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US bribery: the penny drops

By Sally Ramage

Lord Black's tax evasion indictment appealed in 2010

When the then Hollinger CEO Conrad Black was charged in August 2006 with counts of tax evasion in the United States in connection with the two billion dollar sale of Canadian newspapers, the British newspapers went amok, not with the nuts and bolts of the charges, but with the tittle-tattle of gossip about his wife's dresses and other domestic details. The US had charged Lord Black with tax evasion, fraud and racketeering, as well as obstruction of justice for destroying documents. He was convicted on indictment and imprisoned in 2007 for six years, but in July 2010, he was released on bail pending his appeal case because an Enron executive had been convicted in what is not termed 'an abuse of process' by prosecutors who implied fraud where they should not have.

Tax officials monitor businesses but nobody monitors officials

Lord Black did not commit bribery. He did not commit corruption either. Businessmen who 'pay-off' by way of bribes to tax officials, depends not only on the share of profit the businessman chooses to hide, but also on the strategy chosen by the monitoring tax official whose job is to inspect the business. Bribery is 'a different kettle of fish' to high-value corruption in multi-national companies, because by its very nature, bribery is not advertised- it is done in secret, and so cannot be easily monitored or analysed. In the case of the inspection tax official whose job is to inspect individual workers, the worker could either 'work or shirk' and the tax inspector could choose whether or not to monitor him. In the case of businesses, the director knows that he will be inspected. The studies all reveal one thing: those tax officials are imperfectly monitored, or, in many cases, not monitored at all: nobody is gatekeeping the gatekeepers. Common sense says that those who bribe tax officials contribute to the long life of the shadow economy and nobody is studying the richest countries of the world as to how much tax evasion is going on in those countries.

The United States: judicial bribery

At this very moment in the United States, there is an 'impeachment' case being tried at the United States Supreme Court, a fact that has passed the gossip mongering UK newspapers completely. Judge Thomas Porteous has allegedly been engaging for dozens of years in corruption and receiving kickbacks from law firms in Louisiana State. This case, begun many years ago, following congressional enquiries, is only the seventh impeachment case in the history of the United States. This may indicate that a huge 'hush-up' has continued about bribes over the centuries in the US, or that, in the information age we find ourselves in today, such crimes cannot remain undiscoverable. 'How many innocent people have been imprisoned because of bribes received by Judge Porteous?' remains the crucial question. What is the scale of judicial bribery in the United States, and for that matter, in the United Kingdom? How gross is the true amount of miscarriages of justice in the US and the UK? How many judges play God with defendants' lives and in how many countries? Judge G. Thomas Porteous had been a Judge of the United States District Court for the Eastern District of Louisiana, and had applied for assistance in securing discovery from the American Bar Association in June 2010- the case went through every conceivable democratic right of the judge, lasting from 2002 to trial in September 2010. Every conceivable strategy was being used to stall the case against him.

Impeachment of a judge for perjury, bribery, corruption and unethical practice

The articles of impeachment against Judge Porteous allege a concealment of conflicts of interest in connection with his prior service as a state judge in Louisiana. Moreover, the witnesses called by the House of Representatives during its impeachment proceedings specifically raised the distinction between issues known before Judge Porteous's confirmation and issues concealed from the Senate and its investigators. What exactly was known about any illegalities prior to Judge Porteous's confirmation as state judge? The US Senate, after many years of investigation, brought the impeachment case against Judge Porteous on the grounds that he unethically presided as a US district judge in the case brought against the firm *Liljeberg Enterprises,* knowing that he had a corrupt financial relationship with the law firm of Amato & Creely which represented Liljeberg.

'In writing' does not mean 'In truth': lies, lies and more lies
The US Senate stated that Judge Porteous failed to disclose that, since the 1980s, whilst he was a State court judge in the 24th Judicial District Court in Louisiana, he had engaged in a corrupt scheme with law firm 'Amato & Creely' and he had appointed Amato's law partner as a 'curator' in hundreds of cases. The judge then requested and accepted from this law firm, a portion of the curatorship fees which had been paid to the firm. The judge engaged in a longstanding pattern of corrupt conduct that demonstrates his unfitness to serve as a US District Court Judge. The judge solicited and accepted meals, trips, home repairs, and car repairs, for his personal use and benefit, while at the same time taking official actions that benefitted some 'friends' of his.

Sharing out the bail money; perjury and declaring himself bankrupt
The Senate also had evidence that Judge Porteous set and split bail money as requested by certain 'friends'. The judge also improperly set aside, or quashed, criminal convictions for two of his friends' employees. Between 2001 and 2004, the judge intentionally made material false statements and representations under penalty of perjury and filed for personal bankruptcy by using a false name and a post office box address to conceal his identity as the debtor in the case; concealing assets; concealing preferential payments to certain creditors; concealing gambling losses and other gambling debts; and incurring new debts while the case was pending, in violation of the bankruptcy court's order. The plot thickens, bearing in mind that in the US, all judges declare each year, their income and any gifts and benefits- all in the public domain online.

Conclusion
The festering smell of bribery, corruption, lies and abuse of process in the UK as well as the US, is very troubling.

An examination of contemporary bribery crimes in Egypt

Sally Ramage

Egypt's oil and gas sector
Tipping and facilitation payments is part of Egyptian culture, especially in the oil and gas sector, where low-level government officials expect such tipping and facilitation payments during exploration phases.

US oil and gas exploration in Egypt
The 1977 US Foreign Corrupt Practices Act makes the bribing of a foreign official abroad a criminal offence in the United States. As a result, most companies with operations in Egypt are used to working within this type of extraterritorial framework and have policies in place to ensure compliance. The FCPA does not criminalise facilitation payments but rather treats such payments as taxable expenses of the US Company similar to a restaurant 'tip' in the UK out of the company's petty cash. In Egyptian law, facilitation payments by foreign officials are legal. UK's new Bribery Act 2010 allows facilitation payments if permitted under local law. The UK Bribery Act 2010 is still not yet in force. The UK Bribery Act 2010 makes no exception for facilitation payments *unless permitted under local law.* If not permitted, a company will be guilty of failing to prevent bribery unless it can demonstrate it had adequate procedures in place. Companies operating abroad must ensure that all parties engaged in their business comply with local laws in other countries as well as the UK Bribery Act.

Local law of Egypt
Egypt has no specific anti-corruption law but Egypt's anti-bribery law is set out in its 1937 Penal Code (58/1937); illegal profiting offences are set out at (62/1975) and anti-money laundering at (80/2002). Egypt's regulatory body is its Financial Services Authority. There is legislation governing public tenders by way of its Unified Construction Law at (119/2008).

Egypt's Penal Code
The Penal Code does not include the corporate offences as criminal offences relate to personal acts. Therefore a company would not be held liable for a crime set out in its penal code, although a corporate employee or official could be held responsible for a crime under the code in his personal capacity. The penal code provides for harsh penalties for public officials who commit bribery offences. Such

penalties include up to life imprisonment and a fine of up to Egyptian £2,000. Private sector individuals are subject to penalties of imprisonment and a small fine. Note that the bribery proscription only reaches the conduct of the offeror. This is known as 'active bribery'. The OECD Convention defines 'bribery' thus:

'Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.'

The Egyptian Penal Code define 'bribery' as '*asking for or accepting any promise or reward for performing, refraining or defaulting on any duties, or otherwise influencing the decision of a public authority'.* This definition is wide and in line with the OECD guidelines, and may cover facilitation payments, even though culturally, facilitation payments and tips are common practice in Egypt. (The Organization for Economic Cooperation and Development (OECD) has played a significant part in the international fight against bribery and corruption. 38 countries have ratified its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The OECD requires the implementation of a functional equivalent of the convention in signatory states, and then assesses their implementation. It has found the United Kingdom's implementation to be inadequate and its prosecution record to be poor. Although the United Kingdom ratified the convention in December 1998, the UK's Serious Fraud Office did not obtain a prosecution for bribery of a foreign government official until October 2009).

Egypt and the UK: bribery case unclear

The UK Bribery Act 2010 introduces a new strict liability corporate offence of failing to prevent bribery, with no corrupt intent required. Commercial organisations must develop compliance procedures that are appropriate to their circumstances and business sectors, taking into account their size, their area of operations and the particular risks to which they may be exposed. By the act, it is an offence to give or receive a bribe. It is an offence to promise, offer, and request or agree to receive a bribe. It is an offence to bribe a foreign public official. Both the public and private sectors are covered as commercial bribery is also criminalised. It is an offence for a commercial organisation to fail to implement adequate procedures where an act of bribery is committed in connection with its business. Any individual ordinarily resident in the United Kingdom can be prosecuted for bribery offences committed anywhere in the world. Any corporate entity which has a permanent establishment, subsidiary or other operation in the United Kingdom, and which commits bribery, commits the criminal offence.

Facilitation payments as per the OECD

The OECD's approach creates a gap in the coverage of domestic laws adopted, pursuant to the convention, because the convention does not provide a definition of 'facilitation payment' nor an explanation of when a payment is small enough to avoid the criminal proscription. The OECD bribery convention is unclear as to whether it is the size of the transaction which determines whether a payment is small or not, or if it is the value of the benefit that is in question. The OECD does not make clear whether the rank of the official would determine whether the payment is given to facilitate a transaction constitution an illegal bribe. Neither does the OECD bribery convention define 'petty corruption.' This creates, not exactly a loophole, but a blurred area in the law, where much is left to discretion.

Facilitation payments' treatment in the UK Bribery Act

Most importantly, the Bribery Act prohibits facilitation payments. The maximum penalty for individuals is 10 years' imprisonment and/ a fine, or both, on indictment on conviction. The maximum penalty for a corporate entity is an unlimited fine. There will be collateral consequences associated with conviction under the act: director disqualification, debarment from public procurement and asset confiscation. All existing anti-bribery and corruption laws are therefore repealed. The only defence allowed to a company is that is has implemented adequate procedures to prevent bribery. The

commercial community awaits developments with regard to such a naive measure by the UK government. The case of *Nerva and others v United Kingdom*[1] (following the case of *Nerva v RL and G Ltd* [2]) does not apply because facilitation payments is a criminal offence in the UK Bribery Act 2010; unlike the United States Foreign Corrupt Practices Act 1977, which does allow facilitation payments, provided that they are recorded for taxation purposes.

UK Bribery Act 2010: government guidance postponed

Sally Ramage

The Ministry of Justice had announced in July 2010 that implementation of the UK Bribery Act 2010 (which was modelled on the Bribery Bill which the Law Commission published in its November 2008 report, '*Reforming Bribery'*) will be delayed until April 2011 (the act had been expected to come into force in October 2010. According to section 9 of the Bribery Act the government is to provide guidance as to adequate procedures, to be published before implementation. This guidance in question applies to the only statutory defence against the corporate offence of failing to prevent bribery offence as per section 7 of the Bribery Act. The single statutory defence states that the organisation must show that it had adequate procedures in place to prevent such bribery. Consultation before issue of the guidance As is the methodology of this new coalition government, a consultation process will enlighten the government, it is hoped, as to the best guidance it can produce and this consultation exercise is to take place in September 2010 and businesses, legal advisers and other stakeholders will respond, after which the government will draft the guidance which is to be published in 2011. Obviously, the guidance will contain principles of an effective anti-bribery and corruption compliance programme. However, such anti-bribery and corruption corporate procedures should already be in place in those organisations which must comply with the Financial Services Act in order to monitor third-party transactions to reduce the risk of illicit payments being made to win business.

Boiler room fraud/bribery/corruption

The UK Financial Services Authority (as well as the US Securities Exchange Commission) is aware that there are many organisations which do not yet comply, especially insurance brokerages reportedly embroiled in corrupt practices, commonly known as '*boiler-room frauds'* and many such frauds are cross-border frauds, commonly known as '*trans-Atlantic boiler room schemes'*. The term '*boiler room'* in business refers to a busy centre of activity, often selling questionable goods by telephone. It typically refers to a room where salesmen work, selling stocks, and using unfair, dishonest sales tactics, sometimes selling penny stock or committing outright stock fraud. The term carries a negative connotation, and is often used to imply high-pressure sales tactics and sometimes, poor working conditions. A boiler room fraudster is usually a bogus stockbroker, often based overseas, who cold-calls investors and pressures them into buying worthless shares. Boiler-room fraudsters often target middle-aged men with previous experience of buying shares, whose names are to be found on share registers. The most common victims of boiler-room frauds are experienced investors, who typically lose £20,000 each to these fraudsters. The fraudsters are usually well spoken and knowledgeable. They are also persistent. They might call their victim several times with offers of research, discounts on stocks in small overseas companies, or shares in a firm that is about to float. The *'boiler- room'* makes its money in one of two ways. They may simply take investors' money and walk away or they may sell shares at vastly inflated prices and with exorbitant dealing charges, all because there were no procedures in place with regard to honesty, integrity, pressuring or bribing customers, bribing other stock-brokers, customer-care, etc.

Bribes only in the public concept

Under the code, bribes are considered only in the public context. Employees of government-controlled enterprises may be considered 'public officials', provided that the government has some financial interest in the entity. It is possible that the employees and directors of a mixed corporation could be considered to be 'public officials' under the terms of the code. Hence, the ownership and management of a corporation must be closely scrutinized when determining whether it is a government entity or a private entity, and whether certain gifts or benefits may be conferred. Under the code, corporate entities

[1] BLD 2509023395.
[2] [1996] IRLR 46.

may be held criminally liable. Penalties may include fines, confiscation or precautionary measures, such as closure of the business premises or suspension and winding-up of a corporate body. Managers or directors of a company may also be held vicariously liable for the criminal actions of their employees. Courts may presume the manager or director's involvement in the bribery, as the likely beneficiary of the bribes will be the company and/or its directors, not the employee. However, beyond corporate bodies being held liable for the acts of their employees, the code does not fully address the issue of vicarious liability.

Bribes in the pharmaceutical industry

First, pharmaceutical sales outside the U.S. are significant and involve frequent contact with foreign government officials. It is accepted that there is difficulty in identifying foreign government officials in the health care industry. Foreign government officials include the ministry of health and customs officers and doctors, pharmacists, lab technicians, and other professions employed by state-owned facilities. The fierce industry competition and the close nature of many public formularies increases the risk of illegal 'short-cuts.' For companies which employ overseas intermediaries (joint ventures, distributors, agents, consultants, or other facilitators) need comprehensive controls to protect against the risk of bribery.

Case Study of bribery for service contracts

This bribery offence was possible because there had been inadequate procedures in place at Mars Ltd. Four people were found guilty at Reading Crown Court in a case of bribery for service contracts between a machinery maintenance firm and Mars, the confectionary company. The former middle manager of Mars Ltd. (using his contacts after leaving Mars' employment without any confidentiality agreement in place), Anthony Welcher, was able to deal with Excel Engineering over a number of years without any supervision or scrutiny. Four persons were convicted of common law bribery. They were Barry Simpson and Roger Harper (both former co-owners of Excel Engineering), Anthony Welcher (a former employee of Mars UK Ltd) and his wife Georgina Welcher. Barry Simpson and Roger Harper had owned and operated Excel Engineering from the early 1980's. Mars Ltd provided Excel Engineering with most of its business by way service contracts. Barry Simpson and Roger Harper used to make regular bribes to Anthony Welcher in exchange for all the contracts from Mars Ltd. to Excel Engineering. Anthony Welcher, during that time, was a middle manager employed by the firm Mars Ltd. Anthony Welcher's wife; Georgina Welcher was at the same time employed by Excel Engineering as private secretary and chauffeur to Excel Engineering's owners, Barry Simpson and Roger Harper. In 2001, Excel Engineering was sold and the new owners soon realised that the volume of business and income did not match past levels, as reflected in the price they paid for Excel Engineering. The new owners discovered that Excel Engineering's turnover had been solely from contracts from Mars Ltd., facilitated by regular bribes to Anthony Welcher, a middle manager at Mars Ltd. These bribes from Excel Engineering were usually in the form of regular cash payments and gifts to Anthony Welcher and to his wife, Excel's employee, Georgina Welcher. In 2002 new owners of Excel Engineering reported their findings to Thames Valley Police and to the Serious Fraud Office.

Similarity to a United States bribery case

Highlighting the dangers of insufficient pre-acquisition due diligence and the DOJ's continued enforcement of FCPA liability related to acquisitions, on April 7, 2009, the DOJ secured a guilty plea from Latin Node Inc. ("Latinode"), a privately held Miami-based provider of international VoIP services, for making US$2.25 million in business-related improper payments to government officials in Honduras and Yemen, in violation of the FCPA. As part of the plea agreement, Latinode agreed to pay a US$2 million fine over a three-year period.

Latinode's parent company uncovered the irregularity. eLandia International Inc., a US publicly traded information and communications technology provider, during the course of its integration of Latinode. eLandia announced in a June 2007 Form 8-K/A that it had initiated an internal FCPA investigation after a review of Latinode's internal controls and legal compliance procedures revealed inadequate records of past payments made to Central American consultants. The 8-K also indicated that eLandia was designing proper controls and compliance policies for Latinode. Further, upon discovering the unlawful conduct, eLandia promptly disclosed the information to the DOJ. eLandia later shared the factual results of the internal investigation with the DOJ and cooperated fully with the DOJ's ongoing investigation. These steps, along with eLandia's taking appropriate remedial action in terminating senior Latinode management involved in the bribes, were acknowledged by the DOJ in its press release announcing Latinode's guilty plea.

'*The resolution of the criminal investigation of Latinode reflects, in large part, the actions of Latinode's corporate parent, eLandia International Inc. (eLandia), in disclosing potential FCPA violations to the Department after eLandia's acquisition of Latinode and post-closing discovery of the improper payments. eLandia's counsel voluntarily disclosed the unlawful conduct to the Department promptly upon discovering it; conducted an internal FCPA investigation; shared the factual results of that investigation with the Department; cooperated fully with the Department in its ongoing investigation; and took appropriate remedial action, including terminating senior Latinode management with involvement in or knowledge of the violations.'*

According to the one-count information, Latinode committed the FCPA violations in Honduras when it paid nearly US$1.1 million to third parties knowing that the funds would be passed on to employees of the Honduran state-owned telecommunications company. In Yemen, Latinode paid over US$1.1 million either directly or through third-party consultants to employees of the Yemeni government-owned telecommunications company, officials from the Yemeni Ministry of Telecommunications and the son of the Yemeni president. The FCPA's definition of foreign government officials includes employees of state-owned companies.

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Brain scans as criminal evidence

Sally Ramage

Police intelligence

UK police have long since reported on brain fingerprinting (otherwise known as EEG/P300) as an electronic means of collection of evidence by the United Kingdom police. EEG sensors placed on the head and brain activity is compared for stimuli, which are known to be familiar or unfamiliar to the subject. New stimuli are then presented and compared to these baselines to determine whether they are familiar or unfamiliar to the subject. The test measures individual brain-wave responses to relevant words, pictures, or sounds presented by a computer. The measurements are recorded in fractions of a second after the stimulus is presented, before the subject is able to formulate or control a response. It is sometimes known as 'brain fingerprinting'. Whether it has been used or is being tried in Britain is police intelligence. An article on this issue states[3]:

'*The English justice system blissfully continues to pay scant regard to the lack of any mandatory rules as regards bioinformation and digital police databases. There are gaping holes in the English legal evidential system. These holes allow cross-country bioinformation evidence, gathered in non-mandatory ways in other countries. Our own police databases of digital and bioinformaton, (as confirmed by 'auspicious' bodies such as the Parliamentary Select Committee in 2005), derogating our citizens' data protection and human rights, sanctioned by parliament and in common law precedents, are themselves evidence of the total inertia to the acute problem of digital and bioinformation evidence in English courts, much of which goes unchallenged and unquestioned…'.*

[3] Ramage, S., 2009, The Emperor's New Clothes, *Criminal Lawyer, Bloomsbury Professional*, Issue no. 188, pgs 3-5.

In view of the fact that after the European Court of Human Rights gave its decision against the UK government in the Marper case[4] the Crime and Security Act 2010 was passed, which practically set aside that decision in the most subtle turn-around, English criminal law need to be carefully monitored, in case it sleep- walks into a situation it may regret.

Iowa, United States, 2001: Brain fingerprinting evidence: no peer review

In 2001, Brain Fingerprinting evidence was admitted in a district court in the State of Iowa in support of a post-conviction claim of innocence. The district court upheld the conviction, but the Iowa Supreme Court decided against it because the technology was not peer-reviewed or independently replicated and so could not be deemed to be credible. In most jurisdictions, some level of reliability must be shown before scientific evidence can be admitted. US Intelligence agencies are currently exploring the possible application of brain scan technology to counterterrorism work. The United States government has invested in brain-based lie detection in the hope of producing more fruitful counterterrorism investigations. A 2008 report by the United States National Research Council noted that the hope is that this emergent technology might provide insight into the acquisition of intelligence from captured terrorists and terrorism suspects.

Pennsylvania, United States: Brain Fingerprinting peer reviewed in 2002

The United States company- Brain Fingerprinting Laboratories, Inc - developed and patented EEG/P300 based testing systems that determine with extremely high accuracy whether or not specific information is stored in a person's memory and the company announced that the results of this patented testing methodology have been ruled admissible in United States courts as scientific evidence. This development of new technology that purports to accurately reveal deception has been excitedly heralded by police. One brain scan method, known as 'functional Magnetic Resonance Imaging' (fMRI), measures brain activity by creating magnetic images of blood oxygen in the brain. The applicability of fMRI technology to 'lie detection' was published by the University of Pennsylvania in 2002. Areas of the brain that are active use more blood and, as a result, show up brighter when imaged. Computer software is then used to create a color-coded three-dimensional map of brain activity. The location of this activity is then associated with specific cognitive functions. *The operator of the fMRI mechanism then uses his judgment to infer whether a stimulus is familiar or unfamiliar to the subject*.

Brain fingerprinting test allegedly researched for 30 years

In a brain fingerprinting test, relevant words, pictures, or sounds are presented to a subject by a computer in a series with irrelevant and control stimuli. The brainwave responses to these stimuli are measured using a patented headband equipped with EEG sensors. The data is then analyzed to determine if the relevant information is present in the subject's memory. A specific, measurable brain response known as a P300 is emitted by the brain of a subject who has the relevant information stored in his brain, but not by a subject who does not have this record in his brain. The EEG/P300 response has been extensively researched for more than 30 years. This research has been widely published in leading professional journals and the P300 response has gained broad acceptance in the scientific field of psychophysiology.

When brain fingerprinting is the only evidence

However, since brain fingerprinting evidence can be the only alleged witness to the crime recanted, it must be ruled as inaccessible evidence in English law. However in the US, it has been ruled as admissible evidence in some states. Police intelligence believes that memories of the crime are stored in the brain of the perpetrator and in the brains of those who helped plan the crime and the Brain Fingerprinting Laboratories technology claims to be able to detect these records stored in the brain and that this can identify trained terrorists before they strike, including those that are in long-term 'sleeper' cells. Brain Fingerprinting Laboratories claims to be able to help reduce the incidence of insurance fraud by determining if an individual has knowledge of fraudulent or criminal acts.

[4] *S and Marper v United Kingdom* [2008] ECtHR 1581, following *R v Chief Constable Of South Yorkshire Police, Ex P. Ls (By His Mother & Litigation Friend Jb): R v Chief Constable Of South Yorkshire Police, Ex P. Marper* [2004] UKHL 39 and *R v Chief Constable of South Yorkshire and Secretary of State for the Home Department, Ex p. S: R v Chief Constable of South Yorkshire and Secretary of State for the Home Department, Ex p. Marper* [2002] EWCA Civ 1275.

Brain fingerprinting evidence in Indian court in 2008

Brain fingerprinting had been used as criminal evidence in India in 2008 even though a report by India's National Institute of Mental Health and Neurosciences had declared the use of brain scans in criminal cases to be unscientific. The facts of the Indian case are that, in the Indian state of Maharashtra, it was alleged that Ms Aditi Sharma had murdered her former fiancé, Udit Bharati. Ms Sharma had lived with Bharati in the city of Pune but had left him for another man. Prosecutors alleged that Sharma then returned to Pune and asked Bharati to meet her at a McDonald's restaurant where she poisoned him with arsenic- laced food. She was indicted and convicted of murder, her conviction facilitated by the use of a brain scan, relied on to determine the defendant's guilty mind. The jury found that the scan proved that Sharma had experiential knowledge of having murdered Bharati herself, as opposed to hearing details of his murder from another person. The brain scan was accepted as scientific evidence. A brain scan measures brain activity and it has been argued that it can prove experiential knowledge. Brain scan technology could potentially offer investigators the ability to see inside the mind of every criminal defendant. This is not the first time that Indian prosecutors have offered brain scan activity as experiential knowledge and evidence. However, although the 2008 case in the Gujarat court accepted a brain scan as corroborative evidence, the court of appeal did not accept the brain scan evidence because it has not been peer reviewed.

Other machine evidence which breaches fair trial: unmanned air vehicles

British police own unmanned air vehicles (UAV) designed to be used during firearms, chemical, biological, radioactive, and nuclear incidents. It consists of a small helicopter operated by remote control and fitted with a sensor to detect hazards. It is operated by the company *QinetiQ* and it is able to operate in the dark, providing real-time data images, live video, and thermal imagery. It has electronic tracking and detection equipment on-board and the aircraft can be used for police surveillance. It can be fitted with the GDA2, an electronic nose and can be used for counter-terrorism purposes. British police have footwear databases. Shoeprint marks are found at half of all crime scenes. Footprints are the third most common type of forensic evidence after blood and DNA. The Forensic Science Service have an online footwear coding and detection management system using Footwear Intelligence Technology (FIT) which is updated daily and contains thousands of footwear patterns including sole and upper shoe images, brand logos and examples of each type of footwear. It works together with DNA and fingerprints to show patterns of crime. Software called Solemate contains more than 12,500 sports, work, and casual shoes. Its purpose is to identify shoes from shoe prints recovered from scenes of crime. Each record of this software contains the shoe manufacturer, the manufacturer's reference for that shoe, the date of that shoe's release on to the market, an image, or offset print of the sole, several pictorial images of the uppers and a set of pattern feature codes that facilitate search and match operations. Where different manufacturers have used the same sole unit, Solemate records are linked to allow the operator to consider all the footwear that might have been responsible for a crime scene print. To use the database, the pattern of the unidentified shoe print is first assigned a set of codes, a simple procedure that requires the operator of the software to identify elemental pattern features within the shoe print, such as circles, diamonds, zigzags, curves, blocks, etc. The Operator selects from those options that best match the features within the shoe print. The codes assigned to these pattern features form the basis of the database search. The results of a search are presented in descending order of pattern correlation for the operator to examine visually. These are giant leaps in the methods of collecting evidence.

Other machine evidence in criminal courts: facial recognition

Merseyside police is using facial recognition technology to take images of prisoners, which are stored on a national database, which help identify suspects who use false aliases as a guise to commit crime. The software they use is Affinity automatic facial recognition software, which is manufactured by a company named Omniperception Ltd. Northern Ireland police use CCTV facial recognition technology called ABM's Facial Verification Bureau (FVB). The FBV turns images into forensic evidence for court submission by analysing facial and other visual evidence. It then compiles identification reports and provides expert testimony for use in a case. The automated facial recognition software is a powerful t police tool and can search faces obtained from CCTV footage. [5] It is already being used in other countries for immigration purposes and will be used in the UK in a similar way; its only

[5] MSN News, "FBI joins investigation in MI6 agent death", 27 Sept 2010.

limitations being the quality of the CCTV images captured and will facilitate more efficient archiving, indexing, and searching of CCTV images. It can be incorporated with other software such as crowd analysis software that can detect abnormal occurrences or events. SOCA uses such software to detect victims of child sexual abuse on the internet. This equipment is known to UK police and was demonstrated at the manufacturers' exhibition as far back as 2006 at the APA /ACPO annual conference in Manchester, UK.

Human Rights issue of non-consensual use of brain scans

The human rights implications of using fMRI or EEG evidence without the consent of a criminal defendant as proof that he or she has experiential knowledge of a crime and, therefore, must have committed the crime is contrary to two human rights arguments against its use. There is the right not to be compelled to testify against oneself. The International Covenant on Civil and Political Rights and the American Convention on Human Rights both expressly guarantee this right. This human right is violated when a non-consensual brain scan is performed on a person to determine whether he or she has experiential knowledge of a particular crime. The brain scan is only effective when the person is asked questions while the brain scan is being conducted, a violation of the right against self-incrimination, since the suspect would not be allowed to remain silent.

The human right to a fair trial-and against self-incrimination: jurisprudence

British courts should beware, especially now that there is a new government repealing laws en blanc, for in the European Union we have been for some time and should be thankful to be thus protected. The jurisprudence of the European Court of Human Rights is what must be flagged up, Britain having been the most frequent user of the Brussels court until legal aid resources were savaged. We remind ourselves that under the provisions of the Human Rights Act 1998, parts of the European Convention on human rights have been incorporated within the laws of England and Wales and within Scots law. Persons charged with, and/or proceeded against, for offences, must have the benefit of the applicable rights and fundamental freedoms (the Convention rights) as set out in Schedule 1 to the Act[6] and the jurisprudence of the European Court of Human Rights and other judicial organs established under the terms of the Convention, must be taken into account by any court in England, Wales, Northern Ireland and Scotland. According to section 2 (1) of the human Rights Act 1998, 'a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights, opinion of the Commission given in a report adopted under Article 31 of the Convention, decision of the Commission in connection with Article 26 or 27(2) of the Convention, or decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.' This means that the courts of England, Wales, Northern Ireland and Scotland, are not bound by such jurisprudence, but are required to take it into account. To date, courts have been slow to depart from opinions cast by the European Court of Human Rights itself. The government, however, remains stubborn and deaf on such matters as the right of prisoners to vote; the imprisonment of young people with adult criminals; and some aspects of the regulation of investigatory powers for police, where some have argued that the decisions from Brussels have been subtly circumvented.[7]

General comment 13- Human Rights Committee

The Human Rights Committee (in General Comment 13) had emphasized that the accused must not be compelled to testify against himself/ herself, and any form of compulsion is '*wholly unacceptable'*, which means that, with regard to this subject matter, the European Court of Human Rights is instructive. [8]

[6] See section 7; subsection 1 of the Human Rights Act 1998. This concerns proceedings and states that person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may bring proceedings against the authority under this Act in the appropriate court or tribunal, or rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act.

[7] Ibid 4.

[8] The general comment 13, on article 14 ECHR, states that ' *'…the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against him, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable…'*

Caselaw: Jalloh v Germany

In *Jalloh v Germany*[9] the Court noted that compulsory powers may be used to secure real evidence which has an existence independent of the will of the suspect.[10] The German police had Jalloh under surveillance on suspicion of dealing in drugs. When they proceeded to arrest him in Oct 2008, the four plain-clothes policemen saw him swallow what they thought was a small 'bubble' of drugs.swallowed. The public prosecutor ordered that emetics be administered to the applicant by a doctor in order to provoke the regurgitation of the bag. The applicant was taken to a hospital in Wuppertal-Elberfeld and a doctor there held the defendant down, assisted by the four police officers. The doctor then forcibly administered a salt solution and the emetic called Ipecacuanha syrup through a tube introduced into his stomach through the nose. The doctor also injected him with apomorphine, another emetic that is a derivative of morphine. As a result, the applicant regurgitated one bubble containing 0.2182 grams of cocaine. Jalloh was then taken to the police station to be charged. The applicant claimed that he had been subjected to inhuman and degrading treatment as a result of having been forcibly administered emetics. He relied on Article 3 of the Convention. The ECtHR found that the authorities had subjected the applicant to a grave interference with his physical and mental integrity against his will. They had forced the Applicant to regurgitate. They could have used standard, less invasive methods. The procedure they used entailed risks to the applicant's health and caused the applicant both physical pain and mental suffering. He therefore has been subjected to inhuman and degrading treatment contrary to Article 3. The court found that there had been a violation of article 3 and article 6 (1) ECHR.

Caselaw: *R v S and another*

In the case of *R v S and another*[11] the defendants refused to disclose means of access to protected data on a computer. The defendants were alleged to have conspired with others, to breach a control order and to have assisted the person under the control order to abscond to another address. On arrest and interview, the defendants remained silent and after their homes were searched they were charged under s.58 of the Terrorism Act 2000.[12] The police could not access the seized computer files without the encryption key. The defendants were then served notices under s 53 of the Regulation of Investigatory Powers Act 2000[13] and were required to disclose the encryption key and any supporting information to make information intelligible. After they refused to do so, further charges were brought against them and they applied for those to be stayed; they were unsuccessful in their case and therefore appealed but were unsuccessful. It was simply a fact. Disclosure of the encryption key is the provision of access to the protected information. If the data contains incriminating evidence, then knowledge the encryption key would engage the privilege against self-incrimination and a trial judge might exclude that evidence. Furthermore, evidence could be excluded under s. 78 of the Police and Criminal Evidence Act 1984 in relation to the protected material, the means of access to it and the defendant's knowledge of the means of access to it.

'Right to remain silent' will be forcibly bypassed

The right to remain silent in the UK courts is virtually extinct and another nail in the coffin is the announcement by the new government of the UK. .The UK coalition government announced on 22 August 2010 that it will no longer assess abuses of human rights across the world. The UK's Foreign Offices used to produce the FCO Annual Report on Human Rights, which highlighted incidents of torture and oppression, monitored the use of the death penalty and expose d the illegal arms trade.

Breach of privilege against self-incrimination

It is clear that an involuntary confession violates the right against self-incrimination. The ECJ has held that the guarantee against self-incrimination extends to forcing a defendant to disclose documents, which might provide evidence of crimes, even though such documents are real evidence. Here, it

[9] (Application no.54810/00).

[10] The case originated in an application (no. 54810/00) against the Federal Republic of Germany lodged with the ECtHR under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms, by a Sierra Leonean national, Mr Abu Bakah Jalloh, on 30 January 2000.

[11] Court of Appeal, 8 October 2008; 2008 EWCA Crim 2177.

appears that the ECtHR draws a distinction between strictly physical real evidence and real evidence that reflects a defendant's thought processes, because the latter's existence is not truly independent of the will of the suspect.

English law and invasive methods of obtaining evidence
The method employed in a brain scan (looking inside someone's mind) is invasive. This is effectively using memory or experiential knowledge and definitely breaches a person's privilege against self-incrimination since a person's thoughts (including memory) is part of his will. Memory does not have an independent existence from the individual in the way that blood or tissue samples do.

Breach of the right to a fair trial
Using brain scans constitute a breach of the right to a fair trial.

Women who murder their families

Sally Ramage

'Nothing but No and I, and I, and No,
How fals it out so strangely you reply?
I tell you (Faire) ile not be answered so,
With this affirming No, denying I.
I say, I Love, you sleightly answere I:
I say, You Love, you peule me with I:
Save me I Crie, you sigh me out a No;
Must Woe and I, have naught but No and I?
No I am I, if I no more can have;
Answere no more, with Silence make reply,
And let me take my selfe what I doe crave,
Let No and I, with I and you be so:
Then answere No and I, and I and No.'

"From Idea", by Michael Drayton (1563-1631)
W. H. Auden and Norman H. Pearson, eds., (1971) *Poets of the English Language*, Volume II, London: Eyre & Spottiswoode for Heron Books, pg 102.

Mother killed her three young children
On Friday 17 September 2010, Theresa Riggi, aged 46, appeared at Edinburgh Sheriff Court on a charge of murder of her three young children, Austin, Luke and Cecelia Riggi, after which court appearance, she was remanded in custody. Theresa Riggi made her first appearance in Edinburgh Sheriff Court on petition on charges of murder of her children, eight-year-old twins Austin and Luke, and their sister Cecilia, aged five years old. After the children were dead, Theresa Riggi threw herself from the balcony of an Edinburgh house she had been renting, apparently in an attempted suicide, but she instead suffered serious injuries including a broken left arm and leg. When the dead children were discovered Scottish police, on 24 August 2010, applied for a Court Assessment Order so that Theresa Riggi could be examined for a mental disorder (see David Canter, (2010), *Forensic psychology*, Oxford University Press, Oxford, pages 46-63). Psychometric procedures might have been used to measure various aspects of personality, to assess cognitive skills and/or to rule out any brain diseases. Several of these procedures use projective techniques which originated in Freudian ideas of the unconscious. The objective of all projective techniques is to reveal something about the patient's unconscious or hidden motives and thoughts. Other assessment tools that could have been used are those developed to cover assessments of the risk that the individual will commit another violent crime in the near or distant future.

Weaknesses of psychometric procedures: Scotland and United States
Psychometric procedures vary enormously in the thoroughness and appropriateness of their norms. Also, their norms may not be appropriate in places different from where the test was originally developed. For example, an indicator of psychopathy developed in Scotland, may have little value in

countries with very different cultures, such as the United States. This factor may well become an issue in the forthcoming Scottish court trial of Theresa Riggi, an American citizen, born and bred throughout her childhood in the United States.

Murder charge in Scots law

Theresa Riggi has been charged in Scotland with murder. The definition of murder in Scots law used to be that provided by Macdonald's *Criminal Law*. Macdonald had provided the once-established definition of murder in Scot's law:

'Murder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences.'

However, the case of *Stuart Drury v Her Majesty's Advocate* [2001] Appeal No: C76/99, rendered it incomplete and inaccurate when the Lord Justice General Rodger argued that Macdonald's construction failed to describe the relevant intention of the accused. In his view it should include a 'wicked intent' and so the mens rea for murder in Scots law now includes the element of 'wicked intent' as well as the element of 'wicked recklessness'. The facts of this case are that Stuart Drury, in the early hours of 5 September 1998 attacked Marilyn McKenna with a claw hammer and walked away, leaving her in the road. The case report stated (at paragraph 3):

'In the attack the deceased sustained severe and extensive blunt-force injuries to the head and neck, including extensive lacerations to the face and mouth, with multiple comminute fractures of the underlying facial bones and tooth sockets. The expert evidence was to the effect that there had been at least seven blows with the hammer. The fatal blow was to the left side of the neck and it had damaged the internal and external carotid arteries, resulting in an interruption to the blood supply to the brain which had caused death.'

McKenna died the following day. The two had been living together for some sixteen month, but the relationship had come to an end and they had subsequently separated, although there was evidence that they continued a sexual relationship. When he attacked McKenna with the claw hammer, he had been drinking beer and was enraged at the knowledge that McKenna had been having sexual relations with another man. Drury had received a verdict of murder in the lower court. He appealed.

The Assistant Advocate quoted Lord Hoffmann ([2000] 3 W.L.R. at p. 677 H) who had said

'In Scots law, unlike English law, there is no statutory wording to hinder us from framing any test in terms of the ordinary man or woman, if we think it appropriate.'

At paragraph 25, he stated:

'In matters of homicide Scots law admits the plea of provocation only within certain bounds which are considerably narrower than those within which it operates in English law. In Scots law it applies only where the accused has been assaulted and there has been substantial provocation. In English law, by contrast, even a slight blow or mere jostling may be sufficient to admit the plea. In Scots law, no mere verbal provocation can palliate killing. The same applied in England until the law was changed by Section 3 of the Homicide Act 1957. The difference in scope of the doctrine of provocation in the two systems does not arise... Rather, as a matter of policy, the law has taken the view that in such cases the person assaulted or the person insulted should be expected to control himself, at least to the extent of not killing his tormentor. To this policy Scots law admits only one exception: the law recognises that when an accused discovers that his or her partner, who owes a duty of sexual fidelity, has been unfaithful, the accused may be swept with sudden and overwhelming indignation which may lead to a violent reaction resulting in death. In such cases the law provides that, where the jury are satisfied that this is in fact what happened, they should return a verdict of culpable homicide…'

At paragraph 33, he quoted paragraph 35 of *H.M. Advocate* v *Smith*, Glasgow High Court, 27 February 1952, unreported. He said:

'Now, on that, I have to tell you this, that factor - although neither counsel has alluded to it, but I feel it my duty to do it - that factor, if it arises, arises in answer to a charge of stabbing a man to death, and I have got to tell you that in law it takes a tremendous amount of provocation to palliate stabbing a man to death. Words, however abusive or insulting, are of no avail. A blow with the fist is no justification for the use of a lethal weapon. Provocation, in short, must bear a reasonable relation to the resentment which it excites, and you would have to consider from that point of view whether there was anything in the evidence sufficient to raise in your minds even a reasonable doubt as to whether there was in this case provocation of such a kind as I have endeavoured to indicate. Remember the provocation that you would have to discover is …whether such provocation exists….'

Drury's appeal was allowed, the verdict of the trial court was set aside, his conviction was quashed and the Crown was permitted to bring a new prosecution in accordance with Section 119 of the Criminal Procedure (Scotland) Act 1995.

Lord Cameron of Lochbroom
Following her appearance in private before Sheriff Crowe on Friday, 17 September, 2010, the Assessment Order was revoked and she remanded in custody. Theresa Riggi had been separated at the time from her husband Pasquale Riggi and divorce proceedings were underway in respect of the American-born couple who had resided in Scotland for the past thirteen years.

Extreme domestic violence- 'familicide'
The French sociologist Emile Durkheim called these homicides 'amonic suicides'. In 1897, he published a case study titled 'Suicide', which provided an example of what the sociological monograph might look like. Durkheim was one of the founders in using quantitative methodology in criminology during his suicide case study. Such cases in which people kill their families and then attempt suicide are rare. Rather, less extreme forms of domestic violence and child abuse are more common. Murdering one's family and then attempting suicide falls at the extreme end of partner conflict. It is unusual for the perpetrator to be a woman and most perpetrators are men. Men usually use a weapon to kill their families rather than the direct contact method of strangulation as was committed recently by two women who hailed from the jurisdiction of the United Kingdom (one, of English origin, the other, a Scottish resident).

No British research on people who kill their families
No British research on the subject is forthcoming but in the United States, where such homicide is more frequent than in most other wealthy nations, researchers found that intimate –partner violence had previously occurred in 70 percent of cases (a statistic which was the result of extensive interviews with family, friends and neighbours of the homicide victims) of which, 25 percent was recorded in police arrest records (see Ramage, S., Victim's family statements – restitution or unauthorised evidence?", *The Criminal Lawyer*, No. 179, 2007, Bloomsbury Professional, pages 7-8). The writer has carried out extensive surveys into UK familicides, and, bucking the trend, the results show hundreds of such familicides carried out in the UK. It is surprising that the UK has undertaken no research on the subject. It is also surprising that more is not done to make full use of the many protective orders available, thus saving lives (see Ramage, S., Emergency Protection Order under Children Act 1989, *Criminal Law News*, Issue 16, December 2009, Westlaw, London; see also Ramage, S., Child abuse in the United Kingdom, *The Criminal Lawyer*, No. 191, 2009, Bloomsbury Professional, pages 1-3).

Mapping such extreme domestic violence murder-suicide
It has been established that a past criminal history is not a reliable or significant prediction in murder-suicide. On the contrary, according to Professor Gelles, the best prediction of domestic violence is past behaviour (see Professor Gelles' preface in the book by Robert Dingwall, John Eekelaar and Topsy Murray, (1995), *The Protection of Children: State Intervention and Family Life*, Avebury Publishers, Aldershot, UK). According to Professor Gelles, the relevant social and demographic factors to all forms of family violence (except sexual abuse) are poverty, unemployment, and disagreements over money, sex or children.

Conclusion
It may be possible, but unlikely, that geographic mapping in the UK might aid prevention of such murders since such offenders do not usually have a previous criminal record. However, if geographical profiling software were to be used to find reported domestic incidents, rather than criminal convictions

in police databases, such detective work might highlight those families in potential danger, irrespective of wealth or other social status since police information will no longer be stored in the former two separate systems of crimes that have occurred and the other system holding information on suspects and convicted offenders, the latter stored for legal reasons, in relation to court processes (David Canter, (2004), *Mapping murder*, Virgin Books, London, pages 308-309).

Working families and anti-social behaving youth

Sally Ramage

National Working Families Week began this year on Monday 27 September, 2010. Acknowledging how difficult it is to balance the work-home situation was the Right Honourable Harriet Harman, MP and acting Leader of the Labour Party (which she handed over on 25 September). In The Times newspaper, on Saturday 25 September 2010, Ms Harman featured on the front page and on pages 40-41 spoke of the changes to maternity leave, childcare provisions and equalities law, all measures completed by the Labour Party. Ms Harman is concerned that women still have a raw deal as they are the carers of children, the elderly and must show their competence in the workplace also. Her fears are that equality for women in 'slipping backwards' as 'the extreme hours culture in many offices works against women'.[14] Ms Harman's concerns are well founded as news of persistent anti-social behaviour by young people persists. Anti-social behaviour by the young is not something new. Much money has been targeted at solving this crime, yet it persists today. There are around 14 million anti-social behaviour incidents each year of which less that one-third is reported to the police. There are 337community safety partnerships (in England, Wales and Northern Ireland) whose aims are to better spot repeated anti-social behaviour. Research that examined police response to anti-social behaviour showed that when police responded, public confidence in the police rises. All of this costs tens of millions of pounds annually, and still anti-social behaviour persists.[15] A significant body of thinking around the UK Government's anti-social behaviour (ASB) policy agenda draws its inspiration from Foucauld's theory and time for a change has arrived.

Time for change

Governmentality can be said to connect academic theory with public policy and political power and Foucault's writing of interest to those studying anti-social behaviour is his comparison of modern society with Jeremy Bentham's 'Panopticon' design for prisons: in the Panopticon, a single guard can watch over many prisoners while the guard remains unseen. Ancient prisons have since been replaced by clear and visible ones, but Foucault cautioned that 'visibility is a trap.' It is through this visibility, Foucault wrote, that modern society exercises its controlling systems of power and knowledge. Increasing visibility leads to power located on an individualised level, shown by the possibility for institutions to track individuals throughout their lives.

In the Working Families Annual Report of 2007, the Board said that:

'Our long hours culture, particularly if combined with little choice about working hours, causes stress and ill-health, and steals parents from their children. Parents are faced by conflicting messages – to go to work, to be economically active good citizens; and to be there to support their children with homework, stop them spending too much time on the internet, keep them from slipping into anti-social behaviour. Meanwhile, for employers, flexible working has become a must-have, an essential part of the suite of HR and diversity policies which mark out attractive places to work....'

Surprisingly, even with the millions spent on the problem, there has been no improvement. A radical rethink is needed as to why children commit anti-social incidents and whether society aggravates the problem by the criminal justice system.

[14] Sylvester, R. and Thomson, A., 2010, "To be a mother is to feel guilty, to feel you should do more at home", Times, 25 September, pgs 40-41.
[15] Joint study published 23 Sept 2010 by Cardiff University and Home Office.

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