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LATENT EFFECTS OF LAW:* THE DEFAMATION EXPERIENCE

Latent, or hidden, effects of laws have received little attention from social scientists and (outside the oral tradition of practising lawyers) almost none from the legal profession. Such effects, and often latent functions too, may differ sharply from the particular laws' ostensible purposes. Taking, as this writer does, defamation as an illustration, the law's ostensible, manifest purposes ((i) to restore, so far as possible – by monetary compensation or other means – the unlawfully injured person's reputation to its pre-defamed state, and (ii) to punish contumacious action by award of exemplary damages) is shown to be subordinated, perhaps even supplanted, in several quite common situations where the rules and procedures bend to achieve outcomes different from those advertised by the law. Some such effects are unplanned; some plainly are engineered. A few may be viewed by one or both parties as beneficial; others as destructive. Those issues aside, judges, lawyers, litigants and the public might agree that things ought to be called, and be seen to operate, by their proper names and by their undisguised procedures. The example of the late Robert Maxwell is used to show how a person of wealth and power could long exploit defamation laws to shield a questionable business reputation from legitimate questioning. That saga serves merely as a springboard to examination of half-a-dozen other critical issues. Each involves the masking or manipulation of defamation rules and latches attention onto their moral, cultural or economic ramifications. Latency is demonstrably present in law. To ignore it, or to regard it as excrescence or contradiction, is to short-change all parties to the business of legal and social reform.

SIGNIFICANTLY, it was not until Mr. Robert Maxwell's death – albeit immediately after it – that there occurred the comprehensive media exposure of his alleged massive frauds. Prior to that time, November 1991, Maxwell had repeatedly used the threat of defamation proceedings, "gagging writs" specifying unrealistically high sums of damages, to silence his critics.[1] The latter included an unauthorised biographer of Maxwell and a host of newspaper editors who for years had desired to inform the public of the nature and extent of his ruthless and legally questionable dealings.

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* I list thirty-five latent effects of law in *Appendix A, infra. Appendix B* suggests various practical ways of organising those thirty-five 'heads'. A further *Note* explains how a different view of latency may be taken depending on the particular cataloguer's ideological stance.

1 See, *e.g.,* "How the Libel Laws Helped Maxwell Get Away with It", by David Hooper, *The Daily Telegraph, 7* December 1991, "Maxwell Could Never Have Pulled It Off on His Own" by Tom Bower, *The Daily Telegraph,* 14 December 1991.

Almost all legal rules have some manifest function or effect that is approved by the issuing society, or on behalf of the society by its politically dominant section. But, as I have stated in an earlier article[2] and elsewhere,[3] there are many covert or latent functions which the courts countenance or at least tolerate. For example, a disaffected former spouse may make use of legal process primarily to harass or 'punish' the defected partner, perhaps by frequent suits on issues of child custody or by applications for upward variation of maintenance (where no genuine problem exists over child access or over the fairness of maintenance). Again the holder of extreme altruistic or eccentric views may engage in law-violation (*e.g.,* a trespass, damage, to a public monument) deliberately to gain publicity for his or her "cause".[4] Some other persons use, or exploit, legal process to furnish them means of acquiring or maintaining status. In many jurisdictions municipal councils employ codes of minor traffic offences primarily as a means of supplementing the local treasury: the laws' overt (or manifest) function of improving the safety and flow of vehicular transport may be of secondary import.[5]

Some of these functions or effects are deliberately engineered by the law-creating apparatus, others are not; rather their effects are not foreseen by their original makers (for instance (i) the police's adaptation for purposes of "social hygiene" of antiquarian vagrancy laws simply to harass non-indigent undesirables to drive them from the streets, (ii) the law's provision of procedures and 'remedies' so cumbrous and inapt that disputants recoil from them and seek an out-of-court composition, (iii) the law's condonation of delays which is often exploited by debtors to pressure plaintiffs into disadvantageous settlements).[6] Speaking of latent *effects,* rather than *functions,* we note that institutionalised disputing may serve either to solidify or to divide larger or smaller groups in society. Sometimes the drama of the formal trial, as in *Whistler* v. *Ruskin,*[7] or in the 1925 Scopes ('monkey') case, or in last year's William Kennedy Smith 'date-rape' trial,[8] can have the effect of a socialisation or enculturation exercise – the court becomes a place where other-than-legal values are tested, changed or consolidated.[9]

In this article, I propose to examine how the latent functions and effects of defamation laws have impacted upon a number of legal societies which

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2 "Law for Non-lawyers" (1978) 20 Mal. L.R., 133, 134-5.

3 "Light on Latent Effects of Law" 10 N.Z.U.L.R. (1982) 1.

4 For instances, see note 16, *infra* and also *Appendix A,* head 6.

5 Actual illustrations of the above instances are given in 10 N.Z.U.L.R. (1982) 1-15.

6 For actual illustrations see the reference at note 5.

7 *The Times,* 26, 27 November 1878.

8 See, *e.g.,* "And Nobody Has Raped American Justice Either" by Andrew Sullivan, *The Daily Telegraph,* 13 December 1991.

9 For actual illustrations see the reference at note 5, *supra.*

all subscribe to a 'western-democratic' ideology of law. There are at least a half-dozen ways in which such societies are affected in a sense which is hidden from the general public: legislators (sometimes) and lawyers (often) know what is being transacted under the camouflage of legal process.

This writer has no axe of personal or societal values to grind in drawing attention to such covert activities. Arguably there are occasions, for example, where, in a court-room situation, the emotional catharsis experienced by the unsuccessful plaintiff more than compensates – in therapeutic terms – for her or his original misuse of legal process. However, as readers will gather, there are circumstances where a sheep's head is made of particular laws or tribunals, even of an entire system.[10]

The reason for undertaking this exercise may be expressed in the form of questions:

(a) Are the parameters of justiciability accurately drawn and realistically drawn for the society for its time? Do there exist 'hidden' social trouble areas of sufficient size and importance to warrant inclusion in a present catalogue of publicly acknowledged legal wrongs? Or does the present law define as wrongs some behaviours which are better left outside its reach?

(b) Are laws and courts exploited for purposes for which they are not designed?

(c) Are the advertised, or manifest, 'proper' functions of law still altogether suited to the solemn processes that have evolved without, until lately, attracting serious questioning? Is law carrying too much inutile mystique in the symbolism of its procedure and language?

(d) Can the society engage in effective law reform without having a knowledge of the latent functions of its present laws?

(e) Have the maskings of functions and effects created significant derogations from legality, that is, derogations from the law's desired attributes of accessibility and ascertainability?

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[10] Of course, the court may be justified (in appropriate cases) in treating the action as frivolous or vexatious or as an abuse of process. Most jurisdictions are surprisingly lenient to plaintiffs in that regard. The less formal, therapeutically orientated regimes (*e.g.,* family courts, youth courts) may even quietly encourage such use of their processes for the 'desirable' evacuation of parties' personal antagonisms.

In other writings where I have canvassed answers to those questions[11] – though without concentrating on a particular area of the law such as defamation – I draw only one, bland, conclusion. That is that there are arguably good and arguably bad things to say about such latent functions and effects. Most readers would argue there are some socially useful latent effects of law and some that are deleterious. Short of radical reformation of the whole legal system, perhaps efforts ought to be made to avoid upsetting the apple-cart. A little tinkering may be countenanced – but not so much as to unbalance the load. However, I did, and still do, believe that latent functions and effects of law need to be uncovered. Whether people think legal camouflage and mystique is or is not worth conserving, they do need to be shown what and where it is. Different societies and different legal systems will seek out and mark their own points of balance between the contending aims (stated at (a) – (e), above). None will find its true fulcrum without first looking beneath the disguises. A need which is not disturbed will not be counted. And one that is unexpressed will not be likely to ever again be given consideration.

What does the legal system openly, manifestly avow with regard to enforcing its defamation laws? The law starts with two noble, rival, ideas. On one hand it claims that the public has a right to know unpalatable truths about its members (and, of course, a right to expose those truths). On the other hand, the law seeks to protect the reputations of its citizen-members. (To that end it makes various 'remedies' available to defamed plaintiffs, including the award of damages and the order to make a public apology).[12] The manifest aim of the law of defamation is to strike a proper balance between the aforementioned right and the aforementioned protection.

In the context of the Robert Maxwell scandal, one lawyer-commentator[13] has stated that in England the pendulum has swung too far in favour of the protection of the reputation of the rich and powerful – "[And] this at a time when moves elsewhere are in favour of greater freedom of information." The commentator goes on to show, in detail, how Maxwell's skilful and ruthless exploitation of the latent potential of the libel law ensured that many truths – of large public significance – remained concealed. One of these, which was of obvious interest to Maxwell's former employees, was his fraudulent removal of several hundred millions of

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[11] See the references at notes 2 and 3, *supra,* and see B.J. Brown, *Shibboleths of Law* (1986).

[12] For information about these, and other 'remedies' see, *e.g.,* Burrows, *News Media Law in New Zealand* (1990), 43-54.

[13] Hooper, a libel law solicitor with Biddle and Co., London. See the reference to his article at note 1. Contrast the situation in the USA, consistent with the First and Fourteenth Amendments, of the public official, or the 'public figure', who is criticised in his or her official or public conduct: *N.Y. Times Co.* v. *Sullivan* 376 US 254, 84 s. ct. 710(1964); *Star-Banner* v. *Damron* 401 US 295 (1971).

pounds from a pension fund to which they had contributed.[14]

It is time to inspect the lesser and the greater latent effects of defamation law. The first two are not without consequences to legal society but may hold more importance for wider sociology. They are, respectively, the propaganda and the entertainment values of the public trial.

1. *The public trial as pulpit from which propaganda may issue*

The set-piece trial of almost any civil or criminal cause affords parties the opportunity to make public statements about issues related to the trial.[15] One knows that sometimes public order offences are deliberately committed by a person whose first aim is to make a statement (which she or he views as politically or socially important) which may achieve widespread media coverage.[16] Because libel and slander trials commonly involve parties of high profile they are well attended by the public and the press. When, in 1878,[17] the Anglo-American painter Whistler sued the English establishment art critic John Ruskin in libel, each man volunteered (in *ex cathedra* statements) that it was his aim to achieve maximum publicity for his own view of artistic standards and art appreciation.[18] Whistler utilised the witness box as his stage but his adversary was denied that amenity by illness. In spite of Ruskin's enforced absence, the jury's award of contemptuous damages of one farthing against him underlines the prevalence of his aesthetic stand-point – if only with the particular jurors.

More than a hundred years later several members of the Exclusive Brethren sect in New Zealand brought an action against *The Christchurch Press* newspaper claiming that its series of articles about them and their faith brought both into disrepute.[19] Whatever personal damage had been suffered by the plaintiffs (Mrs. McGaveston, Mr. McGaveston and Mr. Suckling) there is little doubt that they and their 'church' saw and took the opportunity to engage in a well-publicised defamation trial to present their faith in the

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[14] *Ibid.,* and see also the reference to his article at note 1, *supra.*

[15] It is not unknown for judges to do so too; see, *e.g.,* Lord Atkinson's judgment in *Roberts* v. *Hopwood* [1925] A.C. 578 and Judge Hofstadter's dissent in *New York Housing Authority* v. *Watson* 207 NYS 2d. 920, 923 (Sup. ct. 1960).

[16] In *O 'Connor* v. *Police* (Unrep. High Court, Auckland, 20 July 1991) (see *The New Zealand Herald* newspaper, 20 July 1991, 1 and 15) Mr. Justice Thomas allowed O'Connor's appeal against a name suppression order imposed on him by a District Court Judge who had suppressed his name after convicting him of criminal trespass at an abortion clinic. The D.C. Judge had also ordered suppression of the organisation's identity and details of the offence because he thought O'Connor intended to use the Court "to push for [anti-abortion] law reform".

[17] *The Times,* 26 & 27 November 1878.

[18] See Judge E.A. Parry, *What the Judge Thought,* 116. Judge Parry's father had been engaged as counsel in the trial.

[19] *Christchurch Press Co. Ltd.* v. *McGaveston* [1986] I N.Z.L.R. 610.

best light. To that end, their counsel was encouraged to secure the services, as an expert witness, of a world authority on minority religions. (Of course, the same opportunity beckoned the defendant newspaper but, in engaging no 'expert', it acknowledged that the plaintiffs would be adducing by far the most prestigious testimony available). To an observer, the fact that the court found for the plaintiffs and awarded them substantial damages, seemed to be of much less public note than the broad favourable publicity achieved for the Exclusive Brethren.

2. *The public entertainment value of the trial*

Defamation actions are 'news'. It is the one sector of law-in-action in which the public may safely anticipate that the whiff of scandal will be present. Almost always, one party – quite often both – enjoys a titillatingly prominent reputation. If the case comes to trial, it commonly provides very good 'theatre'.[20]

The vicarious entertainment of the courtroom drama was documented by David Riesman in *Individualism Reconsidered,* in 1954.[21] In rural communities he suggested that litigation, or threat of it, can lead to either greater social cohesion or to markedly more division. Douglas Hay has made a similar point about the effects of the eighteenth century Assizes in England.[22]

The importance for law and legal process of this public aspect of trials (and not least of trials of libel and slander) is that, together with their 'entertainment value', such occasions engage the attention of ordinary folk in two socially significant senses. First, it is psychologically reassuring for the *hoi-polloi* to know that their own foibles are shared by the rich, the

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[20] Literally it provided good theatre in Terence Rattigan's *The Winslow Boy.* Among many well-attended, widely reported defamation trials were the recent *Neil and the Sunday Times* v. *Worsthorne and the Sunday Telegraph, The Daily Telegraph* newspaper, 31 January 1990, p. 1, and the criminal libel prosecution initiated by Oscar Wilde, in the mid-1890s, against the Marquis of Queensberry who had published the alleged libel that Wilde "had posed as a sodomite". See Hyde, *Trials of Oscar Wilde* (1960).

[21] "Toward an Anthropological Science of Law and the Legal Profession" in *Individualism Reconsidered* (1954), 448-50. Riesman suggests that vicarious entertainment value is largely confined in modern American society to trials in rural communities. One suspects that the very extensive media coverage devoted to trials (and like occasions) such as the 'Watergate' hearings, and the Oliver North 'Irangate' hearings as well as the so-called 'date-rape' allegation against William Kennedy Smith, December 1991, indicates a huge urban, indeed nation-wide, interest in certain trials. Of course, in some trials there is a world-wide interest.
Frake in *The Proceedings of the 9th Pacific Science Congress,* Vol. 3 (1957), 217, in his study of the Lipay people of the North Philippines, found that Lipay *participants* in litigation derive substantial entertainment value – win or lose.

[22] *Albion's Fatal Tree* (1975), 26-28.

famous and the powerful – and that the latter's fall from grace may be more resounding than their own. Secondly, the high interest drama of trials, such as those for defamation, help in the broadest educational sense to identify lay audiences with law and its procedures. A libel trial may have its legal complexities but almost invariably its facts are comprehensible by everyone. It remains one of the few sectors of law where the 'ordinary person' can tune in and 'follow' most of a court action's developments.[23]

Social psychologists may be justified in viewing some instances of litigation (including defamation actions) as a legitimised outlet for the parties' malice and spite, or for their frustration or disillusionment. Bringing a legal action, and especially going to court, can be seen as furnishing parties an opportunity for institutionalised emotional catharsis.[24] This may be far removed from what the Law Lords or most judges anywhere, regard as the proper functions of the trial, yet, as sociologists and anthropologists point out, it is a socially acceptable substitute for self-help violence.[25]

The Eskimo song duel, a formalised custom at specific times set aside for antagonists to sing defamatory songs across the ice,[26] is reminiscent of court-room scenes in warmer climates where neighbours contest disputes over the fence and parents wage battle for the custody of their children. Expensive and time-consuming as it is, surely it is preferable to the bloodletting and fear which accompany such quarrelling away from the court-room.

Gibbs, writing on the tribal moots conducted by the Kpelle people of southern Africa, points to their therapeutic function.[27] This psychological element was understood by the American realist writer and judge, Thurman

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[23] Title 9 (e) *Appendix 'A',* marks such a process, *viz.,* general education, as one of the latent effects of law. See also Weeramantry, "Law as a Cultural Discipline" in *Proceedings of Australasian Law Schools Association Conference* (1978), and Brown, "Law for Non-Lawyers" (1978) 20 Mal.L.R. 133. See also Hay, *op. cit.,* 26-7, on this aspect, especially the eighteenth century English judges' charge to grand juries (and attendant members of the public) at the commencement of Assizes.

[24] See Gibbs, "The Kpelle Moot" *Africa,* vol. 33, 1.

[25] Lord Edmund-Davies does not make that direct connection in his statement in *D.P.P.* v. *Majewski* [1976] 2 All E.R. 142, 168, where he quotes from Stein and Shand, *Legal Values in Western Society* (1974) 31: "The first aim of legal rules is to ensure that members of the community are safeguarded in their persons and property so that their energies are not exhausted by the business of self-protection. However, it does seem to follow that where a legal-institutional apparatus *does* succeed in absorbing or diverting ill-will, it can assist parties to place their energies to positive ends. (Yet we know of many instances when legal process has exacerbated the quarrel).

[26] See Hoebel, "Song Duels Among the Eskimo" in (Bohannan ed.), *Law and Warfare* 255-62, and in the same volume, Redfield "Primitive Law", 16. See also Miller, *Bloodtaking and Peacemaking* (1990).

[27] See note 24, *supra.*

Arnold, who claimed that the chief function of the law may not be to guide society but to comfort its members.[28] A prominent instance in our own experience is the coroner's inquest which, like the formal funeral, may not only 'clear the air' but also serve as a useful channel of catharsis. An acquaintance of this writer, a former resident magistrate in New Guinea,[29] made a point of conducting inquests which supplied maximum opportunity for witnesses and family members to unburden their emotions, and to vent their spleen in a controlled situation.

3. *Defamation calculated to increase newspaper circulation or book sales*

Publication of the deliberate or reckless libel for this ignoble purpose is not unknown.

A quarter of a century ago, Liberace, the American entertainer, was awarded substantial damages by an English court in his action against *The Daily Mirror* newspaper. The *Mirror's* columnist, William Connor, whose pen-name was 'Cassandra', wrote an article about Liberace's impending visit to England which bore the clear innuendo that he was a homosexual. (At that time the practice of homosexuality between males was still a criminal offence in England).[30]

An actuary who compared the *Mirror's* expenditure in damages and legal costs[31] with its additional revenue received through its own sensational coverage of the events would readily agree that the defamation was 'good business'. The newspaper's circulation was vastly increased over those months.

In effect – if not design – the same may be true of the 1990 libel action brought by one English newspaper editor against another. In *Neil and The Sunday Times* v. *Worsthorne and the Sunday Telegraph,*[32] the editor of *The*

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[28] *The Symbols of Government* (1935), 48. And see title 20(a) *Appendix A.*

[29] On the inquest's therapeutic role in Nigeria, see Armstrong, *American Anthropologist* 56, 1051-69. Mr. Paul Quinlivan, R.M., in the late 1960s and early 1970s is my New Guinea illustration.

[30] The statement was publicised not long before 1967; Parliament acted to withdraw the penal sanction from homosexual conduct between two consenting adult males in private. Cassandra wrote, and the Mirror published the following statement about Liberace: "[He is] a sugary mountain of jingling claptrap ... a deadly, winking, sniggering, snuggling, chromium-plated, scent-impregnated, luminous, quivering, giggling, fruit-flavoured, mincing, ice-covered heap of mother-love".

[31] See report "Last Laugh" in *The NZ Herald,* 12 February 1987, 1., stating that the *Daily Mirror* had paid £35,000 libel damages and costs to Liberace.

[32] *The Daily Telegraph,* 13 January 1990, 1. – "Libel verdict satisfies rival editors". Neil was awarded damages of merely £1000 against Worsthorne and *The Sunday Times* was awarded a derisory 60 pence – the price of one newspaper.

Sunday Times sued his counterpart at the rival newspaper for informing his readers of Neil's sexual relationship with a Ms. Pamela Bordes, a high society prostitute. Such a relationship had existed. The libel, by way of an imputation against the plaintiff's moral character, occurred in *The Sunday Telegraph's* claim that Neil must have known of Bordes' sexual character at the time he conducted his relationship with her. The plaintiff denied that knowledge. The two 'quality' Sunday papers' readerships were greatly swollen as a result of their editors' litigated contretemps. Not surprisingly, neither man played down the matter while the case gestated. In that regard, they had a spiritual ancestor in Horatio Bottomly the notorious editor, eighty years earlier, of the journal *John Bull.*

Not surprisingly the sales of books, and of other published material, also have been boosted by their defamatory content. A severe case of a book is reported in *Cassell & Co. Ltd.* v. *Broome*[33] where exemplary damages were awarded. The respondent, a distinguished World War II naval officer, had been defamed by the publication of unjustifiable allegations that he shared responsibility for a wartime naval disaster. It was held that exemplary damages could be awarded if a plaintiff proves that the defendant knew he was committing the tort or was reckless whether his action was tortious or not, and decided to publish because the prospects of material advantage outweighed those of material loss. Lord Reid added, "[T]he jury were fully entitled to hold that [the publishers] knew when they committed this tort that passages in this book were highly defamatory of the respondent and could not be justified as true and that it could be properly inferred that they thought that it would pay them to publish the book and risk the consequences of any action [that Broome] may take. It matters not whether they thought that they could escape with moderate damages or that the enormous expense involved in fighting an action of this kind would prevent the respondent from pressing his claim".[34]

4. *Furnishing the means of damaging another person's interests*

It is inconceivable that any legal system would support such an objective as one of its manifest aims or functions. Yet instances occur, and are recorded, where for selfish motives, persons in business or in political life have deliberately defamed their rivals.

In so doing they take a calculated risk. They know it may cost them dearly in damages (and probably in exemplary damages) – or, at least a substantial out-of-court settlement. Yet this is weighed in the calculation that the material and other advantage to be gained by destroying the

[33] [1972] A.C. 1027.
[34] *Ibid.,* 1088. See also Lord Hailsham L.C., *ibid.,* at 1079.

competition will be more than that lost. It is not only the certain prospect of a damages award which might be expected to deter such exercises in ruthlessness: the would-be defamer might also suspect he will attract public opprobrium for his 'hatchet-work'. But that might be avoided by a private settlement. Even if it is not, the defamer may have achieved his aim of say, election to office, before the action has come on for trial.[35]

Less uncommon is the sabotage of a commercial rival's product by publishing matter defamatory of it. The tort of injurious falsehood lies in such cases, for recovery of damages or for issue of an injunction, where the defendant has told malicious untruths about the plaintiff's trade or business, the untruths being calculated to cause financial loss.[36]

This tort may have diminished in importance with the advent of 'fair trading' legislation creative of liability for deceptive conduct in trade. Usually there is no requirement to prove 'malice'.[37]

5. *Defamation of political opponents as a standard device of propaganda to supplant a government*

This shares the aim of the previous item. But there is a difference of magnitude. The defamation here – utilised to destroy the political *status quo* – is a multi-persons, multi-actions campaign or *pogrom.*

The latent function and effect of libel law (manipulated through constitutionally established, yet weak, courts) is not that of the individual politician, say, Jones in New Zealand, English in Britain, or Elliot in Australia,[38] who seeks to score points against a rival individual. Rather, it is the strategy of a particular political movement employed to overthrow another one, usually one exercising governmental power.

In his earlier career as a law professor, the sociologist David Riesman, in 1942, contributed three articles to the *Columbia Law Review*[39] entitled poignantly "Democracy and Defamation". They charted in detail the strategy used by fascist movements in 1930s Germany and France of attacking

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35 *Ibid.,* 1088.

36 See Burrows, *op. cit.,* 177-9. Note the following cases: *Western Counties Manure Co.* v. *Lowes Chemical Manure Co.* (1874) LR 9 Ex 218; *Thorley's Cattle Food Co.* v. *Massam* (1880) 14 Ch. D. 763; *Ratcliffe* v. *Evans* [1892] 2 Q.B. 524.

37 See, *e.g.,* the (New Zealand) Fair Trading Act (1986).

38 *Templeton* v. *Jones* [1984] 1 N.Z.L.R 448; *Castle* v. *English, The Times,* 29 July 1978. With regard to Elliot the following may be stated. Hawke, a recent Prime Minister of Australia, established a special Business Crime Unit which, with or without his prompting, commenced inquiries into Elliot's commercial affairs. Elliot was President of the (oppositional) Australian Liberal Party. When Hawke, the (Labour) Prime Minister announced the date of a General Election, Elliot brought an action against him for libel.

39 (1942) 42 Col. L.R. 727; 1085; 1282. (These numbers represent the commencement pages of each section).

prominent legislators and bureaucrats through the law courts. Some victims of this barrage of actions were driven to resignation, to mental breakdown, to flight overseas, even to suicide. Riesman states that in Germany, libel law was one of the cumulative factors in the Nazi triumph.

Defamation codes, which were unduly indulgent of *ad hominem* as well as political criticism, allied with generally dispirited and cowed benches to allow spurious defences to be put and sometimes to succeed. When they were not being sued, the vilifiers provoked their 'targets' into making indiscreet statements whereupon they immediately sued *them* in defamation.

Winning or losing the particular legal battles was of little importance when there was a larger 'war' to be won. The guiding text of vilification might be summarised as follows:

— If we throw copious amounts of dirt, some of it will stick.

— Who knows what might come out of it if we get a Minister or a leading bureaucrat in the witness-box?

— Subjected to repeated attacks on their character, some ministers and public servants are bound to break under the strain.

— Their major preoccupation over several years will be the defamation suits they will be forced to bring against us (or defending those we commence against them). That will constitute a major distraction from their pursuit of good governance. Eventually they will lack the will to govern.

— Action after action, week by week, we shall keep our own name and party objectives in the public eye and ear.

Ominously, fifty years later one learns that M. Le Pen, with a similar objective in mind, has no compunction about resorting to the defamation laws whenever he is labelled, variously, a fascist, a racist or a jewbaiter.

In one of his later works Riesman points to the obverse of this defamation coin. He opines that English publishers and writers believe that their libel laws prevent the desirable and necessary exposure of governmental and commercial scandals. "There are matters", he says "about which the public has a right to be fully informed".[40]

This form of legal latency is perfectly illustrated by the exposures which hastily followed the death of Mr. Robert Maxwell.[41] Prior to that event,

[40] *Ibid.,* 1121.

[41] See note 1, *supra.*

the powerful Maxwell was always well positioned to keep even legitimate criticism out of the public eye and ear.

That was achieved by forging a sword from the shield of conservative defamation law. A writ for libel (a "gagging-writ" claiming extremely high damages) would be slapped onto an editor or journalist at the first intimation of a public revelation. Maxwell took out writs and, where he deemed it appropriate, proceedings for injunctions, in remarkably large numbers: at the time of his death it was estimated that there were approximately one hundred writs extant. A London solicitor summed up the situation, late in 1991, in these words: "He knew that the recipient of the writ would have to spend substantial sums proving that what was said was true or fair comment on a matter of public interest. He knew, too, that the person he sued would be reluctant to spend such sums and would be happy if only for economic reasons, to pay a modest sum in damages and costs and make a public apology to get out of the libel action. He also knew that the defendant would soon discover ... that witnesses would be reluctant to give evidence against a man of his power, particularly if they earned their livelihood in journalism or printing. The result was that editors tended to spike stories critical of Maxwell."[42] Among other scandalous irregularities, 450 million pounds were moved from Maxwell's employees' pension funds into Maxwell's private companies. Investigative journalists suspected that some such activity was underway but few would have guessed the magnitude of it. Even if they had, their reports would have died upon the desks of their cowed editors.[43]

6. *Contributions to political party and leadership funds*

A rarely canvassed effect of defamation law is illustrated by another chapter of the Maxwell saga. Where newspapers published in his home-town, Oxford, occasionally dared to print stories which displeased the magnate, his lawyers required them to donate sums of money to the local Labour Party by way of out-of-court settlement.[44]

Allegations of similar practices, built on negotiations over possible, perhaps even putative libels, have been made in the political arenas of other countries. Because some of these are still under investigation by courts or administrative tribunals, it becomes necessary to proceed by way of parable.

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[42] See the article by Hooper, note 1, *supra.*

[43] See note 1, articles by Hooper, and Tom Bower, Maxwell's unauthorised biographer. The remarkable aspect of Maxwell's operations was their resilience after they had been publicly condemned, in 1954, by an official receiver and, in 1971, by inspectors of the Department of Trade and Industry.

[44] See David Hooper's article referred to at note 1, *supra.*

Should a trader, within or beyond the temple, become desirous of making a sizable donation to, say, the chief pharisee's party funds (for the motive which commonly prompts such generosity) it is possible that some inconvenient legislative edict may bar his way. (In many polities, statute sets a low ceiling on the size of menetary contributions to such funds). So the trader, on the advice of cunning counsel, comes to publish a mild, yet technically defamatory, criticism of the leader. On cue, the latter, the chief pharisee, sues the trader for unrealistically high damages. Predictably a settlement for a lesser, though very large, sum is effected – quietly out-of-court.

With the help of the law the party's coffers swell again.

7. *The drama of the trial as a socialisation or enculturation factor*

In this section we examine the trial - and especially the trial of defamation – as a crucible of challenged social, moral and other values.[45]

Occasionally, it is predictable that a particular trial will forever, or long, serve as a sign of change on the map of human experience. Oscar Wilde was determined that his would do so, Nuremberg was bound to, and the State of Israel would not have gone to all the trouble of capturing and trying Eichmann and Demjanjuk (an improbable 'Ivan the Terrible' of Treblinka) if it had not been convinced of the need to re-educate the world abut the Holocaust.[46]

But the majority of these quite rare 'great events' are not recognised as such at the time of the trials. Those who judged Jesus Christ may have thought they were dealing with a remarkable zealot yet none would have expected his persecution to have global repercussions.[47] Sacco and Vanzetti were barely literate run-of-the-mill immigrant workers: who would remember *them?* And who, at the time of his trial and execution, would have regarded Timothy Evans as a future household name to be invoked whenever the question of capital punishment was raised? In such instances, and in most like ones, it was the injustice of the legal process which sparked

[45] See Riesman, *Individualism Reconsidered* (1954) 448-9; Arnold, *The Symbols of Government* (1935); Nader "The Anthropological Study of Law" in American Anthropologist (ed Nader), Part 2, Vol. 67, No 6, December 1965, 19; Brown, "Light on Latent Effects of Law" (1982) 10 N.Z.U.L.R. 8, note 30. The occurrence of greater or lesser moral watersheds might be noted in the trials of, *e.g.,* Socrates, Jesus Christ, Galileo, Thomas More, Bradlaugh, Oscar Wilde, Scopes, Alger Hiss, Penguin Books Ltd., (*Lady Chatterley's Lover*), and Lennon and Gay News Ltd.

[46] See Oddie, "When Corruption Tips the Scales of Justice" *The Daily Telegraph,* 28 November 1991, 21.

[47] This question is raised in a (fictitious) discussion conducted with Pontius Pilate in retirement at Baiae, in Anatole France's *The Procurator of Judea.* Pilate is recorded as saying, "Jesus ... Jesus the Nazarene? No, I cannot remember him. The name means nothing to me."

some later movement for enlightened change: to mention a few, Socrates, Galileo, Joan of Arc, Thomas More, Bradlaugh, the Dreyfus Affaire, Scopes, Lennon and Gay News Ltd. Where it is the trial, and the court's view of the relevant law, which proves to be the precipitating cause of the eventual change, then that trial has (often unwittingly) produced a latent effect for historians to ponder.[48]

Here the defamation trial again fits a distinctive if not definitive role. Not uncommonly the clash of values – the 'new' versus the 'established' – occurs in terms which invite an action for libel or slander. Sometimes it is the vanity of plaintiffs which is at stake, not their reputations.[49]

In 1878, the egocentric and litigious James Abbott McNeil Whistler, an American who joined Wilde's circle and painted in London, sued Victorian England's greatest art critic, John Ruskin, for berating the former's creations in these terms: "I have seen and heard much of cockney impudence before now, but never expected to hear a coxcomb ask 200 guineas for flinging a pot of paint in the public's face".[50] In essence the conflict was one between subjective (nonrepresentational) art and representational art: – between the *avant-garde expressionism of* Whistler and the traditional mid-

[48] In 1944, a group of traditional artists (led by Mary Edwards) failed in their motion to the New South Wales Supreme Court to set aside the award of the Archibald Prize for portraiture on the ground that the 1943 winner, William Dobell' s entry, was not a portrait but a caricature, thereby contravening the terms of Archibald's will. The loss was interpreted by Dobell and his supporters as "a victory for self-expression [and] it did stimulate interest in art in Australia a lot."

Asked, in 1990, if any other portrait had caused such profound effects on so many lives (it had allegedly 'ruined' the lives of the sitter, Joshua Smith, and his father, and the criticism had made Dobell ill for many years), Robert Bleakley of Sotherby's Australia answered, 'No, only the portrait of Dorian Gray'.

See Hawley, "Portrait of Pain – Turning Point for Art" in *The NZ Herald,* 30 August 1990, section 2,1.

[49] In the Dobell instance, *ibid.,* it appears to have been the egos of Edwards and the subject of the portrait, Joshua Smith.

[50] Published by Ruskin in the 1877 issue of *Fors Clavigera.* Accounts of the trial are available in *Whistler* v. *Ruskin, The Times, 26* and 27 November 1878, in Whistler, *The Gentle Art of Making Enemies,* and in Judge E.A. Parry's *What the Judge Thought* (1922). Judge Parry' s father was involved as counsel in the 1878 trial and left relevant important and interesting papers to which Parry had access. The conflict between Whistler and Ruskin, which surfaced briefly in the courtroom is seen as embodying differences of a moral, ethical and socio-political nature in the life of the 19th and 20th centuries. In the rudest artistic terms, Ruskin is seen as a guardian of traditional values and Whistler as an early radical or liberating force toward the broad ends of 'modernism'. Ruskin is quoted in *What the Judge Thought,* 224 as saying: "[the] chords of music, the harmonies of colour, the general principles of the arrangement and sculptural masses have been determined long ago and in all probability cannot be added to, any more than they can be altered".

In 1978, David Craven has written, "The real issue between Ruskin and Whistler was whether art should be committed to rectifying social ills or whether it should be created autonomously .... By condemning Whistler's paintings, Ruskin felt he was defending

Victorian standards championed by Ruskin, the age's chief arbiter of aesthetics.

For several days the court became a place where other-than-legal values were tested and offered to the jury, and to the public, for change or consolidation. From Whistler's standpoint the trial was an opportunity to exterminate a prophet and destroy a false doctrine. And Ruskin, upon the challenge being made, scented the battlefield and the destruction of dangerous dragons. In a letter to the painter Burne Jones, he wrote: "[The] whole thing [in court] will enable me to assert some principles of art economy which I have never (yet) got into the public's head by writing but may get sent all over the world vividly in a newspaper or two".[51]

Both sides of this disagreement about art were thoroughly, and colourfully, aired (even though the defendant was prevented by illness from giving evidence). In spite of the jury's finding that Whistler had been defamed by Ruskin, he was awarded damages of one farthing only. By the time of his death, twenty-five years later, Whistler was no longer seen as a progressive figure. His paintings "had lost whatever experimental look they once had, and were surpassed by Impressionism".[52]

This great 1878 debate about art which – on balance – probably went Ruskin's way, basically remains unresolved today. Yet, whether motivated by vanity or artistic altruism, the impact of Whistler's challenge should not be underrated. The trial that he instigated undoubtedly proved to be a melting pot of social, aesthetic and moral values. It broke the ground in western Europe for the true revolution in artistic expression – for the modern philosophy which, in Pissarro's words "is absolutely social, anti-authoritarian and anti-mystical.... A robust art based on sensation".[53]

It is no coincidence that another libel *cause celebre* of Victorian times was instigated by an ally of Whistler, Oscar Wilde. More talented and more socially prominent than the painter, Wilde possessed a similarly brittle ego and also delighted in outraging staid English Society.[54]

Wilde's intimate friendship with Lord Alfred Douglas caused the latter's father, the brutish Marquis of Queensberry, to conduct an open vendetta against Wilde. Ultimately, when faced with a probably libellous card left by Queensberry at Wilde's club (referring to the poet as "posing as a sodomite"), Wilde placed the matter in the Crown's hands and became the chief prosecution witness in criminal libel proceedings against the Marquis.

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the art world against the debilitating effect of capitalism.... To Ruskin, Whistler's art represented manifestations of Adam Smith's economic system". (From *Ruskin* v. *Whistler: The Case Against Capitalist Art* in *Art Journal* XXXVII/2 Winter 1977/78, 143, 142).

[51] Parry, *op. cit.,* 116.

[52] Hughes, *Nothing If Not Critical: Selected Essays on Art and Artists* (1990), 113.

[53] *Ibid.,* 119.

[54] See generally, *Trials of Oscar Wilde* (ed. H Montgomery Hyde, 5th impression), 1960.

Due largely to the brilliant defence of Queensberry by Sir Edward Carson, the prosecution was withdrawn and an acquittal was entered. Evidence having surfaced of Wilde's sexual peccadillos involving young men, Wilde himself straightway became the subject of prosecution on numerous counts of indecency with males. (That consensual behaviour, short of sodomy, had only lately been enacted as an offence). Although the first trial ended in jury disagreement (which many commentators attributed to Wilde's extraordinarily moving speech about the Platonic love felt by older men for younger men), the second trial yielded convictions on most counts and in 1895 Wilde was sentenced to two years imprisonment with hard labour.

The manifest aim of Wilde's instigation of the prosecution of Queensberry was to protect his reputation and to shield himself from further harassment by that man. However, that trial and the two succeeding ones became celebrated for their latent effects. They are:

(a) Demonstration by the Victorian establishment of its contempt for Wilde's lifestyle and his influence (which it viewed as inimical to "the wholesome, manly, simple ideas of English life");[55] *and*

(b) The raising – in the highest public profile – of the question whether a man ought to be punished, and in effect destroyed, for having sex with a consenting adult male partner in private.

It was not until 1967 that the British Parliament withdrew the criminal sanction from such conduct. Yet whenever, in the interim, the issue had been joined in debate (and not least in the series of prosecutions mounted in the 1950s against Lord Montague and others)[56] the especial anguish of the Wilde trials was re-enacted. No amount of 'scientific' testimony and common sense could exorcise that particular ghost from the proceedings of the Wolfenden Committee whose Report (on Homosexual Offences and Prostitution) was published in 1957.[57]

One suspects that it was in part the Wilde experience that humanised (and civilised) the public response to the Wolfenden Report. A decade later, eighty-two years after its definition as an offence, 'indecency between males' was 'decriminalised' so long as the conduct was consenting in private, between no more than two adult males.

In both cases, Whistler's and Wilde's, the drama of the trial marks, in retrospect, the starting point of eventual radical changes in legal-cultural attitudes to challenges of the *status quo.* As in the trials, or trial-like

[55] Editorial, *London Evening News,* 25 May 1885.
[56] See Wildblood, *Against the Law.*
[57] Cmnd 247.

proceedings, in Scopes, in Penguin Books (*Lady Chatterly*), in the Watergate affair and in the Joanne Hayes *Kerry Babies* case,[58] the latent effect of legal process was ultimately significant in social and moral cultural terms. Societal turning points were signalled. The role of the law, in its most dramatic function, converts potential semaphores of social values into cynosures.

Whether, from today's stand-point, the law's influence could be viewed then as 'unenlightened' or as 'enlightened' seems very largely irrelevant. Objectively, it is influential.

CONCLUSION

In this paper a number of latent effects of law and legal process have been examined in the narrow context of justiciable defamation. In all of those instances (and there may be more), legal doctrine and legal rules have been, at best, subordinated to the part of second or third fiddle to the other-than-legal business transacted on centre-stage. At less than best, truly legal content and framework could be seen as mere 'props', lending the real drama a semblance, or fiction, of legal propriety.

Probably by general assent some of the seven instances listed are socially beneficent, *e.g.,* the trial and its rules may furnish opportunity for venting spleen or for achieving emotional catharsis; the trial may focus public attention onto a subject overdue for reform by law. Only the legal pedants would desire to exclude such effects, or even such aims, from the inquiry and disposition of the court. Almost synonymous with latent or covert factors is that of political activity in the law. In legal systems even the most conservative courts, often under cover of a fiction, engage in the work of politicians when it suits them to do that. To create and apply rules aimed at arresting the process would be tantamount to neutering the legal system

[58] Readers may not be familiar with the last-mentioned case. This concerned wrongful police conduct in the Republic of Eire in extracting "confessions" from Joanne Hayes and some family members that she had killed her child at birth, and with their help had disposed of the body. Scienfific evidence indicated that, although Hayes had given birth to a child at that time, the dead child in issue could not have been hers. The subsequent Judicial Inquiry (1985) which either missed or glossed the real social and moral issues, does furnish an adequate statement of the facts. (See Report of the Tribunal of Inquiry into the *Kerry Babies* case, Dublin 1985 – Mr. Justice Lynch).

The issues, which were widely ventilated by the Irish press, are stated as follows: to what extent is State-law regulated by State-religion (should priests be permitted to operate, in effect, like police inquirers and should police be entitled to act as custodians of private morality?)

Should unmarried women, especially those living in rural Eire, be entitled to enjoy a degree of sexual autonomy?

It may be no coincidence that only a few years after the Kerry Babies scandal, Eire elected a woman President, Mary Robinson.

– distancing its relevance from the living society it serves. Also it would be a practical impossibility.

In an effective democracy, people are entitled to know what the courts, as well as the legislature, are doing. Both institutions ought to speak more plainly about their enterprises: the courts need to make it clear when they are basing decisions on policy grounds (on extra-legal grounds). Only then may future litigants and later courts be sure what should and what should not be influential upon their own 'legal' transactions. However 'worthy' the cause, a point is reached at which law does itself a serious disservice in countenancing camouflage and manipulation. Process and doctrine are sullied. Eventually some public confidence in the legal system is forfeited. Lawyers and parliamentarians should heed the words of Edward Bond, a playwright:

> There is an elementary requirement of moral discourse that we call a thing by its proper name. Disguises convey phoney intellectual and moral prestige. They are one reason why people have difficulty in understanding themselves and their society'.[59]

Naturally, a much stronger case can be made for de-masking where the great majority of people detect exploitation of law and its procedures for servicing the end of self-interest. Here one refers to the heads listed 1,3,4,5,6 (above, in this text).

The law already provides a number of potential useful checks against its manipulation for covert or unconscionable purposes. There is, for instance, the courts' inherent power to bar or dismiss actions as vexatious or frivolous. Also, in extreme cases, where the plaintiff's statement of claim discloses no known action, then plainly the matter will not be allowed to proceed. Where it does disclose a cause of action but it later appears that some extra-legal aim is the primary one pursued, in finding against the plaintiff the court can award substantial costs. Abuse of process may be available too, but in this context it is still an underdeveloped remedy. In practice these devices do not provide adequate protection against the kinds of misuse described in this paper. (In the four jurisdictions in which I have canvassed the views of the practising professions, all have reported the general reluctance of courts to impugn actions where statements of claim contain some element, albeit minor, of justiciability).

One can appreciate the delicacy of the judges' situation. The quite extensive use of pre-trial 'chambers conferences' in some jurisdictions affords an appropriate platform for judicial expression to plaintiffs of robust scep-

[59] "The Romans and the Establishment's Fig Leaf", *The Guardian,* 3 November 1980. See generally Danet, "Language in the Legal Process" 14 Law and Society Review (1980), 445.

ticism about the legal relevancy of their claims. Judges themselves may prefer to see such a judicial, or quasi-judicial, 'sieve' administered by a Master of a High Court or by a Registrar of a lower one. That would accommodate applications by defendants who aver that the sole or primary aim of the plaintiff's action is to litigate matters which strictly or substantially are not justiciable. Where it appears to the Master, or Registrar, that it is the objective of the plaintiff to litigate under a false cloak of justiciability, an order may be made that the matter should not proceed to trial. (That order would be subject to appeal). To discourage defendants' misuse of that facility, a security for costs could be required of them.

That strategy may not fully meet the quite widespread and complex problems concerning defamation which are described in this paper. I refer particularly to the 'Maxwell-syndrome' – the ability of the rich and powerful to exploit the defamation law by cowing their *bona fide* critics into silence. Predictably, most such 'causes' do not come anywhere near a court-room. Should that large legal-economic problem admit of really effective solution, it might be found only in the broadening of the defences of justification, fair comment and qualified privilege.

In the absence of that reform, and common law jurisdictions seem unwilling to do more than tinker with such an approach, smaller scale amendments may bring some realistic relief, especially in the sector of 'gagging-writs'.[60]

In actions against news media defendants, legislation might be introduced requiring that plaintiffs are not to specify in their statements of claim the amount of damages claimed. That might serve to palliate the fear of editors where extremely heavy claims are filed with the aim of frightening them into silence.

Where it is proved that plaintiffs at the time of commencement of proceedings have no real intention of proceeding to trial, that commencement could be deemed to be vexatious. (Of course, it would be very difficult to prove the relevant intention, but a further deterrent to such coercive tactics might lie within the disciplinary codes of the national or local Law Society).

An effective remedy – and deterrent – is the award of exemplary damages where the plaintiff has been the victim of punishable behaviour. As noted earlier, one relevant form of conduct in that category – well illustrated by the libel in *Cassell and Co. Ltd.* v. *Broome* – is where the defendant has calculated that he can make out of the defamatory publication a profit for himself, which may well exceed the compensation he had anticipated having

[60] Although I have no wish to implicate him in my more ersartz recommendations for legal change, Professor J. F. Burrows' excellent book *News Media Law in New Zealand* (1990) has provided a stimulating base for ideas: see 43-54. He covers, *inter alia,* the contents of a (New Zealand) Defamation Bill - the future of which is not clear.

to pay the victim. Lord Devlin has pithily presented the rationale: "One man should not be allowed to sell another man's reputation for profit.... Exemplary damages can properly be awarded whenever it is necessary to teach a wrong-doer that tort does not pay".[61]

Another possible realistic deterrent could prove to be the court's award of defendant and solicitor costs where the judge concludes that, in the light of the damages actually received by the plaintiff, his or her claim was for an excessive amount.

Furthermore, legislative provision could be made for the court, on defendant's application, to order the striking out of proceedings if no date has been fixed for the trial, where no step has been taken in the proceedings in, say, the twelve months preceding the defendant's application. That might counter the intimidatory damoclean shadow cast by the gagging-writ.

No search for effective remedies would be complete without mention of that increasingly utile device in the commercial area – the interim injunction. For better or worse, its effectiveness in defamation law is quite severely circumscribed. For historical reasons related to the value of freedom of speech, courts are not keen to grant such injunctions.[62]

Significant reform in that or any other theatre of defamation law would mark the society's change of direction on a core philosophical attitude. The legal balance achieved between the so-called right of freedom of expression and the protection of persons' reputations from unjustifiable attack varies from jurisdiction to jurisdiction and from time to time. No legal change, by legislation or by judicial agency, should be undertaken without recognition of the existing law's latent ramifications for the particular society and the relevant time-frame. That is the message of this paper. Defamation law has been employed as the chief illustration of the danger of ignoring that message because it is peculiarly sensitive to political masking and to economic manipulation.

In defamation, as in other areas of law, official reform activity which takes no account of latent attributes risks suffering acute embarrassment when sociological research exposes its bases of naive moral judgment.

B. J. BROWN*

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[61] See *Rookes* v. *Barnard* [1964] A.C. 1129, 1226.

[62] The stringent conditions for granting them in the defamation sector are set out in *Bonnard* v. *Perryman* [1891] 2 Ch. 269 and in *Wm Coulson & Sons* v. *James Coulson and Co.* [1887] 3 T.L.R. 846.

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APPENDIX A

As foreshadowed at the commencement of this paper, I initially detected and examined twenty-one latent effects of law and legal process in an article "Light on Latent Effects of Law" (1982) 10 N.Z.U.L.R. 1, 6-12. With the blessing of that journal, I summarise that list here. Additional latent effects are then listed from 22-35. This collection is not exhaustive. (Useful explanatory notes on Nos. 1-21 are printed in footnotes in the above journal, at 6-12).

1. The law's latent effect of furnishing means of damaging another's interests. (Readers will be aware of many cases, civil and criminal, that are commenced with the primary motive of damaging defendants' businesses, social or political interests).

Beals, in an anthropological study of a Mysore village, gives illustrations of litigants' use by villagers of urban land courts to bring about the economic ruin of enemies and rivals: *Studies in Little Communities* (ed. McKim Marriott, 1955). To similar effect, see Berreman, *Hindus of the Himalayas* (1963).

2. Providing means of frightening another into more acceptable behaviour. (For instance, the threat of derecognition/deregistration of a trade union; the threat of divorce proceedings by one spouse to bring the other 'into line'. Hay's study of crime in England in the 18th century shows how the local squirarchy managed to bring their more spirited villagers 'into line' by threatening them with private prosecutions for felony: see "Property, Authority and the Criminal Law" in *Albion's Fatal Tree* (1975), 48).

3. Furnishing means, to officials, of harassing non-offending, non-indigent persons for whatever purpose (commonly to obtain information, or to 'sanitise' a locality).

Obvious examples are the selective enforcement of obscenity and vagrancy laws, which perform the function of witchcraft hunts in other societies.

Cohn in *American Anthropologist* Vol. 67, No. 6, pt 2 (1965), 82, reports on the use of courts to harass political and commercial rivals.

4. Furnishing means of punishing or denouncing another (that is by means other than those articulated by law for punishment and denunciation): see, *e.g.,* Riesman, *Individualism Reconsidered* (1953), 485: "Sometimes [Management employs counsel] not for success but to lambast the other side publicly. There have been cases of quite conservative but unfanatical lawyers who have lost their jobs as labour negotiators because management wanted, not success in the labour bargain, but a ritual of expletives against those damned union bastards."

5. Supplying opportunities for 'cry-for-help' purposes. For example, the cold, hungry indigent who throws a brick through the police station window as a means of securing a warm cell and a meal. Persons who have made false complaints of crimes against them (*e.g.,* in *R.* v. *Manley* (1933) 24 Cr. App. R. 25) – commonly without specifying an identifiable suspect – sometimes appear to have been prompted by a desire to gain public, and official, sympathy for loneliness, frustration, or other real or fancied personal disappointment.

6. Furnishing opportunities for deliberate law-violation aimed at drawing attention to 'altruistic causes'. Typical of this form of exploitation of court process is the 'conscience protester', say, the anti-abortion advocate who trespasses on the abortion clinic premises for the express purpose of being arrested and charged with criminal trespass. She or he then takes the opportunity, in giving evidence, or in making a plea in mitigation of sentence, to gain publicity for the cause.

The effectiveness of this stratagem is illustrated in a New Zealand case. The District Court Judge, who conducted the trial, made an order barring publicity. The higher court allowed the defendant's appeal against that order – effectively converting the witness-box into a pulpit for the defendant's proselytism. (*NZ Herald*).

7. Providing camouflage for increasing public revenue. The 'City Fathers', empowered to legislate for safer and orderly road traffic, create no-parking zones, ostensibly to deter prospective violators and to punish actual violators, but their real (yet masked) aim, and the deliberately engineered effect, is to increase the revenue of the local treasury. That motive is uppermost when streets for several miles' radius from a point of massive public interest – *e.g.,* an Easter-show amusement park – are declared 'no-parking' zones. There is no gain in safety or orderliness of traffic flow: there is a substantial gain in fines.

L. Nader gives a not dissimilar illustration of the power of Zatopec "collecting authorities" in Mexico, "Variations in Zatopec Legal Procedure" in *Homenaje al Ingeniero* (ed. Weitlaner, 1966).

"Western municipal "collecting" practice does not stop at minor traffic offending: other licensing systems or tariffs are set up for common (inevitable) minor wrong-doing, including public drunkenness and soliciting by prostitutes.

And on 'amercements' in thirteenth century England, see Pollock and Maitland, *History of English Law,* Vol. 2, 513.

The use of courts for the chief purpose of economic gain has a long history in 'developed' as well as 'underdeveloped' countries. In some of the former that use is no longer viewed as a latent, or covert, use.

8. (a) Furnishing means of acquiring or maintaining status (that is, by means other than those openly employed by law for such a purpose): For example, careful exploitation of business, tax and criminal laws can assist in achieving either of these aims.
Anthropological writings provide some stark instances of 'official' courts being used as an arena in competition for social status and political and economic dominance in the village: see Cohn on the Senapur experience, in *American Anthropologist,* Vol. 67, No. 6, part 2 (1965), 82.

(b) Furnishing means of legitimating the status quo (by means other than articulated legitimation).
The notion of a 'rule of law' ordinarily operates to induce acceptance of things as they are: Arnold, *The Symbols of Government* (1935), 47-8.

9. Providing means of influencing certain socialisation/ enculturation forces (that is, by means other than those openly used by law for that purpose: (see, *e.g.,* Hay, *Albion's Fatal Tree,* 27-28 where he states a latent effect of judges' charges to the Grand Jury (in the 18th century) often was to preach moral and religious values. That was at a time when the clergy were frequently lazy, absentee, materialistic and defective in their moral educational role).

The influence could be recorded in terms of:

(a) social cohesion, or division, resulting from litigation or threatened litigation;

(b) enculturation through drama of the trial (trial may sometimes serve as a moral turning point, *e.g.,* the 1925 Scopes (evolution) trial in Tennessee);

(c) re-education of litigants through social learning (psychotherapy), (see, *e.g.,* Gibbs, "The Kpelle Moot", *Africa,* Vol. 33,1);

(d) enrichment of language by legal language, *e.g.,* language may be embellished by controlled contests of verbal skill, (see Olivecrona, *Law as Fact,* 252; Aubert, *The American Behavioural Scientist,* 7(4), 16-20 (1963);

(e) general educational influence of laws and legal process. (See, *e.g.,* Weeramantry, "Law as a Cultural Discipline", Proceedings of Australasian Law Schools Association Conference, 1978; Lasswell and McDougal, "Legal Education and Public Policy", 52 Yale L.J. (1943), 203. See also Hay, *op.cit.,* 26-7, on this aspect, especially the eighteenth century judges' charges to Grand Juries at Assizes).

10. Fostering regard for and treatment of an abstraction as a concrete "thing": (see Gabel, "Reification in Legal Reasoning", *Research in Law and Sociology* (1980); Brown, *Shibboleths of Law*).

(a) Reifying social organisation (chiefly through the occupational activities of the lawyer, *e.g.,* in corporations, whose law-trained eye is on structure rather than personalities occupying places within it);

(b) Inducing parties to a legal compact (by its formalism) to attach greater importance to the medium (the 'thing') than to its message (the contents or substance): "We know that many contracts are never read; they are things we keep in a drawer", Danet, 14 Law and Society Review (1980), 489.

11. Providing a necessary accoutrement to the Millenium (that is, when the sole or principal effect of such use of "the new law" is symbolic rather than aimed at actual implementation of the prospective new order).

The revolutionary prophet without "the new law" is without honour and, lacking that cutting edge, he may find himself without much popular support.

Whether the "messiah" is Rua Kenana (a Maori prophet especially

active at the time of World War 1, or Dr. Fidel Castro, the almost complete break with past institutions seems to include the legal system. The prospect of new law forms part of the metaphorical "cargo". See Rowley, *The New Guinea Villager* ("Villagers React"); Binney, *Mihaia;* Lawrence, *Road Belong Cargo.*

12. Attracting to itself and to lawyers the image of society's 'whipping boy'.

The legal profession earns part of its fee as absorber of people's fear and dislike of law, and as moral bearer of clients' disapproval/guilt for serving them in ways which it adjudges 'necessary', of which they might not entirely approve. The law, and lawyers, may thus become scapegoats for results from which the clients excuse themselves because they 'could not possibly know enough' to have an independent judgment (part rationalisation). See generally, Robinson, *Law and the Lawyers* (1935). Even when the client "wins", she or he may be critical of the lawyer for not obtaining a larger award, for "over-charging", or for delays.

13. Draining off into law-based occupations some of the culture's more adept and avid reasoners who might find themselves deviants if such careers were not open to them as external defences and internal sublimations.

The process of "status barring" with its anti-social consequences is described by Merton in *Social Theory and Social Structure* (though of course, Merton was not writing specifically about thwarted lawyers).

14. Fostering a religious devotion to the care and maintenance of its own (the law's own) red-tape. (This can result in, or sometimes be caused by, a demonstrable tendency in lawyers to be overimpressed by the authoritative rituals with which they work: much office based work, especially, is non-utilitarian, or questionably utilitarian, elaboration: generally lawyers do not relate their work to a larger and more embracing whole).

Lawyers are more likely than, say, anthropologists, to harbour a naive assumption that the law and its institutions serve only a single function – say, that of social control – and that any other functions which law serves are excrescences or 'contradictions'. The red-tape may blind them to the fact of the law's inherent ambivalence.

15. Dissuading would-be litigants from embarking on litigation (expense, "hassle"): including (a) law's condonation of delays, procedural and other, that may be exploited by defendants (*e.g.,* debtors) to pressure claimants into disadvantageous settlements, and (b) law's provision of cumbrous and inapt mechanisms/remedies from which disputants recoil and seek, instead, a more, or less, satisfactory solution by informal means.

16. Facilitating the occurrence of masked opportunities (deliberately or unwittingly induced) for legitimating:

(a) a modicum (at least) of in-plant disorder (*e.g.,* the patently "guilty" defendant may be "allowed" to escape conviction because police malpractice renders crucial evidence inadmissible. The same effect could occur, in most instances, through grave "judicial misdirection").

(b) certain legal-rule departures by officials (see Kadish and Kadish, *The Discretion to Disobey*).

(c) large-scale social and political havoc (see, *e.g.,* Tay Erh Soon's "Smash All Legal Rules" in *Malaya Law Review Legal Essays: In Memoriam Bashir Ahmad Mallal* 49 (ed. G.W. Bartholomew, 1975). The modern history of the People's Republic of China provides illustrations of fluctuating law-dismantlement (law-dumping) and refurbishment. The deliberate, albeit masked, exercise of legitimating major social change by dumping law is illustrated by the so-called "Cultural Revolution".

(d) the withering away, or death, of the law itself.

(*E.g.,* Soviet Marxist theory prophesied the eventual withering away and death of state and law and their replacement with the benign, harmonious, coercion-free, self-administration of the fully matured communist society: Pashukanis in *Soviet Legal Philosophy* (ed. Hazard, 1951) 120. Lenin and, later, Khrushchev took a more circularly pragmatic approach, *viz.,* law will wither away if and when society reaches that condition in which it will wither away; see, *e.g.,* Khrushchev's speech 22nd congress, *Documents, 252.*)

17. Inducing a (popular) view of law as a way of depicting human institutions in terms of iconic ideals rather than observed facts: (*e.g.*, reified views of human behaviours – such as 'the reasonable man' – rather than accurate scientific research on how individuals actually react to circumstances such as sudden stress).

Under this head, Merton explores situations where naive moral judgment making is substituted for sound analysis: *Social Theory and Social Structure* (1949).

18. (a) Administering an anodyne to the society as a whole, and to aggrieved individuals, in place of affording them a predictably just and efficient service in all instances of grievance or trouble where the law might be expected to provide official channelling or remedial servicing. (As Thurman Arnold has contended "The function of law is not so much to guide society as to comfort it", *The Symbols of Government* (1935), 33.

(b) Maintaining an intricate belief system about "the law's" (mythical) omnicompetence in reconciling the irreconcilable and resolving the insoluble by a rational uniform procedure. This is the ultimate legal fiction.

19. Conducing to the evolvement of non-official modes of dealing with "trouble" in areas of manifest and latent conflict (that is, in instances where the law has failed to provide official legal preventive channelling, and reorientation of conduct and expectations, to avoid that trouble).

It has to be noted that a particular State's law-making authority's *articulated* policy and practice of governing may be primarily one of facilitating or guiding activities while leaving to *private* decision whether such acts will be done.

20. Allowing a lag to exist between what the law actually prescribes and the demand for a more appropriate reflection of the fact of major social change.

There exists in all societies an *inevitable* tension between legally required behaviour and morally demanded behaviour: Kelsen, *General Theory of the Law and the State* (1945), 436-7.

This head envisages a 'lag' which goes beyond that natural or inevitable degree of tension to the situation *"when the law does not in fact answer the needs arising from major social change or when social behaviour and the sense of obligation generally felt towards legal norms significantly differs from the behaviour required by law"*. See, Dror "Law and Social Change", 33 Tulane Law Review (1959), 749.

21. Allowing or engineering the proliferation of rules, thereby creating the conditions for official arbitrariness. (As Skolnick states "Like a game, social life is usually played in the context of official rules. But the surest way to destroy a game is to build into it so many rules that officials may interpret these in line with commitments irrelevant to the game itself. Thus, the proliferation of rules creates the conditions for official arbitrariness".) Thus, more opportunities occur for bureaucrats to exercise decisive discretions.

22. The law's provision of a 'helping hand' (welfare) mechanism may result in a government being given more arbitrary authority over a particular class of offenders (*e.g.,* juvenile delinquency cases with procedures suggesting clinical aid) than with the common run of offenders.

23. The legal creation of a bureaucratic-cum-judicial administration in a mass society may be to substitute organisational efficiency for a rule of law (*e.g.,* in criminal process, by providing 'systems' of plea bargaining and diversion from process and/or punishment).

24. Latent effects of legal incursion into areas of conventional morality which include:

(a) the creation of criminality among persons who would otherwise be relatively law-abiding (*e.g.,* 'Prohibition' in the USA),

(b) economic advantage accrues to the seller of goods when the law labels those goods 'illegal' (*e.g.,* alcohol during the Prohibition period; narcotics, pornography, prostitution),

(c) law may serve a function of distributing scarce resources,

(d) unanticipated procedural effects of law's incursion into conventional morality may lead to a dilution of individual responsibility.

25. Particular 'trouble cases' (justiciable ones) may become a diagnostic tool for pin-pointing stress areas in the social structure of the community studied. See Emile Durkheim's thesis that 'crime is normal' in society, that is, crime is part of normal social phenonenology.

26. More generally, crime-and its prosecution – helps a society to chart the boundaries of what is and what is not acceptable, 'normal', behaviour in that society. [See Erickson,*Wayward Puritans* (1966)].

27. A latent function or effect of law reform activity is its advertisement of the legal profession. It may be useful to the morale of the profession: reform activity is part of the demonstration that what 'the bar' is and does is good for the society. (See L. Friedman, *The Legal System.* Law reform makes it possible for the top of the profession to strike poses of nobility and rectitude. *Ibid.* 271.)

28. Even when it is not among the law's stated or clearly implied objectives or motives, some laws may have the latent effect of homogenising heterogeneous populations: *e.g.,* a claim of right or colour of right defence to a criminal charge where the accused person's mistake of law is rooted (or he mistakenly thinks it is rooted) in a minority-group custom: see, for instance, *Police* v. *Minhinnick* (1978) NZ Law Journal 199).

29. Legislative process may be used merely as an opening gambit in a long-haul strategy of achieving a very different objective. (Let us ponder a hypothetical instance. Ultimately intending to outlaw, say the use of tobacco, the Parliament initially legislates to make tobacco cheap and available to everyone, including children. There is so much illness, death and consternation, that the society, as a whole, urges new legislation outlawing tobacco altogether).

30. Law may be *designed* to malfunction and to underachieve: Sait, "Machine, Political", in *Encyclopedia of the Social Sciences, 658.*

31. Law may come to serve as a psychological security symbol to comfort the innate conservatism of the community (see Arnold, *The Symbols of Government,* 10).

32. Some criminal sanctions may act to strengthen shared values within the group to which they apply: see Durkheim, *The Division of Labour in Society,* 103. But, conversely, they may further polarise values between the sanctioning and the sanctioned communities. Durkheim suggests a similar function derived from the retributive punishment of offenders, see no. 33 *post.*

33. Law, and its enforcement processes, may serve as an unwitting corrupter of law enforcement officials (*e.g.,* in complex and dangerous areas such as entrapment duty: see Sir R. Cooke, P. in *R.* v. *Mulvihill and Hauseman,* unreported, 19 June 1986 (CA 59 and 60186), cited in Hall, *Sentencing in New Zealand* (1987), 33.

34. In a society with a complex and diversified scientific and occupational culture, lawyers have, by virtue of their 'nonscientific' lack of specialisation, an important integrating role.

The lawyer is not inevitably the whipping-boy, or girl, of society; the lawyer often becomes a mediator, or moderator, of a society's values (in the Common Law-derived systems of law – and in some others – senior lawyers and judges regularly preside over commissions and inquiries examining a great variety of social problems).

Also lawyers may mediate other-than-strictly 'legal' values in everyday litigation.

Of all professionally-trained persons who seek and gain, election to legislatures, lawyers often predominate in this most direct means of creating, maintaining or changing social norms. They also seem to be attracted to influential opportunities in the bureaucracy.

The lawyer's integrating role between the scientific and other cultures was remarked by C.P. Snow, novelist, in his creation of Lewis Elliot as a fulcral character in the series, *Strangers and Brothers.* There are strong hints that the sophisticated lawyer, *e.g.,* Elliot, may be perfectly qualified to mediate between Snow's "two cultures" – the scientific and the literary.

35. Some latent symbolic effects discoverable often, but not exclusively, in or about constitutional legal arrangements, include law operating:

(a) to placate opinion. (Cp. title 18(a)).

(b) to save appearances (to save face),

(c) to confirm the society's self image Cp. title 8(b)),

(d) to ratify a revolution (Cp. titles 11 and 16(c)).

[See Wise, The *Limits of Constitutional Law: Agenda IV.B.2, Am.J of Comp. Law* xxxiv (1986) Sup. 383, 385; and see Griffiths, "Is Law Important?" 54 N.Y.U.L. Rev. 339 (1979)].

APPENDIX B

There may be value in trying to categorise the titles 1-35 in one or more of the following ways:

(a) Classification by *level of generality, viz.,* micro and macro effects, 1-7;8-35.

(b) Classification according to *type of legal culture, e.g.:*

(i) anthropologists might distinguish between effects upon the preliterate, pretechnological society and the 'developed' one; and between effects upon the 'simple' and 'complex' subcultures in each. (See 1, 9, 11, 19, 20, 22, 25, 26, 28);

(ii) political scientists would counsel that what is latent in one type of governmental organisation may well be patent in another. (See the note at the conclusion *of Appendix B, infra*);

(iii) a number of latent effects might be viewed as being of especial interest to economists, see especially 1, 4, 7, 8, 10(a), 16, 24(b), (c).

(c) Classification according to *actors involved, e.g.,* titles 1-5 might have something in common in terms of the *types of person* likely to mobilise the law in these ways.

(d) An effort may be made to classify into truly *objective consequences, i.e.,* the case where *no one* is really trying to achieve the 'effect' (*e.g.,* 9(a), (b), (d), (e), 10, 12, 13, 15, 16(a), (b), 20, 22, 24-26, 28, 31-34) in contrast to *engineered consequences* (where one party might be striving to harness a latent opportunity that has been unintentionally, or intentionally, masked by the law, *e.g.,* 1-8, 9(c), 11, 16(c), (d), 17-18(a), (b), 21, 23, 27, 29, 30, 35.

(e) Although there are obvious dangers in carrying out such a values-prone exercise, there may be some interest for law reformers in distinguishing between what (by general consensus in the particular society) would be seen as a *beneficent* effect and what would generally rate as a *deleterious* one.

Arguably *beneficent* – 9, 6 (c), (d), (e), 13, 15, 25-28, 31, 32, 34, and *deleterious* – 1, 14, 17, 18, 19, 21, 22, 24, 33.

(The lists could be expected to vary from society to society, and in a particular society, from time to time.)

Note (to *Appendix B*)

Marxist critics of 'Western' law will find ample evidence in *Appendix A* of 'covert championship of dominant class interest' in the law's latent yield. (Only if 'pressing advantage' appears as individuals 'communicating' or 'contracting' on a more or less equal basis may such effects be seen by them as not reducible to class interests.)