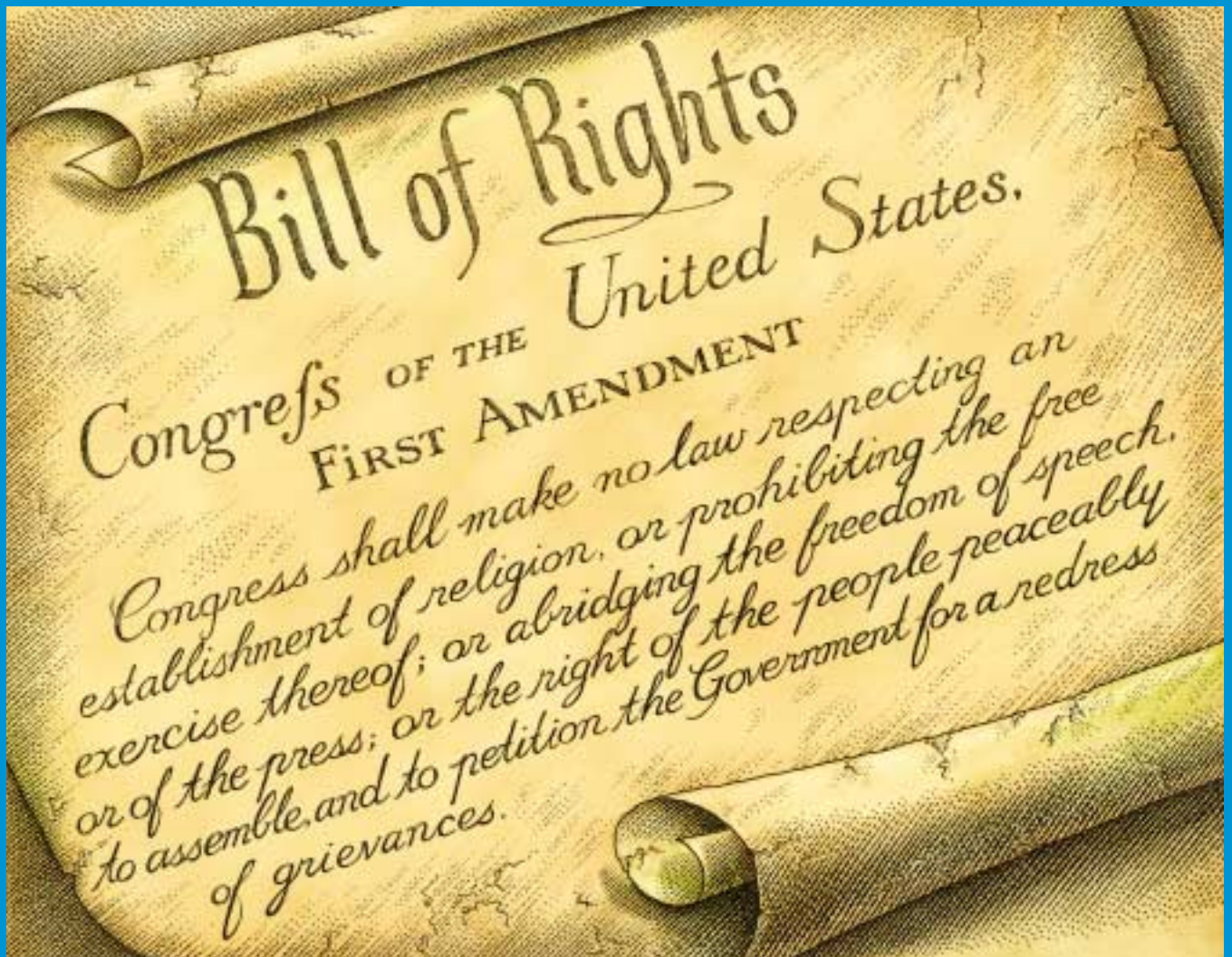


# Privacy Rights and Wrongs

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# California Litigation

THE JOURNAL OF THE LITIGATION SECTION, STATE BAR OF CALIFORNIA





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- Inside**    **Editorial Opinion: Legal London and the Courts of England**  
*By Richard L. Seabolt*
- 2**    **Book Reviews**  
*By Robert Aitken*
- 3**    **Editor's Foreword: Privacy Rights and Wrongs**  
*By Joan Wolff*
- 4**    **Identity Theft:  
How to Protect Yourself and Your Clients!**  
*By Mari J. Frank*
- 13**    **The "Surveillance Society":  
Can Privacy Torts Keep Up with Technology?**  
*By Sharon Arkin*
- 18**    **Data Privacy in a Digital Age**  
*By Kathleen M. Sullivan*
- 23**    **Biometrics and Privacy**  
*By Rocky C. Tsai*
- 29**    **Privacy and the First Amendment**  
*By Neville L. Johnson*
- 35**    **Videotaped Depositions of Celebrities:  
Crafting a Protective Order to Protect Privacy Rights**  
*By Allen B. Grodsky*
- 39**    **The Future of the California Courts**  
*By J. Clark Kelso*
- 43**    **Judicial Opinion:  
Protecting the Privacy of Non-parties in Court**  
*By The Hon. Eileen C. Moore*

# Editorial Opinion

## *Legal London and the Courts of England*

*"Even the fish cannot know the water in which it is swimming."* Buddhist saying.

By **Richard L. Seabolt**



**Richard L. Seabolt**

**A**s California litigators, we familiarize ourselves with both procedural and substantive legal developments, but we rarely have the opportunity to examine and question some of the most fundamental aspects of our judicial system. In July, however, sixty California litigators had that opportunity through the Section's "Legal London" program. We attended

English court proceedings and met with English judges, barristers and solicitors at various London court-houses (including the Royal Courts of Justice and the Old Bailey), at three Inns of Court (Inner Temple, Middle Temple and Gray's Inn), in barristers' chambers and at The Law Society of England and Wales.

Before participating in our Legal London program, I imagined a visit to the courts of England to be the functional equivalent of finding and studying the Holy Grail of the common law — an opportunity to observe expert advocates in the courts where it all began. To the extent that I expected the British judicial system to be more advanced or superior I was wrong. The English judicial system is older than our system, but it is not necessarily better — just different. Our British counterparts have developed procedures that are better in some respects, but not in others. The differences provide contrasts that help us better understand and appreciate our own system, and also provide opportunities to consider improvements to our own system.

It is not possible to catalogue all of the differences that I observed in

the confines of our space limitations, but here are the differences that I found to be most notable or interesting.

**Civility** — To a person, everyone in our group was struck by the civility and professionalism opposing barristers accord each other. While judges and lawyers here decry inappropriately contentious conduct, English barristers conduct themselves with utmost decorum. Barristers consistently refer to their adversaries as "my learned friend." The civility is not just superficial; we observed far more agreements and stipulations than objections — and, far more compliments than criticisms or attacks. While British culture and the relatively small number of barristers may contribute to the civility that we observed in the English courts, British barristers demonstrate that civility need not

*(Continued on Page 47)*

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**California Litigation** Vol. 19 • No 2 • 2006

## Editorial Opinion

(Continued from Inside Front Cover)

diminish the strength of one's advocacy. In fact, the barristers' politeness seemed to lend credibility to the logic of the argument. This reinforced the view of many in our group that the all-too-frequent personal attacks in our courts tend to devalue, undermine and distract judges and the other listeners from the important substance of an argument.

**Right to a Jury Trial** — Although the jury trial was a remarkable innovation of the English legal system embodied in the Magna Carta of 1215, today jury trials are available in England only for criminal cases and very narrow categories of civil cases, primarily defamation. English juries are expected to reach a unanimous verdict, but English judges have discretion to allow a 10-2 verdict. Interestingly, English prosecutors have had difficulty recently in obtaining convictions in corporate fraud cases, and some in England now support further retrenchment and the elimination of the jury trial even in those types of criminal cases. Because England lacks the equivalent of our Constitution, Parliament has the ability to make what to us would be a dramatic constitutional change. Notably, one English judge, who had spent most of his career handling civil cases and now was presiding over a department that specialized in complex criminal cases, commented that his recent judicial experience with juries had caused him to become a firm believer in the jury trial system and the soundness and fairness of jury verdicts.

**Jury Selection** — Remarkably, the British judicial system allows no voir dire or peremptory challenges. Jurors serve unless they know the parties or a witness or there is unusual financial hardship. The sys-

tem is undoubtedly quicker than our process. Many of us, however, worried that the complete elimination of voir dire created unnecessary risk that a particularly biased juror would deliberate and determine the fate of a trial.

**Opening Statements** — While our criminal defense lawyers have the right to provide an opening statement at the beginning of the trial immediately after the prosecution's opening or to reserve their opening statement until after the prosecution has rested, British procedure eliminates any tactical decision — the defense simply has no right to provide an opening statement at the beginning of the trial. For those who believe that an opening statement is one of the most critical parts of a trial as suggested by the Chicago Jury Project, the elimination of a defense opening appears to create a playing field that may not be completely level.

**The People vs. The Crown** — During the adoption of the new California "plain English" CALCRIM jury instructions, there was debate over whether prosecutors should be allowed to continue to describe their side as the "People," as opposed to the "State." English prosecutors enjoy no populist advantages — they represent the "Crown."

**Beyond a Reasonable Doubt** — Both English and American criminal legal principles impose on prosecutors the heavy burden of proof "beyond a reasonable doubt." Rather than providing a lengthy definition that includes relatively complex concepts such as an "abiding conviction," the English have advanced "plain English" by distilling the concept to a single word "sure," with the jury being asked simply whether the jury is "sure" that the defendant

committed the crime charged.

**Questioning Techniques** — To my surprise, I felt that the questioning techniques that we observed in English courts were somewhat less precise than what typically occurs in our courts. Leading questions during direct examination seemed to be very common and rarely drew an objection. That might be the result of the use of witness statements discussed below. Hearsay seemed to be more freely allowed — perhaps, in part, because there appeared to be a widely used "interests of justice" exception.

**Right Against Self-Incrimination** — England, like the United States, continues to provide suspects in custody the right to refuse to answer police questions. We provide "Miranda warnings;" the British police provide "cautions." But the superficial similarities mask the fundamental differences. Our Miranda warnings advise suspects of their rights and discourage answers to police questions. English "cautions" perform the opposite function. In England, a suspect is told that he or she need not speak, but the suspect is also cautioned that if the suspect fails to mention something on which the suspect later relies, that failure will be highlighted to the jury at trial.

**Witness Statements** — In English civil cases, documents are exchanged in advance of trial, but there are no depositions — instead, there are witness statements, in which witnesses set out in writing under oath their version of the relevant facts. A British barrister offered that depositions must be a waste of time, reasoning that if a witness would lie in a witness statement, the witness undoubtedly would also lie in a deposition. Nearly all of our group were skeptical that the witness state-



## Editorial Opinion

(Continued from Page 47)

ments, without depositions, afforded sufficient opportunity to test the truthfulness of witnesses in advance of trial or sufficient opportunity to discover whether documents had been improperly withheld.

**Part-Time Judges** — Many English barristers in their mid-40s sit as judges for approximately six weeks per year. That practice is viewed as a public service that simultaneously credentializes the barrister and prepares him or her for possible judicial appointment later in life. This part-time service undoubtedly strengthens the judiciary by providing greater opportunity for the bench and bar to provide meaningful input for the appointment process, which in turn provides an alternative to our awkward state judicial election process in which the power to select is vested in those who collectively are likely to know least. Like our country, compensation for judges falls far below what should be paid given the importance of the job and far below the compensation of successful private practitioners.

**Summing Up** — After the barristers have made their respective

closing arguments, British judges, like our judges, summarize the law for the jury. But England surprisingly has no standard jury instructions. Instead, the judge tells the jury what legal principles apply. Although it was easy to listen to the judge's conversational "summing up," my bias favors our practice of providing the jury with standard written jury instructions. But that minor difference pales in comparison to the more remarkable aspect of "summing up." British judges do not limit their comments to the law, but rather provide detailed summaries of the evidence, including the judges' views of the inferences that can be drawn from the evidence. These summaries are not limited to short comments. A "summing up" sometimes spans two or three days, raising the prospect that the evidence and barrister's closings will be a relatively dim memory by the time jury deliberations begin. Although our group expressed great concern about this aspect of a British trial, the example of "summing up" that we observed was exceptionally balanced and thoughtful.

**Overall Impressions** — At first it seemed curious that, while the British version of the Statue of Lady Justice atop Old Bailey has the common, delicately balanced scales of justice, she is not blindfolded. On reflection, that difference might be symbolic of a slight, but fundamental difference in the core values of our respective systems. Our system places tremendous emphasis on "due process" and on assuring a process that is "fair" — hence the blindfold. In contrast, the British system seems to me to place somewhat more emphasis on seeking "truth" — hence the fully sighted statue of justice. Whether such speculation is right or wrong, it is refreshing to have the opportunity to step back from the daily battle to reflect on the relative importance of values like "truth" and "fairness" in our judicial system.

Many thanks to Don Barber, the Chair of our Legal London committee, as well as to all of the hard-working and dedicated committee members and staff, and all of our wonderful British colleagues and hosts who made this year's Legal London program such a tremendous success.



## Book Reviews

(Continued from Page 2)

In Book Two, "Son, father," the novel flashes forward 40 years to David, a Stanford law school graduate, law firm partner and dysfunctional human being. He is preparing

for a high-profile trial when he talks to his father again. David believes the trial's success calls for ethical compromises to protect his client from huge punitive damages. His father

also presents a problem, pleading with him, eliciting a promise. In this page turner, Baird has honed his legal and writing skills to craft a novel not of escape, but of confrontation.