Evan Whitton, *Trial by Voodoo: Why the Law Defeats Justice and Democracy*, Sydney: Random House, 1994.

Trial by Voodoo is a most peculiar book and, as such, deserves, perhaps, a rather more detailed review than might otherwise have been expected in a journal of this nature. It is immediately apparent from the disclaimers, which appear very early in the book, that Mr Whitton, who is of course an experienced and lauded journalist, is not enthusiastic about the role of lawyers in the daily operation of the law. Therefore, Whitton ought to be able, it might be thought, to rely on the support of your reviewer who, over the last twenty five years, seems to have developed (undeservedly perhaps) reputation as a radical and comparative critic of the legal profession and system. Unfortunately, this is not to be the case.

The book consists of some 23 chapters and various appendices which deal with a wide variety of topics which are familiar to lawyers operating in controversial areas, especially those beloved of journalists. Whitton's essential thesis may be found on page 21 of the book and states that, "The case against the modern [common law] judicial duel seems unarguable. It is an affront to reality; it encourages concoction, corruption and organised crime; it is ruinously costly; justice miscarries on a daily basis; it is anti-democratic; and it wastes billions of taxpayer's money." Before turning to the substantive content of *Trial by Voodoo*, it should be said that, as someone seeking a socialist ideal, I have long found the phrase "taxpayers' money" both incongruous and inaccurate. If Whitton had referred to "government money", he might have irritated me less.

The first chapter deals with the role of journalism, which instantly sets the tone of the book at large; that is that the heroic role of comment on the common law and its institutions has entirely been carried by journalists. He summarises this chapter as stating that, "[j]ournalism has obligations to interest and amuse the customers, and to truth, justice and democracy." High ideals indeed! I can only wonder whether the musician Elton John (whose noises I, incidentally, find abominable) would be suitably interested and amused. Unfortunately, for the purposes of this review, I was in the United Kingdom in April 1992 at the time of the last General Election and it can fairly be said that the contributions of the Murdoch press could not, by any proper and reasonable criteria, be said to be proper contributions to "... truth, justice and democracy".

The second chapter is entitled, "Origins of the Voodoo: Trial by Cheese etc." Its stated thesis is that, in contrast to English law, European law had diverged into a system based on truth and rationality by 1215. To support that proposition, he refers to early forms of trial (ordeal, battle etc) which were, of course, derived wholly from ecclesiastical jurisdiction. He compares these forms of trial unfavourably with those in civil law systems which appear to Whitton to be, *ex hypothesi*, superior. Whitton seems utterly unaware of contemporary criticisms of civil law processes in

countries where they operate. It should also be said that, well after 1215, European jurisdictions were murdering animals for having allegedly committed offences for which humans would have been triable and punishable. In a rather vile sense, these practices are Professor Peter Singer in reverse.

Nevertheless, Whitton does make one or two valuable comments in this chapter. He refers (at 19) to the trial of the unfortunate Derek Bentley where the late Lord Chief Justice Goddard, as great a disgrace to the office as there has been (*cf*, E Grimshaw and G Jones, *Lord Goddard: His Career and Cases*, 1958), officiated. Whitton's view on that particular case has been corroborated in detail (see J Parris *Scapegoat: The Inside Story of the Trial of Derek Bentley*, 1991), but, at the same time and as will later be seen, Whitton's comments on that case stand in stark contradiction to a substantial part of the book's thesis. In addition, may there not be judges in civil law jurisdictions who are not biased against accused people?

The third chapter is concerned with the general effect of the common law rules of evidence and is subtitled, "Judges' Contempt for Ordinary People". Of course, everyone knows that the common law rules of evidence are exclusionary but, although Whitton makes some attempt to explain their origins, he does not truly get to grips with them and does not make any attempt to examine them in any scholarly manner. Indeed, in that area, he relies almost entirely on J Stone and W A N Wells, *Evidence — Its History and Policies* (1991). There are other theories and views, notably ALC Ligertwood, *Australian Evidence* (2nd ed, 1995), though it should be said that I do more incline to Stone and Wells rather than to Ligertwood. Whitton's essential thesis in this chapter is that (at 37), "... we could start with a rational system that does not hide relevant facts from jurors and does not allow judges a discretion to hide even more facts from them." The focus of his criticism is the decision of the House of Lords in *R v Christie* [1914] AC 545 which he considers (at 39) gives judges the power to conceal from the jurors a relevant fact which tends to prove guilt. This, taking it in totality is rather strong: what had actually happened in the *Christie* case was that a small boy had said that in the presence of the accused, that person had sexually assaulted him. In reply, the accused had denied his guilt. At first instance, the evidence had been admitted. The Court of Appeal quashed the conviction, but the decision was, in turn, reversed by the House of Lords. In the House of Lords, the great Rufus Isaacs, first Marquis of Reading said (at 563) that "[a] statement made in the presence of one of the parties ... may be given in evidence against him if it is relevant to any of the matters in issue. And equally such a statement may be made in the presence of the accused may be given against him at his trial." What is Whitton complaining about?

Chapter 4 is a continuation of the previous theme and is entitled, "Evidence (2) Hypocrisy and Cynicism: The Right to Silence." This is an especially unhappy and selective chapter. As can be expected from its title, the chapter urges the abolition of the right of a person to remain

silent when accused of a criminal offence. Quite out of context, Whitton refers to the French *juge d' instruction* (examining magistrate) and to the Star Chamber which was not the horror that right-wing commentators seem continually to suggest (see M Stuckey "A Consideration of the Emergence and Exercise of Judicial Authority in the Star Chamber (1993) 19 *Monash Uuniversity Law Review* 117). Reference in the chapter (at 44) is made to Lionel Murphy, a former and late judge of the High Court of Australia who, ultimately, was acquitted of attempting to pervert the course of justice. Readers will remember that Murphy was a long term target of his political opponents who, clearly, had forgotten the political antecedents of Sir Garfield Barwick. Chapter 4 concludes by reference to an attempt by the British Home Secretary to require a trial judge to "call upon" a defendant to give evidence and he refused to offer an explanation of his role. He does note (at 56) that Taylor LCJ had found himself "seriously troubled" by the proposal on the ground that it would introduce on "unnecessary piece of theatre" into the courtroom process. Almost everything that Sir Peter Taylor has said, in this context, must be taken seriously. Sir Peter Taylor has been required essentially to rehabilitate the criminal process in the eyes of the community at large — the community at large is unlikely to forget the 228 years spent in prison by wrongfully convicted Irish alleged terrorists for crimes which they could not have possibly committed. Put another way, Sir Peter Taylor's responsibility is to rehabilitate the office of that of Lord Chief Justice as the successor to the least satisfactory incumbent of that office since the egregious Goddard (above).

Chapter 5 deals with Character Evidence and is as unfortunate as any in the book. Once again, it contains an attack on Lionel Murphy but does not involve a discussion of any of the relevant case law as it affects the admission of such evidence. For my own preference, I find the decision of the House of Lords in *Boardman v DPP* [1974] 3 All ER 887 as generally adopted by the High Court of Australia (see, for example, *Harrison v R* (1989) 99 ALR 1; *Hoch v R* (1988) 81 ALR 225; *Sutton v R* (1984) 51 ALR 435; *Thompson v R* (1989) 86 ALR 1) a sensible and reasonable test. In England, where the *Boardman* test of "unique and striking" similarity has been abandoned (see *R v P* [1991] 2 All ER 337; *R v H* [1994] 2 All ER 881; *R v W* [1994] 2 All ER 872; *R v Ananthanaryanon* [1994] 2 All ER 847) the law cannot be described as anything other than unorganised and potentially unfair.

Chapter 6 is entitled "Hearsay Nonsense". In its encapsulation, the chapter comments (at 69) how, "... in the apparently mindless and aimless way of much English law, hearsay [is] being changed from being automatically accepted by Judges, but with exceptions." In support of his contention, (at 70 ff) he cites the present commentator and some decisions which are somewhat supportive of his view. It is, of course, quite correct to say that *Jones v Metcalf* [1967] 3 All ER 205 is something of a foolish decision, but that view had been taken by the court itself. I would

be less critical of both *Sparks v R* [1964] AC 964 and *Subramanian v Public Prosecutor* [1956] 1 WLR 695 than is the author, though he does suggest that the Privy Council in the latter case was attempting to ascertain the truth. A more likely explanation is that they were seeking to avoid a serious injustice.

At the same time he attaches (at 76) the topic of opinion evidence to the chapter on hearsay. That, I think, rather devalues the importance of the topic. An especial problem has been the so-called *ultimate issue* rule which led to well known and patiently absurd results (notably, *DPP v A and BC Chewing Gum* [1968] 1 QB 159) but in New South Wales and the Commonwealth, the rule has been abolished (see s80(a) *Evidence Act* 1995 (Cth, NSW)). In an additional appendix to the chapter regarding "Indecent Evidence" there is a comment about Sir Matthew Hale to the effect that he was a "... believer in witchcraft". Although Hale was the author of various mischiefs at the time in which he held office, especially spousal immunity in rape cases, it would have been rather exceptional had he not been so.

Chapter 7 is garishly entered "Better that 100 Serial Killers Go Free" and contains comment on various cases in England and Australia which, it is urged, undercut lawyers' mythology that existing evidentiary laws protect the innocent. The examples are obvious and well known: in England, Evans, Bentley Hanratty, the IRA wrongful convictions etc. In Australia, McDermott and Stuart. However, when one reads the criticisms, it is not the practices of the law of themselves, but police ineptitude and public demands for retribution which together resulted in the miscarriages. For instance, in the Bentley case, crime involving the use of firearms had massively increased in the short term — the real reason being that the firearms had been stolen by national servicemen from the armed forces (the return of national service is, paradoxically, continually urged by "law and order" commentators). The *Guildford Four* and the *Birmingham Six* cases were the result of social and political pressure for quick convictions. That these were disgraceful situations cannot be gainsaid, but the real societal issues are not properly explored.

Chapters 8 and 9 ("The Common Law Mind (1): Why Lawyers Need Help" and "The Common Law Mind (2): Appeal Courts") are straight forward attacks on lawyers and judges. Chapter 8 is another instance of the book's effectively stated thesis that the role of journalists has been wholly positive and that of lawyers negative. Chapter 9 seeks to extrapolate from one case to prove a rather uncertain general conclusion.

Chapters 10 and 11 are concerned with issues relevant to "Law and Democracy", especially incompetence on corruption and organised crime and taxation. It is not hard to agree with the author on both issues and his views on particular cases, especially those relating to tax where the apparently legalistic approach of the High Court of Australia under the regime of Barwick CJ led to abuses which ought not to be tolerated in any allegedly egalitarian society. It should be said that, in my view, much of

the blame for the sad state of much public law in Australia is directly due to the *Constitution Act* 1900. From someone of my own political stance, this document, as has been interpreted by various High Courts, is thoroughly bourgeois. The antics displayed at every referendum which seeks to change it should be sufficient corroboration of that statement.

Chapters 12–16 seek to deal with the issue of censorship. Whitton refers to censorship, first, by taxation. Whitton's thesis (at 158), *ipsissimis verbis*, is that, "[a] corrupt trade of authority then imposed disguised censorship by taxation and other devices." What follows is polemic derived from other polemicists such as Defoe and Fox. Whitton does not properly document nor argue his taxation thesis. In Chapter 13 Whitton considers censorship by secrecy; at that point he is able to relate to the reviewer's prejudices. He refers (at 168) to the Thatcher regime in Britain and the Reagan Presidency in the United States (at 169). That is all very well and good, in the context in which Whitton operates, except that it is not contextualised in any real way. The abominable Thatcher regime which, by any objective standards, was strongly supported by the Murdoch press does not show the journalistic media in anything other than in a tendentious and vicious light. As regards Reagan, I lived and worked in the United States during his sad Presidency and with few honourable exceptions (such as the McLean-Lehrer, *News Hour* on PBS) the mass media were sickeningly supportive of his socio-political attitudes.

Chapter 14 is concerned with censorship by bribery. That is an argument which is very hard to contradict especially when Whitton cites some very cogent examples. However, these are largely historical. Essentially, much depends on what is meant by "bribery". As I have already noted, indirectly, the 1992 General Election was won, in the end, by a blast of hate against Neil Kinnock and the British Labour Party by the Murdoch press, the *Daily Sun* in particular. Inevitably, Whitton refers in some detail to historical sources. In an Australian context, he mentions (at 176) Sir Robert Askin briefly only once. He states (at 177) that over the past 30 years journalism has sought to invent democracy in Australia. What, one might properly ask, has been the relationship between the capitalist press and the politicians of the right which led, for example, to the dismissal of the Whitlam government in 1975?

Chapter 16 is entitled, "Censorship by Affront Law". In Whitton's own words (at 179) he was dealing, "... mainly with contempt in the face of the court by declining to answer a question, and contempt designed to reinforce security." Journalists have long railed against contempt of court in whatever form it exists: as someone who has been involved in the operation of family law as both an academic and as a policy maker, I can only hold many journalistic incursions into the area in total despite. Quite egregious and erroneous journalistic comments have been made about the operation and orientation of the Family Court of Australia (see, for example, P Tennison, *Family Court: The Legal Jungle*, 1983). In addition, given that situation, there have been very few curial reactions to them.

(There have been only two reported decisions in relation to scandalising the court — see, *Wade and Faull v Gilroy* (1986) FLC 91–722; *Re Schwartzkopff* (1993) FLC 92–381. For comment, see F Bates "Scandalising the Court: Some Peculiarly Australian Developments" (1994) 13 *Civil Justice Quarterly* 241). He also deals with the *Spycatcher* case referring entirely to the House of Lords decision. The decision of the New South Wales Court of Appeal was rather different. In the Equity Division of New South Wales Supreme Court, in *A-G for the United Kingdom v Heinemann Publishers Pty Ltd* (1987) 8 NSWLR 341, Powell J refused an application for an injunction to restrain Mr Wright from publishing his memoirs, much of the information for which had come into his possession while a member of the British Secret Service. Hence, the global situation is not quite so dire as Whitton seems to suggest.

Chapters 16 and 17 deal with the law of defamation — inevitably, perhaps, concentrating on actions against the mass media. He describes libel laws, especially in relation to the notorious Chelmsford ("Deep Sleep Therapy") case as "evil", but could not the actions of the Murdoch press in relation to the popular musician Elton John not be so similarly described? Of course, there is sometimes an unhappy element of mutual advantage — one can but cite the action brought by the late entertainer Liberace against the London *Daily Mirror* in respect of an article written by the late Sir William Connors (*sub nom*: Cassandra). This article described the pianist as, *inter alia*, "... a lump of sugar-coated vomit" and more than strongly suggested that Liberace was homosexual. In the event, Liberace was awarded substantial damages and the newspaper's circulation increased significantly. As is, now, well known, the suggestion regarding the plaintiff's homosexuality was proved to be true and those readers old enough to remember Liberace can, doubtless, make their own decision about the earlier comment.

Chapter 18 deals with inquests. It is here that Whitton, as in Chapter 19 which deals with Commissions of Inquiry, is faced with a problem. Neither of these bodies, like most administrative tribunals, as he himself notes, are bound by the rules of evidence (although it does seem as though they are not wholly ignored (see F Bates, "Aspects of Evidence in Australian Social Security Proceedings (1987) 6 *Civil Justice Quarterly* 108). His comment about inquests (at 239) is scarcely detached: "... I think," he states, "that the coroner and the jurors should reserve their decision and prepare a proper report in which the scoundrels, if any, are held up to public gaze." And, it might be added, prejudice any subsequent judicial proceedings.

Chapter 20 is central to the thesis of the book and discusses the relationship between journalism and democracy. His thesis (at p264) is that Australian journalism, prior to 1970, had done little to enhance the cause of democracy but, thereafter, had done a great deal in enhancing the cause of democracy by exposing corruption. There is, of course, much to support Whitton's view. At the same time, is the converse not true? Howsofar

the syndicated press have sought to conceal the corruption of politicians with whom they were sympathetic, is clearly unknown. He utilises selective examples, but, for instance, fails to note the relationship between the Launceston *Examiner* newspaper and particular television situations and the loudly right-wing Northern Tasmanian entrepreneur Edmund Rouse and his conviction, to which charge he pleaded guilty, for attempting to bribe a politician to cross the floor of the Tasmanian lower house in order to bring down the properly elected government of the State. The maximum penalty for this offence is 21 years' imprisonment (see Tasmanian *Criminal Code* s 72), Rouse received a sentence of three years' imprisonment (the last person so convicted was much older than Rouse and received nine) of which he served 18 months and was retrieved from the Hayes Prison Farm in his own Rolls Royce! Were the journalists critical of this situation? I cannot remember any.

Chapter 21 is entitled, "How to Investigate the Truth" and makes a statement, at the outset, that "It has been said, and not entirely in jest, that Sydney is the most corrupt city in the western world, except for of course Newark, New Jersey, and Brisbane, Queensland." That, as he himself states, is comment made by him in an earlier work (*Can of Worms*, 1986). He states in the introduction to the chapter that the inquiry into corruption in the State of Queensland in 1987, and subsequent trials, provide the sharpest possible contrast between the English and European systems of justice. The chapter does, in truth, outline usefully some of the instances, but nowhere in the substance of Chapter 21 does Whitton specifically address why the European system(s) might have achieved anything different.

Chapter 22, entitled "What the Jurors Didn't Hear," expands on the theme and discusses the factual situation regarding the Fitzgerald inquiry and the former police commissioner, Lewis. Once again, the chapter is disappointing. In the introduction, the role of journalists in exposing evidence concealed by law is praised, but no detail eventually appears. We are all deeply shocked by the Lewis inquiry and know the ultimate conclusion, but more than polemic is required if Whitton's thesis is to stand up.

The final chapter is entitled, "Contempt by Prejudice" and takes the position that contempt proceedings are predicted on the fact that jurors are inherently stupid and are likely to be excessively prejudiced by journalistic comment on cases which they are to hear. The attitude of this chapter is patiently self-serving. The *Glennon* case of which he writes involved a crassly irresponsible piece of journalism which, in any objective assessment, could have done none other than prejudice the particular trial. However, he does appear to conclude that the High Court seems to be moving in the direction of encouraging judges in lower courts to have a greater respect for the intellect of jurors. Of course it would be struthious indeed for us to pretend that, in notorious cases, few people, including potential jurors, would know nothing of the case and its surrounding

facts. But that, surely, is not the whole point by any means: much is bound to depend on the way in which the various media present the case and its surrounding facts. Whitton seems to be implying that journalists could not be other than totally fair and objective in their presentations. Whitton is probably correct when he describes the various trials of Jack (The Bagman) Roukley as "hilarious" (p 307) but that does not mean that conduct which is likely to prejudice the course of justice does not exist and, indeed, does not, in the end, have that effect. Chapter 23 also graphically illustrates one of the book's major defects — and, paradoxically, one which he criticises in the common law. That is, drawing global conclusions from single instances.

After the *corpus* of the book there follows four appendices. The first is "Europe v England" and compares the curial systems as they operate in France and England to the detriment of the latter. Irritatingly (p 315) he refers to British justice. There is no such thing. There are, at least, four separate legal systems within British Isles — England and Wales, Scotland, Northern Ireland and the Isle of Man (one might also argue for the inclusion of the Channel Islands). There are significant differences in procedure between them. Thus, in Scotland a jury is composed of fifteen people and a conviction may be obtained on a simple majority. (This is probably the cause of the perverse verdict of "Not Proven", which has the same practical consequences as a "Not Guilty" verdict) and juries, for obvious reasons, do not exist in Northern Ireland at all. A glance at D M Walker's readily accessible *Oxford Companion to Law* (1980) would have shown Whitton his fundamental error (an error, incidentally, made by Derek Bentley's family on his headstone). Whitton refers to the large numbers of possible innocent people incarcerated in the prisons of common law jurisdictions but not the possibility of the same happening in civil law jurisdictions. He also does not refer to the possibility of suspects in those jurisdictions being incarcerated for long periods of time while the *judge d'instruction* conducts his investigations. Whitton would have done well to have looked at *An Introduction to European Legal History* (1985) by Robinson, Fergus and Gordon, (a second edition of this book, entitled *European Legal History: Institutions and Sources* appeared conterminously with *Trial by Voodoo*), which explains in documented manner why the various European jurisdictions evolved as they did.

The Second Appendix is concerned with "Techniques of Journalism". This part examines various purported approaches to journalism and does not, it seems to this reviewer, take any of Whitton's arguments a great deal further and I am not quite sure what point the author is trying to make by this inclusion, as he does not himself make it clear. The only hint is to be found at the beginning of the Appendix when Whitton writes (at 329) that journalism may, "... be one of the last fun industries. It should be fun for customers as well as reporters." One might legitimately add that there is not much fun in being traduced by a Murdoch tabloid!

The Appendix which follows purports to deal with the techniques of cross-examination which is effectively derived from the United States writer Francis L Wellman's book, *The Art of Cross-Examination* (4th ed, 1932). Really, that ought to be sufficient to comment on the relevance of the chapter to modern Australian law. The Final Appendix deals with the value of awards of damages in relative terms and, for that reason alone, is quite useful and interesting.

There is also a bibliography which is eclectic and it will probably be no surprise that the author who is mentioned the most is Whitton himself.

In fine, Trial by Voodoo has given your reviewer something of a mixed experience. Put another way, I feel rather like the proverbial chameleon on the tartan. I cannot criticise the book on the basis that it is not an academic text — it was never intended so to be. It does say, though, a great many interesting things about particular cases and can be read with not inconsiderable pleasure for that alone. On the other hand, the book does have, for me at any rate, one especially irritating feature in that almost all journalists do or write in relation to the criminal process is utterly admirable whilst the behaviour of lawyers is anything but so. In my various occupations in various jurisdictions, I have met many of both and Whitton's globalisation cannot be justified. Similarly, I find his assertive prose-style rather irritating. Most particularly, I cannot accept his primal thesis, the more so as it is, I believe, quite incapable of achievement.

Frank Bates