemy of *Gay News*. More extreme examples of repression I later observed in South Africa and Malawi, and fought against in Prague and Singapore, but all derived from the same error: the perception that laws can and should silence subversive people and ideas. The government learned a lesson from the ABC Trial, but the powerful private prosecutors of the artist Stephen Boggs and the director of *The Romans in Britain* had to be taught it as well. It was the adversary system that gave these dissidents a chance: there was always the jury, the 'gang of twelve', its constitutional power to cause an upset confirmed, curiously enough, by the case of runaway MP John Stonehouse. But juries do not always do justice to unpopular people. That task calls for unflinching appellate judges, like those who freed the man convicted of supplying 'nuclear triggers' to Saddam Hussein, because his trial was unfair.

The book chronicles a sea change in the attitudes of judges, partly generational and partly through the influence of human rights treaties. This can be seen most markedly in the decisions on the death penalty made by the Privy Council and described in Chapter 4, between the judgment which hanged Michael X in 1975 and the decision which saved the lives of Earl Pratt and Ivan Morgan and hundreds more in 1993. A reminder that justice is reasonably demanded by *victims* of crime and can take precedence over the interests of the State is found in the battles of Ron Smith to establish how his daughter Helen died in Saudi Arabia and in the similar crusade of the 'Friendly Fire'

parents to penetrate the army's all-purpose excuse that their sons were killed in the 'fog of war'. As a further reminder, in 'Fantasy Island' I describe some international efforts on behalf of the innocent victims of drug cartels, the honest judges and journalists whose killers were helped by irresponsible bankers and businessmen and politicians. In contrast, 'Diana in the Dock' is a tribute to one would-be plaintiff who was partly the author of her own misfortune, but whose claim for privacy does need to be weighed with the value (heavily supported in other chapters) of freedom of expression.

Although British culture and history sustain a rhetorical commitment to 'fair play', decisions taken behind the closed doors of Whitehall may nonetheless lack consistency and sometimes honesty – as the Matrix Churchill trial revealed. That case was important not only as an example of how the justice game can be played against the State, but for setting the sleaze ball rolling towards the 1997 general election. This picked up speed with the collapse of another trial – Neil Hamilton's libel action against *The Guardian*, a game won in the teeth of odds which the Lords and Commons had stacked in the plaintiff's favour by tinkering with the Constitution. Although Sir Humphrey Appleby and the *Yes Minister* brigade regard open government as a contradiction in terms ('You can be open, or you can have government'), my point in these chapters is that openness is conducive to better government, part of which entails respect for the value of justice.

All these case histories serve as jumping-off points for a wider argument about the role of law in guaranteeing individual liberty. Considered in isolation, they demonstrate how this has been achieved, variously and haphazardly – sometimes by strokes of advocacy, occasionally by an ingrained sense of fairness in the trial judge; more often by politic bargains in the jury room or by proper application of precedent in appellate courts. Taken together, I believe they

make an overwhelming case for a return to first principles, for approaching all these problems not just with a grab-bag of precedents and a sentimental faith in the jury or the adversary system, but from the bedrock of a Bill of Rights. The absence of human rights as a starting point for legal argument is the great and glaring defect of the common law tradition, in England which developed it and Australia which inherited it. Studying and practising law in these two countries over the past quarter-century has often felt like worshipping scientology rather than true religion, a search for artificial arguments to win cases which should be decided by appreciation of basic values. In Australia, progressive-minded judges have sought to import these values from international human rights treaties (somewhat to the discomfort of politicians who signed them without thinking they would have any real effect). In Britain at last we have a government prepared, at the time of writing, to make the European Convention on Human Rights a part of domestic law, thereby willing to have its exercises of arbitrary power controlled by independent arbiters of fairness. For many reasons – enumerated in the last chapter – I believe that this will lift the justice game to First Division level. It will not mean that the best team will always win, but the match will be worth watching.

The book argues for freedom of information and libel law changes, for abolition of blasphemy, for proper inquiries into violent deaths, for a privacy law, for an Independent Commission Against Corruption, and for an end to that great British confidence trick, ‘voluntary self-regulation’, as it is deployed to excuse the misbehaviour of politicians and newspaper editors. These populists are the first to cry ‘let’s kill all the lawyers’ when the law does not conform to their expectations, although their ‘Privileges Committee’ and ‘Press Complaints Commission’ are fraudulent bodies through which they contrive to avoid conforming to law. It is a great mistake for lawyers to want to be loved: their job is

to ensure that the value of fair adversarial trial is recognised as a guarantee for civil liberty of importance equal to a free press and a democratically elected Parliament. The advent of a Bill of Rights will make this role both explicit and worthwhile. They must prepare themselves to perform it in return for more satisfaction and less money.

The chapters come chronologically rather than logically, spanning twenty-five years. Some of the earlier forensic flashpoints could not happen now (which is some measure of progress) while others have done something to penetrate the secrecy and upset the complacency which have been the abiding features of British Governance over the period. The book offers a view from the robing room, a place as important as the jury room and the police canteen in the hidden culture of the English adversary system. Yet however objective an advocate tries to be, you cannot cut psychologically adrift from that obsessive commitment to the side you were on at the time, no matter how many years have elapsed, and these histories should be read with that caveat. For that reason too, the reader is owed some explanation of where I am coming from – hence the accounts of Sydney and Oxford and of early days qualifying for the Bar. This is not intended as an autobiography and is probably too argumentative to qualify as a memoir. It is a chart of some cases which I look back on in the way airline pilots think of radio beacons – they call them ‘way points’, aids to work out how far they have come, and how far they have yet to go.

It remains to thank those clients who have entrusted me with their battles and encouraged me to write about them. For editing, my thanks to Jenny Uglow and Jonathan Burnham, and for preparing the manuscript to Anthony Hudson, Jane Mulholland and Christopher Whitehouse. My colleagues at Doughty Street Chambers have suffered my distraction over this book in silence, unlike my wife whose support has, as ever, been critical. Most of these cases can

be found in skewed perspective in the press clippings and in the more circumspect pages of the law reports. I have tried to show how they really happened and for what they stood or fell in the long march for human rights.

Geoffrey Robertson
Doughty Street Chambers
November 1997

I

Sounds of the Seventies

Chapter 1

Who is Mr Abbie Hoffman?

‘That was Abbie Hoffman – he’s catching the nine o’clock flight from Paris, and he wants a lawyer at Heathrow in case they try to deport him.’ Richard Neville, the editor of *Oz* magazine, put down the telephone and looked at the only lawyer immediately available to the English underground press on a Sunday night in March, 1971. Not really a lawyer – a 24-year-old postgraduate whose thesis on freedom of speech had provided the excuse for descending from Oxford at weekends to Richard’s basement flat in Notting Hill, scene of the crime of conspiracy to corrupt public morals for which he was shortly to stand trial at the Old Bailey. I was a strait-laced, short-haired, pedantic Rhodes Scholar; Richard was London’s latest Peter Pan, a charming chat-show revolutionary whose basement served as a crash-pad for the lost boys and girls of *fin de sixties* England. This never-never land had Tinkerbells, I noticed, who rolled fairy dust and evinced a mixture of dread and contempt for the pirates moored at Scotland Yard, who made regular raids to spoil their fun.

Richard’s eyes gleamed at the prospect of meeting the star of the Chicago conspiracy trial, who had defied a reactionary judge and turned a prosecution for disrupting the 1968 Democratic Convention into an epic courtroom clash between the American protest movement and the establishment. But there was a dab of caution beneath his bravado. The *Oz* editors had been committed for trial for an offence carrying a maximum sentence of imprisonment for life. After Richard’s arrest, Scotland Yard had objected to

bail, and even objected to his surety, a long-haired television producer of apparent good character named John Birt. Abbie Hoffman, he suspected, would be banned from entering Britain as the result of an escapade the previous year involving his co-conspirator Jerry Rubin, whose appearance on *The David Frost Show* had been interrupted by 'yippies', led by Richard and *Oz* co-editor Felix Dennis, squirting water-pistols. Frost had become hysterical, and the government had overreacted by placing all the Chicago conspirators on a 'stop-list', as persons whose presence in the United Kingdom was 'not conducive to the public good'. As an Australian, Richard too was liable to deportation if convicted (although the journalist Anna Wintour had graciously offered her hand should he need to avoid transportation).

These were strange Bunuel-type times, before the IRA's resurgence, when secret policing of young radicals was justified less by their anti-Vietnam protests than by the small bombs which sporadically exploded at 'Miss World' contests and outside Spanish tourist offices, planted by Cambridge graduates calling themselves 'The Angry Brigade'. Every time I walked along Palace Gardens Terrace and descended into Richard's basement at No. 11A, I was captured on film by the Special Branch, who were (I discovered many years later) occupying an entire floor of the Edwardian house opposite. What they made of a clean-cut Australian law student in an unfashionable brown suit and tie I shall find out only if I live long enough for a Freedom of Information Act which allows me to see my file. (They certainly must have recorded a decline in dress sense, as my hair lengthened and I changed into compost-coloured corduroys and finally acquired the mandatory velvet suit.) Had I known 'they' were watching, I would probably have caught the next train back to Oxford. But at the time, I did not think twice: I had not been in this town long enough to realise how limited was its tolerance. Abbie Hoffman was a

celebrated defendant who might be in need of a lawyer. Excited at the prospect of standing in momentarily for William Kunstler, the 'movement' lawyer who had defended the Chicago conspirators, I agreed to go and meet him.

Richard had acquired a chauffeur – a crippled New Zealander named Stan, who hinted darkly on the way to Heathrow at his qualifications for driving get-away cars. He parked directly outside the arrival hall, idling his souped-up engine while Richard and I waited for the flight from Paris to empty. To our surprise, it was not long before Abbie Hoffman sailed through – there is no other metaphor to describe the passage of a person so resplendently rigged with billowing black hair. 'It's Sunday night. They got dozy' he laughed, embracing his English acolyte. 'I brought my attorney,' said Richard with some pride: the best-selling hip adventurer Hunter S Thompson never travelled without one, so having a lawyer in tow had become a desirable fashion accessory for the well-groomed revolutionary of the period. Hoffman eyed me for a moment, with ill-concealed disdain for my youth and my haircut; his broken Brooklyn nose actually crinkled at my olfactory *faux pas* – Old Spice aftershave. 'I need to go down to Pan Am to check my ticket through to Northern Ireland,' he said breezily. 'I'd advise you to do that tomorrow,' I whispered, mindful of the stop-list, but Hoffman surged downstairs to the Pan Am counter, where we were promptly intercepted by three immigration officials.

'We're sorry, Mr Hoffman, we need your passport back for one moment,' said the largest, with an embarrassed smile. 'We just need to put another stamp in it before you go. Please.' Richard, ever polite, said 'Sure' and Abbie, like most Americans a sucker for English good manners, reached for the vital document. That was when, to everyone's surprise and especially my own, I intervened. 'Actually, Mr Hoffman will not surrender his passport. He's been lawfully admitted to the United Kingdom, and you have no power to detain him or require him to give you his passport again. As his

legal advisor, I assure you he will abide by his conditions of entry. Gentlemen, good night.' Then, undermining the majesty of this message, I muttered, 'I think we'd better run for it' – and we did, leaving the officers standing, legally powerless to pursue us. Stan's get-away car was still waiting outside, and just in case my advice was wrong, he gunned it at break-neck speed towards the lights of London.

Abbie Hoffman's motor-mouth went just as fast, and I sank into silent reflection. Hoffman seemed arrogant and self-obsessed, with nothing much to say in England and even less in Northern Ireland. His presence was, in fact, not particularly conducive to the public good and certainly not conducive to mine, if I wanted to stay after my student visa expired. What had made me intervene, to abort the process whereby officialdom would simply have cancelled his entry visa and put him on the next flight to New York? Perhaps I was a lawyer by nature, as well as by training? I had realised that these pleasant officials were lying, in the good cause of retrieving their mistake (the fact that they said 'please', and said it nervously, was the giveaway). They were abusing their power, or at least asserting a power they did not have, once they had given Hoffman leave to enter. The rights or wrongs of Abbie Hoffman being banned from Britain did not enter into the calculation: he was entitled to know his rights, even a right which had accrued through an oversight. It struck me, miserably, on that high-speed, white-knuckled journey, that the sooner I found a rationale for defending people as meretricious as Abbie Hoffman, the better.

The rationale was found for me a few days later. I had retreated to the safety of the postgraduate common room at University College, where homesick American Rhodes Scholars mooched behind copies of the *Herald Tribune*. (Bill Clinton from Arkansas was one of them at 'Univ', where it had not been thought he would amount to much. The ambitious American we middle-commoners voted 'most likely to succeed' was Paul Gambaccini.) Taking my place

behind *The Times*, I read with astonishment how my first piece of legal advice in Britain had caused a rumpus in Parliament:

> Mr Fell (Yarmouth, Conservative) asked what were the circumstances under which Mr Abbie Hoffman was allowed into Great Britain.
>
> Mr Sharples (Minister of State, Home Office, Conservative): Mr Hoffman was inadvertently admitted as a visitor on March 21st.
>
> Mr Fell: Is it not rather serious, as hippies are perfectly well known to the Home Office and have stated that they support the National Liberation Front in Vietnam, the Black Panther Movement, and the Irish Republican Army. What is the Minister to do to prevent inadvertently letting in people of this type?
>
> Mr Sharples: The immigration officers do an extremely good job. A mistake was made in this case and steps have been taken to see that it will not happen again.
>
> Mr Merlyn Rees (Leeds South, Labour): Who is Mr Abbie Hoffman? (*Laughter*)
>
> Mr Sharples: There is a long description of Mr Hoffman. Perhaps I had better write to Mr Rees. (*Renewed laughter*)

Reading these inane exchanges gave me the first inkling of the fallacy that Parliament is the true guardian of civil liberties. Abbie Hoffman's three days in England had been uneventful, yet here were MPs and ministers contriving to keep others like him out, for no reason other than their lifestyle and political opinions. They were supported by the Shadow Home Secretary. (A few years later Merlyn Rees welshed on Labour's commitment to introduce a Freedom of Information Act, explaining to a disappointed MP that 'only two or three of your constituents would be interested'.) So I had the retrospective satisfaction of realising that I had given legal advice that was correct and which had contributed to freedom of speech. And, of course, that had caused 'steps to be taken' to ensure such a contribution could not be made again. I tossed the newspaper onto the table, dimly aware that I had discovered in it the first evidence for what over the next quarter-century would harden into my only unshakeable belief; namely that it is to the law and the courts, rather than to politicians and

Parliament, that we have no alternative but to turn if civil liberties are to be protected.

What struck me more immediately was the irony that I had so recently left a country which *did* regularly refuse entry to people and books and films that its government did not like, in order to enjoy the liberty I had learned about from reading the *New Statesman* and Penguin Specials. Growing up in Sydney in the fifties and sixties had been the cultural equivalent of living in a suburb of the Isle of Wight, without the pop festivals. We had studied only English history ('Australian history' being a short course in British penology, circa 1788); we listened to recycled BBC radio programmes and had swooned, quite literally, over the young Queen. (The first atrocity I observed, at the age of nine, was the sight of hundreds of small children collapsing from heat exhaustion after waiting hours in the boiling sun at Sydney Showground for a limp wave from the passing monarch.) One result of this cultural obeisance was that from afar England sounded increasingly attractive as it progressed from the *Lady Chatterley* trial through the Beatles to the liberal reforms of Harold Wilson: Australia did not enter the sixties until it was dragged into them by Gough Whitlam's Labour government in 1972. That was two years after I arrived in what Australians still called, and with fondness, 'the mother country'.

In the post-war diaspora of displaced Australians, I arrived with the second wave – less witty, more political as a result of Vietnam. The first surge had left while I was at school (a boy's comprehensive) in Sydney. I would sneak off to watch Barry Humphries trying out Edna Everage, whose cringing self-abasement was originally the joke. I arrived at Sydney University in 1964: the revue was still using scripts left behind by Clive James, and a tear-stained tutor arrived very late for my first philosophy seminar, explaining through sniffles, 'I've just come from the airport. *Germaine* is gone

forever.’ The office I soon occupied as the President of the Student Council had traces – kicked over, I suspect – of these and other expatriates who honed their wit on a country run in small-minded and ridiculous ways. They left before being required to die for it, in the Vietnam War, to stop the ‘yellow peril’ which was waiting to descend, as if by gravity, on its whites-only civilisation.

Conscription was conducted as fairly as a lottery: only those twenty-year-olds whose birth-dates were drawn out of a barrel were called up. Old schoolfriends who had not made it to university and draft exemption started to go missing, presumed dead, in unpronounceable provinces of South Vietnam, fighting people of a colour they would never have seen at school. This gave student politics a kind of steel – if we were old enough to fight an unjust war, we were no longer prepared to be treated like children. ‘Student power’ required our participation at every level of university government: I became the first ‘student proctor’, sitting in judgment on friends accused of pelting reactionary politicians with rotten tomatoes, secretly wishing I had the gumption to commit the same crime. But on every occasion that tempted towards heroism or hedonism, I had this albatross around my neck, what my mother called ‘your legal career to think of’. It led to a reserve, a detached and slightly puritanical outlook, a sense that I would always be last to join the orgy.

I had first thought of a legal career at school, as the result of a bizarre act of Antipodean censorship. The acquittal of *Lady Chatterley’s Lover* at the Old Bailey, by a jury which had been asked ‘Would you allow your wife or even your servants to read this book?’, had horrified the repressive Australian establishment. The Prime Minister, Robert Menzies, announced in Cabinet that the book must remain on the banned list because he would never allow his wife to read it; zealous customs officials, in an excess of wife protection (Australians, at least, did not worry about their

servants), banned C H Rolph's edited account of the trial as well, which had been published as a Penguin Special, on the grounds that it too might 'tend to deprave and corrupt'. This idiocy provoked one courageous Sydney bookseller to arrange for friends in England to transcribe by hand every word of Rolph's book onto thirty-two tightly spaced air letters, which entered the country as personal mail and so eluded the censor. *The Trial of Lady Chatterley* was then reconstituted and printed in a *Samizdat* edition, which fell into my schoolboy hands. Endowed with the thrill of forbidden fruit, it was this book which must first have aroused in me the corrupting desire to practise at the Old Bailey like D.H. Lawrence's defenders, Gerald Gardiner and Jeremy Hutchinson.

At Sydney University, the ideals of the time demanded we should learn a different kind of law to that which regulated conveyancing and commerce. We wanted to understand how it impacted upon the poor, so we could use it to improve their lot. There were bloody fights with the Faculty to force it to offer a course in 'poverty law', a battle won only after we promised to change the title to 'Law and Social Justice'. In these years, much affected by Martin Luther King's example, we organised 'freedom rides' to outback towns to break down the colour bans which were everywhere, from pubs to swimming-pools, a petty apartheid as entrenched as it was in South Africa. I became a Board member of an organisation for the advancement of Aborigines and Torres Strait Islanders, and began to act for blacks – usually on minor criminal charges. There was a problem in bringing them back to the prestigious commercial law firm where I worked as an articled clerk and then as a solicitor: it never dirtied its hands with crime. I took this up with the senior partner: why couldn't we defend clients on criminal charges? He sucked his pipe for a moment and looked on me rather like a fond father called upon to tell his son the facts of life. 'Why, lad, it's like this.

We just couldn’t have *criminals* sitting alongside clients like Mr Packer and Mr Murdoch in our waiting room.’

Australians of my generation are haunted by the treatment meted out to Aborigines in the past, the more so as these persecuted people were the first to break down the ‘Englishness’ in the national character: they taught us to dream, to be easy-going, and to find our way through the bush. Acting for them, however, was not a matter of sentiment: no other group suffered such injustice. The first case we took up was that of Nancy Young, a mother who had been jailed for the manslaughter of her baby who had died, so the police doctor said, from malnutrition. She lived in abject poverty on an unsanitary Aboriginal reserve behind a prosperous country town in Queensland: her all-white, all-male jury ignored expert evidence that the child had died from disease rather than neglect, and so did the local Court of Appeal. There were student protests, a television programme and my first articles for serious newspapers about this wrongful conviction. The Queensland authorities found a pretext to reconsider the case and quash the conviction on a technicality, without any apology or any misgivings: the next time it happened they hoped that nobody would notice. It was my first inkling about how often justice only gets done when someone does notice.

In law, Australia was still a colony, its final court of appeal made up of English judges – the Law Lords – who sat in the Privy Council in London. This was despite the fact that the Australian High Court boasted the best judge in the common-law world, Sir Owen Dixon. His was a great legal mind with a curious pathology – he discouraged the Privy Council developing as a true Commonwealth Court because he was physically revolted by the prospect of sitting alongside a black judge. Dixon’s successor as Chief Justice was Garfield Barwick, who had been the pre-eminent advocate of his day, much admired by the Privy Council. I would dine with him occasionally, and he would tell of his

exploits in that far-off battlefield in Downing Street before the Lords of English justice. The best story, or so he regarded it, was the one about the ‘thirteen little Malaysians’. All were communist subversives who had appealed to Her Majesty’s Privy Council against their death sentences, but only twelve had the sense to retain Barwick. He took a very short and very technical point about the validity of the execution warrant, which the barrister for the thirteenth man had not noticed and did not take. In due course the Lords of English justice delivered their verdict: Barwick’s argument succeeded and the lives of his twelve clients would be spared. The thirteenth, whose case was the same in every way, had his appeal rejected and was hanged. The moral of this story, I suppose, was that lawyers best serve the cause of human rights by attention to detail, rather than by waxing passionate about evils like capital punishment. As a student, I found it shocking rather than amusing.

The lawyer who seemed most to epitomise progress was Gerald Gardiner, the defender of *Lady Chatterley*, who had only taken the job of Lord Chancellor in the British Labour government on condition that the death penalty be abolished. Under his guidance the government had put homosexuality and abortion outside the reach of criminal law, had abolished censorship of the theatre, passed a law against incitement to racial hated and had begun, by establishing a Law Commission and appointing Leslie Scarman to it, to reform the archaic common law. When I left Sydney, Bill Deane, the city’s leading silk, kindly gave me *QB VII* to read on the boat. This is Leon Uris’s fictionalised account of the libel action brought against him by one of the Auschwitz doctors he had exposed in *Exodus*. There I found the most glowing literary tribute ever paid to a member of the Bar. The worried author, walking in the Temple late at night, sees the lights still burning in the room of his advocate, and is filled with awe that a man could so

relentlessly dedicate himself to another's cause. Gardiner was that counsel – his room was known as 'the lighthouse' long before Uris saw its beam and identified the obsessive commitment which is a barrister's most admirable (and most overlooked) quality.

Lord Gardiner had gone, along with the Labour government, by the time I reached Britain. It was not until 1985 that I was provided with an excuse to meet him, to invite his help in what was probably an unlawful conspiracy to publish a book called *Spycatcher*. Mrs Thatcher had got wind of an embittered ex-MI5 officer penning his memoirs in Tasmania, and her Cabinet Secretary, Sir Robert Armstrong, had sworn an affidavit to stop him in the Australian courts. He claimed that Gardiner, as Lord Chancellor in 1967, made a blanket prohibition on the release of any document making reference to the security services. By now, Lord Gardiner was in an advanced stage of Hodgkinson's disease, but his mind and his memory were as precise as ever. The electric blue eyes, which had once terrified witnesses like torches shone on rabbits at night, switched on as they burned through the Cabinet Secretary's claim. Gardiner told me he would be happy to testify that a blanket ban was not what he had meant at all. As I was leaving he said, 'By the way, I seem to remember a convention that former Lord Chancellors should notify the incumbent if they are going to breach the Official Secrets Act: would you like me to drop a warning note to Quintin Hailsham?' The eyes flickered for a second – a momentary loss of voltage, or a twinkle? It occurred to me then that one essential characteristic of a great advocate is the ability to control an instinctive sense of mischief.

Lord Gardiner died in 1990, a few weeks after he had the pleasure of hearing *Lady Chatterley's Lover* read as a 'Book at Bedtime' on the BBC. His performance in defending that work I knew almost by heart, as the result of my schoolboy reading, but by the time I received a Rhodes Scholarship I

had no intention of practising law at the Old Bailey. I was already a solicitor, and had begun to specialise in setting up tax havens for the corporate beneficiaries of Australia's mining boom. Oxford, I thought, would be a pleasant diversion where I could briefly pursue a passing interest in liberal jurisprudence, so I chose to spend it at University College, where the exemplars of that philosophy, Professor H L A Hart and his successor Ronald Dworkin, were Fellows. I was, however, just beginning a doctoral dissertation on 'blue sky laws' over international stockmarkets and contemplating a respectable future at the Sydney Bar, when a small bear with a large penis came along and changed my career trajectory.

Oz began in Sydney in 1963 as an Antipodean equivalent of *Private Eye*. I had been recruited to write for the magazine when two of its founders – Richard Neville and the artist Martin Sharp – left to take the yellow brick road which led, via Kathmandu, to the basements of swinging London. Here, in the late sixties, *Oz* was reborn in a blaze of local colour which rendered much of it unreadable, although Richard attracted contributions from his Australian friends like Robert Hughes, Clive James, Colin MacInnes and Germaine Greer, and his new English ones such as David Hockney, David Widgery, Auberon Waugh and John Peel. Their articles, washed in day-glo, appeared flush against borrowings from the crude cartoons of Robert Crumb and Gilbert Sheldon and the hippie manifestos of the anti-Vietnam movement in the US (such was the idealism of the times that the 'underground press' proudly waived all copyright), interspersed with personal advertisements for sexual partners, all jumbled between the covers of Martin Sharpe's Todd-AO coloured imagination. The magazine's philosophy was later alleged by its prosecutors to be a glorification of 'dope, rock and roll and fucking in the streets', and it may be that the attraction for more credulous readers was to be

made to feel that it was possible to achieve all three at once, but the notion of the 'philosophy of *Oz*' was a contradiction in terms. It was a coffee-table magazine for a revolution which would never happen – unless someone in authority took it seriously.

A few months after arriving in Oxford, I caught up with Richard Neville. We met in the Balliol common room, where he was holding a seminar on the underground press with Tony Palmer (once famous for five minutes for comparing the Beatles to Schubert) and Caroline Coon, the beautiful and passionate dancer who had left the Royal Ballet to found 'Release', an organisation which helped drug victims and victims of drug laws. The student audience was large, but its curiosity languid: in privileged Oxford, the Thames Valley police were a good deal more respectful of young gentlemen than the drugs squad at Notting Hill. University life looked in and up itself: the Law Faculty seemed unaware that 'rights' might be conferred on anything other than property. A New Zealand don at New College called a meeting to set up a legal advice centre for unemployed car workers at Cowley: I attended but no one else bothered, and so Bryan Gould abandoned the idea. Many Rhodes Scholars regarded the university as little more than a five-star refuge from the draft: a place for post-coital punting and a base for touring Europe. It was not that we lacked all awareness: when we discovered that not a single black had ever been selected as a Rhodes Scholar from South Africa or Rhodesia, many of my year were so outraged we threatened to resign our scholarships (the Beatles, by returning their OBEs in protest against Vietnam, had made this kind of gesture fashionable). Yet it had not occurred to any of us, in 1970, that *women* had never been eligible for selection, or that such discrimination against them might be in any way objectionable. We had a lot to learn, and it would not be taught at Oxford.