The US Constitution: A Catalogue of Complaints about Britain

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I encourage all my students, along with my son, to study History along with whatever else they are interested in, since it is a simple truth that *if we do not learn from History, we will be doomed to repeat History's mistakes.* It is with this in mind that my second lecture of the series looks at the U.S. Constitution through the lens of its authors, to learn what we may of the concerns of the day. Mostly, the document must be seen as a criticism of the excesses of the British government under George III, excesses that led to the American Revolution in 1776. Once we consider what those criticisms were, it is worth wondering the extent to which Britain has changed.

The Bad American Revolutionary Ideas

Before we go too far, let's get three matters out of the way: First, I don't plan to talk this time around about the vital element of the "Structural Constitution" – how our policy is put together (that's for January's lecture). Neither do I plan to go into the First Amendment (that will be February). And third, I won't spend much time on the elements of the Constitution that nobody their right mind would want to replicate.

> For example, Article IV, Section 2, Clause 3 provides:
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> *No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.*

This essentially it preserved the 'right' of a White Man to own Black Slaves – if some unfortunate person from Mississippi should escape the clutches of the 'Master' and get to a Free State, the law required that the enslaved person should be returned.[1]

The idea that slavery should have been validated in any way in the foundational document of the United States is abhorrent, of course, though nobody in the U.K. is really in a position to cast the first stone – the British were the primary progenitors of slavery in North America. It took nearly a century to get this out of the constitution, and the stain was not entirely erased by the Thirteenth Amendment:

> *Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.*

This was passed by the Congress of the Northern States on January 31, 1865, while the Civil War still raged, but it was not ratified by sufficient states until December 6 of the same year, when the South had been defeated. But obviously the scars inflicted on the entire nation by two centuries of slavery were not erased by these words. And it is often overlooked that "involuntary servitude" (i.e., slavery) was retained for people in prison, where it exists to this day.

Another madness in the U.S. Constitution is the Second Amendment, though here the insanity comes primarily from its recent interpretation:

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[1] Many of the early decisions surrounding the "Full Faith and Credit Clause", which mandates that each state must respect the laws of the other, involved rulings that New York, for example, should return a slave to Mississippi. I used these decisions to good effect in the case of Sam Johnson in 1988, where Mississippi did not want to respect the New York decision that a prior conviction could not legitimately be used to enhance a capital conviction to the death penalty. But there are still ways in which this will spark debate in the years to come – in the tension between a state like California (which approves of abortion) and Texas (which makes it illegal even to leave the state to have an abortion in a place like California)

> *A well-regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*

The problem with the Second Amendment is that the six conservatives on the U.S. Supreme Court have contorted the meaning of this phrase. For more than 200 years, the Second Amendment played no role at all in American law, since the general opinion was that it was language of its era, when a militia might be needed to help to repel the British, as had happened in the War of 1812. Only in the 21st Century did the National Rifle Association think they had the votes on the Supreme Court for a radical shift. Sure enough, in *District of Columbia* v. *Heller*, 554 U. S. 570 (2008), and *McDonald* v. *Chicago*, 561 U. S. 742 (2010), the Court ruled that the Second Amendment protects the right of a law-abiding citizen to possess a handgun in the home for self-defense.[2]

This is not so much an example of a foolish "right" in the Constitution, as it is a foolish group of justices going against the settled understanding of two centuries. The idea that it is a constitutional right (let alone a sensible idea) to allow everyone citizen a semi-automatic rifle in "self-defense" is ridiculous, as well as a significant contributor to the American homicide rate.

Be that as it may, it would be equally foolish to reject the concept of a U.S.-style constitution based on two things that seem unwise. After all, the document was written and signed solely by a group of White European men well over 200 years ago. There were some remarkable intellects, people who had travelled widely (for the era) and imbued the true flavour of the Enlightenment. Yet the "Founding Fathers" included no mothers, no slaves, no native Americans, no Asians, no Muslims, and even among the White Males were several people who argued dogmatically that Slavery found moral authority in the Christian Bible. No, the Constitution could be perfect – and our 21st Century prejudices will one day be seen as barbaric.

While we may cherry pick the useful concepts from History, then, we would be unwise to think anyone had a monopoly on good sense. I wrote recently about how Thomas More's *Utopia* was the impetus for the birth of the modern prison-industrial complex:

> *"Within twenty years of Thomas More's death … the Utopian proposal for penal confinement with hard labor had begun to take root across Northern Europe."*[3]

The idea that anyone's *Utopia* would have prisons is bizarre, even if he was writing in 1516 and the prison was meant to have an educational purpose. Yet he was followed by Jeremy Bentham and his Panopticon – another significant leap towards mass incarceration.

Empowering Both the Vilified Minority and The Judiciary Through the Fair Trial Rights

What I plan to discuss in this lecture is primarily the rights that make up a fair trial. These are the rights (each of them a "proxy") that are generally thought to make it more likely that a jury will come to a fair decision.

When it comes to protecting the Vilified Minority from the Tyranny of the Majority, whoever the judiciary is, and however emphatic their power over the interpretation of rules and rights, there must still be mechanisms whereby rights can be enforced.

The Dorset trial of Mark for "assault on two police officers"

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[2] Along with this must be the Third Amendment, which provides that "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." This is perhaps the least litigated or consequential provision in the entire constitution, since it grew out of the Quartering Act of 1765, which allowed such forced housing of troops, prompting Grievance 14 (see below). The Quartering Act (which was an element of the annual Mutiny Act, required the colonies to house British soldiers.

[3] Clive Stafford Smith, *Thinking outside the box: Is it time to reconsider prison's place in the penal system?* Times Literary Supplement (Aug. 23-30, 2024), available at https://www.the-tls.co.uk/philosophy/contemporary-philosophy/the-prison-before-the-panopticon-jacob-abolafia-book-review-clive-stafford-smith (accessed 2024.10.03).

When it came to objections to the denial of the jury trial, the Founders put it in the text of the Constitution as Article III, s.2, cl.3:

> *The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.*

I'd like to discuss how "trial by jury" can and should work in the context of a case I helped on recently. It was not a special case in my world, where I normally deal with the death penalty. It was a felony charge of two counts of assault on police officers in Dorset. It involved the brother of one of my cricketing friends who I will call Mark (there is a pending complaint that I filed against the police, so we won't use real names). Mark's kids went to school with my son, and when I met with him, he was thoroughly traumatised by the whole affair. He had been told he could plead guilty and get a suspended sentence, but he was not willing to do that because he was innocent.

Mark was involved with two police officers in a near-miss where they did not collide, and nobody was hurt. Mark was in no way at fault and in a normal situation the two drivers would wave and move onwards. The officers were responding to what they called "another accident" apparently in the neighbourhood. Two other officers were already on that scene. If this was true, then the need for speed was obviously reduced.[4] Anyone who knew the area would know the police were on the wrong road if they wanted to arrive quickly and safely.

Mark was returning home from work, in a pleasant mood, in the sunshine. He was driving approximately 25 mph, he was not speeding and, as was fully established at trial, he was guilty of no traffic offence.

While the jurors, the judge, and the lawyers did not visit where this all happened, I did. I was horrified that a British lawyer would ever go into a trial without visiting the scene. Mark was coming down a narrow road where there were no passing places for over 150 metres. The police were about to enter this stretch of road from a junction where there was room to pass. Anyone familiar with the area would have known that the onus was on the police car to pause or come to a near-halt to make sure that nobody was coming in the other direction. Siren and lights or not, the police car would be the one that needed to back up should there be another car in that stretch of road.

It was technically at 60mph limit, but is one of the narrow country lanes where common sense says nobody should be doing over 30 mph. Prior to the trial, I went to the scene myself and took pictures and measurements. It is easy enough to get distances because there are telegraph poles along the road. The distance between each is approximately 38m. If two cars are approaching each other at 30 mph (i.e., converging at 60 mph) then they would go 26.8m (88ft) in one second, hence covering the distance between poles in about 1.5 seconds.

I placed my car where the police car would have been when coming into the section of road where the incident happened. I recorded a video showing a vehicle coming towards me at considerably slower than 30 mph, and I was not moving. Thus, it is not a true representation of how the parties' cars were closing in our case – which would have been more than twice as fast. However, as the video illustrates, the police driver would only have seen a car coming in the other direction shortly before the first telegraph pole, perhaps 45m away. Thus, they would have had less than two seconds for reaction and stopping if they were both indeed going 30 mph. If one or both was going faster, the time would have been shorter. The RAC suggests that for an average family car the (thinking + stopping) distance at 30mph would be approximately 23m (73'). This would be almost precisely the distance between the vehicles under this scenario. There is very little room on the road for cars to avoid each other as it is very narrow (I do not recall the precise width there).

I also took pictures from the other direction, as the driver in Mark's car would have been on the right-hand side and that would have reduced his vision given the curvature of the road. This was illustrated in the picture of the scene where one can only glimpse my car from just short of the telegraph pole.

Despite the fact that *Officer A* was seemingly at fault for not pausing before entering that stretch of

[4] This was not made clear at trial, as it was deemed irrelevant to whether Mark was acting in self-defence. However, it is significant to this complaint and Mark requires information – redacted only where strictly necessary – so as to understand how this all came about. Was this the only way to get there? Did Officers A and B have sufficient knowledge of the driving hazards in the area? (If they did, then they should have been aware of the need for particular caution at the scene of the near accident with Mark.) Etc.

road, thankfully there was no actual accident. Mark had to swerve slightly onto the verge at the left and the police car stopped. However, *Officer B* got out of the police car and yelled at Mark saying he was going too fast. Mark moved his vehicle to a safe location at the junction a few yards ahead of him. The police did the same, parking in the gateway to a field on their side of the road. The officers decided that they had to do a "Vicinity Acc. Pol." – a "Vicinity Accident involving Police" – where they have to await a supervisor and have both drivers breathalysed, etc.

There is a significant question as to whether there was probable cause for this, even if it could be done without a warrant. In the U.S., the **Fourth Amendment** provides:

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

Nobody in the UK seemed to think there was a problem with the police ordering Mark around, but it would not be legal in the U.S.

Nevertheless, Mark complied with this, and he provided his driver's licence (though there was no legal reason why he had to since he had committed no offence). However, he was shaken up by the near miss, it was a hot day, and he took a sip of his thermos, telling the officer truthfully it was tea.

Officer A told him he could not do this. In this, she was out of line, as Mark suggested to her. There was nothing in the law or policy that said she had the right to tell him not to sip tea. Furthermore, there was no evidence presented at trial that tea can invalidate a breathalyser – and presumably if they were mis-trained to think it could, the officer would only have had to have him wait 15 minutes afterwards (which is the time it took for the supervisor to arrive anyway). If she thought it was alcohol then she could merely have asked to sniff it.

Officer A then tried to snatch, or bat away, the thermos which would, in the U.S., again implicate the Fourth Amendment, as Mark would have an expectation of privacy in his car, so a search or seizure could not take place without a warrant, or at least probable cause that a crime was taking place.[5]

Her action was anyway itself not legal. Indeed, Mark viewed it as an assault (the jury would later agree with him). He pushed her away and out of the car. *Officer A* then announced he was under arrest for assault and pulled out her PAVA spray and sprayed Mark. Ironically, while drinking tea cannot cause problems with a breathalyser test, spraying someone with PAVA apparently can.

At this point, *Officer A* would clearly have been in breach of Mark's civil rights, and therefore probably liable under 42 U.S.C. § 1983:[6]

> *Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.*

As discussed in my earlier lecture, if Martin had been in the U.S. he could sue, and I could represent him, without any concern over costs. In the U.K., on the other hand, he could be exposed to all kinds of liability even if he had a cause of action. He would also have to find a lawyer who would do it for nothing as – being a carpenter of limited means – he could not possibly afford the hourly rate of a solicitor and barrister.

Officer B ran over came and said Mark had to get out of the car. Mark refused saying he had been assaulted and would not cooperate with these two officers, though he consistently said he would cooperate

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[5] *Carroll v. United States*, 267 U.S. 132 (1925) (while the vehicle's mobility might create exigent circumstances excusing the lack of a warrant, there must still be probable cause that a crime is being committed).

[6] While this is a statute rather than a constitutional provision, it is merely enforcing the constitutional rights. Art IV s2 Clause 1 provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *See also U.S. Const. Amend. V* ("No person shall be … be deprived of life, liberty, or property, without due process of law")

with other officers. *Officer B* should then have helped to calm the situation down. However, *Officer B* then also used PAVA on him.

Officer B, who is a burly officer, then entered the car, struck Mark repeatedly, and tried to drag him out of the vehicle.

Mark resisted the assault and tried to push *Officer B* out of the car. *Officer B* later falsely said that Mark put him in a headlock – the footage shows that this was not true. Regardless, Mark was acting in lawful self-defence, as established at the trial to the unanimous satisfaction of the twelve jurors.

Officer B then said Mark was also under arrest for assaulting him during this struggle (in which Mark remained in the car). In truth, Officer B assaulted Mark. *Officer B* then used PAVA on Mark too, again in violation of any acceptable policy.

Mark then locked himself in the car. *Officer B* announced his plan to smash the window of the passenger's side door, so as to continue his efforts to drag Mark out of the car. Mark retreated towards the back of the car. *Officer B* thought better of shattering the glass.

At some point the officers took the keys out of the ignition and placed them on the roof of the car. If they had asked Mark to hand them over at the start of the incident he would have done so, but they failed to do this, so it was another offence by the police. There was never a suggestion that he was going to drive away. Mark continued to complain that he had been assaulted, and to state that he would comply with the directions of other officers, but not the perpetrators of this assault. He was afraid of what would happen if he got out of the car.

He did his best to ameliorate the effect of the PAVA by wiping his eyes with water. However, the effects of the PAVA lasted for him into the next day.

When other officers came on the scene, Mark complied with them, as he said he would. He just would not comply with the two who he felt had assaulted him. However, the officers handcuffed him behind his back, rather than arresting their fellow officers for assault. This was not necessary since he would have gone voluntarily to the police station.

Mark was then put in a 'cage' in the police van, on a narrow seat where he was not strapped in with a seat belt. It is extraordinary that, in country where the failure to wear a seat belt is an offence, the police required him to travel in this unsafe manner.

When he got to the Weymouth police station, he was booked in on two counts of assault of an officer at 17.30 and, at some point, the police added a count of resisting arrest. He asked for the duty solicitor at 17.51. The police called this into the solicitor at 18.01. The evening shift came on at 22.00 and *Officer C* who became the case officer, started preparing for an interview at 23.08. However, the defence solicitor did not appear until 01.00 the next morning whereupon the police thought it justifiable to make Mark give a recorded statement.

By now, we would be facing the Fifth Amendment in the U.S: *No person shall be … shall be compelled in any criminal case to be a witness against himself…*[7]

Clearly Mark could not be required to wait for 9 hours before asserting his right not to talk to the police. The police would have been required to decide whether they could hold him without bail (which, for this level of offence, would violate the Eighth Amendment[8]), and then just returned him home.

Not so in the U.K. where, while in theory someone being questioned by the police may remain silent, it will be used against them if they do. Mark was told that it might harm his defence not to "mention when questioned something which you later rely on in court".[9]

In the U.S., Mark would have had the right to *effective* counsel in any statement he did choose to make voluntarily. Not so in the U.K. Before the interrogation, *Officer C* did not share with the Duty Solicitor the body cams of the officers but preferred unfairly to spring these on Mark during the interview which lasted for over an hour, starting at 01.25 and concluding at 02.37. Despite this, Mark's statement was

[7] *U.S. Const. Amend. V.*
[8] *U.S. Const. Amend. VIII* ("Excessive bail shall not be required").
[9] GOV.UK, 'Being arrested: your rights' (*GOV.UK*), available at https://www.gov.uk/arrested-your-rights (accessed December 1, 2022).

consistent with the evidence, and proved, to the jury's satisfaction, that he had acted in self-defence. Nevertheless, when Mark was released from custody at 03.54, he remained charged with three offenses. Indeed, after his trauma, the police merely drove him to his car in the middle of nowhere and dropped him off.

For a felony case to go forward, there would have been a Grand Jury where the jurors would have assessed whether there was a case to answer:

> *"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury…"*[10]

The chances are that no grand jury would have gone forward with this case to begin with. But no such right exists any more in the U.K.

Out of this came a three-day Crown Court trial. There was apparently no pre-trial litigation about the plethora of issues that arose out of the case. In the U.S. we would have litigated a number of issues, including but not limited to the following:

- Whether he was illegally arrested in the first place? (*Answer*: he was. The entire case might well have been dismissed.)
- Whether the police officers violated his rights under the Fourth Amendment? (*Answer*: they probably did, so anything that was the fruit of this would be suppressed.)
- Whether the statement to the police was taken in violation of his Fifth and Sixth Amendment rights? (*Answer*: it was an would have been suppressed. It would then have been Mark's choice to use it or not.)

We would also have looked very carefully at the way a number of other rights were being impacted – including the right to a jury trial itself (as discussed below).

How the Sixth Amendment (and other Due Process Rights) would impact Mark's case.

In facing trial, Mark would – in the U.S. – be protected by the Sixth Amendment where at least eight distinct rights would kick in, with a few others thrown in by the Fifth and Fourteenth Amendments.

The Right to a Speedy trial (VI)

Over the ten months he had to wait for his trial, Mark suffered additional trauma while nothing was done to better his situation. For example, on September 29, 2022, he was bound over for trial, and the local paper reported that he had allegedly "beaten" *Officer A* before he "resisted" and "assault[ed]" *Officer B*. The location of his home was published in the paper. Over the time running up to trial, being tarred as a violent criminal was with him every day.

In the U.S., he would have had the explicit right to a speedy trial: *In all criminal prosecutions, the accused shall enjoy the right to a speedy … trial…*[11]

While it would not likely have been long enough in Mark's case, the kind of delay that happens in many cases in the U.K. could – if caused by the prosecution – result in dismissal of the charges.[12]

The Right to a Public trial (VI)

Starker, though, is the U.K. attitude to a "public trial". I went to Mark's trial in Bournemouth to help him. I had my laptop with me, as I always do. I was told by a clerk I could not use it in court even though the barristers both had them, and the Government website says that phones and cameras are allowed into court buildings (and therefore presumably the court itself), provided they are not used for recording.[13]

Instead, I pulled out my pad of paper to take careful notes about everything around me. The clerk

[10] *U.S. Const. Amend. V; see also U.S. Const. Amend. VI* (the right "to be informed of the nature and cause of the accusation…").
[11] *U.S. Const. Amend. VI.*
[12] *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).
[13] https://www.gov.uk/entering-court-or-tribunal-building

asked me what I was doing. I said that it was not really anyone's business. She said she would ask the judge for permission. I told her she was welcome to do so.

When the judge came into court, he addressed me from the bench asking me what I was doing. I told him who I was, and that I was there help my friend Mark. But at the same time, I said I was an American lawyer of four decades' experience in serious capital cases, that I teach at two British universities, and that I was also curious to write about the way a British trial compared to one in the U.S. and was therefore going to take this as an example. I said I believed that I had the right to take all the notes I liked as it was a public trial.

He begrudgingly said I could, so long as I used my notes "in a responsible manner." I decided not to make any more of it, or even to point out that I had that morning googled my rights, and found a recent decision that was precisely on point:

> *The judge expressly indicated that the court had no concern about responsible reporting of the appeal by the media. There was also no general concern about notes being made by or on behalf of Mr Kirk, including by the claimant. The judge acknowledged that any person might obtain a transcript. The judge went out of his way to ensure that Mr Kirk was able to make notes of the entire proceedings, alternatively have notes taken for him when he genuinely was unable to do so. The court was clearly alive to the existence of Mr Kirk's website and perhaps was troubled by the possibility that Mr Kirk would place inaccurate information on it. But the risk of that happening would not be reduced by restricting note-taking either by him or by members of the public. The Bristol proceedings comprised an appeal against a conviction in the Magistrates' Court. Neither Mr Mably nor Mr Douglas-Jones was able to suggest how note-taking by the claimant could interfere with the course of justice in those proceedings. The fact that notes may be used to brief a witness yet to give evidence about evidence given by others might provide a basis for restricting note-taking. Yet there is no discernable basis in this case for supposing that there was a risk of that happening.*[14]

Yet it is extraordinary that this should be an issue. Presumably I am more capable of protecting my own rights than many in a court room setting, and others might have been intimidated by the clerk alone.

In other cases, I have seen far more dangerous limitations. A fundamental issue in the U.K. is the imposition of reporting restrictions. I attended a hearing when my Guantánamo client Moazzam Begg was locked up in Belmarsh in July 2014, as if he had not suffered enough, he was charged by the West Midlands Police Force with terrorist activities, reported in the British media as follows:

> *The first count relates to attending a terrorism training camp in Syria between October 9, 2012, and April 9, 2013. The next five charges are for the possession of "an article" for a purpose connected to terrorism between December 31, 2012, and February 26, 2014. They were listed as being electronic documents with the titles Camp 1, Camp 2, Tactical Training Schedule, Camp Rules, and Fitness Training Schedule (training exercises). Finally, Begg was charged with funding terrorism by making available a Honda generator between July 14 and July 26, 2013.*[15]

I was there to offer up my house in support of his bail, since I knew Moazzam well and also was fully aware that he had done nothing wrong – he had talked to the U.K. Security Services about his humanitarian trip to Syria before going there. I had gone to the camps in Syria – which I viewed as Guantánamo-on-the-Euphrates – five times myself.

I was aghast at the judge's denial of bail. He actually said in his judgement (according to my notes!) that he was denying Moazzam his liberty because Moazzam was liable to commit the crime again – an obvious violation of the presumption of innocence (see the Due Process Clause, U.S. Const. Amend. XIV). The judge then turned to the assembled media and imposed reporting restrictions on them (and me) so that we could not report this nonsense or refute the very public prejudice created by the police press release.

Moazzam could well have been convicted were it not for the fact that MI5 was ultimately forced to admit they knew all about his trip and had effectively condoned it – leading to the dismissal of the charges

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[14] *Ewing v Crown Court Sitting at Cardiff & Newport & Ors* [2016] EWHC 183 (Admin).

[15] Emily Pinnink, *Ex-Gitmo Briton accused of terrorism*, Belfast Telegraph (July 19, 2024), available at https://www.belfasttelegraph.co.uk/news/northern-ireland/ex-gitmo-briton-accused-of-terrorism/30443405.html (accessed October 30, 2024).

several months later.[16]

None of this could have happened in the U.S., where: *In all criminal prosecutions, the accused shall enjoy the right to a … public trial…*[17] This, combined with the First Amendment rights of both the media and the accused, makes it very difficult for a judge to prevent people from saying whatever they like about the process.

The right to an open trial "will only rarely give way to other interests."[18] A violation of this rule must result in automatic reversal of any conviction: "once a violation is found of a defendant's right to a public trial, the defendant should not be required to prove prejudice."[19]

The notion that the press and public must be repressed in order to protect the rights of the accused is a myth: there are other ways to preserve that right, as we see in the next element of the Sixth Amendment.

The Right to an Impartial Jury (VI)

The Sixth Amendment preserves the right to trial *"by an impartial jury…:*[20] This is protected in various ways.

1. The Venue or Vicinage Requirement

The first issue here is one of venue or vicinage. Why was he being tried in Bournemouth when the "offence" (if offence there was) took place in Bridport and its environs? Mark would have had the right to trial in the county where the "crime" allegedly happened. American counties are generally much smaller than those in the U.K. – in the most recent census (20210 just under half (48.7%) of counties had under 25,000 in total population,[21] which is about an eighth the size of Bournemouth, much less Dorset. Yet Mark, rather than being tried in the neighbourhood of Bridport, where the incident happened, was taken to a relatively large city.

This made a great difference. In Bridport and its vicinity – with a population around about 25,000 – Mark and his family would have been known. Bridport is a liberal town compared to the surrounding area (West Dorset had voted Conservative in every election from the establishment of the constituency in 1840 until 2024, yet Bridport has a council that sometimes has only one Conservative member).

If I had been trying the case in the U.S. I would have immediately filed a jury challenge, based on Mark's Sixth Amendment right to be tried:

> *by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law…*[22]

I would have argued that the venue or "vicinage" requirement runs deep in the law – much more so in the U.S. than the U.K. As the Mississippi Supreme Court held in *Mississippi Publishers Corporation v. Hon. Williams F. Coleman*, 515 So. 2d 1163, 1165 (Miss. 1987):

> *Questions of venue in criminal cases are not merely matters of formal legal procedure. They raise deep issues of public policy. The venue provisions of the United States Constitution are important safeguards designed to protect an accused from unfairness and hardship in defending against prosecution by the government . . . [and is a] "provision of the Bill of Rights which is 'fundamental and essential to a fair trial' . . . made obligatory upon the states by the Fourteenth Amendment." * *

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[16] Ian Cobain, *Moazzam Begg freed after terrorism case against him collapses*, The Guardian (Oct. 1, 2014), available at **https://www.theguardian.com/world/2014/oct/01/moazzam-begg-freed-case-collapses** (accessed Oct. 30, 2024).

[17] *U.S. Const. Amend. VI.*

[18] *Davis v. Reynolds*, 890 F.2d 1105, 1109 (10th Cir. 1989) *citing Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 2215, 81 L. Ed. 2d 31 (1984)).

[19] *Nieto v. Sullivan*, 879 F.2d 743, 753 n.15 (10th Cir. 1989); *Davis v. Reynolds*, 890 F.2d at 1111.

[20] *U.S. Const. Amend. VI.*

[21] Of course, some are much larger - 19.5% of counties had a population of 100,000 or more. See https://www.census.gov/newsroom/press-releases/2023/population-estimates-counties.html#:~:text=As%20of%20July%201%2C%202022,population%20of%20100%2C000%20or%20more.

[22] *U.S. Const. Amend. VI.*

** Mississippi cases point to the significance of the defendant's right to trial in [the] county where the offense was committed, based on the guarantee of the right in Miss. Const. Art. 3, § 26.*

The right to a jury who are genuinely representative of the locality began to evolve more than three hundred years ago, when the jury that had acquitted William Penn was tried for perjury. *See The Trial of William Penn*, 6 How. St. Tr. 951 (1670). At that time, if the King was not happy with the verdict rendered by the original twelve, he could order a retrial with 24 or more jurors, and if the second verdict differed from the first, Mr. Penn would go to prison, and the original jury would join him.[23]

The case of William Penn was followed by the infamous prosecution of the early Revolutionary publicist John Peter Zenger, defended by Andrew Hamilton. Zenger had criticized the Royal Governor of New York and was prosecuted for seditious libel in 1735. Despite a move to transfer the prosecution to London -- where support for Royalist policies would run high -- the case was ultimately tried in New York. Despite this, the Judge's instructions left no room for acquittal; however, the local jury showed scant regard for the Governor's imperious attitude and acquitted Zenger.

By trying to remove the accused from the relatively friendly colonial venue to the hostile courts of England that the British government sought to control "seditious" elements in the American Colonies in the second half of the eighteenth century. Indeed, one of the "first object[s] of any tyrant in Whitehall would be . . . to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen."[24] To avoid this threatened transportation of the accused away from the home environment that the United States Constitution included not one, but two provisions regarding venue. *See U.S. CONST. Art. 3, § 2, ¶ 3; U.S. CONST. amend. VI*.

The right of trial by jury "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[25] As the Supreme Court has long since held, "the essential feature of a jury obviously lies in the interposition between the accused and his [or her] accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from the group's determination of guilt or innocence."[26] The criminal law therefore constitutes a rule of law "to which a *community standard* or conscience [is], in the jury's discretion, to be applied…"[27] It is the injection of local mores into the occasionally harsh implementation of the law which Judge Learned Hand approved as introducing "slack into the enforcement of law, tempering its rigor by the mollifying influences of current ethical conventions."[28]

Mark did not have the right to any kind of rigorously established venue. But then sometimes it is far worse. Moazzam Begg was taken from the Midlands, with its substantial Asian and Muslim population, to face the court in London – why? In another case the fishermen of the Isle of Wight were taken to a notorious law enforcement friendly area of South London – again, why? In the U.S. we would have litigated that issue vigorously before trial, learned who made this decision, and overturned it.

2. Ensuring a representative jury pool

Yet the venue issue was not the worst infraction of Mark's rights. When I took out my notepad in his case, one of the first things I wrote down was the composition of the jury. There were 12 people, sure enough, but not a single one was anything other than patently White. I did not know their precise ages, but it was clear that only one was under 45, and four were clearly over retirement age. Where on earth did they get these people?

The origins of the jury service date back to the 12th century and the *Magna Carta*, which provided the right to '*judicium parium'* meaning 'the judgement of peers.'[29] Being tried by peers meant to be tried by

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[23] *See 1 Holdsworth, History Of English Law 162 N. 9 (1903)*.
[24] *Duncan v. Louisiana*, 391 U.S. 145, 156 n.23, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968), quoting *P. Devlin, Trial by Jury, 164 (1956)*.
[25] *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004).
[26] *Williams v. Florida*, 399 U.S. 78, 100, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970).
[27] *United States v. Spock*, 416 F.2d 165, 183 (3d Cir. 1969) (emphasis supplied).
[28] *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir. 1942). *See also Platt v. Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 245, 84 S. Ct. 769, 11 L. Ed. 2d 674 (1964) ("The provision for trial in the vicinity of the crime is a safeguard against . . . unfairness and hardship").
[29] The Law Dictionary- https://thelawdictionary.org/parium-judicium/; Walker, N. (1974). 'The British Jury System', *University of Cambridge Institute for Criminology*.

your equals. Gradually this evolved in the U.K. as it did in the U.S. For example, the *Juries Act (1825)*[30] set out a wider range of jurors, though only men were still eligible. Now the selection is governed by the *Juries Act (1974)*:

> '*Qualification for jury service*
>
> *(1) Subject to the provisions of this Act, every person shall be qualified to serve as a juror in the Crown Court, the High Court and **[**the county court**]** and be liable accordingly to attend for jury service when summoned under this Act if—*
>
> *(a) he is for the time being registered as a parliamentary or local government elector **[**and aged eighteen or over but under seventy six**]**;*
>
> *(b) he has been ordinarily resident in the United Kingdom, the Channel Islands or the Isle of Man for any period of at least five years since attaining the age of thirteen; and..*'[31]

Many of us have never served on a jury, and I for one would like to know why I have never been called. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019) ("Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process."). But the jury system is another Anglo-typical example of the lack of transparency in our system.

Mark's trial was in Bournemouth which was, according to my rapid use of Google,[32] only 18.1% over 65, and at least 16.2% BAME. I did not have a calculator with me, but it looked to me like the probability of seeing an all-white jury by chance was about 8.4% and the chance of getting 11-of-12 over 45 was considerably lower. Nationwide, the number of 18–45-year-olds is slightly greater than those over 45.[33] Assuming the proportions were roughly equal, the chance of only one juror in that age group would be roughly the same as tossing a coin 12 times and getting 11 heads, or about 0.005 – it would happen once in 2,000 tries, which is just not likely to happen.

We don't know whether there was anything fishy in the end in Mark's jury, but our lack of information is because nothing was done about it. In the U.S, I'd have filed a jury challenge the moment these people appeared on the panel. A probability of 0.05 (two standard deviations from the mean) is generally deemed statistically significant that something is amiss in the U.S. Thus, the initial proof of age-discrimination in Mark's case was ten times that required to demand an explanation from the government. The total elimination of BAME jurors would likely have required explanation too.[34]

The U.S. Supreme Court long since laid down the principle that "[j]ury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."[35] In *Castaneda v. Partida*, 430 U.S. 482,494, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977), the Supreme Court summarized the requirements for proving an equal protection violation under the Fourteenth Amendment:

> *The first step is to establish that the group is one that is a recognizable, distinct class, . . . Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as . . . jurors, over a significant period of time... Finally … a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.*

The government must then come forward and disprove the discrimination. It is hard to see how this could have been done in Mark's case – but then the defence did nothing to challenge the panel that appeared before them.

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[30] Juries Act [1825]. UK Public General Acts, c.50. https://www.legislation.gov.uk/ukpga/Geo4/6/50/paragraph/1n1/enacted

[31] United Kingdom: *Juries Act* [1974] (United Kingdom of Great Britain and Northern Ireland) c.23. While they use the male pronoun, clearly women and other genders have an equal right or duty to serve.

[32] https://gi.dorsetcouncil.gov.uk/insights/areaprofiles/PreUnitaryAuthority/bournemouth.

[33] https://www.statista.com/statistics/734726/uk-population-by-age-group/.

[34] There are no precise mathematical standards for determining what constitutes a significant underrepresentation. *Alexander v. Louisiana*, 405 U.S. 625, 630, 92 S. Ct. 1221, 31 L. Ed. 2d 536 (1972). The "comparative disparity" between the pool (16.2%) and the jury (0%) would likely have been sufficient to require a hearing.

[35] *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975).

There are obvious 'distinctive groups' that may excluded like BAME citizens. However, when it comes to some of the groups excluded in Mark's case, for example, there have been studies in the U.S. that show that older jurors are more likely to convict then younger ones.[36] I would certainly have litigated this, as I often have in the U.S.

The Right to an Impartial and Representative Jury – ensuring there is as little bias as possible among jurors.

Mark was faced with an all-white jury of a certain age. He knew nothing about them. He had no idea whether any of them had biases in favour of the police, or close relatives who were officers. For all he knew they might have been related to some of the police who would take part in the case. This is because over the years the U.K. has effectively ended the practice of seeking to identify prejudice in the jurors ahead of the trial. In contrast, in the U.S., once the jury challenge discussed above has been decided, the defense can have a full exploration of who the jurors might be, and what biases they may harbor.

In the U.S. there is a constitutional right to ask those questions reasonably necessary to the exposure of prejudice which may jeopardize the right to a fair and impartial jury.[37] As a matter of federal law, the general rule is that "the trial court abuses its discretion in *voir dire* when the parties are denied the right to some surface information about prospective jurors which might furnish a basis for challenge."[38]

In very basic terms, jury selection in the U.S. reflects the fact that most people would like to know something about the people who are going to judge them, rather than just take the first 12 people who show up for jury duty, and hope that this means that everyone will be fair. If you go into the local pub, the probability that you can pick 12 people at the bar without encountering some serious prejudices seems vanishingly improbable.

Nothing like jury selection takes place in the U.K. There is a case that went to the European Court of Human Rights that illustrates the problem. In *The Case of Sander v. United Kingdom*, Application No. 34129/96 (9th May 2000), there had been no *voir dire* in the American sense, but some while into the trial a juror had sent a note to the judge that some of the other jurors were being racist, and not taking their task seriously.[39] Even then, there was no actual questioning of the jurors. The judge merely told them:

> *"Members of the jury, this morning I received a note from one of your number expressing extreme concern that some of your number are not taking your duties seriously, are making openly racist remarks and jokes about Asians and may not reach your verdicts upon the evidence but because of some racial prejudice. I am not able to conduct an inquiry into the validity of those contentions and I do not propose to do so. This case has cost an enormous amount of money and I am not anxious to halt it at the moment, but I shall have no compunction in doing so if the situation demands. When you took the oath or affirmed as jurors it was, you will remember, to bring in true verdicts according to the evidence. That is solemn and binding and means what it says."*

He sent them home with a paternalistic lecture that they should look ingo their honest hearts. The next morning, the jurors all (including the original complaining member) signed a note to the judge saying:

> *"We, the undersigned members of the jury, wish to put on record to the Court our response to yesterday's note from a juror implying possible racial bias.*
> *1. We utterly refute the allegation.*
> *2. We are deeply offended by the allegation.*
> *3. We assure the Court that we intend to reach a verdict solely according to the evidence and without racial bias."*

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[36] See *A Fair and Impartial Jury? The Role of Age in Jury Selection and Trial Outcomes*, Economic Research Initiatives at Duke University (2012).

[37] *Turner v. Murray*, 476 U.S. 1, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986).

[38] *United States v. Brown*, 799 F.2d 134, 136 n. 3 (4th Cir. 1986), citing, *United States v. Baldwin*, 607 F.2d 1295, 1297 (9th Cir. 1979) ("Discretion is not properly exercised if the questions are not reasonably sufficient to test the jury for bias or partiality"); see, e.g., *State v. Hall*, 616 So. 2d 664, 669 (La. 1993) ("A juror's response to less imposing questions may well reveal attitudes and biases not disclosed by superficially correct answers.").

[39] The juror wrote: "I have decided I cannot remain silent any longer. For some time during the trial I have been concerned that fellow jurors are not taking their duties seriously. At least two have been making openly racist remarks and jokes and I fear are going to convict the defendants not on the evidence but because they are Asian. My concern is the defendants will not therefore receive a fair verdict. Please could you advise me what I can do in this situation."

At the same time one of the jurors sent a “many-of-my-best-friends-are-black” letter:

> *The second letter, which the judge commended, was written by a juror who appeared to have thought himself to have been the one who had been making the jokes. The juror in question explained at length that he might have done so, that he was sorry if he had given any offence, that he was somebody who had many connections with people from ethnic minorities and that he was in no way racially biased.*

This was good enough for government business, and the trial went forward to a conviction that was upheld by the British courts, and only overturned some years later by the ECHR on a close a 4-3 vote.

The idea that this is an adequate way to go about exposing and eliminating bias is just fatuous. I have picked many a jury, and exposing racism cannot be done by asking a juror if he or she is racist – only once in 40 years, and thousands of jurors, have I witnessed a juror putting his hand up and admitting to being a bigot. The U.S. courts have recognized that it is not good enough if "the type of questioning used by the court on the legal issues often was close-ended."[40] You have to ask them open questions about their views on OJ Simpson or George Floyd and get them talking about topics that will expose their biases.

Neither can you simply assume that by putting your judicial head firmly in the sand and taking the first 12 who come along that jurors are going to be unbiased. I picked one jury in Louisiana where I got 126 of the 171 jurors (74%) of the jurors off the case for “cause” because they could not honestly give my client a fair trial. It would only take one biased juror to invalidate the entire trial.

Mark’s right to be presumed innocent (Due Process and the Vth and XIVth Amendments)

Generally, when I have picked juries, a number have put their hands up when I asked whether they thought my client must be guilty of something simply because he was there on trial. The world is full of people who think that the system works, and that innocent people are rarely if ever brought to trial.

But there are much more subtle ways in which such prejudice is injected into the trial. One of the shocking aspects of Mark’s trial to me was that he was put in large cage at the back of the courtroom, sealed in with glass. It was so bad that he could not hear the witnesses, and in the end so he could hear his own trial he had to be given headphones.

As one British advocate has advised, *Oh, also you should ask permission if you want your client to sit beside you.*[41] But she is only talking about family court, and it is probably not allowed in criminal court at all – not that one would know as nobody seems to ask for it.

What is this all about? In the U.S. my client *always* sits next to me. I always dress the client up rather better than myself, and the jurors told me after Sam Johnson’s capital resentencing trial later told me that it was the third day before they worked out that he was the defendant, rather than me. That is precisely how it should be. Quite apart from this how is he meant to consult with me about the evidence if he is set off far away? It really all reflects a failure to accept the presumption of innocence, or even the human dignity of the person on trial, on the part of the system itself.

This issue just could never come up in the U.S. as the case would be reversed on the spot. The only thing that does sometimes come up is a decision to use shackles on an obstreperous prisoner who does not like what is happening in the trial. There are basically two rationales for the "common-law right of a person being tried . . . to be free of all manner of shackles or bonds . . . when in court in the presence of the jury."[42] These have been described as follows:

> *Initially, the prejudice perceived when a defendant is seen in shackles by the jury involves the presumption of innocence. The issue has generally arisen in the context of a determination of guilt or innocence. Courts focus on the prejudicial impact restraints have on the defendant's presumption of innocence.*[43]

This is a due process issue that derives from the Fifth and Fourteenth Amendments:

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[40] *State v. Strange*, 619 So. 2d 817, 820 (La. App. 1st Cir. 1993).
[41] *Pink Tape: A Blog from the Family Bar*, available at http://www.pinktape.co.uk/rants/unspoken-rules/.
[42] *Rush v. State*, 301 So.2d 297, 300 (Miss. 1974).
[43] *Elledge v. Dugger*, 823 F.2d 1439, 1450 (11th Cir. 1987), *rehearing denied with opinion*, 833 F.2d 250 (1987), citing *Allen v. Montgomery*, 728 F.2d 1409, 1413 (11th Cir. 1984).

> *The Supreme Court has characterized shackling as an "inherently prejudicial practice." Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340, 1345, 89 L. Ed. 2d 525, 534 (1986). "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of the technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." Illinois v. Allen, 397 U.S. 337, 344, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970).*[44]

Later in Mark's trial came another extraordinary incident. When he took the stand in his own defence, unlike everyone else who testified, he had a guard standing immediately to his left. Why was counsel not objecting? What was this meant to reflect? Was this docile carpenter expected to fly over the front of the witness box and assault the judge or prosecutor (or perhaps he had the sense to see the biggest threat came from his own lawyer)?

A defendant in a criminal trial is "entitled to have his guilt or innocence determined solely on the basis of evidence introduced at trial, and not on grounds of official suspicion, indictment, *continued custody*, or circumstances not adduced as proof at the trial."[45] The "constant reminder of the accused's condition" – a threat, incarcerated or shackled -- "may affect a juror's judgment."[46] This should not have happened in the first place to Mark, even if he was deemed a threat in some way:

> *[O]nce it has been determined that special security precautions are called for, `the least drastic and conspicuous measures reasonably available that will meet the particular need' should be employed.*[47]

The Right to Confront Witnesses (VIth)

> Again, Mark should have had the right, protected in the U.S. by the Sixth Amendment, *to be confronted with the witnesses against him*…[48]

This is one of the few rights that seem to bind all U.S. justices together, whether they are liberal or conservative. Recently all nine justices went along with this principle in *Smith v. Arizona*, 602 U.S. ___ (2024):

> *The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him. The Clause bars the admission at trial of "testimonial statements" of an absent witness unless she is "unavailable to testify, and the defendant ha[s] had a prior opportunity" to cross-examine her. Crawford v. Washington, 541 U. S. 36, 53–54 (2004). And that prohibition applies in full to forensic evidence. So, a prosecutor cannot introduce an absent laboratory analyst's testimonial out-of-court statements to prove the results of forensic testing. See Melendez-Diaz v. Massachusetts, 557 U. S. 305, 307, 329 (2009).*

Mark certainly did not enjoy this right in his trial, where the police spouted various things that others did and said and discussed breathalyzers and Acc. Pol. incidents willy-nilly.

An element of the right to confrontation is that the "best evidence" must be used. I was taken aback, then, when *Officer C* was testifying about Mark's recorded statement, made in the middle of the night of his arrest. Rather than use the recording, they used a transcript and the officer read his lines while the prosecutor purported to be Mark. In this way they injected tone and emphasis that just did not exist in the original. Defence counsel sat mute through all this.

The entire prosecution case appeared to boil down to the fact that at some point around 2.45am Mark had used the word "retaliate" – that he had retaliated when the police hit him and sprayed him with PAVA. This was meant to reveal his intent to assault the police, despite the fact that even "retaliation"

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[44] *Elledge*, 823 F.2d at 1451 (footnote omitted), citing *Woodard v. Perrin*, 692 F.2d 220, 221 (1st Cir. 1982).

[45] *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986) (emphasis added).

[46] *Estelle v. Williams*, 425 U.S. 501, 505, 96 S.Ct. 1691, 1692-1693, 48 L. Ed. 2d 126 (1976).

[47] *Commonwealth v. DeVasto*, 387 N.E. 2d 1169, 1172 (Mass.App. 1979), *quoting Commonwealth v. Brown*, 364 Mass. 471, 476, 305 N.E. 2d 830 (1973).

[48] *U.S. Const. Amend. VI.*

implied that an assault had been initiated against him in the first place. But Mark is a carpenter, not an ambulatory *Roget's Thesaurus*. He did astoundingly well to tell his story under the pressures of the moment, and his selection of "retaliate" rather than "defend myself" was clear if you listened to the actual tape recording.

The Right to present a Defence (XIVth Amendment)

One of the key elements of Due Process is the right to present a defense. This can manifest itself in a number of ways. For example, the judge cannot prevent the presentation of evidence critical to the defence by the mechanical application of the hearsay rule.[49] Another area involves the right to present expert witnesses for the defense: the Due Process and Equal Protection clauses of the Fourteenth Amendment require that the accused be allowed funds for defence experts, as well as a degree of parity with the prosecution when it comes to the 'battle of the experts.'[50]

In Mark's case, this might be considered in terms of the work I had done myself. I have appeared from time to time as an expert in a number of capital cases on a number of issues. Mind you, this was not very expert: I went to the scene of the *contretemps* between the police and Mark to take some photographs, do a few video recordings, and measure distances. I even took Mark's kids along as I thought they might find it interesting to see first had how their father was being treated.

The first issue was to question what the police were doing on that road. They were trying to get to a place near Beaminster, and it was clearly the wrong way to go – they could have got on the main road and travelled much faster and with greater safety. Those of us who live in the area get irked at those I tend to characterize as "Londoners" who travel too fast on the small roads, and who are too concerned with their fancy paintwork when it comes to getting close into the hedges. The jury needed to understand that the police were wrong about the road they were taking, which was a fairly basic matter, and were therefore likely to be wrong about other things.

Then I measured the distance between the telegraph poles, so that we could visualize the distance that a vehicle would travel at a reasonable speed. Most important, since the police car was coming around a bend which was, for them, curving to the left, they would have seen the left wing of Mark's car before he would have seen the right wing of theirs – so they have more time to stop. Mark clearly steered his car into the bank of the road as one could see by the markings whereas the police did not. All in all, there was a reasonable case that the police were at fault for what happened.

I would also have done a basic experiment in court if I was trying the case in the U.S. It is the sort of thing that is basic to persuading a jury: I would have volunteered to be a guinea pig for the use of PAVA in the courtroom. It is one matter talking about PAVA and comparing it to the less powerful sprays that people can buy for self-protection. But if the jurors were to understand what these two officers had actually done to Mark, they needed to experience it. I would have expected, had we used PAVA and then introduced a cannister into evidence, no matter what the judge instructed them they would probably have tried it out.

Counsel for Mark expressed no interest in doing any such of these things. This is the kind of thing that wins jury trials but the British just do not do it. I have been frustrated more than once watching British lawyers stipulate that something is not really relevant when it is totally central to the art of persuasion. In one case, the accused was charged with smuggling cocaine, and when the police arrived at his home, they found white powder on the floor of the living room. The man's wife sheepishly explained that they had had a floor fight the previous weekend and they had clearly not used the vacuum cleaner properly. The police rather sneeringly refused to accept this story, apparently thinking that someone who might be dealing cocaine had so much of the powder that he would be snorting it off the floor.

The test came back as the wife had promised – plain flour. The British lawyers agreed in their clubbable way that it was therefore not relevant. Yet it was totally central to the issue of whether the police were biased. I would have had a bag of plain flour on the witness stand throughout the testimony of the officers.

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[49] *Green v. Georgia*, 442 U.S. 95 (1979) (Georgia could not legitimately prevent Roosevelt Green from presenting statements by his co-defendant Carzell Moore admitting to being the killer, when the same statement was presented against Moore in his capital trial).

[50] *Ake v. Oklahoma*, 470 U.S. 68 (1985).

The right to Remain Silent (Vth Amendment)

When Mark took the stand in his own defence, he did remarkably well given that nobody had really prepared him for what was coming. As already noted, he did not have the "Fifth Amendment Right to Remain Silent" so his options were limited. But the British system is utterly unrealistic in other ways.

Perhaps forty million Americans experience significant anxiety when speaking in public,[51] and that number obviously rises when faced with a lawyer who is going to attack you. To think one can just throw someone up there who has never experienced it, and that truth will somehow come out, flies in the face of reality. While never telling a witness what to say, it is certainly true that in the U.S. we "prep" witnesses, meaning we put them through their paces, practice cross-examination with them, and warn them of the known tricks that lawyers play.

The right to Compulsory Process (a subpoena) to ensure attendance of Witnesses (VIth)

I learned very early in my career to make sure I had all my witnesses (and most of the prosecution's) under subpoena so I could make sure they showed up at trial. Obviously, I had talked to them all ahead of time too. In doing this, I was merely asserting my client's right under the Sixth Amendment

to have compulsory process for obtaining witnesses in his favor…[52]

In Mark's case there was a witness who had driven past when the police were assaulting him, and who could have backed up his case. His barrister had not talked to the witness and certainly had not issued a subpoena, so she was not present for the trial.

There were two potential "character" witnesses available to him. Neither was under subpoena. One was his sister, who was present every day of the trial anyway, but who suffered from an obvious bias. The second was someone who had known him for years, but was flying in from Central America that morning, and had to make it from London to Bournemouth. From what I knew I thought he would make a good witness, so I had been in touch with him to see how his train was getting along the track to Bournemouth.

When the impatient judge appeared to be wanting to press on with the case without waiting for the second witness to arrive, and Mark's barrister did not know what to say, I put my hand up. I told him that I was in touch with the witness, and he was just 30 minutes away. The judge ticked me off for having a phone in the courtroom – I did not tell him that the government website said I could, that everyone else did, and that it was on silent – but he had the good grace to say I was doing it in a good cause. So, the witness did take the stand half an hour later, and the jury seemed impressed with his testimony and the fact that he had flown 5,000 miles to deliver it.

The right to the Effective Assistance of Counsel

This leaves perhaps the most important right of all which would be (in the U.S.) Mark's right *to have the Assistance of Counsel for his defence.*[53] Crucially, this is read to be the right to *effective* counsel.[54]

In this regard, under U.S. law, counsel for Mark[55] would be found to have failed fabulously in the

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[51] https://www.crossrivertherapy.com/public-speaking-statistics#:~:text=40%20million%20people%20in%20the,to%20giving%20a%20public%20speech.

[52] *U.S. Const. Amend. VI.*

[53] *U.S. Const. Amend. VI.*

[54] This principle goes back nearly a century, see *Powell v. Alabama*, 287 U.S. 45 (1932), but nowadays the lead case is the more recent 1984 decision in *Strickland v. Washington*, 466 U. S. 668 (1984), which holds that an ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Id.*, at 687.

[55] I do not mean this to be a personal criticism of his barrister. She was young, and was merely following the traditions of the U.K. system in most of what she did. Fortunately, the case was so weak that Mark was rapidly acquitted anyway. From my perspective, though, the problem was that the U.K. system is fundamentally flawed.

whole range of aspects of the case, generally including the following:

- The failure even to meet the client until the day before trial.[56]
- The failure to ensure the basics of an investigation, including finding witnesses, visiting the scene, and proving the police were at fault all along.[57]
- The failure to develop expert evidence.[58]
- The failure to interview witnesses and ensure their attendance at trial.
- The failure to challenge the jury array for racial and age discrimination.[59]
- The failure to ensure that the jury did not include biased members.[60]
- The failure to object to the series of prejudicial matters in the trial, from the client being in a protective box, to having an officer by him as he testified, to having the prosecutor and Officer C read the “statement” out when there was a perfectly acceptable recording, etc.[61]

One could go on and on. There is no similar issue of “ineffective assistance of counsel” in the U.K. where the bar prefers not to indulge in criticism of fellow members. This is strange, where surely, we should all put up our hands when we make inevitable mistakes that may result in terrible consequences for the client.

CONCLUDING CONSIDERATIONS

With all that I have written, I should issue a few caveats. First, while we have many rights in the U.S. that are denied to the British defendant, that does not mean that Americans or their lawyers use them effectively. Over my career, matters have got better, but that includes the fact that a colleague and I represented Calvin Burdine in his second capital trial, whereas first time around his lawyer slept through some of the proceedings. There is an evolving quality in most states, but it has always been true that those who use their rights most are those who least need it – primarily the wealthy.

Second, the U.S. is a frighteningly vengeful place, where two million people are in prison, disproportionately representing the minorities in society. The death penalty is bad enough, but it is perhaps the extraordinary use of life without parole that is even worse when it comes to the infliction of misery.

Third, there are many Americans in positions of power who had little time for the rights that I am discussing in this essay. At least six of those people currently carry sway in the U.S. Supreme Court – but at least there is a document from which they cannot stray too far.

In the end, my friend Mark was fortunate that he was acquitted by the jury despite all the flaws in his trial. But when I reported all the mistakes to the police in a lengthy exegesis, they took a long time to decide they had done nothing wrong and that they had “no lessons to learn” from what had happened. Of course, I took that up the chain of review, but was told that it would take the IOPCC *a year even to appoint someone to review the case*.

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[56] *Turner v. State,* 335 S.C. 382, 517 S.E.2d 542 (1999) (counsel ineffective for failing to adequately advise the client)

[57] "At the heart of effective representation is the independent duty to investigate and prepare." *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982); *accord Porter v. Wainwright*, 805 F.2d 930, 933 (11th Cir. 1986); *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985); *Ramonez v. Berghuis*, 490 F.3d 482, 489–91 (6th Cir. 2007) (investigation could have led to impeachment of the prosecution’s key witness); *Stewart v. Wolfenbarger*, 468 F.3d 338, 361 (6th Cir. 2006) (same).

[58] *Michigan Millers Mut. Ins. Corp. v. Benfield*, 140 F.3d 915, 920 (11th Cir. 1998) ("The use of 'science' to explain how something occurred has the potential to carry great weight with a jury."); *United States v. Blade*, 811 F.2d 461, 465 (8th Cir. 1987) (noting that expert testimony enjoys an "aura of special reliability").

[59] *Grace v. State*, 683 So. 2d 17 (Ala. Crim. App. 1996) (failure to litigate issue pretrial).

[60] *Moody and Garcia v. State*, 644 So. 2d 451 (Miss. 1994) (reversed for ineffective assistance of counsel in part for defense attorney’s failure to *voir dire* where prosecutor conducted in-depth *voir dire*); *see also Triplett v. State*, 666 So 2d 1356 (Miss.1994) (reversed for ineffective assistance of counsel in part for defense attorney’s failure to challenge a single juror for cause).

[61] "We cannot conceive how defense counsel's conduct (or lack thereof) concerning the blatant hearsay testimony . . . could have been valid trial strategy." *Collis v. State*, 685 P.2d 975, 977 (Okla. Cr. 1984); *see also Hussick v. State*, 529 P.2d 938 (Ore.App. 1975) (failure to object to improper comment); *Smith v. Wainwright*, 799 F.2d 1442, 1444 (11th Cir. 1986) (failure to impeach witness); *Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985); *United States v. Auten*, 632 F.2d 478, 482 (5th Cir. 1980); *Commonwealth v. Grove*, 229 Pa.Super. 293, 324 A.2d 405, 406 (1974) (there could be "no reasonable tactical reasons" for failure to act).

This is my main criticism of the U.K.: Britain lacks transparency in a profound way, such that people have no idea why they never make it onto the jury panel, or how Mark ended up with an all-white jury. But worse yet Britain is complacent. I don't think people know the hard-fought history that began to create true legal rights in the Common Law world. This allows the fools battling for the leadership of the Conservative Party to argue that we should withdraw from the European Court of Human Rights, even though it was the Conservative government who helped set it up after the Second World War.

Remember, first they come for the Vilified Minority and then, when you suddenly realise you need those legal rights, they come for you. Not because they are evil, but because they do not know their history.