A trifecta in search of an ethical base

Jocelynne Scutt

’No question is ever settled / Until it is settled right.’ — Ella Wheeler Wilcox

Lessons from the Outside

‘For knowledge itself is power.’
Francis Bacon

Often, our reflections on what has happened elsewhere provide a guide to what happens in our domain. The law and the media tangle in tribunals and courts the world over. Often, those who cry loudest in the name of media freedom are most likely to be harbouring within their own legal systems oppressions against the freedom they demand should be effectuated elsewhere.

Sometimes, failures in effecting justice, and the promotion of injustice through the legal system or the media system of others, can illuminate our thinking and analysis of our system.

Media freedom and the demand for law and justice are universal cries of every informed electorate. They are demands that must be met. Yet every system has its failures. It is through these failures that not only the systems that generated the failures ultimately can find an equilibrium enabling them to create better outcomes, but by which those not involved in the failures can generate better outcomes for themselves and their own system.

When Azaria Died

‘This is the story of a little girl who lived, and breathed and loved and was loved.’
Alice Lynne Chamberlain

On 17 August 1980 at Uluru — Ayers Rock — in the Northern Territory, Azaria Chantel Loren Chamberlain disappeared. A child of nine weeks, she had been holidaying with her parents and two brothers, traveling by car from Mt Isa in the remote southern region of Queensland, through rough terrain and into the red desert of Australia’s centre.

Just over two years later, on 29 October 1982, Azaria Chamberlain’s mother, Alice Lynne Chamberlain was found guilty of her daughter’s murder. Michael Leigh Chamberlain, husband and father, was guilty as accessory to murder after the fact.

Circumstantial evidence alone gained the conviction:

The Crown charged a murder committed in a most grievous manner, within an extremely limited time and in difficult circumstances where the chances of discovery were high. During a period of between five and ten minutes Mrs Chamberlain is alleged to have gone with Azaria and her son Aiden from the barbecue area to their tent some 20–30 metres away; donned tracksuit pants over her dress; taken Azaria from the tent to the family car which was parked alongside; slit Azaria’s throat with a sharp instrument (possibly scissors) whilst sitting in the front passenger seat of the car; hidden the body (possibly in a camera bag in the car); returned to the tent with blood on her hands and the tracksuit pants; removed the tracksuit pants and washed her hands in an ice-cream container; and returned, quite composed, to the barbecue area with Aiden.

In view of the Crown’s claim that a great deal of blood was shed in the car during the killing, Mrs Chamberlain must also have managed to clean up at least the obvious signs of blood in the car during this period. The registered nurse who travelled in the car later in the evening did not notice any blood. Mrs Chamberlain also found time during these few minutes to put Aiden to bed in his sleeping-bag, hear him complain he was still hungry and to collect a can of baked beans from the car. Aiden, almost seven years old, appears to have been awake throughout this period, apparently remaining in the tent until he returned with Mrs Chamberlain to the barbecue area. Despite the somewhat bizarre goings-on that he would therefore have been likely to witness (assuming the Crown’s theory to be valid) it is reported that on the night of Azaria’s disappearance he told one witness (Mrs Lowe) that ‘the dog had got his baby in its tummy’ and when asked by another witness (Mrs West) if the dingo had taken the baby, he answered that it had.1

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When she cried: 'The dingo's got my baby,' Alice Lynne Chamberlain had no way of knowing, nor even of half-sensing, the huge media frenzy those five words would spark. Nor could she anticipate that society would be divided, families at loggerheads, husbands, wives, children, parents, sisters, siblings, friends, work colleagues would face each other, glaring, from opposite sides of the argument. Nor would she dream of debates ranging still, some thirty years later, between those who condemned and continue to condemn her just as the Northern Territory jury did in October 1982, and those contesting the verdict, looking for the dingo that did it.

The media swung, sometimes wildly, sometimes mildly, between guilt and innocence, wicked and without sin, doting motherhood versus motherhood gone mad, woman-to-be-protected or woman-of-wicked-ways, evil witch, pure saint, wronged wretch, wicked wench.

For the longest time, the forces against Alice Lynne Chamberlain were triumphant: her guilt was a given. Yet always there was an underlying force for her innocence. Nonetheless, the predominant force seemed unassailable.

Azaria Chamberlain's death was traversed in three inquests, a trial that ran for more than six weeks, an appeal to the Full Federal Court heard over sixteen days, an application for leave to appeal to the High Court and an appeal to that Court, multiple applications for bail, applications for parole, and a judicial inquiry and Royal Commission. It was central to the use, and abuse of evidence, the use and abuse of the legal system . . .

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Dreyfus Decommissioned

'A man of honour, as he had been all his life, he believed that the truth would speak for itself, especially since it appeared to him plain as day. Why stir up trouble especially since the sun would soon shine.'

Emile Zola

Almost one hundred years before Azaria's disappearance and death, and in the same month Azaria Chamberlain's mother, Alice Lynne was found guilty, on Monday 15 October 1894 Captain Alfred Dreyfus set out from home for army headquarters on Rue St Dominique, Paris. Before he could report in at 9.00am, he was seized, arrested and held in secret confinement behind the walls of the military prison. Condemned by a military tribunal two months later, Dreyfus was found guilty of treason and shipped off to the penal colony of Devil's Island for the term of his natural life.

Before leaving to begin serving his sentence in April 1895, Dreyfus — 'Captain' no more — was returned to the Military College where, with a mob yelling outside the walls and pounding on the gate, before row after row of troops on parade, all decorations, ribbons, medals and insignia were torn from his uniform. Broken in two over the knee of a former colleague, his sabre was dashed into pieces upon the ground.

Enter the media.

Religion was at the heart of a political struggle then ascendant in France. The right-wing newspaper La Libre Parole saw Dreyfus as the perfect target: not only a traitor, but a Jewish traitor and symptom of the failures of Republican government. Catholic Church publications ran the story as one of conspiracy between Jews and Freemasons, whom they asserted (in an odd coupling), as conspirators aimed at destroying the army, damaging the country's standing as a military force, and undermining France within the community of nations.

Although generally a part of the media pack, L'Éclair published a countervailing article by Jewish journalist Bernard Lazare. A professed anarchist, in his L'Éclair article Lazare coined the catchwords 'J'accuse', later employed to huge effect by Emile Zola in the struggle to reclaim Dreyfus' innocence and reassert justice. Yet with the affair-Dreyfus in their sights, La Libre Parole and L'Éclair, along with France's Roman Catholic daily paper, La Croix and their media mates, intensified the campaign against more than 250 career officers of the Jewish faith and Jewish colonels and general officers holding elevated posts in the French armaments industry. All this was both a part of, and fueled, the right's efforts to discount republicanism and re-establish monarchy over the people as the choice system of political organisation.

'I am innocent,' said Dreyfus.

On the other side of the world, one hundred years later, Alice Lynne Chamberlain echoed his words.
Who Then is Guilty?

"Concern for the clarity of language is not "frivolous". To think clearly is a necessary first step towards political regeneration.

George Orwell

Alfred Dreyfus was condemned by the media (small voice only in dissent) and by a military tribunal. The charge? Espionage. The evidence? Retrieved from a wastepaper basket at the German Embassy in Paris, a screwed up and torn list or bordereau of French military documents addressed to Colonel Maximilian von Schwartzkoppen. Colonel von Schwartzkoppen was serving as German military attaché. Unsurprisingly, France had its spies at the German Embassy and one of them, the cleaner, found the incriminating material whilst doing her cover-job with the zeal expected of military counter-intelligence. Captain Dreyfus was pinpointed as the culprit because as an officer of the artillery and on the Army's General Staff he had access to information at the level of that in the list. Albeit not alone in this — an exclusive number of others had access, too — once anti-Semitism was factored in along with his origins in Alsace — annexed after the Franco-Prussian war — Dreyfus became the target.

Later, it was found that 'evidence' had been manufactured against him:
- A contention that the handwriting of the list was his, when there were major differences in the script he used and that of the bordereau which could not be explained as efforts at disguise;
- Forged documents added to Dreyfus' file to embellish the case, these not being disclosed to Dreyfus or his counsel.

Here are echoes again in the case against Alice Lynne (Lindy) Chamberlain. The Northern Territory's Alice Springs and Darwin are not only worlds away from Paris, France, in distance, but by culture, tradition, geography, demographic they are almost in a different universe. Yet for Darwin and Alice Springs, that the Chamberlain family lived outside the Northern Territory, in another state, ran parallel to the French approach to those whose families hailed from the Alsace. Foreigners, with foreign connections, from a foreign land. Religion was at the heart of the matter, too: the Chamberlains adhered to the Seventh Day Adventist religion — being, not unlike Judaism, out of the mainstream and a source for religious phobia.

As it was for Alfred Dreyfus, evidence was manufactured against Alice Lynne Chamberlain, too. Haemoglobin tests were purportedly carried out on a camera bag, clothes, tent equipment and the Holden Torana that had brought the family trekking through the desert to Uluru. The forensic 'expert' who had few qualifications and even less experience found blood galore — all of it carrying haemoglobin levels which, she said, identified it as that of a newly born baby. That the couple's older children had had nose bleeds, that the baby had vomited; that a hitchhiker with a bleeding nose (who gave evidence at the trial) had bled made no difference. That the slides this 'expert' had used, and upon which her evidence was based, had been wholly destroyed by her, so were unavailable — not only for any prosecution check, but for the defence experts to study, too — was no impediment to her evidence and its acceptance by the jury as indubitably true? Yet it wasn't. It was false. Blood under the car's dashboard turned out to be a latex fixative present in all cars of that make.

Exonerating evidence was concealed from them both. For Alfred Dreyfus, it rapidly became clear to those in authority that another officer, Major Walsin Esterhazy, was responsible. But the army elite engaged in cover-up — for as long as they could. For Alice Lynne Chamberlain, the culprit she identified was a dingo, a native Australian dog common around the camping area and in other parts of the Territory. Evidence that park rangers had been so concerned about dingo attacks on campers that the chief ranger, Murray Raff, had written to the Chief Minister (head of government) asking that immediate steps be taken was kept from the defence and out of the trial. His request was made not once, but was a series, over a period of years. As well, the existence and identity of a witness who had stayed at Uluru in a caravan neighbouring their tent was kept from her. Finally, at the Royal Commission — years later — she learned that he along with an Indigenous Australian tracker had seen blood, dingo tracks, and the impression of a baby's matinee jacket on the sand near the camping area, immediately after Azaria's disappearance. The conclusion: that a dingo had 'taken my baby', bleeding, from the tent, along the sandy track, resting Azaria's weight for a moment, perhaps, whilst fastening its grip on the child's body.

Guilt, Innocence & Freedom of Voice

'A mind conscious of the right.'

Villiers de l'Isle Adam

The power of the common voice fighting back against prejudice and mean-spirited thinking had an impact.
Both Alice Lynne Chamberlain and Alfred Dreyfus, one hundred years apart, were exonerated. For him, it took years and multiple trials and enquiries, too. He was condemned twice at military law, despite the efforts of the new head of army intelligence who had pushed for a retrial to establish his innocence and for the prosecution of Esterhazy. In September 1899, despite his second wrongful conviction — this by another military tribunal — he was pardoned by the President, so securing his return to Paris. But it took twelve years before — in 1906 — he regained his former rank in the military. For her, it took fewer years, as on 13 September 1988 the Northern Territory Court of Criminal Appeals was unanimous in quashing Alice Lynne Chamberlain’s conviction and that of her husband. Later, she was paid $1.3mln compensation for wrongful imprisonment.

What does all this mean for justice, law and the media in local and international context?

For Alfred Dreyfus and Alice Lynne Chamberlain, guilt was first established through the hounds of the media. For her, this was more direct. The first inquest had accepted ‘the dingo’s got my baby’ without demur, formally confirming she and her husband had played no part in Azaria Chamberlain’s disappearance or death.

For him, the media campaign before his conviction was one aimed generally at the Jewish religion and its adherents, which caught him up when the charges were laid against him and the finding of guilt made. For her, an ongoing campaign making assertions of religious fanaticism, strange rites, anti-woman and mother-guilt, witchcraft, ‘un-natural behaviour’, conduct unbecoming a woman, wife and mother, and one who (should have been) grieving at that, swirled in print and up through the ionosphere, the message transmitted into millions of homes around Australia and out into the global community. As Denis Barritt, coroner presiding over the December 1980/February 1981 inquest, said:

> You have suffered the loss of your beloved child in the most tragic of circumstances but you have also been subjected to months of innuendo, suspicion and probably the most malicious gossip ever heard in this country.

The storm resulted in a second inquest, leading to the trial and conviction.

The media would assert it was simply giving the people what they want. This is ever the recurrence of the popular press in the face of criticism, particularly when running campaigns, as it was so for these two. The public cannot, of course, be deemed innocent in these affairs. The uproar in France has been described by the historian and writer Barbara W. Tuchman as ‘one of the great commotions of history’. Commotion is frequently created or advanced by the media. But the great commotions of history are not a product of the media alone.

In France, the army and army elite had a huge stake in maintaining Alfred Dreyfus’ guilt. Hence, they played a role not only in engaging in ‘cover-up’ of what they had done and what they had allowed Commandant Ferdinand Esterhazy to get away with, but in stirring up popular sentiment against their innocent target. As Professor D. Wilkes of the University of Georgia Law School wrote on 11 February 1998 for the anniversary of the publication of Emile Zola’s _J'accuse_ . . .

> ... high-ranking officers on the army’s General Staff and officers in military intelligence, fearful that public exposure of the injustice done Dreyfus would embarrass the army, engaged in a gigantic cover-up which featured perjury, forgery, and obstruction of justice. The conspirators, including at least eight generals, even protected and assisted Commandant Ferdinand Esterhazy, the army infantry officer whom, as they knew by 1896, had actually committed the crime for which Dreyfus had been wrongfully convicted.

At the Royal Commission held into the Chamberlain Affair, John Winneke, QC, lead Counsel for the Chamberlains, said:

> We venture to suggest to your Honour that their trial was unique in this regard in the history of Australian criminal law in that it fuelled rumour, speculation and innuendo ... it was within the currency of public knowledge before this trial ... that the name Azaria was a synonym for ‘sacrifice in the wilderness’ [it wasn’t], that Azaria was a brain-damaged child [she wasn’t], that Azaria had been killed well before the night of 17 August 1980 [despite eyewitness evidence to the contrary], that the Chamberlains were weird religious fanatics with predilections towards sorcery ... [no part of Seventh Day Adventism][and] these and many more rumours had circulated about the Chamberlains at the time ... they came to trial in Darwin.

Upon the acquittal of Ferdinand Esterhazy and Alfred Dreyfus’ second conviction, Emile Zola saw the press as a central part of the problem, too:

> [It] is a crime to have relied on the most squalid elements of the press, and to have entrusted Esterhazy’s defence to the vermin of Paris, who are now gloating over the defeat of
justice and plain truth. It is a crime that those people who wish to see a generous France take her place as a leader of all the free and just nations are being accused of bringing turmoil to the country, denounced by the very plotters who are conniving so shamelessly to foist this miscarriage of justice on the entire world. It is a crime to life to the public, to twist public opinion to insane lengths in the service of the vilest death-dealing machinations. It is a crime to poison the minds of the meek and the humble, to stoke the passions of reactionism and intolerance, by appealing to that odious anti-Semitism that, unchecked, will destroy the freedom-loving France of Human Rights. It is a crime to exploit patriotism in the service of hatred...8

Both the media system and the legal system were implicated in the wrongs done to these two protagonists, the one in nineteenth century France, the other in twentieth century Australia. Both the law and the media were central to the use and abuse of evidence, the use and abuse of the legal system, the use and abuse of freedom of the press. Condemnation without investigation and reliance upon religious phobia was the media's method. This fed into the legal system.

In the first instance, the media effectively supported the baser elements of French society (including intellectuals and 'elites') along with the French military in the making of their two perverse decisions against Alfred Dreyfus, by promoting a climate in which it was easy for them to engage in their cover-up. Had freedom of the press and investigative journalism asserted themselves, and the media dispensed with the phobic approach to religion and 'difference', then Captain Dreyfus would have stood a real chance. By kowtowing to the worst elements in the human spirit, however, the press supported the conviction of an innocent man, and the escape of he who was guilty, along with the simultaneous ignoring of others who committed crimes including forgery and false evidence in the trials.

In the second, the media supported the baser elements of Australian society (including some who would call themselves intellectuals and class themselves as elites), providing a climate wherein suspect evidence could be branded 'truth', the truth condemned as a lie, and where one of the bastions of the common law criminal justice system, the jury, was the method facilitating wrongful conviction of the accused. One juror explained an unexpected impact of the media on the jurors' decision-making. Referring to the forensic evidence of foetal blood — later proven utterly false, the juror said that in court:

[The 'expert'] just talked and explained it right the way through and we understood it. She drew pictures and we knew what she was talking about. The other men [experts] used all these long words and we didn't have a clue. So how did she do it? What did she do? She cut out what the local paper had put in [the story], which was [what the] police dictated, and this became her 'what happened that day' [story for the jurors]. What she gave in evidence was literally newspapers stuck in her scrapbook.9

Yet ironically, while the media and the legal system worked in tandem against the interests of justice, combining to bring about the wrongful conviction and incarceration of the innocent, both the media system and the legal system ultimately facilitated the overthrow of the convictions and release of the imprisoned. The media and the justice system gave voice to the vindication of the condemned military man of the nineteenth century and to the condemned woman and mother of twentieth century fame (or infamy) Again, however, in this, they did not act alone or unaided.

Public support for the wrongfully convicted and revulsion in the face of prejudice and the vicious attacks leveled at Captain Dreyfus and Alice Lynne Chamberlain mobilised. This mobilisation had consequences. It was evidenced, in France, by the joinder of radicals, socialists and republicans — many of them moderates, at least until the Dreyfus Affair spurred them into taking a stand. The Radical Party had long campaigned for the separation of church and state and the events that resulted in the struggle for Alfred Dreyfus' freedom precipitated many more to that cause. The combined power of church and state, and subversion of state responsibility through church encroachment on the organs of the state, was exposed as antithetical to ideals espoused in the political demand for liberty, equality and fraternity. In Australia, more than 100,000 signatures supported petitions for a judicial inquiry into the Chamberlains' convictions. Community groups flourished. Witnesses from the trial who had been present at Uluru and who had seen the child Azaria alive and heard her cry shortly before Alice Lynne Chamberlain returned to the tent from the campfire only to call out 'The dingo's got my baby' became public speakers, attending at meetings in private homes, country halls, shopping malls and suburban centres.

The power of the common voice fighting back against prejudice and mean-spirited thinking had an impact. Alice Lynne
Chamberlain says that of all the journalists covering the story — her story and that of her daughter Azaria — one alone distanced himself from the mob, going on to write one of many books the case spawned.

‘For’ or ‘Against’ Ethics, Integrity & Illumination of the Subject

'Today is only the beginning for this case, since it is only today that the positions have been made clear: on one side, the guilty parties, who do not want the light to shine forth; on the other, those who seek justice and will give their lives to see that light shine.'

Emile Zola

Yet in both cases — Dreyfus and Chamberlain — it was neither journalists nor judges who initially turned the tide. Emile Zola was primarily a writer — a novelist who wrote journalistic pieces to survive. His J'Accuse resulted in his own prosecution and conviction for criminal libel and a self-imposed exile in England to avoid prison. John Bryson's Evil Angels — made into a film of the same name in Australia10 — was a book by a lawyer-turned-writer, who later wrote journalistic pieces but was no journalist.

Despite the great tradition of investigative journalism, there was no investigative journalism by the media for nineteenth century Dreyfus or twentieth century Lindy and Azaria. Spurred by the public outcry from those who could recognise injustice when it stared them in the face, writers did the work.

This might be considered odd, when high profile examples made headlines over those hundred year periods. The scandal that rocked London when WT (William) Stead, editor of the Pall Mall Gazette and founder of the 'new journalism' launched a crusade against child prostitution was enormous. Rather than simply 'making it up' or relying upon second hand tales, he launched his own investigation into the trade, uncovering links between the purveyors and sellers of minors for sex, and men-in-high-places. Going further, he advertised for under-aged girls-for-sex. The search successful, Stead ran the story in his own newspaper columns. Then, he suffered the consequences so frequently fallen upon those who expose the criminal conduct of others, particularly when those others are persons of prominence, commercial or political or both. He sought arrest deliberately — then served time in prison having been convicted of abduction and criminal assault. Subjected to the opprobrium that befalls those who expose the exploitative conduct of people in high places, rather than joining establishment ranks or succumbing to the siren song of the powerful, he maintained his integrity. Efforts to close down his investigative methods served only to solidify Stead's commitment to highlighting, through his writing, the lack of ethics and absence of ethical boundaries entrenched in British society. He was described as 'the conscience of the wealthy'.

For the late twentieth century, the investigative journalism's high point came via the 'Watergate' expose by Bob Woodward and Carl Bernstein of the Washington Post. With the committed support of the publisher, Katharine Graham, these journalists revealed to Washington, DC, and the world the political machinations and downright criminality engaged in by CREEP — The Campaign to Re-Elect the President and the United States President's inner circle. At first, it was 'only' a break-in to the Watergate Building. Then it was a break-in and infiltration of the Democrat Party headquarters housed there. Ultimately, it brought down a President: President Richard E. Nixon resigned rather than be impeached. His top aides and others in the administration or working undercover for it went to prison.11 Woodward and Bernstein had their own undercover source. But they did not rely on this as an excuse for doing no work of their own: the source came to them. But they checked and rechecked, researched, checked and rechecked, and researched and dug and checked. They took nothing at face value. How could they? This was a potentially explosive story alleging criminality in the office of the President.

In the Dreyfus case and the Chamberlain case no such effort was expended. The superficial story was 'the' story. The 'easy' story was that with which journalists ran. The story based in prejudice, readily palatable to that portion of the public which harboured those same prejudices and wish for the superficial, was served up without any recognition of or realisation that there may be another tale to uncover, something underlying the obvious, another layer behind the obvious.

Sadly, in Dreyfus and Chamberlain, if it were not obvious or feeding into their own biases, the journalists did not want to know. Yet — there was another story behind what the newspapers, radio stations and television monitors relayed to the public. Each of these stories required digging — and minds untrammeled, or less trammeled, by easy assumptions about a Jewish Captain of the military and a Seventh Day Adventist mother who refused to cry for the cameras.12
Jean Doise, in *Un secret bien garde: Histoire militaire de l'Affaire*, published in 1994, almost one hundred years after Dreyfus was ultimately vindicated in his final acquittal, asks why such a high-level cover-up was engineered and why was Major Esterhazy never convicted, despite the recognition of his guilt, and set free to retire in England on a pension? How, too, was it that Esterhazy had access to the information found in the bordereau discovered at the German Embassy? In answering these questions, Doise posits that the development of a quick-firing French 75mm field gun was at the heart of the matter. The design, based on a long recoil hydropneumatic system and in advance of German and British armament development, was a jealously guarded secret. Doise says that the bordereau was part of a disinformation plan engineered by the then head of French military counter-intelligence, Colonel Sandherr.

This was not unusual for the times, says Doise, describing other counter-intelligence schemes of a similarly ilk.

When Sandherr was replaced, two years later, his replacement Lt Colonel Georges Picquart painstakingly uncovered the wrongful charge and prosecution of Dreyfus, and was in the forefront of the efforts to have him rehabilitated. Jean Doise's research suggests that Esterhazy was a double agent and that his acquittal, along with Alfred Dreyfus' prosecution and convictions, was deliberately engineered by the French military intelligence supporting the man they believed to be their sole agent, Esterhazy. Major Joseph Hubert Henry, who forged evidence against Dreyfus, served at the same time and in the same office where Esterhazy had worked as a German translator. The office in which they worked was a part of the French military espionage network.

Even if Jean Doise's exposition is untrue, why should one hundred years have passed before the facts upon which he bases his theory have been published and analysed? Where were the investigative journalists of Paris at the time? What of the international media -- which covered the case at the same superficial level, even if internationally there were some who did not take the easy line followed by the majority in France -- and there is little indication of this.

Paul Toohey, Australian journalist, wrote in 2000 -- long after Alice Lynne Chamberlain had been vindicated through the legal system:

Lindy and Michael Chamberlain became totally fictitious human beings, characters, unrecognizable even to themselves.

Whilst this barrage was going on, the Northern Territory government was in the midst of supporting a major tourist development at Uluru. It is said that the 'final papers were to be signed' the week of Azaria's disappearance, and a runway had been completed at Yulara, for direct access by air, whilst 'SUS 20ml had already been invested' by a bank and private investors. Again, even if there were no connection, why no investigation into and airing of these matters at the time?

It would have taken little digging, and the Northern Territory government of the day was recognised not only as 'pro-development', but as pro-developer. Stories had figured in the media at other times of the large salaries paid to Northern Territory politicians and the plush -- even extravagant -- complex they had commissioned for sittings of the NT Assembly -- all for a population of 125,000, far smaller than that of the least populated state of Australia, Tasmania -- even now only some 450,000. It may not be insignificant that during the 1980s the Northern Territory gained a net 1,000 people a year from overseas except for 1982-83 when this dropped to 400. At that time, too, the Northern Territory was vying for statehood.

Whether these factors held any significance in the dissimulation and cover-up alleged to have occurred in the case of Azaria Chamberlain, none of it was aired by the media at the time. Investigative journalism was conspicuous by its absence.

The Law versus the Media

'Then, sir, you will turn it over once more in what you are pleased to call your mind.'

Lord Westbury

Around the world, governments and media engage in conflict. In Australia, the ABC is seen by the encumbent government — whatever its political stripes — as 'in opposition'. When the conservatives are in power, the ABC is charged with being 'left wing'. When the ALP is in power, the ABC is criticised for bias towards conservatism. When the Whitlam government was deposed in 1975, many attributed Whitlam's loss of the following election and Fraser's success to News Ltd's *Australian* and what was seen as 'rampant' 'bias' against the outgoing government. In the United Kingdom, some newspapers are seen as 'pro-Labour', some as 'pro-Tory'. In the United States and globally, CNN and Fox News are regularly the butt of criticism for perceived bias.

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Courts and the law do not escape criticism. In Victoria in the 1990s the Supreme Court employed a journalist who had been the Age law reporter as a ‘media officer’, her job was to help explaining the Court’s judgments.

Yet there are significant differences in the way the courts are expected to operate, that incorporate standards of fairness which the media are not obliged to follow, or do not see themselves so. Procedural fairness (natural justice) and substantive fairness (the intended outcome of rules of procedural fairness) apply to the courts and the legal system as a whole. Unlike the courts, these rules have no formal application to media conduct or content.19

In criminal law, those accused are held to be innocent unless proven guilty. That standard of proof is ‘beyond a reasonable doubt’. In civil law, the standard of proof is ‘on the balance of probabilities’. Courts and tribunals are obliged to apply the requisite standard and, if they do not, their decisions are wrong and can be overturned. Decisions of courts and tribunals are subject to appeal: this means that always the decisions of judges are under scrutiny. No judge is immune.

Courts are required to provide a fair hearing; equal time is extended to both or all parties, the body hearing the proceeding is required to be unbiased, impartial and neutral; all conflicts of interest are required to be disclosed and if the conflict of interest would interfere with judicial neutrality or impartiality, then the judge must recuse her or himself. Irrelevant matters must not to be taken into account in decision-making. All relevant matters must be considered. Proper and adequate reasons are obliged to be produced by the judge, magistrate, court or tribunal. In the absence of these rules, their wrongful application or being ignored, court and tribunal decisions are subject to review. Where held to have been breached or applied so as to interfere with the outcome by denying a party or parties a just result, the decision will be overturned or quashed. Even where substantive fairness may result, if there is procedural unfairness, this can be the subject of review.

Courts and tribunals can err. Dreyfus and Chamberlain show this indubitably. But, ultimately, the legal system overturned the wrongly made decisions. Dreyfus and Chamberlain were acquitted and justice was restored. That the convictions ought not to have happened in the first instance is uncontroversial. But that there was a mechanism within the legal system for affecting the right outcome is what mattered, in the end.

In both cases, albeit both the legal system and the media system were wrong, in the end, they worked together to effect justice. This does not mean that the courts and media worked ‘hand in glove’. Nor does it mean that they were or are in any way obliged to do so. But it does mean that the interests of both — in a just result If they share that interest or aim — can dovetail, ultimately affecting a greater good.

For the media, however, the tragedy of inaction in both cases arises out of the failure to advance the one method which is not open to the courts or the justice system. Our system operates generally along adversarial lines. Unlike the civil law system, the common law system generally has no inquisitorial role — there is no power within the common law system to initiate investigation. This is a power within the scope of the media. Investigative journalism was the one method at the disposal of the media system which it did not employ either for the Dreyfus case or the Chamberlain affair. This lack left the entire system wanting. It is this method, used with due regard to truth — that could have made the difference, that could itself have taken the lid off the cover-ups and the wrongful use of ‘evidence’, the forgery and the fracas; of forensic science served up to the courts. The aim is, after all, to seek the truth, not to employ ‘investigative’ methods to build upon scandal or to generate it without regard to the purpose of journalism or the reasons for freedom of expression and freedom of the press.

The use of investigative journalism would have taken the media in a different direction — one more difficult and time consuming, but one more worthy than the serving up of the simplistic, the dressing up of rumour as reality. The media system may have conflicted, then, with the justice system — to illuminate the truth behind Captain Dreyfus’ wrongful conviction, and that underlying Alice Lynne Chamberlain’s false labeling as ‘child killer’.

Conflict can engender positive advances and outcomes. Conflict between governments and media, and criticism of courts and judicial decisions, along with criticism of the media itself, can advance the democratic ideal. The Constitutional requirement for fairness and good faith in the dealings and operations of the institutions of the state, and the institutions that make up the polity may be advanced through critique, and institutions
are the worse if not subjected to it. None of these institutions should, however, be immune. Nor should they see themselves as such. Governments that do not abide criticism run the risk of totalitarianism. Courts that abjure outside scrutiny run the risk of unjust decision-making. Media that set themselves up as immune from critique run the risk of impeding the very freedom of speech they profess to uphold. Self-righteousness harboured by any powerful institution is dangerous to the society those institutions govern and lead. The inability of any such institution to accept that it is never, ever, always right is not only prudish and a failure of insight, but damaging to freedom and the democratic ideal.

The Great Commotions of History

'Fortune favours the brave.' — Terence

Once, Emile Zola was asked his purpose for living:

'If you ask me what I came to do in this world, I, an artist, I will answer you: I am here to live out loud.' — Émile Zola

He did not mean by this that he sought notoriety or media coverage, that his deeds should be recorded in the pages of either the popular or intellectual press. He sought not to be famous, or infamous. He sought to speak the truth, to work towards the ideal of living life in truth and with a clear regard for justice. He wanted institutions including the media, the courts and government to do their job — to do it properly, to do it well, to do it in accordance with the principles that should be espoused both in and through the media, and in and through the courts. He wanted governments to operate by reference to principle.

In his famous J'Accuse ...! Zola accused all levels of the system which had condemned an innocent man to prison, convicting him of a crime he had never committed. Amongst them were the members of the courts martial, members of the military hierarchy who had committed crimes themselves, or had covered them up, to sustain the falsehoods against Captain Dreyfus. He accused those in government, at the War Office, who had engaged in calumny or sustained it. He accused the 'expert' witnesses — handwriting 'experts' who:

Submit[ed] reports that were deceitful and fraudulent, unless a medical examination finds [these men] to be suffering from a condition that impairs their eyesight and judgement.20

Alongside the War Office, the press was in there, too:

I accuse the War Office of using the press, particularly Éclair and L'Echo de Paris, to conduct an abominable campaign to mislead the general public and cover up their own wrongdoing.21

Finally, he said:

I accuse the first court-martial of violating the law by convicting the accused on the basis of a document that was kept secret, and I accuse the second court-martial of covering up this illegality on orders, thus committing the judicial crime of knowingly acquitting a guilty man ...

As for the people I am accusing, I do not know them, I have never seen them, and I hear them neither ill nor hatred. To me they are mere entities, agents of harm to society. The action I am taking is no more than a radical measure to hasten the explosion of truth and justice.

I have but one passion: to enlighten those who have been kept in the dark, in the name of humanity which has suffered so much and is entitled to happiness ... Let them dare, then, to bring me before a court of law and let the enquiry take place in broad daylight! I am waiting ... 22

For Emile Zola, it was not personal. His was not a concern about personalities. It was not about 'like' or 'dislike', but about being professional. In demanding it of himself, he sought professionalism from others. He did not care that this brought him into disrepute with those who held to another view. He did not care that those governed by the 'like' and 'dislike' method, putting personalities before professionalism, deceit before honesty, operating in a cabal and calling it teamwork, would label him 'not a team player'. This, to him, was not even beneath contempt. He was uninterested.

Nor did Zola care that his reputation might be sullied — or sought to be sullied — by those going along to get along with existing powers or 'the power elite'. He did not seek to attach himself to any group, as do the insecure or ambitious, whether for security; a sense of identity or self-advancement. He had no need for the security that comes through 'group-think' and group-identification. He had no need to seek an identity through that of others; well he knew who he was. With no selfish ambition, self-advancement not his aim, he had no thought for those deriding him for standing independent.
For him, if something were true, it had the power to stand on its own. If something were right, it had no need for a cabal to sustain it. Truth and right have their own momentum. Ultimately, truth sustains right, just as right sustains truth.

He knew that loyalty is not true loyalty, which alters allegiance when power-dynamics shift, as they inevitably do. He lived by the principle that true loyalty is expressed through fairness and direct, honest dealing. He sought to do what he considered right, by principles of justice and truth. This is the greatest loyalty of all.

Those who fail to see it, or who spurn it, harm themselves. No one need do harm to them.

**Media, Law, Government — The Truth will Conquer**

Truth is on the march. Nothing can stop it now. — Emile Zola

The legal system can operate according to principle. This gives meaning to the rule of law. To all lawyers who care about fairness, justice, doing what is right, the rule of law is there to guide us. Similarly for all judges who care about fairness, justice, doing what is right, the rule of law is there as our guide.

This touchstone provides a clear pathway for those of us who are in the law. It is for the media to determine upon a guide that will take it through times of turmoil and difficulty, which demand even more principles that can be held up to the light for journalists, editors and publishers to follow.

Every person has the right to freedom of speech and expression, to seek, receive and impart information and ideas, and freedom of the press and other media: s. 30 Constitution.

The power of speech, and the power to speak, is embodied in this Constitutional provision. Implicitly, in relying upon this right, responsibility goes with it. Information is as nothing — or worse, if it is false. Ideas are debased if those writing about them do so without regard to accuracy or truth, fairness or justice.

This freedom is a trust. That trust was debased in the Dreyfus case and the Chamberlain affair. It is up to every thinking human being to commit to the pursuit of truth and justice, so that the chances of other Dreyfus and Chamberlain episodes, whether large or small, are lessened or, better yet, cease.

'How terrible it is to see [truth and justice] trampled, unrecognised and ignored!' said Emile Zola. Yet as he knew:

... when truth is buried underground, it builds up and acquires an explosive force that is destined to blast everything away with it ...  

The superficial story, the surface 'truth' — which is never the truth — should not be allowed to prevail. Courts, government and the media are jointly responsible if the truth is left underground to suppurate in sludge. Truth should not be buried.

Truth has its own force. Governments, courts and the media can seek to stifle truth, just as they can seek to advance them. None stands outside the possibility of manipulating truth, providing misinformation, or seeking to fool the people.

As always with institutions, power groupings change, power dynamics shift, leaders lead well or badly. But the notion that any of these institutions has no need for scrutiny or being scrutinised is false. The unwisdom of any who assert their institution is above reproach is just that — unwise. The capacity for self-scrutiny is the first step to wisdom.

None of the institutions involved in the Dreyfus and Chamberlain debacles is above reproach. Governments, courts and the media stand equally accused.

'Dare to tell the truth,' said Emile Zola. 'My duty is to speak out; I do not wish to be complicit.' The truth was not told for Alfred Dreyfus, nor for Alice Lynne Chamberlain, by the government, the courts or the media. Not, that is, until the rumble of a public wanting the truth bubbled up from under the superficial noise of rumour, innuendo and lies so blatant that for too long it was seen as the public voice. When the words from below reached a crescendo, they sent two writers to their desks to reconstitute the story for Dreyfus and Chamberlain which would tell the truth.

Then, like a trail of dominos or a pack of cards the institutions reversed their positions.

Media, governments and courts reinstated truth.

Robert Louis Stevenson said: 'The cruelest lies are often told in silence.' John Wycliffe countered: 'In the end, the truth will conquer.'

More recently, upon the conferring upon him of the Nobel Prize for Literature in December 2005, in Stockholm, Sweden, Harold Pinter said:

... the search for the truth can never stop.
It cannot be adjourned, it cannot be postponed. It has to be faced, right there, on the spot.
Whether spoken in silence or in words, through government, courts or the media, untruths shatter trust. The media, no less than courts or government, has a responsibility in this. The media cannot stand outside, demanding standards it does not apply to itself.

Truth requires a bold voice. This is the demand the people have of government and the courts. It is right and proper that they do so. They have a right to demand it of the media too.

The media, equally with the courts and government, has a responsibility to meet that demand by demanding it of itself.

Every person has the right to freedom of speech and expression, to seek, receive and impart information and ideas, and freedom of the press and other media:

s. 30 Constitution of the Republic of the Fiji Islands

The responsibility embodied therein is a trust held by us all.

JAS © November 2008

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Film
Evil Angels/A Cry in the Dark, 1988

Footnotes


2 The third inquest was held in 1995 (some years after the retrial and acquittal of Alice Lynne Chamberlain and Michael Chamberlain) presided over by Coroner John Lowndes and delivering an open finding; Analysis & Findings of the Third Coroner's Inquest (Finding of Coroner John Lowndes following the third coroner's inquest into the death of Azaria Chamberlain) December 13, 1995, http://www.law.umkc.edu/faculty/projects/trials/chamberlain/lowndesreport.html (accessed 23 November 2008).

3 Later a juror was reported as saying that this 'expert' presented her evidence simply, in a way that was readily understood, so that it was persuasive rather than that of other experts whose evidence was more complex and presented with complexity. See National Museum of Australia, Canberra, Eternity series: Lindy Chamberlain-Creighton — A conversation with Lindy Chamberlain-Creighton and Sophie Jensen, Senior Curator, National Museum of Australia — Recorded at the National Museum of Australia, 14 October 2007, http://www.nma.gov.au/audio/transcripts/NMA_Chamberlain_20071014.html (accessed 20 November 2008), p. 11.


5 Denis Barrett received 'no more promotions' and was sent to Coventry by his peers — they 'refused to speak' with him. In his findings, he was extremely critical of the reports and evidence of the forensics division of the NT Police. Through this it is said he hoped to ensure the appointment of a qualified forensic scientist to the Northern Territory, rather than continuing their reliance upon unqualified people — not only were there no forensic scientists in the NT police to analyse the Chamberlain material, but not even scientists. See National Museum of Australia, Canberra, Eternity series: Lindy Chamberlain-Creighton — A conversation with Lindy Chamberlain-Creighton and Sophie Jensen, Senior Curator, National Museum of Australia — Recorded at the National Museum of Australia, 14 October 2007, http://www.nma.gov.au/audio/transcripts/NMA_Chamberlain_20071014.html (accessed 20 November 2008), p. 10; http://www.lawsch.uga.edu/academics/profiles/dwilkes_morelhis6_dreyfus.html (accessed 21 November 2008), p. 11; http://www.nma.gov.au/audio/transcripts/NMA_Chamberlain_20071014.html (accessed 20 November 2008).


8 Emile Zola, J'accuse ... ! http://chameleon-translations.com/sample-Zola.html, pp. 1–13 (accessed 21 November 2008); published originally on 13 January 1898 in L'Aurore as an 'open letter' to Felix Faure, President of France. Four thousand words in length, it filled the entire front page of the newspaper, headed 'J'Accuse ... ! Lettre au President de la Republique, par Emile Zola ...


11 For example John D. Ehrlichman, HR Haldeman, John Dean, Howard E. Hughes, Chuck Colson.


14 When eventually charged with forgery, on 31 August 1898 Major Henry committed suicide in his prison cell. He used his razor to end his life.


19 Although in the United States, the 'right to be heard' can extend to persons vilified in the media, and the law of defamation, as well as vilification laws, can sometimes extend this principle.

20 Emile Zola, J’Accuse ...! http://chameleon-translations.com/sample-Zola.html, pp. 1–13 (accessed 21 November 2008), p. 10; published originally on 13 January 1898 in L’Aurore as an 'open letter' to Felix Faure, President of France. Four thousand words in length, it filled the entire front page of the newspaper, headed ‘J’Accuse ...! Lettre au President de la Republique, par Emile Zola ....

21 Emile Zola, J’Accuse ...!, p. 11.

22 Emile Zola, J’Accuse ...!, p. 11.

23 AV Dicey, often regarded as a doyen of the British legal system, identified three 'basics' constituting the rule of law. In his 1885 Introduction to the Study of the Law of the Constitution, published in London, UK, Dicey said these were: (a) First, no one could be punished or lawfully interfered with by the authorities except when in breach of, and for, those breaches, of law; all government actions must be authorised by law; (b) Secondly, no one above the law and rank notwithstanding, everyone is subject to the ordinary law of the land; and (c) Thirdly, no 'Bill of Rights' is necessary for the general principles of the constitution are built up by and derived from judicial decisions that determine the rights of private persons. Today, generally his third principle has gone by the board — all common law countries apart from Australia have some form of 'Bill of Rights' whether entrenched constitutionally (as in the United States and Fiji) or by way of statute (as for example the United Kingdom, Canada and Aotearoa/New Zealand). Still, the 'rule of law' is generally recognised as constituted by the first and second principles, and from the third, that the rights of private persons generally and vis-a-vis the state and other powerful institutions must be articulated in a way that makes the comprehensible and comprehensive, so as to give the private person rights as against the powerful and exploitation by the powerful — whether individuals or institutions, and not only the organs of the state.


25 Delivered by video-link.