Summing Down the Summing-Up

It is customary at the start for lecturers, after a few words of modest demure at the overblown introduction, to seek to attract their audience’s attention...to permit a glance at the end in view, possibly even a tour d’horizon to comfort the listeners and enable them to tick off the milestones as they are led to the summit, confident that the possibility of an early drink or even dinner will not be altogether postponed.

I am sorry to disappoint. I shall speak to you at length; I cannot even say how long I will be. There will be few intervals; about once every 1½ hours if you are lucky, or 2 hours. I cannot say how long this will last, certainly more than a day, so please do not believe you can make any sensible arrangements for the rest of the week. You will not be able to take a proper note; even if you had pen and paper, your neighbour will be pressing hard upon your writing arm. You cannot interrupt or ask questions while I am speaking. To those of you who are not lawyers, or practise only in the commercial court, if that is not tautology, I shall be speaking in a language entirely foreign to you. There will be few visual aids; I shall expect throughout to capture your attention with the power of my voice, speaking faster during those parts of the process which I do not really understand and more slowly when it is really important.

Before I finish my lecture it would be as well if you did not discuss it amongst yourselves because you will not, until I finish, have learnt all I wish to teach nor had the opportunity to appreciate my objective. Please, if I haven’t finished today do not discuss it with anyone else when you get home tonight. When I have finished I
shall set you an exam. It is not the sort of exam with which you
will be familiar. You must all agree the answer. You will receive the
same mark and you will never know if you have reached the right
answer.

As the years go by, discussions about juries come and go. They are
usually conducted on a high plain of principle, expressing the views
of the speaker on the desirability or otherwise of maintaining the
jury system...from Lord Devlin’s Hamlyn Lectures in November
1956, published as *Trial by Jury*, (for) to Sir Louis Blom Cooper,
*Judge and Jury or Judge Alone*, to the British Academy of Forensic
Sciences in 2003 (against) to these recent months - Lord Justice
Hooper in favour (twice) and Lord Brown in his Oxford High sheriff
lecture (on the fence). We hear the ringing tones of oft repeated
quotation: if you are in favour you recite Lord Devlin“so that trial by
jury is more than an instrument of justice and more than the wheel
of the constitution: it is the lamp that shows that freedom lives” or
Blackstone: the “glory of the English law”. If you are against you
cite Professor Glanville Williams Hamlyn lectures in 1963 *The Proof
of Guilt* and his exposure of the superstitious reverence attached to
trial by jury, or you repeat the sour tones of GK Chesterton: “our
civilisation has decided and very justly decided that determining the
guilt or innocence of men is a task too important to be trusted to
trained men”.

It is not surprising that the arguments look to what might be
described as familiar sources or, less genially, to cliché. There is
little to add to the debate as to the desirability of juries. Indeed it
is pointless to do so since no government in the foreseeable future
is going to abolish trial by jury. The modern Government does not
need to do so; it can finesse the problem and do away with trial
altogether. It can control its citizens without prosecution or decline
to prosecute at all lest it interfere with commercial relationships or, as it is called nowadays, the communication of intelligence.

I’m afraid I am going to climb down from the sunny uplands of high principle and consider how judges deal with juries. The institution of the jury may be of less importance than the mode in which it is administered (G-W p.3). Given that juries are not going to be abolished, can we really not do them the service and pay them the respect of dealing with them in a better manner than we have achieved so far?

We should start by identifying the problem. It is the problem of how we help a jury reach a conclusion of guilt or innocence. We seem to have hit upon a system designed to ensure, in any but the simplest of cases, that the path we require them to follow should be as obscure, as tortuous and as arduous as could possibly be devised. The problem lies in the function of the judge and his role as guide, when he embarks on a summing-up.

As guides the judges are, after all, performing a curiously ambivalent and not altogether comfortable function. Their judging function is easy enough to identify during the course of a criminal trial: they make decisions about the relevant law, they decide what evidence the jury should be allowed to hear, they decide whether they are to hear any evidence and they decide whether the evidence is such that a reasonable jury properly directed could convict. But when it comes to their function as guides, when they are no longer permitted to judge but are confined to leading others to judgment, their ability to perform is less assured.

We observe the ambivalence of the judge’s function most clearly at the end of the trial. What, in their role as guides, do the judges think they are doing? The answer, you may say, is easy. The task of the trial judge in the summing-up is to present the law and a
summary of the evidence in such a way as best to enable the jury to reach a just conclusion. Too easy. In March 2010, a remarkable event took place in the world of legal publication. It was the revised Crown Court Bench Book by the Director of Training, Criminal Group, Pitchford LJ. It is remarkable because in 395 pages he sets out most of the legal issues which a judge is likely to have to confront in a criminal trial, identifies the relevant and correct legal propositions and the authority for those propositions and in plain language suggests how the jury might be directed as to those propositions of law. He reminds the reader, at the outset, that the trial judge is in the perfect position to form a judgment how best to craft the summing-up.

And so with the endorsement of the Lord Chief Justice, praising the admirable rigour, clarity and depth of Sherpa Pitchford’s work, the modern judges, as they are described by the LCJ, are sent on their way to follow the cartographer, mindful that the objective has been to move away from the perceived rigidity of the previous directions towards a fresh responsibility of the individual judge in an individual case to craft directions appropriate to that case.

But the problem lies not in the skill and clarity with which Pitchford LJ has drawn the map but rather in the journey which he was asked to make. The traditional summing-up starts with directions of law and moves to what is described as a summary of the evidence. The Bench Book is designed to guide the modern judge in the first of those tasks. And that is just the start of the journey…and at that point, at the very start, there appears a cloud, perhaps, in a simple case no bigger than a man’s hand but in any other than a simple case transforming into the thick grey featureless layers of nimbostratus, thick grey blankets, deadening the senses and producing rain…How could it be otherwise? All those legal directions showered upon their heads…I could not begin to provide a list, apt
even for a trial of medium length, with more than one defendant and more than one count…the burden and standard of proof, the separate consideration of different counts and different defendants, the difference between direct evidence and circumstantial evidence, conspiracy or participation or both, causation, why a witness’s evidence is on video, why she is behind a screen, why she is not there why the statement is read, good character, bad character, similar facts, lies, hearsay, failure to answer questions, self-defence.

It should not be forgotten that however clear the new directions are to a lawyer, they are in a foreign tongue to a member of the jury. The concepts are alien, far removed from the problems they have to confront in every day life…people in their daily drift are not called on to distinguish direct from circumstantial evidence. Everyday routine, in everyday life, does not require people to distinguish between inference and suspicion and few if any in their everyday lives ask themselves whether they are driven to a conclusion.

And just consider the circumstances in which the jurors are asked to consider and apply these directions. They have sat for days, possibly weeks, possibly months, with total passivity, listening to evidence. Some will have made some notes, in so far as the proximity of the neighbour permits, and it is not encouraged…they have been sent out of court without explanation, brought back in, sent out again. And then, and only then, right at the end they must sit with equal attentiveness but equal passivity to a lecture, a lecture delivered orally as to what they must do and what they must not...full of warnings and cautions and signposts which point in opposite directions: a lecture in a foreign language about foreign subjects which may last without break for an hour or more, and continue for a day or even days.
It is true that many judges now reduce their directions in law to writing and hand them to the jury. But the Court of Appeal persists in ruling that whether or not the jury are to be handed their written directions is a matter for the individual decision of the judge. The oral tradition proves hard to shift but we must surely have grown out of the belief that any good can be achieved by the ritual incantation of obscure utterance, expecting the jury to sit there saying nothing but absorbing all they are told like a sponge.

And when they go out and wrack their brains trying to remember what they have been told, and come back to ask to be reminded, the judge re-reads his instruction, sometimes more carefully, possibly more slowly, or even in a louder voice. Sometimes he is merely hurt, and responds in a tone of injured affront, rather as the Prime Minister of Italy might if you ask him the rules of Bunga-Bunga.

Not content with the lecture about the law, the judge then launches into a summary of the facts. Why? As a matter of history, and no lecture about juries is complete without what Michelin calls *un peu d’histoire*; the purpose was not to remind the jury of the evidence but, after 1836, once defence counsel were permitted to address the jury, to comment. It was to meet a perceived need to correct the distortions of counsel (Wildy Wright could “produce ingenious arguments swallowed by a jury like a mayflower by a trout”) or to make up for the failures of what used to be described as a lack of firmness in prosecution counsel.

In those days, when judges had a point to make, a summing-up had a point. Warned, as we are by Tony Judt in his history of postwar Europe that: “the heritage industry in England suggests an obsession with the way things weren’t - the cultivation of genuine nostalgia for a fake past” (p.775), we should resist the almost
irresistible temptation to recite the directions of long dead judicial ogres. I am unable to do so. After all, the age of the damning charge to the jury coincided with what Orwell described as the great period in murder...roughly between 1850 and 1925 when there were murderers whose reputation, he says, has stood the test of time...Dr Palmer, Jack the Ripper, Mrs Maybrick, Dr Crippen, Seddon, Joseph Smith, Armstrong, Bywaters and Thomson...six out of nine poisoning cases, eight said, by Orwell, to belong to the middle classes and sex often the powerful motive...what more could you want? And as the English murder declined so too has the vigour of the judicial attempt at persuasion. In 1915 Joseph Smith sat in the dock of no.1 court at the Old Bailey and waited for the summing-up as his counsel Marshall Hall sat down after failing to persuade the judge, Scrutton J, to exclude the evidence of the discovery in two other baths of the drowned bodies of two other brides of the accused, which were not the subject of any count on the indictment and would now be described, rather quaintly, as bad character evidence. There was nothing Marshall Hall could do to exclude the third drowning since the defendant’s neighbours were alerted to that death by the sounds of “Nearer my God to Thee” which the accused was heard to be playing on his harmonium. In his final speech, Marshall Hall had relied on the absence of any signs of violence on any of the bodies. In the Brides in the Bath case, Scrutton said, in response, to the jury: *Include in your consideration this possibility; wife to husband, ‘I am going to have a bath’, husband to wife ‘All right I will go and turn on the water for you’...Husband turns on the water, wife comes in in her night gown. The newly married husband stays in the room and strips her or she strips herself...I’ll put you in the bath, my dear’ picks her up...lowers her into the bath but holds the knees up.* As he said this the judge rose from the bench and in dumb show demonstrated to the jury how it was possible to lift the woman up and put her in the bath, forcing her
head down with one hand and holding her knees up with the other...it was so vivid, said junior counsel for the Crown, that the demonstration contributed largely to the conviction. Or who now recalls how on a misty December afternoon in 1907 the thousands gathered outside the newly built Old Bailey, out of Newgate street down to Ludgate Circus, waiting for the verdict in the Camden Town murder? (the victim, Emily Dimmock, was painted by Sickert on a ruffled bed, her naked back to the artist so that you cannot see that her throat was cut from ear to ear). As Wood, the accused, who the public believed was innocent, sat impassively in the dock, he was sketching the judge as he summed up (he was told to put his pencil away). The judge told the jury that just because there was no motive it did not mean that the accused was not guilty, that the defendant says he is innocent yet he keeps everything from the police and from his own brother... As the judge spoke so tellingly for a conviction, the crowd in the court muttered audibly that this was grossly unfair...and their dissatisfaction spread to the crowd outside. Suddenly and dramatically the judge changed tack... “Although it is my duty to further the ends of justice, so that criminals are brought to justice and properly convicted, however strongly circumstances may go against him, in my judgment strong as the suspicion is, I do not think the prosecution have brought the case home against him clearly enough...I think I have spoken plainly to you. You are not bound to act on my view...” At that cheering broke out in court and it spread to the crowd standing out in the street, rolling down to Ludgate circus...before even any verdict had been given...only Marshall Hall was displeased...”Bah, he said as he turned to his junior, the judge is trying to take the credit away from me”.

We do not have so big an audience these days for the summing-up and small wonder; there is so little of interest or use to hear. The
modern judge eschews anything which might light the tilt sign on the pin ball machine of a criminal trial. But therein lies the source of the problem. If the point of the judge’s summary of the facts is not to comment what then the point?

The repeated explanation that it is to remind the jury of those parts of the evidence salient to the issues they have to try ignores the evidence as to what the human mind is capable of recalling about matters of even deep personal concern...tests on patients in doctors’ surgeries reveal that most can only recall a quarter of what they are told.

Nor should we be reassured by the fact that there are 12 jurors with that dubious concept of a collective memory. Of course it may be assumed that different jurors will recall different aspects of the evidence but how accurate will be the recollection of the group? Dr Solomon Asch conducted experiments in perception in the 50s in which he asked participants to identify which of two lines were shorter, but only after they had heard one of their number deliberately identify the longer line as the shorter. The majority agreed with the incorrect answer. More than 100 times those results have been replicated in the years since Asch’s experiments...until a report this year, in the International Journal of Psychology, when groups of Japanese friends were asked to spot the difference between two objects while wearing polarising glasses, (those used for 3D films); this showed that the impact of group pressure on perception was less than previously thought. But we cannot have juries wearing 3D glasses and friends do not usually find they are picked to sit on the same jury.

Let us no longer pretend that judges can assist a jury’s recollection by a recitation of the facts. In a short case, AP Herbert’s Swallow J said it all: “gentleman of the jury, the facts of this distressing and
important case have already been put before you some four or five times, twice by prosecuting counsel, twice by counsel for the defence, and once at least by each of the various witnesses...but so low is my opinion of your understanding that I think it is necessary, in the simplest language, to tell you the facts again”. If it is a long trial the judge’s recitation of part of his note merely deflects the jury from their task. The jury returns to the jury-room wracking their brains, not as to the resolution of the issues they have to decide but as to what the judge told them...and they may be faced with that task days, weeks, months after they heard the relevant evidence, after counsel has harangued them and after the judge has stunned their senses with his lecture on the law.

There has been no shortage of advice nor any reluctance to give advice as to how to avoid the judicial ramble through the undergrowth of evidence. The judge, said Lord Devlin in 1956, should mark out the paths that can be taken through the facts, leaving to the jury the final choice of route and destination; he should provide the agenda. Lord Hailsham, in 1982, hoped for a correct but concise summary of the evidence and argument in Lawrence.

The solution is neither novel nor untried nor revolutionary. It was once in the United States. Stung by the belief that colonial judges had influenced the juries, the States forbade judges from mentioning the facts to the jury at all. There is no such prohibition in the Federal courts but no detailed examination of the evidence takes place in those courts either. They appreciated that once trenchant comment was prohibited there is no point in reciting the facts at all. Perhaps it is some colonial, de haut en bas attitude to the criminal law in the States which has prevented us from adopting the same solution.
But we need not look so far afield. In Scotland there is no requirement to summarise the evidence, and any attempt to do so is deprecated. A skilled judge is expected to charge the jury in 15-18 minutes, even in lengthy cases. As the Director of Judicial Studies, Sheriff Welsh QC, has told me, “The Scottish Perspective is that once you go into the evidence where will it end?… Scottish judges will usually leave the evidence alone”.

In England and Wales the problem has already been solved. Lord Justice Auld’s Review of the Criminal Courts was published in October 2001. In the ensuing debate as to the right to trial by jury, important and clear recommendations as to procedure were forgotten.

At the start of the trial the judge should explain the case and the issues to the jury, the nature of the charges…a brief narrative with the facts which are agreed and the facts which are likely to be required for decision…mindful of Professor Griew’s injunction in 1989 that the jury should be spared from the law, and ample research, Auld recommended that there should be a list of likely questions with little if any reference to the law. The judge should explain to the jury their function and the burden and standard of proof…he should provide them with a written case and issues summary prepared by the advocates and approved by him. He should remind them that the issues may narrow or widen, in which event the written summary may be changed. I propose this addition: defence counsel should be required to tell the jury what the defence is at the outset.

I do no more than echo the proposal of the LCJ back in 2008…there is some superstition and it is no more than superstition that to require the defence to explain its defence somehow infringes the right to silence. There now exists, after Auld reported, a statutory
obligation, imposed on the defence by the Criminal Justice Act 2003 to set out, in response to the prosecution case statement, the nature of the defence, and, amongst other things to set out matters of fact on which the defence takes issue, and to identify the witnesses it is intended to call. For an inexplicable reason, the statutory obligation to update the statement has not yet been brought into force. The statute limits the power of the judge to show the jury this statement to those cases where it would help the jury to understand the case or to resolve any issue in the case. (S.6E(5)(b)). It is not possible to envisage any properly drafted defence statement which would not be of assistance to the jury.

Auld moves to the end of the trial, without, apart from an opening by the defence, any interruption to the jury’s passive observation. I suggest that too should be corrected... Where the law requires the jury to treat a portion of the evidence in a certain way, with caution for example, or where the significance of the evidence may be unclear, the time to explain the proper approach to that evidence is the time when it has just been given, not weeks or months later. In a case of any length...more than a week...the judge should summarise in writing, with the help of the advocates, what has occurred thus far, a list of witnesses, a word or two as to what issue the evidence went to and any direction which has been given in relation to those witnesses. It may be necessary to identify the issues to which evidence in the week ahead goes. If there looms the prospect of a dispute between experts...surely before the evidence is called, the judge, with the aid of counsel, should explain the terms to be adopted, the areas of agreement and disagreement and the points to which the dispute goes. There are still cases where the nature of the dispute, or whether there is any dispute at all, remains without any illumination until long after the evidence
has been called. To summarise during the trial alters the tedious rhythm of passive observation. It avoids a lengthy lecture at the end. No guide, worthy of the name, disappears into the fog and leaves his duties till he has reached the summit when he then attempts to shine a wan lamp through the mist to the weary traveller far below.

Auld makes a number of recommendations for the end of the trial. Counsel and the judge already should discuss how he should direct the jury on the law...and if those directions are to be given in writing then they should be shown to counsel.

But that does not go nearly far enough...the factual issues should be debated in court by counsel, resolved by the judge and the issues in the form of questions written down before speeches to the jury. Auld recommends that the judge should devise and put to the jury a series of factual questions, the answers to which lead logically to a verdict of guilty or not guilty. The questions would correspond to the updated case and issues summary and tailored to the law, the issues and the evidence. He recommended that the jury should announce their answers in open court.

And I suspect it was that suggestion, the jury’s public response to the written questions, which contained the seeds of its own destruction. Auld foresaw the nature of the opposition. In principle, that it offended the folklore that political liberty depends upon the institution of the jury; it might inhibit the jury’s privilege of returning a perverse verdict. But there is no reason why the jury should not answer the question “are you sure that there was no lawful excuse for damaging the GM crops”?, with a rebellious NO.

We have the great advantage nine years after Auld of seeing how the process of drafting questions is possible. Since Middleton the
inquest is the instrument by which the state discharges its obligation to protect the right to life under Art 2 of the Convention. Coroners now are required to elicit, in any case in which a jury is empanelled, a jury’s conclusion on the central issues as to by what means and in what circumstances, a deceased met his death. The coroner does so by framing questions. Hooper LJ set out the detailed questions in two inquests arousing the public interest, in the Menezes shooting there were 13 questions. If that can be achieved in an inquest, I suggest so too it can be done in criminal cases. Hooper LJ demonstrated that himself, and modesty and not forgetfulness no doubt prevented him from recollecting his directions to a jury back in 1999, two years before the Auld report and 5 years before Middleton.

In the trial of Dr Moor for murder by administering an excessive quantity of morphine, Hooper LJ asked 4 questions, for example “are you sure that the injection given by Dr Moor contained significantly more than 60mgms of diamorphine?”. Each question was accompanied by a sentence or two of explanation. There is a temptation to ask, if Hooper LJ can do it then why not any other judge?

The jury will have heard warnings as to how to approach particular types of evidence, when the evidence is called, and can be reminded of those directions in a short note, annexed to the list of witnesses, each of whom will be linked to the issues and questions to which their evidence relates.

The reduction of the issues to questions has the advantage of reducing that moment in a trial which everyone dreads, the moment, sometimes after days of deliberation, when the jury appears to be stuck. We are not permitted to tell the jury to get a
move on; but there remains a particular species of judicial nudge: the *Watson* direction a splendid example of saying one thing, and meaning quite another: “*No one must be false to that oath but you have a duty not only as individuals but also collectively. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of others. There must necessarily be discussion, argument and give and take within the scope of your oath*”. Like the best of advocacy this does not lend itself to minute legal analysis, what is a collective duty, what is the point of telling a jury to give and take at a stage when what is needed is more give and less take. There is a similar direction sanctioned in the Supreme Court in the United States in *Allen v US*, in 1896—a dissenting juror is asked to *consider whether his doubt was a reasonable one when it made no impression upon the minds of so many men, equally honest, equally intelligent with himself*. But in the United States they have the great benefit of assessing changes and reforms in procedures by looking at different practices in different states; we should learn. In Arizona radical changes were made in 1993 which require a schedule of deliberations to be prepared for the jury by the judge, giving them the opportunity to ask questions about that schedule. If they are at an *impasse* they are instructed to identify the issues of fact or law in relation to which they need assistance.

Provided with a list of issues in the form of questions, a jury in England, as in Arizona, will have much less difficulty in identifying the issues and the evidence about which they need further assistance to break the *impasse*. The Auld proposals reduce the risk of deadlock and the expense and agony that causes.

None of this is new. There has been a dispiriting chronicle of neglect. Du Cann’s suggestion to furnish a written summary was made in 1960. Professor Griew invited judges to spare the jury from
the law in 1989. Following Auld in 2001, in 2003 Young J of the New Zealand High Court wrote of what jury research says about current rules and practice in summing-up to juries; in 2006 HHJ Madge wrote of the Judge’s Perspective when summing-up, and in the same year Wood J in Adelaide spoke and wrote to similar effect. The reforms are cheap, will save money and be cost effective. A criminal trial costs , about £4300, a day and £7,000 a day at the Old Bailey. Summings up regularly last a day in trials lasting more than two weeks: there were 389 of such trials in the year to April 2010. £4000 or even £7000 is an expensive ticket to listen to a replay of the drama delivered in monotone. The judges’ summing-up is a frequent source of appeals against conviction. Conviction appeals cost about £14,000 day.

If we understood why we are so resistant to change, we might find less inhibition in changing.

It is not the fault of the judges who daily are required to perform the ritual utterance without regard to the nature of the communication. It is the fault of the Court of Appeal. Of course, the Court of Appeal must decide what the law is and rule accordingly on the safety of the verdict. But in doing so they carry out an activity which is never open to the jury and which is miles away from the process which the jury has to follow. The Court of Appeal do not sit and listen to the summing-up; indeed, if they had to few would remain awake for longer than 30 minutes, even with the aid of a flacon of Portuguese smelling-salts. They read and trawl through the summing-up in a way no jury can ever do. They identify parts of the lecture they require to be given to the jury and identify omissions. And even if, after pouring over days of summing-up, they fail to find sufficient fault, they comment and say one expression would be preferable to another, additions should be made, amplifications would be preferable. Thus further authority
expands the mighty product of Pitchford’s all-embracing consumption.

And it is in the knowledge that that is to be the process of appeal, that trial judges are compelled to adopt a task which merely widens the scope for appeal after appeal in which the Court of Appeal exercises a process of Talmudic analysis. The trial judge is not fearful of criticism from the Court of Appeal or should not be. But trial judges are fearful of the expense and distress of an appeal, and the expense and distress of a re-trial, and it is that which leads them to this endless exercise in composing a defensive summing-up, a summing-up crafted to defend the trial from appeal.

Resolving the issues into a series of questions, drafted with the aid of counsel for both sides, will reduce radically the possibility of appeals based on criticism of the summing-up.

Another impediment to reform, I suggest, is the perceived need, whenever a sensible proposal is made, to consign the issue to research. Professor Cheryl Thomas conducted research for the Ministry of Justice and reported in March 2010 in *Are Juries fair?* She gave results of a simple case simulation, a film of an assault occasioning actual bodily harm in which the judge posed 2 questions...did the defendant believe it was necessary to defend himself and did he use reasonable force? Whilst the press criticised the result that out of 797 jurors only 31% accurately identified both questions, 48% one and 20% neither, many felt that was a remarkably high proportion. But even Professor Thomas, whose findings dispel so many myths, suggests further research. This is dispiriting. Kingston University *What can the English Legal System Learn From Jury Research Published up to 2001?* reported to Auld, on the basis of up to 5,000 items of research and recorded the reaction of juries to the summing-up. It concluded that the oral
conduct of trials, the jury’s summing-up and the reliance on collective memory in the jury room are all anachronistic relics of the days when trials were extremely short affairs. If you doubt whether there has been sufficient research, not just here but in the United States and New Zealand, you need only look at the lists, between pages 667 and 675 in Auld, a quarto volume, of published research in commonwealth countries. I suggest that the time has come to ditch Sir Humphrey’s defence; no more research.

There has been a further inhibition: the fear that a proposal to reduce the summing-up to a series of questions will lead to condemnation in the ECHR that the present system is unreasoned and contravenes the accused’s rights enshrined in Art 6 of the Convention. There is no justification for such a fear now. In Taxquet v Belgium, the Belgian process condemned in a seven-judge chamber and in the Grand Chamber last week was miles away from our system, since the questions were confined to ascertaining the jury’s conclusion as to the type of murder of which a particular defendant was guilty and the only direction was that the jury must be inwardly convinced. The Grand Chamber emphasised that precise questions to the jury were an indispensable requirement in order for the applicant to understand any guilty verdict reached against him. [98]

There is one other major impediment to reform in this and in many other areas of the law: a combination of the belief in humbug and a belief in fairy tales. The repetition of meaningless but well-established phrases to the jury is the ostinato of the traditional summing-up. The references to ‘you may think’ and ‘it is a matter for you’ were described by Sir John Dyson (Goodison) as no more than formulaic expressions which did not mend an unfair summing-up. Sir John recognised a judicial riff when he saw one and that riff justice is rough justice.
Must we repeat the unhelpful reminder that they have seen and heard the witness, that misleading suggestion that a jury can unerringly assess the truth of witnesses by seeing and hearing the manner in which they give their evidence? Dreyfus gave his evidence in an irritating pedantic monotone, quite alien to the public’s belief in how an innocent man should behave. In the criminal courts we avoid any reference to the first chapter in Lord Bingham’s Business of Judging...the judge as juror. Lord Bingham identifies features to favour one witness against another, probability, inconsistency, self-contradiction; he suggests that too much attention has been paid to the demeanour of the witness in guiding the judge to the truth, too little has been paid to probability (13). I do not believe he would have thought that demeanour was a better guide when the standard of proof is higher.

And what of the appeals to common-sense? The invocation to ‘Use your common-sense, members of the jury’. This is a phrase which Lord Hoffmann described (in Common Sense and Causing Loss) in 1996 as concealing or perhaps revealing a complete absence of any form of reasoning...simple appeals to common sense, he suggests, do not tell you how to find the answer. A judge’s references to common-sense often mean that they have not really thought through the real reasons for their decisions.

In his essay on humbug, which the professor of Philosophy Emeritus at Princeton, Harry G Frankfurt, called On Bullshit, the professor identifies a person guilty of humbug as one who attempts to deceive us about...his enterprise. His only indispensably distinctive characteristic is that in a certain way he misrepresents what he is
up to. Judges would never wish to be accused of misrepresenting what they are up to when they purport to direct a jury.

Perhaps, in the end, the reason why we have not adopted an obvious solution is that we are rather fond of fairy tales, that we resent it when Lord Reid tells us that there is no *Aladdin’s cave hidden in the common law which may be reached by knowledge of the magic words: ‘open sesame’ and that...we do not believe in fairy tales any more*. Lord Hoffman has dispelled the belief that taxing statutes *had a penumbral spirit which strikes down devices or stratagems designed to avoid its terms or exploit its loopholes*. He said that *there is no need for such spooky jurisprudence*. I suspect we rather like spooky jurisprudence in the criminal law. We are comforted by it; it waves the good fairy’s wand of authority over a jury’s verdict.

There is in all of us a little of the Tite Barnacle of the Circumlocution Office. This is what he said to Clennam as reported in Little Dorrit...we must have humbug. We all like humbug, we couldn’t get on without humbug. A little humbug and a groove and everything goes on admirably, if you leave it alone. But we must not leave it alone.