THEMES IN AN INQUISITION: JUSTICE MURPHY AND THE LIBERAL PRESS

DAVID BROWN*

I. INTRODUCTION

The so called "Murphy affair"[1] which raged from the publication in February 1984 of fragments of transcripts and summaries of illegal phone tapping operations, which went under the title the "Age Tapes", to Justice Murphy's untimely death in October 1986, raised a wide range of legal, political, and ideological issues. The millions of words written on these events "completely dwarfed in volume anything formerly written about him *while* a judge, but was consistent with it in that it had virtually nothing to do with Murphy *as* a judge".[2] I wish here to examine the way some of the issues were constituted in a section of the print media, predominantly *The National Times*, to a lesser extent *The Sydney Morning Herald* and *The Age*. These particular papers are the focus because they were decisive in setting the terms of the debate; are or were regarded as the liberal,[3] more investigative "quality" section of the print media; and some of the leading coverage was produced by

*LL.B. (Hons) (Auck.) Dip. Crim. (Cantab) Senior Lecturer in Law, University of New South Wales.

1 G. Sturgess, "Murphy and the Media" in J.A. Scutt (ed.) *Lionel Murphy — A Radical Judge* (1987) 211, 213, argues that this usage was "itself a sexy media epithet to convey a sense of scandal".

2 *Id.*, 211.

3 Hence the title, borrowed from Sylvia Lawson, "Murphy and the Press" (1986) 5 *Australian Society* (December) 39-40; the "liberal" in her original draft being omitted in the published article.

journalists with libertarian[4] backgrounds.

The aim is not to demonstrate some unified conspiracy on the part of the Fairfax press but neither is it to herald the coverage as an heroic exercise in investigative journalism. Rather the intention is to discuss some dominant themes that emerge from the coverage of a range of issues thrown up in the Murphy "affair". If there is a clear thesis, it is that the broad unity of approach generated through the media coverage of a diverse range of issues could only be so generated by abandoning a considered and principled assessment of the specific issues, their particular histories and logics. The unity of approach was only possible through the resolution of diverse issues with complex histories in terms of whether the particular position taken assisted the pursuit of Justice Murphy. With such an organising principle, complexities, local histories of struggle over constitutional, ethical and legal issues could be swept aside and a clear and simple course charted through stormy waters.

I shall argue that the sense of certainty generated from media coverage organised on such terms did considerable violence to a wide range of significant debates. I will not rehearse the detailed history of events, assuming that the broad contours will be known to most people. In any event there are other sources which summarise or review events.[5] I will concentrate rather on the media coverage itself — less so *The Age* for Sturgess has already covered this admirably.[6] Illustrations of the themes will be discussed in the text and in some cases further examples detailed in the footnotes.

---

4 Bacon, Marr and Toohey are all from broadly libertarian backgrounds, Bacon in particular, see her "From P.L.C. to Thor" in Bacon et al. (ed.) *Uni sex* (1972) 43-65, where she is described in the introduction as a "sexual freedom activist" *id.*, 43, and A. Turner (ed.) *Censorship: Wendy Bacon versus Peter Coleman* (1975). In 1979 Bacon's application for admission to the N.S.W. Bar was rejected by the Barristers' Admission Board on the grounds that she was not a "fit and proper person," without benefit of a hearing. In subsequent proceedings the N.S.W. Court of Appeal refused an application for admission, largely on the basis of her involvement in a bail arrangement, Moffitt P. stating that "she cannot be accepted as a truthful witness as to what happened in the bail matter ..." and that "[t]he bail matter and her evidence in respect of it establish she is not fit to be a barrister.": *Re B* [1981] 2 NSWLR 372, 394. Reynolds J., *id.*, 402, found that she deposited bail moneys "falsely pretending that they were her moneys and knowing the true source thereof." The "proceedings" before the Barristers' Admission Board with the focus on Bacon's character, social activism and criminal convictions, were criticised by some (including this writer) at the time as an inquisition and there are many similarities with the subsequent "Murphy affair". It might have been expected that someone who had undergone this process would be acutely aware of the dangers of guilt by association techniques, but this does not seem to have been the case. For a comment on recent libertarian approaches to law reform issues see: D. Brown, "The Politics of Reform" in G. Zdenkowski, C. Ronalds and M. Richardson (eds), *The Criminal Injustice System: Volume Two* (1987) 254, 271-279.

5 See A.R. Blackshield, "The 'Murphy Affair'" in Scutt (ed.) note 1 *supra*, 230-257; D. Brown, R. Hogg, G. Boehringer and M. Tubbs, "The Murphy case: some issues" (1985) 10 *Legal Service Bulletin* 153-157; D. Brown, R. Hogg, G. Boehringer and M. Tubbs, "Re-presenting Justice Murphy" (1986) 11 *Legal Service Bulletin* 147-153.

6 Note 1 *supra*.

II. JOURNALISTIC PRACTICE

1. Description or Construction?

The first issue to raise is the fundamental one of the nature of journalistic practice. The journalists most influential in the media prosecution of Justice Murphy persistently argued that journalistic practice is purely descriptive. Their task is that of discovering and revealing "facts", conversations, incidents, associations, events et cetera.[7] These are understood as possessing a "Truth" and a meaning that already resides within them, prior to being "reported". That is they exist in a complete form prior to and independently of forms of journalistic knowledge and practice, like pebbles on a beach. The task of the journalist is merely to go out and collect them and hold them up to the public gaze.

Even if we were to concede for a moment, that "facts" lie preformed like pebbles scattered in the social world, clearly the very process of *selection,* the choice of a particular pebble from amongst many, imparts, creates or alters meaning, as does the *arrangement* of the pebbles in relation to each other, their placement in a new structure or form.

In short journalistic accounts are a representation, a *re*presentation, a process of social construction involving both the primary sources (interviews, research, discussion with sources, et cetera) and the existing body of knowledge and understandings, journalistic forms of production and work processes. Not mere description but construction, the assembling of a story against a background of a large number of understandings. Understandings about, for example, what is deemed newsworthy, what are the existing frameworks of meaning and interpretation into which the individual story will be inserted, what sort of language and terminology can be used, what the editor will print, what is or is not defamatory, contemptuous et cetera, what will endanger sources and informants, meet the deadline and so on.

A first step in conducting any sort of media analysis is for journalists to abandon the "mere description" and "fact gathering" defences of their work and enter into a serious debate about the social processes involved in producing journalistic accounts.[8]

2. "The Facts": "The Truth"

Even within their own terms, what were justified as "facts" turned out so often to be mis-statements, inaccuracies, distortions, elements taken out of

7 See for example, the response of the Editor of *The National Times* to a letter from a number of law teachers at the University of New South Wales, (1984) *The National Times*September 14-20.

8 We need, as Sylvia Lawson argues, journalism which takes "journalistic practices themselves as news, stories about stories, worth telling for a general audience". Sylvia Lawson, "Review" (1987) 6 *Australian Society* (December) 43. Wendy Bacon in "Awkward Silences" (1987) 101 *Australian Left Review* (September/October) 16-24, mostly rehashes the allegations, but does provide some reflection on journalistic practice. See also D. Brown, "Interrogating The Interrogators" (1987) 101 *Australian Left Review* (September/October) 16-20.

context. A large number of examples are given in the course of Garry Sturgess's devastating critique of *The Age's* first story of the "Tapes", which he describes as "a case study in carelessness".[9] He starts by pointing out that two of the four words in the heading *Secret tapes of judge* were incorrect. The tapes were not secret and they were not even tapes but rather transcripts and summaries of conversations for which there was only one matching tape. A more appropriate adjective, "illegal", did not appear until the seventh paragraph, where it was diluted into a "belief" in their illegal nature.[10] Paragraph three "comprises two conversations, which occurred nearly a year apart".[11] Later the wrong dates are given. A vague and equivocal conversation concerning an appointment to a public position was transformed into a "promise" to "line-up" a job. A later paragraph identifies the judge replying "[i]f you can call getting tired and drunk and f... everything a good time, yeah..." in response to a "did you have a good time" inquiry from the solicitor. In fact *The Age* managed somehow to transpose the speakers, the judge asking the question, the solicitor making the reply. As Sturgess argues, "the sleazy tone conveyed by this serious error and its surrounding paragraphs (which contain errors and distortions of their own) did perhaps more damage to Murphy than anything else"[12] and as he points out, as there was no deadline pressure, publication was bound to cause "irreparable damage to people and institutions",[13] so that more care might have been expected. To cap it off there was the "failure to disclose the error for a full two weeks after the publication of the first story, and then only after the then Premier of New South Wales Neville Wran, pointed it out".[14]

Blackshield gives a number of clear examples of the way snippets of conversations from the transcripts or summaries were lifted out of even these limited contexts and imbued with sinister connotations.[15] One example is the conversation where the impression is given "that Murphy and Ryan are jointly engaged in some dubious real estate venture".[16] Simply by looking up the article in *The Sydney Morning Herald* which Murphy refers to in the conversation, Blackshield shows that the context was that Murphy was drawing Ryan's attention to the fact that Dr Jim Cairns and Ms Junie Morosi were applying for a lease of the Paris Theatre to use for films, public lectures, documentaries and unemployment assistance.[17]

This preparedness to lift fragments of conversations from transcripts or summaries which themselves had been wrenched from another context on

9 Note 1 *supra*, 215.
10 *Ibid.*
11 *Id.*, 216.
12 *Id.*, 219.
13 *Id.*, 218-219.
14 *Id.*, 219.
15 Blackshield, note 5 *supra*, 230-257.
16 *Id.*, 233.
17 *Ibid.* See "Decision on City Theatre is deferred" *The Sydney Morning Herald* (1979) March 20.

unknown criteria and to attribute a particular meaning to them was one of the most objectionable features of the saga. Particularly when this operation was justified in the name of truth. The view of meaning and truth promoted in such an exercise is that clear cut meaning and truth are embodied in individual words, sentences, fragments of conversation and partial exchanges. Meaning and truth are thus qualities that reside in elements of language or events.

In contrast, I would argue that meaning is fundamentally contextual, is attributed or constructed out of a complex set of cultural and social understandings and that truth is not a quality that resides in events but "a system of ordered procedures for the production, regulation, distribution, circulation and operation of statements".[18] We say that we believe X to be true on the basis of a set of procedures and understandings about the production of event or statement X. Included among these procedures will be sets of criteria governing the selection of particular elements from a larger group. The particular criteria of selection and the specific form of procedures may vary in different discourses, disciplines and fields of knowledge. A common requirement, however, is some set of criteria of selection that itself is clearly articulated and open to review and testing. This is fundamental to any claim of truth.

And yet of course, the "Age Tapes" transcripts and summaries relied upon as "fact" and "truth", as containing obvious and unequivocal meanings, violated these basic requirements. Consider how Justice Stewart describes the transcript material:

> [t]he Commission accepts that the material appearing in verbatim form as a transcript of a telephone conversation has an acceptable degree of accuracy and probably fairly records that part of the conversation it purports to record. However, even in cases where a transcript appears to have been transcribed verbatim, there is no way, except in the few cases where tapes still exist, by which the Commission can ascertain whether or not the whole of the conversation has been transcribed from an unedited tape. The relevance of the conversation to the investigation in hand has been subjectively gauged by the individual transcriber; something said at the beginning or the end of the transcribed portion and omitted, may well change the whole meaning of the conversation. The dangers of quoting selectively and out of context are well known.[19]

Not so well known in certain journalistic circles it would seem. As Blackshield notes "no safe conclusions can be based on these transcripts at all".[20]

This is even more so in relation to the "summaries" (different from purported transcripts) of which Justice Stewart was not satisfied "that the transcript material in summary form has been prepared with sufficient care to be affirmed as wholly accurate" and did "not consider that many of the police concerned in the task of summarising the material possessed the necessary objectivity to render their summaries reliable".[21] Of a particular set of

18 M. Foucault, *Power/Knowledge* (1980) 133.
19 D. G. Stewart, *Royal Commission of Inquiry into Alleged Telephone Interceptions* 30 April (1986) *Report-Volume One* para. 14.70, 296.
20 Blackshield, note 5 *supra*, 234.
21 Note 19 *supra*, para. 14.71, 297.

summaries Justice Stewart was even more scathing, referring to "expressed inferences which were in some cases logically unavailable" upon which "further conclusions and inferences"[22] were based. The basic point is that this material was incapable of "proving" anything in relation to Justice Murphy, other than that he spoke on the telephone on occasions to Morgan Ryan.

III. GUILT BY ASSOCIATION AND "NETWORKS OF INFLUENCE"

1. From "contact" to centre stage

This association between Justice Murphy and Morgan Ryan was central to the campaign against him. It was the starting point for the first article in *The National Times* on November 25-December 1, 1983, by Marian Wilkinson, headlined "Big Shots Bugged". The front page sub-heading continued:

> [t]he National Times has gained access to official reports from a highly secret surveillance operation that gives fascinating insights into the relation between a lawyer, an organised crime figure, police, and a judge.

Beneath this was an A4 size graphic consisting of three small and one large figure. The bottom figure, seated, wearing dark glasses and smoking a very long cigar, is dialling on a telephone. The phone line passes over two figures sitting above the cigar smoker, one a man with a suitcase with money falling out clutching a deed or document, the other a high ranking police officer. The police officer is holding or passing the phone up to the large figure of a judge who looms over all three and enclothes them in his judicial robes.

This graphic condenses into a single image the bald allegation that a judge was part of a network of shady deals, court fixes, corruption. More than that the graphic suggests that the judge is the dominant figure, providing protection for the network. In this it goes far beyond the Marian Wilkinson story, which without at this stage naming names, discusses a "crime intelligence report" which "gives a glimpse into the modus operandi of organised crime in Australia" centering around the activities of a "Mr-Fixit" solicitor. In the story, as compared with the graphic, the judge is merely one of "an impressive array of contacts cultivated by the solicitor".[23] There is not a single reference in the three page story to the illegality of the phone tapping operation.

The next *National Times* story, by Marian Wilkinson and Neil Mercer, was on February 10-16, 1984, following the first *Age* report of "The Tapes" on February 2nd. To the earlier emphasis on insight into "the modus operandi of organised crime" is added "influence-peddling". Rather than just intelligence the slant is towards "the leads to possible prosecutions provided by the information" and "ignored" by "the authorities". The story now

22 *Id.*, para. 14.72, 297.
23 M. Wilkinson, "Big Shots Bugged" (1983) *The National Times* Nov 25-Dec 1,3.

acknowledges that the phone tapping was illegal. In relation to the judge the "taps and transcripts" are claimed to "indicate that over a period of several months the judge was in regular contact with the Sydney solicitor" (who was at this time the judge's solicitor for the purpose of a possible malicious prosecution suit). It is stated that "the solicitor also used the judge to appoint a friend to a senior government position in N.S.W."[24] Blackshield goes through this claim in detail and demolishes it.[25] Assuming that the transcript was accurate "the most than can be extracted" was a "simple inquiry".[26] The inquiry did not involve appointment to a new position "but only of finding out whether he would be reappointed to a position he already held".[27] And when the decision was made some seven months after the conversation the applicant was *not* reappointed and the job went to somebody else. The other person resigned ten months later and the applicant was then appointed. As Blackshield notes, much of this information was on the public record: "[i]f the journalists who published and republished the Jegorow story did not know these basic facts, they were careless. If they did know them, they were dishonest."[28]

In *The National Times* of the following week, February 17-23, 1984, the judge has moved from one of the solicitor's contacts to the centre of attention. A front page banner headline "THE JUDGE AND THE POLICE TAPES" is followed by the statement "[w]e examine the behaviour of the Federal judge recorded on police bugs and also the background to the alleged $50,000 casino bribe."[29] This is an appalling running together of two quite separate matters which could give the impression to the many people who just glance at the front page in the newsagent that the judge was somehow involved in a $50,000 bribe. The story on p.3 by Wendy Bacon makes clear that the summaries and transcripts "do not reveal that the Federal court judge whose conversations with a Sydney solicitor were tapped was involved in illegal activities". It is pointed out that "there is no evidence...that the solicitor discussed with the judge any cases which were before any Federal court" and that "there is no evidence in the material that the judge knew the solicitor was involved in these [fixing] activities".[30]

2. From "contact" to "taint"

The considerable dangers in guilt by association and "networks of influence" approaches lie in their vagueness and ambiguity. Implications of impropriety and conspiracy are seen to lurk beneath any association or contact. The knowledge, desires, deeds of one person are passed on to the

24 M. Wilkinson and N. Mercer, "Phone Taps: The Net Widens" (1984) *The National Times* February 10-16,5.
25 Blackshield, note 5 *supra*, 231-233.
26 *Id.*, 232.
27 *Id.*, 233.
28 *Ibid.*
29 "The Judge and The Police Tapes" (1984) *The National Times* February 17-23.
30 W. Bacon, "The judge and the phone taps: what the issues are" (1984) *The National Times* February 17-23,3.

other, much as nineteenth century conceptions of "criminality" conceived it as a form of "taint" that spread or could be caught on contact. It is a form of journalism particularly prevalent in contemporary Australian politics. Thus Paul Keating is not attacked for specific policy decisions but for his friendship with Warren Anderson; Bob Hawke is at fault not for particular decisions but for being seen on Bond or Packer's yacht.

To expect lawyers and judges who have practised in the field of criminal law never to have come into contact with people charged and convicted of criminal offences is nonsensical; a wilful misrecognition of the role of lawyers in society. It further sanctifies those lawyers and judges who have practised in the "whispering" jurisdictions such as equity, company and commercial law. It promotes high tory values in that it requires judges to live a monastic existence or more accurately perhaps to avoid being the subject of controversy.[31] Lord Hailsham puts it clearly, stressing "the importance of keeping the judiciary...insulated from the controversies of the day. So long as a judge keeps silent, his reputation for wisdom and impartiality is unassailable."[32]

3. Linking, repetition, timing

The core of the case against Justice Murphy is succinctly expressed by Wendy Bacon:

> the tapes revealed that Murphy was still involved in exchanging advice and assistance with Ryan, who was the solicitor and business partner of Abe Saffron, who has been named in Parliament as an organised crime figure.[33]

Various *linking* techniques were used to extend the boundaries of association. The rather grandiosely titled "Our Society on Trial" banner front page of the December 21-27 1984 *National Times* displayed linked photographs of Justice Lionel Murphy, former N.S.W. Chief Stipendiary Magistrate Murray Farquhar, Frank Costigan, N.S.W. District Court Judge John Foord, police sergeant Roger Rogerson and former N.S.W. Minister for Corrective Services Rex Jackson; a contemporary "spot the odd one out"? Inside the technique is repeated. After being informed again that "our society is...in the dock",[34] four mug shots: Murphy, Farquhar, Foord and Rogerson, are displayed one on top of the other. This association of images is probably more effective than pages of "analysis".[35] The juxtaposition of Justice Murphy and Murray Farquhar, dubbed in banner headlines "The Bent Beak" by *The National Times,*[36] was a common feature.

In addition to the linking of images, cases, personalities, accounts, the tactic of *repetition* was crucial. David Marr introduced one article with a

31 See generally, D. Brown, "Judicial independence: an examination" (1986) *The Australian Quarterly* 348-356; "Judging the Judges" (1984) 3 *Australian Society* (April) 21-25; "The Judicial Mystique" (1985) 4 *Australian Society* (May) 6-9; "The Cost of Isolating Our Judges" (1986) *The Sydney Morning Herald* March 24.

32 Quoted in *Manchester Guardian* (1986) January 27.

33 W. Bacon, "Roads to Judgment" (1985) *The National Times* July 12-18, 3.

34 D. Marr and W. Bacon, "The long, long road" (1984) *The National Times* December 21-27, 3.

35 Bacon's columns in particular were frequently flagged "Analysis" in bold type.

36 W. Bacon, "The Bent Beak" (1985) *The National Times* March 15-21, 8.

refrain that might have been the theme song of *The National Times:* "[r]epetition has the power to make the astonishing commonplace..."[37] It was a lesson well learnt. By my rough count *The National Times* repeated the basic allegations derived from the *Age* transcripts and summaries, with varying emphases on more than thirty occasions over nearly a three year period from November 1983 until the eve of Justice Murphy's untimely death in October 1986. These reports, allegations, questions, largely set the agenda and were themselves reported and recycled in the daily press.

At numerous key points through the whole saga, lest we had forgotten its antecedents we were reminded in great detail, with increasing certainty. The urgency and sense of mission became more and more strident, particularly once the Briese evidence to the second Senate Committee was published in contempt of the Senate.[38] All manner of other material going back into Murphy's period as Attorney-General, such as the Sala "affair" and the Morosi break-in, was added. There was the constant revival of "allegations" and "questions" which had already been addressed, as if they were fresh allegations. A prime example was the so-called "Lewington allegation" which Blackshield describes as a "special favourite of the National Times".[39] The first Senate Committee decisively rejected what Blackshield calls Lewington's "uncorroborated recollection". Justice Stewart later did the same, adding that even if the conversation recalled by Lewington did occur, the "conversation does not of itself constitute an offence by either party".[40] This constant recycling had the effect of generating controversy and lending weight to the view that there was substance to the allegations.

In addition to the repetition was the strategic *timing* of various accounts. "A Hard 18 Months for Lionel Murphy", which rehearsed a wide range of allegations and "facts" surrounding the "Age Tapes", "corruption" in N.S.W., Justice Murphy's links with Morgan Ryan, the Sala Case et cetera, appeared the same week that the magistrate hearing the committal adjourned to consider his decision. In contrast, when various academics and politicians were critical of the first jury verdict the front page of *The National Times* proclaimed that "the trial [was] still technically incomplete".[41] Another strategically timed story was the Don Thomas allegation dating back to a lunch conversation in 1979 which was run three days after the acquittal at the

37 D. Marr, "The Amazing Senate Hearings" (1984) *The National Times* October 12-18, 19.

38 A. Ramsey, "Senate Committee rejects 'public interest' defence in contempt hearing." *The National Times* (1985) October 19-25. Blackshield note 5 *supra,* 238, argues that the leaking and publication of Briese's "successive statements ... decisively changed the political climate in which the Committee conducted its hearings" and that "for journalists on *The National Times,* as for journalists on the Melbourne *Age* in relation to the original transcripts, the need to *justify* the decision to publish became from that point on a significant factor in their treatment of the Murphy affair." For a comment on the "hardening" of Briese's evidence see Brown et al. (1985) note 5 *supra,* 15.

39 Blackshield note 5 *supra,* 237.

40 *Ibid.*

41 "His Honour, The Prisoner", (1985) *The National Times* July 12-18, 1.

second trial and as Justice Murphy was preparing to return to the High Court. Under the heading "Temby rejects advice to charge Murphy again" David Marr and Wendy Bacon "look behind the trial at events in the career of Mr Justice Murphy which may shape the political debate".[42] On a separate page under the heading "The judge who would not take the oath" a selection of the "Age Tapes" conversations are raised, yet again.[43] This was reinforced the following week with a full page "Questions Lionel Murphy should answer", purporting to raise "the issue of Lionel Murphy's behaviour as a High Court judge"[44] but including many matters dating from his time as Attorney-General.

4. The need to denigrate past achievements

Another theme that emerged clearly in various accounts was the perceived need to denigrate Justice Murphy's past achievements. This took many forms. Most defensible was the argument that the program of law reform achieved in Murphy's period as Commonwealth Attorney-General, the establishment of the Australian Legal Aid Office, the Australian Law Reform Commission, the Australian Institute of Criminology, the Family Law Act 1975, the Trade Practices Act 1974, the Human Rights Bill 1973, Death Penalty Abolition Act 1973, his setting in train the Administrative Appeals Tribunal Act 1975, the Ombudsman Act 1976, the Federal Court of Australia Act 1976 and the Administrative Decisions (Judicial Review) Act 1977, the Racial Discrimination Act 1975 and others,[45] were the product of the broad social forces that swept the A.L.P. into office, Senator Murphy being merely the figurehead, a conduit for A.L.P. policy. This view is of course correct in the sense that broad social forces shape history and that particular individuals give expression to these forces, rather than creating them. It is also rather uncharitable for clearly the enthusiasm and commitment of influential individuals, their ability to articulate and represent wider social forces, can be significant in a particular conjuncture. Many commentators have suggested that Senator Murphy's role was important, not the least, in the words of one, in "overthrowing the notion that law reform was a technical exercise for lawyers only" and enlarging "the ordinary person's access to the law".[46] The "Murphy was only the figurehead" argument was completely inconsistent with the simultaneous concentration on the overwhelming *significance* of Justice Murphy's individual moral character in other contexts.

42 D. Marr and W. Bacon, "Temby rejects advice to charge Murphy again" (1986) *The National Times* May 2-8, 5.

43 D. Marr and W. Bacon, "The judge who would not take the oath" (1986) *The National Times* May 2-8, 10.

44 B. Toohey and W. Bacon, "Questions Lionel Murphy should answer" (1986) *The National Times* May 9-15, 8.

45 See L. Maher, "Murphy the Attorney-General" in J. A. Scutt (ed.) note 1 *supra*, 36-59, for an assessment of these reforms.

46 *Id.*, 58.

A slightly different, and less defensible, form of this denigration theme was to simply deny that the law reform of Murphy's period as Attorney-General was of any significance. Such views are simply elitist, the product of notions that only total overthrow amounts to worthwhile change.

A different stage of the denigration theme focussed on Justice Murphy's period as a High Court judge. Here the emphasis was on denigrating his judicial abilities and the significance of his judgments. In its crudest form this manifested itself in the claim by one of the leading protagonists, that "any law student could have written his judgments".[47] With so cavalier a sweep is an enormous judicial legacy and a distinctive judicial methodology dismissed.[48] Apart altogether from the obvious point that "any law student" is not usually a member of the High Court.

The basic point is that it would have been quite possible to acknowledge the significant reform and judicial achievements of Justice Murphy and still argue that, for example, the question of his removal from the Bench under s.72 should be put before the Parliament. One does not have to denigrate a person's life achievements to argue that, in some particular context, they should be answerable for some specified conduct. Or as Blackshield puts it:

> those who are angered or disturbed by [Justice Murphy's] judgments are not entitled to conclude that *therefore* the hints of extra-judicial misconduct must have some foundation. Equally, those who find [his] judgments powerful and persuasive are not entitled to conclude that *therefore* the allegations are false.[49]

This perceived necessity to denigrate Justice Murphy's achievements was linked to the attempt to reconstruct his character and personality as fundamentally flawed *all along.* In this way it was made to seem that particular allegations were merely the inevitable manifestations of essential personality traits or appetites. This attempt to characterise Justice Murphy as being of an essential *type* is one of the elements Garfinkel identifies as central to "successful status degradation ceremonies".[50] It is a form of demonology which holds that condemnation is more easily attached when individuals can be portrayed as essentially of a particular type, which is read back into all their previous activities. Possible alternative characterisations must be minimised as must the suggestion that individuals might condense a range of mixed or partly contradictory aptitudes and attitudes.

5. Reading back: the teleological approach to history

An associated theme in some journalistic accounts was the tendency to read back into many of Justice Murphy's previous actions and judgments a

47 W. Bacon, personal communication, 23/9/85. For a slightly more considered assessment by the same author see W. Bacon, note 8 *supra,* 22.

48 For two collections of selected judgments by Justice Murphy see A. R. Blackshield, D. Brown, M. Coper and R. Krever (eds) *The Judgments of Justice Lionel Murphy* (1986) and J. and R. Ely, *Lionel Murphy: The Rule of Law* (1986). For assessments of his legal contribution in various areas including the Constitution, Family Law, Taxation, Property, Human Rights, see J. A. Scutt, (ed.) note 1 *supra.*

49 A.R. Blackshield, "Introduction" in Blackshield et al. note 48 *supra,* xiv.

50 H. Garfinkel, "Conditions of Successful Degradation Ceremonies" (1956) 61 *The American Journal of Sociology* 419-424.

self-serving justificatory preparation for his later predicament. An appalling teleology resulted, well captured by Sturgess:

> [t]he civil liberties badge he carried became the scarlet letter of his crimes. In view of what he had done, the argument ran, you would of course expect him to complain about breaches of individual privacy, illegally obtained evidence, conspiracy charges, too great a reliance on circumstantial evidence, cumulative inferences of guilt, reverse onus of proofs, threats to the jury system, overzealous prosecutions, political trials and whatever other civil liberties abuses he might use to prospectively or retrospectively sugar over his own guilt. *It was as if he had lived the whole of his life preparing for the day his criminality and the real reason for his existence would be exposed* [emphasis added].[51]

John Slee in *The Sydney Morning Herald* provided an example of this sort of argument. Covering a speech Justice Murphy made in May 1986 to a seminar on the jury at the Australian Institute of Criminology, Slee portrayed Justice Murphy's critical comments on the failure of prosecutors to observe traditional standards of fairness as merely an oblique reference to his own case.[52] This interpretation was only possible by actually editing out of Justice Murphy's speech a reference to and quotation from a N.S.W. case, a form of unfair practice. And in any event Justice Murphy's view that "those prosecuting on behalf of the community are not entitled to act as if they were representing private interests in civil litigation"[53] had been well established in other cases and was widely known.

6. "Proteges", "Claqueurs", "Lawyerly Mateship" and "Forensic Scepticism"

This approach has been continued after Justice Murphy's death and extended to Justice Mary Gaudron who is portrayed as being merely a Murphy "protege"[54] and a "vigorous defender of Murphy".[55] Thus her opposition to the extension of phone tapping powers, her defence of the dock statement or whatever, is snidely presented as refighting the Murphy campaign rather than as her genuine views on the issues.[56]

---

51 Note 1 *supra*, 213.

52 J. Slee, "Murphy is just a little off beam" (1986) *The Sydney Morning Herald*, May 22. Slee quotes from Justice Murphy's speech: "[t]he excessive zeal of prosecutors can be a real threat to a fair jury trial. In Australia, cases have come, even to the High Court, in which excessive zeal has been apparent. It is very dangerous to the administration of justice when the career prospects or the prestige of a prosecutor become involved in the prosecution ... Prosecutors should not be scalp-hunters" Slee adds immediately: "In what cases? His own?" In fact Justice Murphy supplied an example in the form of a quotation from *R* v. *Bathgate* (1946) 46 SR (NSW) 281, 284-285, as follows: "[c]ounsel for the prosecution ... are to regard themselves as Ministers of Justice, and not to struggle for a conviction ... nor to be betrayed by feelings of professional rivalry — [not] to regard the question at issue as one of professional superiority, and a contest for skill and pre-eminence", L.K. Murphy J. "Trial by Jury: The Scope of Section 80 of the Constitution" (1986) in D. Challinger (ed.) *The Jury: Proceedings of Seminar on The Jury* (1986) 13-19. This specific case reference and quotation occurred in Justice Murphy's address before the words "Prosecutors should not be scalp-hunters". By omitting the reference and quotation with an ellipsis Slee is then able to set up his "In what cases? His own?" question. This is unfair journalistic or academic practice.

53 *Lawless* v. *The Queen* (1979) 142 CLR 659, 682, *per* Murphy J.

54 W. Bacon, "The bouncing of Murphy back into N.S.W.'s court" (1986) *The National Times* August 16-22, 8.

55 W. Bacon, "Murphy Forces Gather" (1985) *The National Times* July 19-25, 4,5.

56 J. Slee, "The ghost of Lionel Murphy" *The Sydney Morning Herald* (1987) September 29.

This "obsession"[57] with Justice Gaudron also illustrates the continuation of the "mateship" theme that was so apparent in the media pursuit of the Murphy "affair". Anyone who had had any contact or friendship with Justice Murphy was presumed to be motivated primarily by some personal loyalty in responding to the variety of issues thrown up. Their expressed views were portrayed not as their considered beliefs or opinions but as defensive loyalty. Such portrayals ranged from the offensive and insulting references to "Murphy claqueurs" and "Murphy and his chorus" in *Justinian* [58] to the more mundane "Murphy supporters" or "defenders".

David Marr and Wendy Bacon in *The National Times* at one point put it more subtly, but the bite is clear. "On one side of the split are those lawyers who in the present events call for party loyalty and lawyerly mateship; on the other are those who argue for forensic scepticism."[59] Such formulations illustrate the dichotomous, either/or framework into which events and opinions were forced. In fact, as I have tried to stress, the diverse range of issues raised generated different responses from and between people and within groups that could broadly be said to be favourably inclined towards Justice Murphy. Indeed "forensic scepticism" could more aptly have been applied to those who pointed to the illegal, ambiguous and unreliable nature of the "Age Tapes" transcripts and summaries; those who pointed to the considerable legal, political and social dangers inherent in the inferential logic underpinning the developing climate of guilt by association; those who questioned journalistic practice, and the unarticulated criteria of newsworthiness through which dominant media representations were constructed.

At other points when it was perceived to be necessary to denigrate the "Murphy Forces"[60] in order to shore up the case, defend the role of *The National Times,* defend the guilty verdict in the first trial or outline what various witnesses would have said if they had been asked, the portrayal of Murphy defenders as motivated by "lawyerly mateship", "party loyalty" and "blind faith",[61] became rather sharper. Thus:

> for Murphy's most *fervent admirers,* problems arising out of the contents of the tapes or flaws in the defence case, are no problem at all. Their *campaign* is based on a vision of Murphy which wipes aside such issues as irrelevant or impossible [emphasis added].[62]

The same Bacon article went on to indict the "passion" and "anger" of the Murphy "campaign", the "thin understanding of the case" exhibited by

---

57 A letter to the Sydney Morning Herald from a number of law teachers at the University of New South Wales on 11 November 1987 suggested that John Slee's regular "Law" column be labelled "Obsessions". The letter referred to "the three guaranteed topics: (1) the unseemly vendetta against the late Justice Lionel Murphy; (2) the niggling attacks on Justice Mary Gaudron; or (3) the latest in the Tectran Litigation." The letter was not published.

58 "Murphy and the decent thing" (1986) 51 *Justinian* 7.

59 D. Marr and W. Bacon, "The Murphy Affair: Judge versus Judge" *The National Times* (1984) October 5-11, 3,4.

60 Note 55 *supra,* 4.

61 *Id.,* 5.

62 *Id.,* 4.

Foreign Affairs Minister Bill Hayden, the "character assassination" of Briese, based on "the idea that he is a 'dobber', an informer on a man whose contribution to the left-wing cause should have made him safe from such allegations".[63] Or again in a different article: "the various lines of defence continue — it doesn't matter what Murphy has done, it shouldn't have been exposed; Murphy only did what they all do; Murphy did not do it; Murphy did do it and there is nothing wrong with it."[64]

These constantly repeated attacks on "the support Murphy campaign"[65] reveal precisely that which is attributed to others: namely, a "passionate"[66] or "fervent" advocacy of a particular position or portrayal of events. Rarely were "Murphy supporters" actually able to speak for themselves. Detailed legal and social critiques of the events which went far beyond this spurious "blind faith" portrayal, published in reputable legal journals, copies of which were sent to the journalists leading the coverage, were simply ignored.[67] Presumably to fairly report or summarise these views would have disturbed the simplistic "blind faith — naive loyalty — mateship" portrayal of arguments that ran counter to *The National Times* version of events. When comments were reported of members of labor lawyers groups they were usually based on third hand accounts of meetings — no attempt seemed to be made to pick up the phone and seek some direct comment from the relevant people living in the same city and well known to the individual journalists.[68]

The "mateship" motif also manifested itself in *The Age* description of commentator Professor Tony Blackshield as "Murphy friend" or "Murphy supporter". Other commentators such as Professor Colin Howard or Associate Professor Mark Cooray were not described as "Murphy opponents". This writer was contacted on several occasions by journalists seeking information about the Murphy family on the assumption that anyone who spoke publicly in Justice Murphy's defence must be a close family friend. They seemed incredulous that I had only met Justice Murphy on two occasions and did not know his family.

A further, most offensive, example was the claim made by Toohey, Bacon and Marr in *The National Times on Sunday* on September 7, 1986, that Justice Murphy "then returned to the High Court Bench to sit on a case involving media magnate Kerry Packer...".[69] The implication is clear, that his return was prompted by the intention to sit on a particular case, the mateship theme again. The next paragraph acknowledges that "several days later it was

63 *Id.*, 4-5.
64 Note 33 *supra.*
65 *Ibid.*
66 Note 55 *supra*, 4.
67 *e.g.* D. Brown et al. (1985) and (1986) note 5 *supra.*
68 See *e.g.* W. Bacon, "Civil Liberties and Reputations" (1984) *The National Times* November 9-15, 10; D. Marr and W. Bacon, "The Murphy Affair: Judge versus Judge" (1984) *The National Times* October 5-11, 3; note 34 *supra*, 3-4.
69 B. Toohey, W. Bacon and D. Marr, "What the Murphy team had found" (1986) *The National Times on Sunday* September 7, 1.

announced that Murphy was dying of cancer".[70] Justice Murphy's dramatic and courageous return to the Bench on 1 August, described by Blackshield as "an unforgettable symbol of human triumph over mortality",[71] was driven by his determination to symbolise his entitlement to sit, and to reinforce conceptions of judicial independence. That this act which elated many Australians could be attributed, five weeks later in the full knowledge of his impending death, to an intention to assist a particular litigant demonstrates a breathtaking meanness of spirit. It captures clearly the single minded attribution of base motives to his every last act, so apparent throughout scores of pages of *The National Times* over the preceding two and a half years.

7. The personal interest approach

Another strand apparent in media treatment was the implication that Justice Murphy's responses were driven solely by perceived personal tactical advantage. This emerged most clearly in the repeated unfavourable references to Justice Murphy's refusal to give oral evidence to the two Senate Committee inquiries and to give sworn evidence at his second trial. The common-sense refrain so favoured by police that the person with nothing to hide has nothing to fear from interrogation, was the launching pad for this portrayal. *Justinian* put it with characteristic sensitivity:

> to claim judicial independence as the reason why explanations are not forthcoming is just a lot of balderdash. Judicial independence has nothing to do with it. Murphy didn't answer the allegations openly, because he couldn't. He doesn't have the answers that can stand up, and he never did.[72]

In a revealing contrast to both the content and the style of such arguments Blackshield examines Justice Murphy's refusal to give evidence to the Senate Committees in some detail. Blackshield argues that it would have been to Justice Murphy's considerable *personal advantage* to appear before the first Senate Committee and suggests that such an appearance "would probably have put an end to the Murphy affair".[73] He details the three main reasons for the refusal, reasons which reveal that Justice Murphy's responses were largely determined not by personal tactical advantage but his structural location in the highest branch of the Australian judiciary. This location and the largely unprecedented nature of events require that his responses be interpreted in the light of constitutional and legal principle and institutional spheres of authority.

First, Justice Murphy argued that the Senate Committee hearing "would violate the rules of natural justice unless his counsel were allowed to cross-examine Briese",[74] a course not permitted by Senate Standing Orders.

---

70 *Ibid.*

71 Blackshield note 5 *supra*, 256.

72 Note 58 *supra*.

73 Blackshield note 5 *supra*, 238.

74 *Ibid.* Interestingly Wendy Bacon, Brian Toohey and John Fairfax and Sons Ltd made precisely the same claim, through counsel, to the Senate privileges committee in a submission on penalty after the publisher and the two journalists had been found in contempt of the Senate. "Barrister claims journalists were denied natural justice" (1984) *The National Times* May 3-9, 27.

Blackshield describes this view as "open to debate" but nevertheless a "serious" issue, "characteristic of his approach to natural justice in other contexts" and "impossible to ascribe...to any element of speciousness or special pleading".[75]

Secondly, Justice Murphy argued that "for a High Court judge to submit to questioning by a Senate Committee would infringe the constitutional separation of powers, and violate the independence of the judiciary".[76] Blackshield argues that "there is no doubt that his argument was in principle correct" but queries whether "Murphy's insistence on strict constitutional principle should not have been sacrificed, in the context of the Senate inquiry, to self-serving political pragmatism".[77] His refusal then, far from being a tactical calculation based on self interest, was a stand based on the constitutional struggle "for the security and institutional authority of *all* High Court judges".[78]

Thirdly, Justice Murphy argued that the Committee's "investigative" functions were being carried too far, that preliminary inquiries must "clearly stop short of anything approaching an adjudicative function" lest the protections of judicial tenure contained in s.72 of the Constitution be diminished by the development of mechanisms "*outside of* the formal machinery of section 72".[79]

The refusal on similar grounds to give evidence to the second Senate Committee hearing, discussed by Blackshield, was also personally damaging to Justice Murphy for it provided scope for some Committee members such as Senators Tate and Haines to conclude that "in the absence of evidence from Murphy they must unreservedly accept the uncontested evidence of Briese".[80] David Marr in *The National Times* had earlier pushed this view strongly: "he must actually appear before the new committee or the old allegations of Briese...and the new allegations of Judge Paul Flannery will stand, in law, uncontested".[81]

My point here then is that it is quite possible to disagree with some or all of the arguments put forward by Justice Murphy for his refusal to testify before the Senate Committees. But such disagreement must be based at least in part on an assessment of broad constitutional principle: the scope of s.72, the appropriate relationship between the judiciary and the legislature, and so on. In short, such debates cannot be resolved by recourse to the crude, individualist and reductionist attribution of self interest as determinative of complex events.

---

75 *Ibid.*
76 *Id.*, 239.
77 *Ibid.*
78 *Ibid.*
79 *Ibid.*
80 *Id.*, 248.
81 Note 37 *supra.*

IV. THE TREATMENT OF LEGAL PRACTICES

1. Introduction

The Murphy saga unfolded as an "accretion of decisions made by a range of social agents", one important task then being to "examine the conditions in which these decisions were made".[82] Some of these decisions involved issues of legal doctrine and practice, the exercise of discretions, the public representation of legal processes concerning, for example, the presumption of innocence, criteria for prosecution, pre-trial prejudice, illegal phone tapping, character evidence, the dock statement, judicial directions, the role of the jury, jury disclosures, appeal bail, the appeal process and so on. Many of these issues have complex legal, political and social histories. It might be thought that responsible journalistic analysis, especially that emanating from "self-proclaimed"[83] libertarians writing "analysis"[84] for a weekly paper without daily deadlines, would be particularly sensitive to these histories of struggle and would not seek to diminish or reduce them in the name of some over-riding logic or concern. And yet, unfortunately, this was precisely what happened. Crudely put, these various issues were not approached via their histories, were not addressed according to their desirability on designated legal or political criteria. They were approached in terms of whether the particular decision taken assisted the pursuit of the Murphy case and promoted any tactical advantage serving to further such pursuit. Some examples of this approach will be given, others have been outlined elsewhere.[85]

2. Criteria for Prosecution: "Public Officials" and "Ordinary Citizens": Which "Public Interest"?

One of the issues involved criteria for prosecution. After the second Senate Committee, Federal Director of Public Prosecutions Ian Temby was asked to assess the evidence against Justice Murphy. Geoff Kitney in *The National Times* put the position this way:

> Temby could go ahead with the prosecution of Murphy on his own initiative, if satisfied there is sufficient evidence to establish a prima facie case against him and that there is a reasonable prospect of his conviction.[86]

Kitney went on to say that "if not satisfied on these grounds" Temby could refer the matter to then Attorney-General Evans "to consider whether the extraordinary circumstances of the case would justify charges being laid".[87] He continued:

---

82 Brown et al. (1985) note 5 *supra*, 153.
83 W. Bacon, note 68 *supra*, 10.
84 Brown et al. (1985) and (1986) note 5 *supra*.
85 *Ibid.*
86 G. Kitney, "Murphy's Cabinet support weakens" (1984) *The National Times* November 9-15, 7.
87 *Ibid.*

> Evans could argue that there are powerful public interest considerations that require him to use his discretion to override the normal evidentiary requirements and take an immediate decision to mount a criminal prosecution. But he will also have to consider that there may be an equally powerful public interest in not setting the precedent of having a High Court judge charged with a criminal offence on weaker evidentiary grounds than an ordinary citizen.[88]

In the same week that Kitney was writing these words D.P.P. Ian Temby spoke on prosecutorial discretion at a seminar at the Australian Institute of Criminology where he said of a case involving a public official:

> it may be a justified course to prosecute even if the evidence is not sufficiently strong to make a conviction more likely than not, and the case would not have proceeded against an ordinary citizen.[89]

A *Sydney Morning Herald* report quoted these remarks, noting pointedly that Mr Temby made these statements at a seminar on prosecutorial discretion when he had "before him material relating to allegations against Justice Murphy".[90] Shortly thereafter the D.P.P. charged Justice Murphy with two counts of attempting to pervert the course of justice under s.43 of the Commonwealth Crimes Act. From that point on Kitney's earlier, very fair, recognition of "an equally powerful public interest in not setting the precedent of having a High Court judge charged with a criminal offence on weaker evidentiary grounds than an ordinary citizen"[91] seemed to vanish from *The National Times* concerns. The decision to prosecute and the criteria on which it was based, criteria later partly abandoned by Temby himself,[92] were viewed as unproblematic. Wendy Bacon put it this way: "Temby is an independent statutory officer. The charging of Murphy was not something on which he could be directed by either the N.S.W. or Commonwealth Cabinets".[93] In contrast when Temby both earlier and later declined to prosecute Justice Murphy a rather more elaborate discussion ensued in *The National Times.*[94]

Later criticisms of what became popularly known as "the Temby doctrine" were ignored in *The National Times.* Here then is a clear example of support for a particular decision appearing to preclude a discussion of the appropriateness of the criteria on which that decision was made. This evasion is even more disturbing in the light of subsequent articles which promoted

88 *Ibid.*
89 I. Temby, "Prosecution Discretions — Director of Public Prosecutions Act 1983" In I. Potas (ed.) *Prosecutorial Discretion* (1984) 53, 57.
90 R. Frail, "Prosecutions may clear air: Temby" (1984) *The Sydney Morning Herald* November 9.
91 Note 86 *supra.*
92 Note 89 *supra, cf. Prosecution Policy of the Commonwealth* (1986) 6; Blackshield, note 5 *supra,* 249.
93 Note 34 *supra,* 4.
94 W. Bacon, "The judge and the tapes: differences now emerge" (1984) *The National Times* March 2-8, 8; "Explosive new questions on the police tapes affair" (1985) *The National Times* March 29-April 4, 4; note 42 *supra.*

the view of Justice Murphy as being, profoundly advantaged in relation to the "ordinary" criminal defendant.[95] That the decision to prosecute demonstrated precisely the opposite, that is the disadvantage of being a controversial public figure, and the "basically political character and determinants of the prosecution", hardly seem good reasons for a failure to address the issue.

3. The Illegal Tapping Operation

Another example of this tendency was the promotion of the contents of the "Age Tapes" and the minimizing of concern over questions of the illegality of the tapping operation or of democratic control of the police. Certainly early *National Times* articles pursued the general question of how the illegal phone tapping operation was able to continue "without the tacit or active approval of successive police commissioners".[96] In particular, it was stressed that the then Premier Neville Wran was police minister for part of the period when the tapping was conducted. However, alongside this concern with how the tapping was conducted was an attempt to justify or excuse the motivation of the police involved by portraying them as a handful of "honest cops" frustrated at the lack of progress in tackling organised crime. Thus in April 1984 Wendy Bacon wrote:

> it is well known in legal circles that police who are frustrated in their attempts to catch criminals often become less scrupulous in the methods to which they resort. In this view, the N.S.W. Government must accept some responsibility for the illegal bugging which resulted from the disillusionment among N.S.W. police interested in suppressing organised crime.[97]

This portrayal was repeated in two articles in July 1985 with references to "frustrated N.S.W. police who began to illegally tap Morgan Ryan's phone"[98] and "the tapes were made by police who were among the few N.S.W. detectives more interested in tracking down powerful criminals than in locking up working-class offenders or carrying out surveillance on political dissidents".[99] Bob Bottom in *The Age* echoed this theme in his "unsung heroes"[100] version of the tapping operation.

The point here is that there were many other possible interpretations of the motivation of police, the selection of targets, the criteria of relevance and selection of conversations, the eventual uses to which material was put. The secretive and unaccountable process of selective and tactical leaking by police informants which constituted the basis for influential journalistic accounts

95 Note 55 *supra.*
96 W. Bacon, "Wran and civil liberties: the issues come back home" (1984) *The National Times* April 13-19.
97 *Ibid.*
98 Note 33 *supra.*
99 Note 55 *supra,* 5.
100 B. Bottom, "Anonymous police heroes can now sleep peacefully" (1986) *The Age* May 2.

simply did not allow the adequacy of this dominant "honest cops — unsung heroes" account to be scrutinised.

Secondly, we learnt subsequently from the Stewart Report in 1986 that the phone tapping operation was conducted over sixteen years[101] and involved over 120 police.[102] Names of police involved given in the Stewart Report reveals that a few of the police heralded unproblematically as honest cops were simultaneously being pursued on other pages of *The National Times* as corrupt members of the "Barbecue Set".[103] Further, as Stewart details, when the tapping operations became subject to public discussion, police officers involved, led by the then superintendent of the Bureau of Criminal Intelligence, conspired to cover up the whole activity by destroying the equipment and remaining materials and systematically lying to the inquiries conducted by the present D.P.P. (then a special prosecutor) and the N.S.W. Solicitor-General.[104]

Thirdly, there was no real attempt to discuss the deeper implications behind this sort of operation. Such was the concern to promote the contents of the "tapes" that no consideration was given to the question of whether it was desirable for police to tap a solicitor's phone. One might have expected journalists from libertarian backgrounds to at least raise the question whether the illegal operation might constitute a far more serious collective threat to the democratic fabric than any of the individual conversations and activities it sought to monitor. When Brian Toohey in *The National Times* finally criticised government proposals to extend phone tapping powers,[105] proposals bolstered enormously by *The Age/National Times* publication and promotion of the content of fragments of the illegal tapping operation, it was as if the news had no history at all and journalists no responsibility for its structure and effects.

Fourthly, some earlier appalling and unacknowledged errors became apparent. For example Bottom had claimed in *Without Fear or Favour* that an opinion from the then Attorney-General Lionel Murphy in 1974 that the provisions of the N.S.W. Listening Devices Act was unconstitutional:

---

101 Note 19 *supra*, para. 7.1, 81.

102 *Id.*, 383-388.

103 W. Bacon, "Det. Rogerson and the police Barbecue Set" (1984) *The National Times* November 30-December 6, 8-9.

104 Note 19 *supra*, paras 7.152-7.170,16.8, 122-126,337.

105 B. Toohey, "Curbs needed on State police phone-tap powers" (1986) *The National Times* May 16-22, 8. Toohey noted that "Justice Stewart, of course, has claimed the illegal taps were done by honest police who were so frustrated in their efforts to catch criminals that they had to break the law." "Maybe so" Toohey added, "but it's asking us to take a lot on faith" noting that "[o]ne of the N.S.W. police for whom Stewart recommended immunity against prosecution is currently before the Police Tribunal; another is strongly suspected of fabricating evidence in a case involving a major miscarriage of justice." But, as we have seen, it was not only Justice Stewart who promoted the "honest cops" portrayal, Wendy Bacon in particular and *The National Times* in general had spent the past two years promoting just this notion, asking us, in Toohey's words, precisely "to take a lot on faith."

> frightened off NSW police from using electronic bugging devices which necessitated the entry of premises to plant them. In their place, the police turned to tapping of telephones, enabling them to intercept without having to enter premises.[106]

But the Stewart Report revealed that the tapping operation began in 1968.[107] Bottom's "poetic justice" implication is thus completely baseless. The Murphy opinion could hardly have been the genesis of a practice which in fact began six years earlier. There are many other alarming aspects to the way the illegal tapping operation was constituted in the dominant media accounts; another being the treatment of the Stewart Report in a way that retrospectively legitimated the prolonged illegal tapping operation and promoted the notion that "authenticate" was equivalent to "true", largely ignoring the question of reliability. But enough has been said to illustrate yet again the subordination of serious and informed public debate over vital issues in a democratic society, to the immediate pursuit of the Murphy case and the promotion of any tactical advantage accruing to the prosecution in such pursuit.

4. Criticising the Jury Verdict: "Legitimate Public Concern" or "Undermining Public Respect"?

Other examples of this tendency included the response to criticism of the first jury's guilty verdict. Contacted by journalists for comment on the verdict, a number of academic lawyers including Professors Blackshield and Stone, Associate Professor Aronson and this writer were quoted commenting critically on the verdict, with various emphases.[108]

In a prompt attempt to shore up the verdict, journalists who had devoted millions of words to creating the broad media and political context for the prosecution attempted to portray the specific criticism as a general attack on the jury system. The criticism was "simply flying in the face of the verdict" said Wendy Bacon on radio.[109] In *The National Times* she claimed that "senior legal scholars, most of whom would normally support the jury

106 B. Bottom, *Without Fear or Favour* (1984) 138.

107 Note 19 *supra*.

108 Professor A.R. Blackshield was quoted in *The Sunday Telegraph* (1985) July 7, as saying "[t]here was nothing in these charges. The whole situation was like the story of the Emperor's New Clothes — all about nothing. It was spun by the 'Age tapes' and judges and politicians and journalists. Once an illusion gets hold on the public mind, its very difficult to remove it. In the Emperor's Clothes it takes a little innocent child to stand up and say 'There's nothing here!' We have all been relying on the jury to stand up and do that. But perhaps it was too much to ask as they have had to sit and hear judges and lawyers taking it seriously". Other comments, quoted in *The Sydney Morning Herald* (1985) July 9, included Professor Julius Stone who referred to the "political underbearings" of the case; Associate Professor Mark Aronson who said that "it was clear the jury had failed to understand in any measure the day to day manner in which judges operated"; and David Brown who described the verdict as representing "the jury's understandable confusion in the face of legal mysticism and political and media prejudice." Minister for Foreign Affairs, Bill Hayden was quoted in *The Sydney Morning Herald* (1985) July 11, as saying "I'm yet to be convinced that Lionel Murphy is guilty as found." See also M. Turnbull, "Miscarriage of Justice against Murphy" *The Bulletin* (1985) July 16, 37-40.

109 Bacon, 2JJJ, (1985) 5.30pm July 8.

system, led the campaign this week by sweeping aside the jury verdict".[110] The notion that the jury may have been confused was ridiculed. "It was not an especially confusing or complicated case"[111] according to Wendy Bacon. *The National Times* front page declaimed that the criticism "showed scant regard for the canons of the English common law, and its time-honoured jury system. The jury itself, in effect, has been publicly pilloried for its decision".[112] A *Sydney Morning Herald* editorial referred to "highly emotional comments by academic lawyers attacking the jury's verdict"[113] and the "quite irresponsible comments by the Foreign Minister, Mr Hayden",[114] later editorials referring to "intemperate attacks".[115] Justice Yeldham of the N.S.W. Supreme Court declared from the Bench in the course of another case that there had been "lamentable and grossly improper comments made about the verdict...which can only have the effect...of denigrating that system and of unfairly criticising the jury...".[116]

There were thus two limbs to these attacks on the critics: one a defence of the particular verdict and of the processes that produced it, the other a claim that criticism of the verdict constituted an attack on the system of jury trial. The problem with the first limb was that while certain journalists were mounting a strong defence of the trial and the verdict, denying jury confusion, individual members of the jury began to break jury secrecy and reveal their feelings and understandings of the trial process on radio, and later in the press.[117] What the anguished post-conviction testimony revealed was in fact considerable confusion over the legal elements of the charge. Some jurors clearly believed that the law was unjust — "it's a terrible law";[118] "we find this law repugnant and abhorrent".[119] Comments such as "it is necessary to make it clear that nobody should talk to a judge while he has a matter before him"[120] illustrate clear confusion about judicial practice concerning discussion of cases, together with considerable anguish — "there was much sorrow, regret and resentment in the jury room";[121] the feeling of being constrained by the directions of the trial judge to reach a verdict of guilty and dubious of the supposed benefits of the law — "are we isolating our judiciary to the extent where they can't talk about what is going on —

110 Note 33 *supra.*
111 *Ibid.*
112 W. Bacon, "His Honour The Prisoner" *The National Times* (1985) July 12-18, 1.
113 *The Sydney Morning Herald* (1985) July 12
114 *Ibid.*
115 *The Sydney Morning Herald* (1985) October 21.
116 *The Sydney Morning Herald* (1985) July 12.
117 The jury foreman spoke on radio 2GB talk-back on 11 July, see *The Sydney Morning Herald* (1985) July 12, followed by a second juror. A third juror wrote to both Justice Murphy and Professor Blackshield, see *The Sydney Morning Herald* (1985) July 19.
118 Jury foreman, text of 2GB interview (1985) July 11.
119 Text of letter from 3rd juror to Justice Murphy (1985) July 10.
120 Note 118 *supra.*
121 Note 119 *supra.*

then maybe they're getting too remote from what society wants of the law and how it wants it interpreted".[122]

The apparent reversal of the onus of proof evident in one juror's description of their attempt to explore "any reasonable hypothesis consistent with innocence"[123] drew no critical comment from libertarian journalists. The threat of contempt from the D.P.P. was invoked to stem the flow of jury disclosures.[124] Nevertheless *The National Times* published a lengthy story — "for the first time...the whole story from the inside" — from a fourth juror. According to Jeff Penberthy's report, Juror 4 decided:

> to go public ... because he believes that members of the jury themselves have now suffered a grave and scarring injustice in relation to the conscientiousness of their efforts ... and that the jury system itself has been placed at risk.[125]

It was claimed that the account "is entirely based on Juror 4's story" which "on several significant points ... sharply contradicts statements now *publicly attributed* to the jury foreman and one of the two other jurors to speak out" [emphasis added].[126]

The formulation is interesting in several respects. First, the account also supports aspects of Jurors 1-3's accounts. Secondly, far from being only "publicly attributed", Jurors 1-3, were actually able to speak for themselves, directly to the public via talk back radio in two cases, edited transcripts of which were subsequently republished in some papers, and via the text of a letter released to the media in another case. In contrast Juror 4 does not speak directly to the public in this way, but as *re* presented in a journalist's report "*based on* Juror 4's story" [emphasis added].[127] The story contained little by way of direct quotation, being more in the nature of "the picture presented by Juror 4 was..." as "relived over nine hours of interview last weekend".[128]

The second limb of the onslaught on the critics, that they were attacking the whole of the jury system, was similarly flimsy. As was pointed out then, and since, it is clearly possible to be critical of particular decisions and the wider political and legal processes that produce them and yet be a staunch upholder of the jury system. As Blackshield puts it:

> the debate which followed the Murphy verdict has been publicly deplored in terms that could be justified only by those who had never heard of Leith Ratten or of Lindy Chamberlain — not to mention Sacco and Vanzetti. The process of trial by jury is essentially a public process: it is the most direct and deliberate form of community participation in the administration of justice. Where the outcome of a particular case gives grounds for disquiet, that disquiet is itself a matter of legitimate public concern.[129]

---

122 Note 118 *supra*.
123 J. Penberthy, "Inside The Murphy Jury" *The National Times* (1985) 26 July-1 August, 1,27.
124 *Sydney Morning Herald* (1985) 12 July, 1.
125 Penberthy note 123 *supra*, 3.
126 *Ibid.*
127 *Ibid.*
128 *Id.*, 26.
129 A. R. Blackshield, "After the Trial. the Free Speech Verdict" (1985) 59 *Law Institute Journal* 1187, 1191

In fact, the portrayal of criticism of the verdict as "public contempt for the judicial process",[130] as Professor Colin Howard put it, was made by people who *had* heard of the Chamberlain case. Howard actually used the case to deplore any criticism of jury verdicts, arguing that it resulted in "undermining public respect for impartial judicial procedures":

> [a] recent extraordinary instance was the Chamberlain case. If ever anyone had the full benefit of a fair trial it was Mrs Chamberlain. Yet immediately after the case had come to a final conclusion we were treated to the spectacle of scores of thousands of citizens simply refusing to accept the result. The words 'justice' and 'injustice' were freely bandied about. The protestors ignored the obvious fact that for justice to be a reality you have to have a strong and respected judicial system.[131]

Fortunately for the Chamberlains and for "a respected judicial system...scores of thousands of citizens" imbued with notions of "justice" and "injustice" did indeed "refuse to accept the result" and in so doing forced the establishment of a Special Commission of Inquiry which found "serious doubts and questions as to the Chamberlain's guilt and as to the evidence in the trial leading to their conviction"[132] and recommended a pardon, which was duly granted. It would be difficult to find a clearer choice between competing views of legal processes than that offered between Professors Blackshield and Howard above.

The rush to defend the first Murphy jury decision by academics, editorialists and journalists with libertarian credentials allegedly campaigning on a "let's open up the criminal justice system" ticket left them in the completely untenable position of labelling those who wished to discuss the broader construction of the case as wreckers of the jury system, while sections of the jury publicly abandoned their own decision and implicitly supported many of the very points the critics had made. As Blackshield points out, it is not as if the Murphy case was a "rational and orderly process until it was rudely disrupted by a storm of controversy"[133] following conviction. The charges were always controversial and "if only those who were so eager to proclaim his guilt had at any stage felt similarly constrained, the atmosphere in which the case went to trial may have been less prejudicial".[134]

5. A Successful Appeal: "Fine Legal Points"?

The N.S.W. Court of Appeal unanimously upheld the appeal against the conviction on four grounds, finding it not necessary to consider a further eight. The Court stated that "proper regard for the rights of accused persons requires that the present conviction be set aside since the appellant may have

130 C. Howard, "The Murphy trial and the road to 1995" *The Sydney Morning Herald* (1985) July 12.
131 *Ibid.*
132 *The Sydney Morning Herald* (1987) June 3. For a good account of the case see J. Bryson, *Evil Angels* (1985).
133 Note 129 *supra.*
134 *Ibid.*

been deprived of a chance of acquittal fairly open to him".[135] Wendy Bacon found in this "a political victory for Murphy and his supporters", referring to a few "fine legal points".[136] Once again this was a very partial and selective "reading".[137] First, new trials are not awarded simply on "fine legal points"; the proviso to s.6 of the N.S.W. Criminal Appeal Act 1912 enables a court to dismiss the appeal despite points being decided in favour of the appellant, if the court "considers that no substantial miscarriage of justice has actually occurred". Secondly, contrary to the implication that new trials are unremarkable, simply doled out to those who ask, the court statistics show otherwise.[138] Thirdly, the purported summary of the judgment seriously understated the strength of the Court's findings. The article failed to mention the Court's agreement that certain directions were "confusing and misleading", and "that there was a very real risk that the jury were confused about how they were to arrive at this conclusion concerning motive, an issue of considerable importance, and intention, a critical element, in the case".[139] If misdirections on such "critical" issues as motive and intention are not worthy of mention or are reducible to the category of "fine legal points" then such "a reading of the judgment" is open to question on basic grounds of fairness and accuracy.[140]

6. The Flannery Charge: Adding Prejudicial Weight

"No one was surprised by the acquittal of Murphy on the charge that he had attempted to influence Judge Flannery, who presided over the trial against solicitor Morgan Ryan"[141] according to Wendy Bacon. She continued:

> [t]here was evidence that Murphy had discussed his judgment in Hoar's case with Flannery two days before that trial. But once Judge Cantor ruled that the jury should not be told that Hoar's case was mentioned in submissions by Ryan's defence lawyer at his trial, the evidence against Murphy on this charge seemed flimsy indeed.[142]

This apparent concession continued the conspiratorial interpretation that "Flannery was surprised two days later when Ryan's solicitor in his opening address drew his attention to precisely that passage in *Hoar's* case".[143] This interpretation was clearly rebutted by Justice Murphy at the committal

135 *R* v. *Murphy* (1985) 4 NSWLR 42, 70 (hereinafter *Murphy*).
136 W. Bacon, "Murphy prepares for the next round" *The National Times* (1985) 6-12 December, 5.
137 *Ibid.*
138 In 1981, 1982 and 1983 the number of new trials ordered by the court on appeals against conviction or conviction and sentence (excluding appeals against sentence only) was 4 out of 97, 7 out of 135 and 6 out of 121, respectively.
139 *Murphy*, note 135 *supra*, 60.
140 A letter to *The National Times* making the above points was published under the misleading heading "New Facts on Retrials" *The National Times* (1985-1986) 27 December-3 January, with critical comments edited out. Throughout this period *The National Times* failed to observe the *Sydney Morning Herald* practice of contacting letter writers to discuss editorial changes to letters.
141 Bacon, note 33 *supra*.
142 *Ibid.*
143 W. Bacon, "How Judge Flannery tipped the balance" *The National Times* (1984) 9-15 November, 8.

proceeding[144] when he explained that *Hoar's* case, criticising the practice of prosecutors charging conspiracy where they could have charged a substantive offence, had indeed been raised by Ryan's counsel who handed Judge Flannery a *Sydney Morning Herald* report of a speech on "The State of the Australian Judicature" delivered at the Australian Legal Convention a few days previously by the Chief Justice.[145] The Chief Justice criticised the practice of charging conspiracy rather than a substantive offence, in similar terms to the unanimous decision in *Hoar's* case. It was this report which in turn generated the dinner party reference to the case. As Turnbull argued, the Flannery charge added prejudicial colour to the Briese charge.[146] It should not have survived the committal.[147] Flannery admitted at the Foord committal that he had "discussed the Morgan Ryan trial during its course with five judges..."[148] one of whom made a recommendation as to sentence. Earlier, the Flannery allegations had been rather enthusiastically promoted by *The National Times* in the context of the second Senate Inquiry and the creation of media pressure for prosecution. "Knowledge of Flannery's allegations has transformed the way in which judges and many lawyers perceive the crisis"[149] claimed David Marr and Wendy Bacon. "As a judge he has to be taken seriously by the judges, and the Sydney Bar is now...agog".[150] A month later it was "How Judge Flannery tipped the balance".[151] Again we might have expected from journalists, especially with a libertarian legal background, a rather more sanguine approach, a recognition of the relevance of *Hoar's* case and how it came to be raised, support for its sentiments,[152] repeated in other authorities,[153] and a scepticism as to how referring a judge to a decision of the High Court could possibly be perceived as improper, let alone criminal.[154] We might also expect some acknowledgement when a clear

144 "Murphy angry at 'false charges'" *The Sydney Morning Herald* (1985) April 27.

145 *The Sydney Morning Herald* (1985) July 9.

146 M. Turnbull, "Miscarriage of justice against Murphy" *The Bulletin* (1985) July 16.

147 Brown et al. (1985) note 5 *supra*, 156.

148 L. Simpson, "I discussed Ryan trial with five judges: Flannery" *The Sydney Morning Herald* (1985) April 13.

149 Note 59 *supra*, 3.

150 *Ibid.*

151 Note 143 *supra*.

152 *The Queen* v. *Hoar* (1981) 148 CLR 32. Gibbs C.J., Mason, Aickin and Brennan JJ. in a joint judgment said that "[g]enerally speaking, it is undesirable that conspiracy should be charged when a substantive offence has been committed and there is a sufficient and effective charge that this offence has been committed ... There is even less justification for charging conspiracy and the substantive offence separately and for maintaining the prosecution in respect of the substantive offence after securing a conviction for conspiracy". (*Id.*, 38) Murphy J. agreeing said: "[t]he overzealous use of conspiracy charges proves embarrassing and costly not only to the accused but ultimately to prosecuting authorities and the courts. It brings the administration of criminal justice into disrepute. This is happening in Australia. History shows that the administration of justice will be well served if courts keep a tight rein on the spawning of conspiracy charges". (*Id.*, 41).

153 *e.g. Gerakiteys* v. *The Queen* (1984) 58 ALJR 182.

154 T.W. Smith, "Murphy" (1985) 59 *Law Institute Journal* 892, 893; D. Brown (1986) note 31 *supra*, 353.

and convincing explanation was offered. To continue to repeat, unqualified, the earlier mistaken conspiratorial interpretation, was blatantly unfair.

7. The Acquittal: Resurrecting the Guilty Verdict

Justice Murphy was acquitted of the remaining charge at the second trial. Sensing an acquittal *The National Times* published the day before the jury retired to consider their verdict, reminded us that "their verdict cannot bear directly on the great issue that lies behind this case...the proper conduct of judges".[155] This had indeed been rather forgotten in the excitement of the chase, as evidenced by the lack of discussion about the standards or criteria by which such an issue might be judged. For John Slee in *The Sydney Morning Herald* however,

> Justice Murphy was never just any accused. At his retrial he was not simply seeking to persuade a jury that they could not be satisfied beyond reasonable doubt that he was guilty. He was doing that. But he was also seeking to clear all doubts that, in relation to the particular charges against him, he had done nothing to make him unfit to sit on the High Court...[156]

In this version, the criminal trial was merely a forum for the ventilation of an array of diverse matters, conduct, associations, beliefs, character, from different periods of his life involving different capacities, including that of Attorney-General. For Slee then, Justice Murphy's recourse to a dock (unsworn) statement — an anachronism[157] — not only constituted "no greater abuse of that right imaginable"[158] but also it was now essential that this matter too should be dealt with, if not by the Parliament itself. "'Misbehaviour' under section 72 of the Constitution...is probably wide enough to include, in certain circumstances for a judge, failure to answer questions".[159] *The National Times* also slated Justice Murphy's recourse to the dock statement "The Judge who refused to take the oath",[160] but few went as far as Slee in suggesting that the exercise of a legal entitlement in a court hearing provides a ground of impeachment of a judge. For if a judge can be removed from office for exercising a right provided in law then judicial independence in terms of protection of tenure of office means absolutely nothing at all.

The use of the dock statement and the failure to put character at issue was used to resurrect the guilty verdict of the first trial. The character issue was referred to as "very largely" determining the "successful appeal from the

155 D. Marr, "Murphy's Final Plea" *The National Times* (1986) 25 April-1 May, 3.

156 J. Slee, "New Inquiry could force reluctant resignation" *The Sydney Morning Herald* (1986) May 8.

157 J. Slee, "Crisis of confidence not eased by trial tactics" *The Sydney Morning Herald* (1986) May 1. P. Bryne, N.S.W. Law Reform Commissioner, in response to Slee's claim that the N.S.W. Law Reform Commission recommendation to retain the unsworn statement was "going against a steady trend", pointed out that during 1985 four reports by law reform bodies were published, all recommending retention.

158 Note 156 *supra.*

159 *Ibid.*

160 Note 43 *supra.*

earlier conviction",[161] which as we have already seen is highly misleading. Justice Murphy's justification for "adopting these tactics in the second trial to prevent 'political' attacks on himself and the distinguished friends he might have called to give evidence"[162] was portrayed as mere rationalisation. David Marr and Wendy Bacon declared confidently that "Murphy's overriding objective in all this was to minimise the evidence before the court of his relationship with Morgan Ryan. That he achieved."[163] In fact there had been considerable sniping at the character witnesses in the first trial, especially Justice Michael Kirby, President of the N.S.W. Court of Appeal. Wendy Bacon decided that Justice Kirby "has well and truly disqualified himself by giving character evidence"[164] from sitting on any appeal. "Michael McHugh also knows Murphy quite well and will not sit on the case;"[165] the mateship theme again. No doubt these "newer more liberal judges"[166] were pleased to be advised of their ethical responsibilities by *National Times* journalists. *Justinian* went even further, accusing Justice Kirby of a "breach of judicial convention" and suggesting that "being such a fervent and public Murphy supporter could raise questions in the future about Kirby sitting on appeals against decisions made by Briese or even Flannery".[167] It even implied he might be precluded from sitting on cases involving "a frequent litigant in Kirby's court"[168] John Fairfax and Sons Ltd.

Justinian also made the amazing discovery "that Murphy has hardly been investigated at all. The one time he faced his accusers, and gave evidence on oath, a jury did not believe him and he was promptly found guilty".[169] This view was repeated in *The National Times,* without the earlier bracketed qualification that jury disclosure "suggests considerable confusion about how the verdict was reached".[170] As we have already seen, the jury confusion concerning motive and intention as apparent in juror disclosures and as formally legally canvassed in the Court of Criminal Appeal's discussion of the trial judge's summing up, makes such conclusions untenable. As even *The National Times* story of the account of the 4th juror acknowledged, "while the evidence of Murphy and Briese was in conflict on detail, there was general agreement that certain events had taken place".[171] On one interpretation of the elements of the offence available to the jury and evidently taken by at least some of them, such events could found the charge irrespective of intent.

161 *Ibid.*
162 *Ibid.*
163 *Ibid.*
164 Note 54 *supra.*
165 *Ibid.*
166 *Ibid.*
167 "Kirby's character evidence" 41 *Justinian* (1985) July 29, 3.
168 *Ibid.*
169 Note 58 *supra.*
170 Note 55 *supra.*
171 Note 123 *supra,* 26.

8. Keeping to the "Foreshadowed" Script

Another striking feature of *The National Times* coverage was the readiness to provide scripts for various witnesses, to confidently outline what people would have said if only they had been asked the question, if the laws governing the admissibility of evidence had been suspended or if different tactical decisions had been made. An extraordinary sense of certainty, of omniscience almost, prevented the script from being disturbed by what was actually said. Rather the reader was able to follow what should have been said, or what would have been said if only...

David Marr was clearly annoyed when "some of the [Flannery] evidence we *foreshadowed* in The National Times over the past fortnight was ruled inadmissible as hearsay" [emphasis added][172] by the second Senate Committee. If *The National Times* had already "foreshadowed" it, what business was it of the Senate Committee to "impose upon itself, quite voluntarily, the rules of evidence used in a criminal trial before a jury"?[173] Hearsay was, after all, "the meat and drink of the Combe Royal Commission."[174] Rather than disrupt the "foreshadowed" script, we were told that Flannery could have given evidence, first...second...third...[175] Similar scripts were written in advance of events throughout the various proceedings. The discerning reader may have wondered why there had been all the expense and trouble of senate committees, committals, trials, appeals, retrials, commissions et cetera when a group of journalists had decided it all already.

Before the retrial, evidence excluded on the first trial, could, Wendy Bacon assured us, "be heard by a jury. This evidence would be expected to run directly counter to Murphy's evidence and could further damage the defence case."[176] After the retrial it was evidently not only "the Crown" that:

> was frustrated in its plans to cross-examine on the Don Thomas allegations (see story page 5), on his role as Attorney-General before and after the break-in to Junie Morosi's Sydney flat early in 1975, and his role in the famous Sala case.[177]

He could also "have been asked to explain..."[178] (cut to rerun of list of "Age Tapes" allegations). However, (sadly) "the rules of evidence would never allow the jury to be shown the conversation where..."; "nor would a jury at a Murphy trial be allowed to read transcripts where...".[179] If only "the tapes had been made as part of a properly authorised police operation...".[180] Hopes

172 Note 37 *supra.*
173 *Ibid.*
174 *Ibid.*
175 *Ibid.*
176 Note 55 *supra.*
177 Note 43 *supra.*
178 *Ibid.*
179 *Ibid.*
180 *Ibid.*

were then expressed that their illegality may be recuperated by the Stewart Report.

This role of external advisor to the prosecution, remedying defects in the trial process, overcoming the inconvenient tendency of the laws of evidence, legal presumptions, procedural safeguards and forensic tactics to disrupt the "foreshadowed" script, filling in the naughty bits for the benefit of the public, prospective witnesses and jurors, was rather a new one; more akin to the novelist or playwright than the journalist covering a criminal trial, the latter being usually constrained by actual events and concern over prejudicing trials.

V. CONCLUSION

This discussion has attempted to identify some of the themes apparent in dominant media representations of the Murphy "affair", drawing on examples predominantly from *The National Times.* It has been conducted in the belief that the form of the debate itself, its terms and in particular its media constitution and representation, is an important object of analysis. It has been argued that forms of journalistic practice included the promotion of guilt by association techniques, and that the treatment of legal practices was governed predominantly by an unprincipled support of whatever most assisted the further prosecution and pursuit of Justice Murphy. In the process important histories of struggle over legal and institutional practices were diminished in the name of truth and investigative journalism. As Sylvia Lawson puts it, "Lionel Murphy fell foul of our press's most obvious kind of unfreedom, the compulsion to produce news as spectacular commodity, the expose centred on the major *local* name".[181]

The task Sylvia Lawson sets us of attempting "to understand how liberal journalism could so befuddle its objectives"[182] is not furthered by crude assertions of some generalised "Fairfax conspiracy". At a broad level it is understandable how this could appear to be the case, given the unrelenting nature of "the assault on Murphy".[183] The problem with conspiracy type explanations (the basis of much of *The National Times* coverage of the "Age Tapes") is that they tend to explain away rather than explain, to close off rather than open up. In a journalistic context they lead to an over-emphasis on questions of ownership and control at the expense of an analysis of journalistic traditions, practices and ideologies.

Former *Age* journalist Garry Sturgess also argues that "one does not need to reach for conspiracies", referring instead to a "pack element", of "one in

181 Note 3 *supra,* 40.
182 *Ibid.*
183 *Id.,* 39.

all in, one wrong all wrong."[184] Certainly there was a sense of feeding frenzy at times, the incessant and repetitious encircling of the prey. But in the wider media there were honorable defections from the pack and even in *The National Times* Patrick Cook's cartoons provided an incisive and witty alternative to the surrounding text. Sylvia Lawson argues of *The National Times:*

> [t]here was no conspiracy, no determinant line of command, and in the event no need for it. Libertarian notions of free enquiry — begging all questions of what it might be free from, or for — collaborated with the romantic fearless — investigation mythology to produce an inquisition, a vicious trial-by-media job in which guilt was presumed from the outset.[185]

One objection to the focus on the journalistic practices, constitution and representations of the Murphy "affair" is that it fails to "come to grips with what was said"[186] and fails "to say exactly how...the affair should have been handled."[187] But one of the major conclusions to be drawn from analysing the media coverage is that proper journalistic regard for "fair and honest means", to use the words of the Australian Journalists Association Code of Ethics, would result in a recognition that the evidence of "what was said" was irredeemably unreliable, incapable of delivering up a clearcut unambiguous meaning with which anyone could "come to grips". This is quite different from saying that allegations should be suppressed or "that journalists should actively censor material if it does not fit with their political interests".[188]

The most that could fairly be raised against Justice Murphy was the question of his relationship with Morgan Ryan. Justice Murphy admitted a relationship, but with three qualifications. One, that it was at the material time a solicitor-client relationship. Secondly, any relationship outside these parameters was less extensive or frequent than suggested. Thirdly, that he objected to being judged on the basis of his association with others. There was room for argument and debate over these matters. Whether such a debate deserved to be constituted as the major focus of public attention over such an extended period is very doubtful.

Two preconditions for the proper conduct of a debate over fitness for office on the ground of personal association were largely absent. The first is for some set of criteria against which such questions can be judged.[189] The

184 Note 1 *supra,* 227.
185 Note 3 *supra,* 40.
186 Bacon, note 8 *supra,* 16.
187 *Id.,* 18.
188 *Ibid.*
189 The relevant words of s.72 of the Constitution, "proved misbehaviour or incapacity" were a source of considerable debate and confusion. The attempt to find in them some clear resolution was misguided. Their meaning is flexible, contingent on the context, and ultimately determined by the wider balance of political forces. See Brown et al. (1986) note 5 *supra,* 152; Blackshield, note 5 *supra,* 253-256. See also the *Report of The Advisory Committee to the Constitutional Commission* (1987) 22 May, 76-92.

second is for some formal institutional mechanism for applying such criteria. Ultimately, under s.72 of the Constitution, the Parliament is that mechanism. If the qualification to remain on the Bench is conditional upon a rolling open-ended inquiry not conducted against a set of clearly articulated standards of propriety, then there is no reason, in principle, why such an inquiry should be limited to Justice Murphy. The question arises, what would a similar investigation into the private lives of other members of the judiciary reveal?

Justice Kirby puts the point well:

> the way we deal with one case tends to set our standards for the way we may deal with future cases. If we were to deny one judge the preliminary indication of charges at the outset of the inquiry, we may deny another. If we were to refuse one judge the privilege against testimony and against self incrimination, we may equally refuse the next. If we were to institute a roving inquisition into unspecified conduct in one case, might it not be revived for another? Procedures are central to the protection of freedom. Once adopted, they affect the relationships of those subject to them.[190]

If the manner of handling allegations of judicial impropriety degenerates into an open-ended inquiry into a person's whole life history and character, without any clearly articulated criteria or standards of judgment and without any clear nexus or bearing on the conduct of public office, then we are indeed presented with a modern form of inquisition.

An indication that the Murphy "affair" did degenerate into an inquisition is provided by Patrick Cook's cartoon in which Justice Murphy is "found guilty of being the subject of a Senate Committee Report",[191] a satire on the "controversy/taint" argument promoted by commentators like Professor Colin Howard. Howard argued that "it is incontestable that Justice Murphy has become a highly controversial figure" and as such "regardless of the extent to which, if at all" this could be "attributed significantly to his own conduct" he is "a threat" to the "perceived integrity"[192] of the High Court.

As pointed out previously,[193] this is not an answer to, but a restatement of, the problem. Justice Murphy was always viewed as a controversial figure in a way that other judicial appointments were not, precisely because he represented a political tradition which puts social change above social conservation.[194] And if the existence of political and legal controversy surrounding him was to be the major criterion for determining his fitness for

190 M. Kirby J., "Of Judicial Independence", Occasional Address, Graduation Ceremony, La Trobe University, (1986) 23 May.

191 P. Cook, *The National Times* (1984) November 9-15, 7.

192 C. Howard, "He should go with dignity" *The Sydney Morning Herald* (1986) May 6.

193 D. Brown, "He must stay and defend" *The Sydney Morning Herald* (1986) May 6.

194 S. Fink, "The Media, Law and Politics: A Preliminary Symbolic Case Study of Lionel Murphy (1982-1985)" B.A. (Hons) Thesis, (1985) University of Melbourne, argued that there are "six categories of understanding Murphy symbolism": 1) early background and style, 2) as a legacy of the Whitlam era, 3) as a hero of the Labor Reform Movement, 4) conspiracy theories associated with Lionel Murphy — religion, tax, elections, 5) corruption, lies, sex and money in the trials of Lionel Murphy, 6) the legal and political."1,8-9.

office, does that mean that the absence of controversy is sufficient to remove the question of routine yet improper or objectionable judicial behaviour from the agenda? This is indeed what Lord Hailsham, quoted earlier,[195] appears to suggest.

Finally, if the generation of controversy becomes a ground for removal or resignation in itself then ultimately the question of fitness for office will be determined by the agencies that have the power to generate controversy around a particular figure and judicial tenure becomes subject to unarticulated criteria of newsworthiness. This brings us back to the media.

Sylvia Lawson quotes Manning Clark's suggestion that "in time [Murphy's] last chapter would read like Australia's *Dreyfus* case", with a "high probability that history would find the man not only not guilty, but also most unjustly pursued."[196] In response to such views it is not sufficient to invoke generalised notions of the truth, investigative journalism, good intentions or the public interest. Influential media constructions of the Murphy "affair" should be evaluated according to principles of openness as to the criteria of selection of subject matter, scrupulousness over checking, consistency with previous approaches over similar issues, an acknowledgement of departures from previous positions and a preparedness to resist the temptation to override or deny histories of struggle of considerable legal, political and cultural importance in the name of some wider crusade or pursuit. This discussion has suggested, drawing on a range of examples and themes, that *The National Times* fell rather short of these, and other basic principles of fair journalistic practice. It was a failure we have all had to pay dearly for, not the least Justice Murphy himself.

195 Note 32 *supra*.
196 Note 3 *supra*, 40.