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*GUILTY OR NOT GUILTY?*

*HENRY FIELDING'S TOM JONES AND THE LAW*

LLB (Hons) Research Paper

Laws 524 – Lawyers as Writers

Faculty of Law

Victoria University of Wellington

**2007**



“[It] is a more useful capacity to be able to foretel the actions of men ... from their characters, than to judge their characters from their actions.”

– Henry Fielding *Tom Jones*, Book 3, chapter 1.

“[H]e had not divested himself of humanity by being an attorney. Indeed, nothing is more unjust than to carry our prejudices against a profession into private life, and to borrow our idea of a man from our opinion of his calling.”

– Henry Fielding *Tom Jones*, Book 12, chapter 10.





*W. Hogarth, del.*

*J. Basire, sculp.*

HENRY FIELDING.

*From an engraving of a pen and ink sketch, made by Hogarth,  
after Fielding's death.*



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## ***ABSTRACT***

Henry Fielding was a playwright and author before turning to a career in the law at age 30. By the time of *Tom Jones*'s publication in 1749, Fielding had been deeply involved in the law for 12 years. This paper focuses on the extent to which Fielding's legal training and his professional experience as a barrister and magistrate are reflected in his portrayal of the law in *Tom Jones*. The analysis focuses on Fielding's presentation of the story to the reader, and the way in which he invites the reader to judge events and characters as judges or jurors do in a legal case. The paper identifies the language Fielding uses to establish law as a central theme. Particular attention is paid to how the language reinforces the judicial character of the many "trials" within *Tom Jones*. The dominant themes of justice, mercy, and judgment are linked to the discussion of the main characters and their actions, and parallels with Fielding's actions as a magistrate and his extra-judicial writings are drawn. Fielding's use of the game laws as a metaphor for Squire Western's views on the relationship between Tom and Sophia informs the discussion of Western's character; and introduces the contrast between his character and that of Squire Allworthy. Fielding's use of circumstantial and character evidence is linked to contemporary laws of evidence, and contemporary views of lawyers and the law. The analysis of the character of lawyer Dowling reinforces the importance of considering all available evidence, in context. The discussion of the trifling incident of little Tommy establishes the link between the earlier parts of the paper, this incident, the structure of the novel, and the structure and presentation of a legal case. The paper concludes that there is a direct link between Fielding's parallel careers as a lawyer and writer, the content and structure of *Tom Jones* as a legal case, and the reader's active role as judge (or juror).

*Word Length:* The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises 18,450 words.

### *Key Words:*

Lawyers as writers

Henry Fielding 1707–1754

*Tom Jones*

Law – Great Britain – History – 18<sup>th</sup> century

Authors – English – 18<sup>th</sup> century



## I INTRODUCTION

Henry Fielding was a playwright and writer before the Licensing Act 1737 ended his theatrical career.<sup>1</sup> Many of Fielding's early works contain references to the law, but most were "opprobrious".<sup>2</sup> Admitted to the Middle Temple in November 1737,<sup>3</sup> Fielding was called to the Bar on 20 June 1740.<sup>4</sup> During his time as a barrister, Fielding continued writing to supplement his income. *Tom Jones*, the comic masterpiece which established Fielding as "father of the English Novel",<sup>5</sup> was not published until February 1749<sup>6</sup> by which time Fielding had left the Bar for the Bench.<sup>7</sup> This paper investigates the extent to which Fielding's portrayal of the law in *Tom Jones*, directly and by analogy, reflects his legal training and his professional experience as a barrister and magistrate.

The thesis this paper explores is threefold. First, *Tom Jones*' structure resembles that of a legal case. The narrator and neatly paired antithetical characters present the reader with conflicting "evidence" from which she or he is invited to arrive at a series of "judgments" before reaching a final conclusion. Second, Fielding assigns the reader an active role as judge (or juror). And no judge (or juror) can deliver a valid judgment or verdict without considering all the evidence, in context. Third, the paper argues that there is a direct link between the content and structure of *Tom Jones*, and Fielding's professional experience of the law.

Part II outlines Fielding's biography. It introduces aspects of Fielding's life which reflect the autobiographical elements in *Tom Jones*. Part III contains a brief summary of *Tom Jones* and contemporary critics' reaction. Part IV analyses how Fielding uses language to establish law as a central theme in *Tom Jones*. As well as identifying key legal analogies, this part considers Fielding's use of metaphor with particular reference to the hunting theme which dominates Squire Western's references to the relationship between Tom and Sophia. This part introduces the analysis of Squire Allworthy, continued in Part V, and contrasts the view of justice he represents with that Western offers. Part IV concludes with a section that establishes the active role of reader as judge (or juror).

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<sup>1</sup> Pat Rogers *Henry Fielding – A Biography* (Paul Elek, London, 1979) 93–95.

<sup>2</sup> *Ibid.*, 97.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, 100.

<sup>5</sup> Sir Walter Scott "Henry Fielding" in *Biographical Memoirs* (vol 1, Robert Cadell, Edinburgh, 1848) 115.

<sup>6</sup> Henry Fielding, R P C Mutter (ed) *Tom Jones* (Penguin Books, London 1985) xxviii [*Tom Jones*].

<sup>7</sup> Fielding's Commission for the Peace of Westminster was signed on 30 July 1748. See Martin C Battestin with Ruthe R Battestin *Henry Fielding – A Life* (Routledge, London, 1989), 440.

Part V focuses on Fielding's presentation of the evidence upon which the reader bases her or his judgment or verdict. It includes sections on circumstantial evidence, character evidence, manipulation of evidence, and concludes the analysis of Squire Allworthy with particular emphasis on his ability as a judge of character. Part VI is an in-depth analysis of the lawyer, Dowling. The analysis, which interweaves the discussion Dowling and his actions with details of the training, status, and public perception of lawyers in the eighteenth century, demonstrates the relevance of Fielding's practical and personal experience to the central legal themes in *Tom Jones*. In addition to revealing Fielding's distaste for "attorneys and petty-foggers", the discussion of Dowling's character illustrates how Fielding mirrors the way a court case evolves by withholding the full truth until the end of *Tom Jones*, while dropping hints that alert the astute reader.

Part VII utilises the "trifling Incident" of "little Tommy",<sup>8</sup> itself a metaphor for *Tom Jones* as a whole, to draw together the discussion and analysis contained in the earlier parts, with specific reference to the main protagonists, Master Blifil and Tom Jones. A review of the then available character evidence for and against Blifil and Tom is followed by an analysis of the disjunction between deed and doer. The way in which Fielding encourages the reader to focus on what motivates Tom and Blifil is identified. The next section reviews the discussion of the law that follows the "trifling Incident"<sup>9</sup> and links this to the hunting metaphor discussed in Part III. The final section establishes the connection between this incident, the structure of the novel, and the structure (and presentation) of a legal case. Part VIII sets out the overall conclusions.

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<sup>8</sup> *Tom Jones*, above n 6, 124–27.

<sup>9</sup> *Ibid*, 127–29.

## II *FIELDING – A BIOGRAPHY*

### A *Family History and Early Life*

Henry Fielding was born on 22 April 1707. His mother, Sarah, was the only daughter of Sir Henry Gould, who was a King’s Bench Justice from January 1699 until his death in March 1710.<sup>10</sup> His father Edmund, an army officer, came from a distinguished family,<sup>11</sup> but one marked by a “yeast of intemperance”<sup>12</sup> going back several generations.<sup>13</sup> Sarah married without consent and in Lady Gould’s words, “contrary to their good likeing”.<sup>14</sup> Sir Henry and Sarah reconciled, and in a will made 10 weeks before his death he left her £3000 on terms that caused considerable conflict between Edmund and the Goulds after Sarah’s death.<sup>15</sup>

Shortly before his death, Sir Henry purchased a farm at East Stour with the intention of settling it on Sarah, but the conveyance was not completed. Sarah’s £3000 legacy was insufficient to cover the purchase price, forcing Edmund to find £1750 to pay for his share of the farm.<sup>16</sup> While this added to his precarious financial position, Edmund did not let it cramp his extravagant lifestyle.<sup>17</sup>

After Sarah’s death in 1718, Lady Gould accused Edmund of misappropriating the income from Sarah’s estate, required to be held on trust for her children.<sup>18</sup> Edmund’s remarriage in 1719 saw Lady Gould commence Chancery proceedings on behalf of Fielding and his siblings seeking an account of profits from the estate and custody of the children.<sup>19</sup> The Lord Chancellor’s judgment of 28 May 1722 was a victory on all points for Lady Gould.<sup>20</sup>

<sup>10</sup> Sir John Sainty *The Judges of England 1272–1990* (Selden Society, London, 1993) 35.

<sup>11</sup> His great-grandfather, Sir William Fielding, became Earl of Denbigh, and one of his sons became Earl of Desmond. See G M Godden *Henry Fielding – A Memoir* (Sampson Low, Marston & Co Ltd, London, 1910) 5.

<sup>12</sup> For example, Samuel Pepys (*Diaries*, 1667) records that two of Edmund’s uncles became involved in a drunken street brawl after falling out. One brother was killed and the other was sent to Newgate prison. See Godden, above n 11, 4.

<sup>13</sup> Rogers, above n 1, 13. The intemperance had skipped Edmund’s father, John (a Royal chaplain, Canon of Salisbury, and Archdeacon of Dorsetshire) but it resurfaced with a vengeance in Edmund.

<sup>14</sup> Godden, above n 11, 3. The quote comes from the 1720 Chancery proceedings, *Fielding v Fielding*, commenced by Lady Gould on behalf of Fielding and his siblings after Edmund’s remarriage to a Catholic widow, Anne Rapha, in 1719.

<sup>15</sup> Battestin, above n 7, 12. The legacy was expressly for Sarah’s “sole and separate use ... It being my will that her husband shall have nothing to do with it.”

<sup>16</sup> Godden, above n 11, 7.

<sup>17</sup> Rogers, above n 1, 6. See also Battestin, above n 7, 13.

<sup>18</sup> Battestin, above n 7, 19. The children included Henry, one brother, and four sisters.

<sup>19</sup> Godden, above n 11, 11.

<sup>20</sup> *Ibid.*, 16–17. It appears Edmund’s new wife’s religion was an influencing factor. The judgment records the children “shall reside with ye Lady Gould their Grandmother that they may not be under the influence of ye Defandant Fielding’s Wife [Anne Rapha], who appeared to be a papist.”

Fielding studied classics at Eton between 1719 and 1724–25. It was here that Fielding forged his life-long friendship with George Lyttelton,<sup>21</sup> later his patron and to whom *Tom Jones* is dedicated.<sup>22</sup> Fielding was a zealous scholar, but one whose “vigorous energies” resulted in frequent acquaintances with the “birchen alter”.<sup>23</sup> Shortly after leaving Eton, Fielding then aged 18 and still a Ward of Chancery, was involved in a failed attempt to elope with a 15 year-old heiress and distant cousin, Sarah Andrew.<sup>24</sup> Little is known of Fielding’s activities between 1726 and 1727,<sup>25</sup> but by 1728 he was writing for a living.

## **B Personal Life**

Like *Tom Jones*, it was some time before Fielding learned the virtue of prudence. His early and middle years were marked by “the Rabelaisian vigor of his body appetites.”<sup>26</sup> Fielding enjoyed many things to excess, including food, drink, tobacco, sex, and gambling, fuelling the gout he suffered in later life. Fielding was a “good-natured Libertine,”<sup>27</sup> whose excesses were only partially ameliorated by his 1734 marriage to Charlotte Cradock,<sup>28</sup> the love of his life and upon whom Sophia Western was modelled.<sup>29</sup>

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<sup>21</sup> Battestin, above n 7, 43.

<sup>22</sup> *Tom Jones*, above n 6, 3–6.

<sup>23</sup> Rogers, above n 1, 18. See also *Tom Jones*, above n 6, 565: “And thou O learning, ... where [at Eton] in early youth I have worshipped. To thee at thy birchen altar ... I have sacrificed my blood.”

<sup>24</sup> Godden, above n 11, 24–25. Sarah’s uncle and joint-trustee, Andrew Tucker, wanted to marry Sarah to his son, John. He had earlier hired two men to beat Fielding in an attempt to discourage his suit. After the attempted elopement, Sarah was sent to live with her other trustee, Mr Rhodes, who married her to *his* son, Ambrose. See Rogers, above n 1, 20.

<sup>25</sup> Rogers, above n 1, 20.

<sup>26</sup> Battestin, above n 7, 150.

<sup>27</sup> *Ibid*, 146, quoting the phrase Sophia Western uses to describe *Tom Jones* in Book 18, chapter 10 (*Tom Jones*, 805).

<sup>28</sup> Charlotte was one of three sisters, whose widowed mother lived in Salisbury near Fielding’s friend, James Harris. Although none of the 20<sup>th</sup> and 21<sup>st</sup> century biographies consulted in the course of researching this paper refer to the fact, several 19<sup>th</sup> century publications maintain that Charlotte was a “natural child”, ie illegitimate (see, for example, Lawrence (1855) 68; Scott (1848) 105), it having been suggested that this was one reason that Fielding made the hero of *Tom Jones* illegitimate. However, the source of this “fact” was none other than Fielding’s archrival, Samuel Richardson (1689–1761), who in his *Correspondence* (published in 1804), asserted: “In his ‘Tom Jones,’ his hero is made a natural child, because his own first wife was such.” Austin Dobson *Fielding* (Macmillan, London, 1883) ch 3, citing an earlier biography of Fielding by Thomas Keightley, *On the Life and Writings of Henry Fielding* (1858), says: “[Keightley] elicited the information that the family, now extinct, was highly respectable, but not of New Sarum’s [Salisbury’s] best society. Richardson, in one of his malevolent outbursts, asserted that the sisters were illegitimate; but, says [Keightley], ‘of this circumstance we have no other proof, and I am able to add that the tradition of Salisbury knows nothing of it.’”

<sup>29</sup> Rogers, above n 1, 76–77.

Charlotte's dowry of £1500 did not last long.<sup>30</sup> Like his father, Fielding's improvidence with money was legendary.<sup>31</sup> Fielding was sued for debt several times, but his natural generosity saw him lend money he could ill afford to friends worse off than himself, while he continued to borrow to support his own needs. In November 1747, three years after Charlotte's death, Fielding married her maid, Mary Daniel, who was six months pregnant.<sup>32</sup> The marriage was a public scandal,<sup>33</sup> but Fielding had done what young Mr Nightingale did for Nancy, "made [Mary] an honest woman".<sup>34</sup>

## C *Playwright, Student, Journalist, Novelist*

### 1 *Playwright and Student*

Fielding's first play was staged at Drury Lane in February 1728. However, for reasons that can only be speculated on,<sup>35</sup> between March 1728 and April 1729 Fielding spent two terms studying at the University of Leiden. Uncertainty surrounds what he was studying<sup>36</sup> and why he left.<sup>37</sup> By the end 1729 Fielding was back in London. His second play, *The Temple Beau*, was staged in January

<sup>30</sup> After his marriage, Fielding "retired" to the farm at East Stour to live the life of a country squire. His extravagance saw Charlotte's fortune dissipated on "hospitality, horses, and hounds"; Fielding and Charlotte were back in London, penniless, in the spring of 1736. See Frederick Lawrence *The Life of Henry Fielding* (Arthur Hall, Virtue & Co, London, 1855) 74–80.

<sup>31</sup> An early Fielding biography summarises the position well: "Both father and son, indeed, were the victims of a prodigal disposition, and probably no amount of wealth could have kept either of them out of difficulties." See Lawrence, above n 30, 150. Fielding managed to avoid the fate of his father, Edmund, who was sent to Fleet Prison (over a debt of £887.10s) in November 1740, not long before his death.

<sup>32</sup> Rogers, above n 1, 150. Mary was a devoted wife, and the marriage was by all accounts a happy one. Fielding had five children (three of whom died young) with Charlotte; Mary and Fielding had five children in the six years they were married.

<sup>33</sup> *Ibid*, 155. Horace Walpole, Sir Robert's son, later wrote: "... Fielding started up, & striking his breast, cried, 'if you talk of virtue, here's virtue! I married my whore yesterday.' He had; Lyttelton made him."

<sup>34</sup> *Tom Jones*, above n 6, 675.

<sup>35</sup> Godden, above n 11, 34, declines to speculate: "The reason for this sudden change ... must surely be a matter of conjecture."; Battestin, above n 7, 63, suggests: "He had the wit to see that his apprenticeship to his craft [as a playwright] was still far from complete ... "; Ronald Paulson *The Life of Henry Fielding* (Blackwell Publishers, Oxford, 2000) 20, states: "[Fielding's] father decided for him ... "; and Rogers, above n 1, 29, simply says: "[T]here was less family pressure than personal whim behind the decision ... My own view is that Henry probably just changed his mind [about going to university]."

<sup>36</sup> Rogers, above n 1, 29, says Fielding was studying classical literature; Paulson, above n 35, 20, says Fielding was "officially" enrolled in law, but improving his knowledge of the classics; Battestin, above n 7, 64, simply says it is uncertain. When one considers that many of Fielding's works have a strong autobiographical element, the plot of *The Temple Beau* (see n 38 below) indicates Paulson is probably close to the mark.

<sup>37</sup> Rogers, above n 1, 30, suggests the withdrawal of the small allowance his father had been paying was a factor; Battestin, above n 7, 72–73, notes that Fielding was in debt and a summons had been taken out against him in the University Court.

1730.<sup>38</sup> Over the next seven years, Fielding wrote 18 plays,<sup>39</sup> many of which satirised Prime Minister, Sir Robert Walpole, and his government. In 1737, an “obscene and seditious farce”, *The Golden Rump*,<sup>40</sup> in which Walpole featured prominently, precipitated the passage of the Licensing Act which ended Fielding’s theatrical career.<sup>41</sup> On 1 November 1737 Fielding took the formal steps necessary to commence studying law.<sup>42</sup>

## 2 *Journalist and Novelist*

Financial necessity saw Fielding’s career as a political journalist continue in tandem with his legal career, including his time on the Bench. Fielding’s experiments with prose fiction began in 1740 and his first published piece, *Shamela*, appeared in 1741.<sup>43</sup> Several other works followed before the publication of *Tom Jones* in 1749. Theatrical metaphors marked many of Fielding’s early works, but as his legal training advanced, judicial metaphors began to dominate.<sup>44</sup> And as this paper will demonstrate, Fielding’s use of legal and judicial metaphor reached its zenith in *Tom Jones*.

### **D** *Barrister*

Fielding was admitted to the Bar of the Middle Temple on 20 June 1740, having completed the normal seven year pupillage in just over two and a half years. Fielding’s intellect and diligence played their part, but the influence of his

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<sup>38</sup> Paulson, above n 35, 29. The “Temple” is one of the Temples of the Bar; the title character, Young Wilding, is a pretend law student, who runs up large debts for “law books” (of which he has none).

<sup>39</sup> Battestin, above n 7, 231–232.

<sup>40</sup> Although anonymous, it was attributed to Fielding despite his denials. The play was never performed and no text survives. The inspiration for *The Golden Rump* was a satirical print, “The Festival of the Golden Rump” which depicts the King as a satyr while the Queen, dressed as a priestess, is inserting an “aurum potabile” into his naked backside. Prime Minister Robert Walpole is standing by, in the robes of a chief magician. See Rogers, above n 1, 94.

<sup>41</sup> Battestin, above n 7, 69. The Act required theatres to hold a royal patent or a special licence from the Lord Chamberlain, and all new plays had to be licensed before being performed. Parliament had, in the words of Fielding’s friend, James Harris, “made a law, in order to curb one private man.” See Linda Bree “Henry Fielding’s Life” in Claude Rawson (ed) *The Cambridge Companion to Henry Fielding* (Cambridge University Press, Cambridge, 2007) 10. See also *Tom Jones*, above n 6, 167, where Fielding makes his views known via a combined legal-theatrical metaphor: “[W]hat [do] the modern judges of our theatre mean by that word *law*; by which they have happily succeeded in banishing all humour from the stage, and have made the theatre as dull as a drawing-room?”

<sup>42</sup> Rogers, above n 1, 97.

<sup>43</sup> Bree, above n 41, 11.

<sup>44</sup> Paulson, above n 35, 106.

uncle, Davidge Gould, helped secure his early admission.<sup>45</sup> One of only (approximately) 200 barristers in total around this time, Fielding had joined an elite profession, but its “lower rungs were neither dignified nor remunerative.”<sup>46</sup> Fielding maintained chambers at the Temple for less than 6 months.<sup>47</sup> He rode the Western Circuit while his health permitted,<sup>48</sup> but remained reliant on the income from his writing.<sup>49</sup> Fielding was, however, committed to the law, and in 1747 he sought appointment to the Bench.

## ***F Magistrate***

Fielding took the oaths for the Commission of Westminster on 25 October 1748;<sup>50</sup> and after meeting the property qualification,<sup>51</sup> he took the oaths for the adjacent Commission of Middlesex on 13 January 1749.<sup>52</sup> As magistrate, Fielding responsibilities included maintaining public order and detecting crime, as well as day to day administration of justice.<sup>53</sup> The position was unpaid; income came from the fees associated with various tasks, and unofficially from bribes.<sup>54</sup> Unlike his predecessor, Sir Thomas de Veil, Fielding did not become rich in the job. Fielding was a tough but just magistrate, and there is no evidence he used the position for personal gain.<sup>55</sup>

Fielding did use his position to advocate for law reform, sending the Lord Chancellor a draft bill “for the better preventing street robberies” in July 1749,<sup>56</sup> and writing several pamphlets urging criminal law and social reform.<sup>57</sup> Fielding

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<sup>45</sup> Battestin, above n 7, 271–72. Davidge Gould, Sarah Fielding’s brother, was a Master of the Bench at the Middle Temple.

<sup>46</sup> Rogers, above n 1, 101.

<sup>47</sup> Godden, above n 11, 109.

<sup>48</sup> Rogers, above n 1, 101.

<sup>49</sup> Bree, above n 41, 11.

<sup>50</sup> Rogers, above n 1, 165.

<sup>51</sup> Another of Fielding’s benefactors, the Duke of Bedford, agreed to lease him the property valued at over £100 required by the property qualification. Fielding acknowledges his “... gratitude for the princely benefactions of the Duke of Bedford” in the Dedication to *Tom Jones*. Bedford charged Fielding a nominal £30 per annum rent, but nothing was paid and a total debt of £712 was wiped after Fielding’s death. See Rogers, above n 1, 171.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, 172. The role was more like that of a continental superintending magistrate, as opposed to the purely judicial role of modern English magistrates.

<sup>54</sup> At this time, the magistrates of Westminster were pejoratively known as the “trading Justices”.

<sup>55</sup> Rogers, above n 1, 174.

<sup>56</sup> *Ibid.*, 179. Among other things, this bill advocated that receivers of stolen property be treated the same as the original thief.

<sup>57</sup> Bree, above n 41, 13. Fielding’s influential works included *An Enquiry into the Causes of the Late Increase of Robbers* (1751), and *Proposal for the Making of an Effectual Provision for the Poor* (1753).

used his editorship of *The Covent-Garden Journal* to highlight “public and private evils” beyond his reach as a magistrate.<sup>58</sup> One of Fielding’s enduring legacies was the establishment of the Bow Street Runners, London’s first permanent, salaried police force.<sup>59</sup>

Fielding’s health, already poor, deteriorated rapidly under the pressure of work. Suffering from gout, jaundice, dropsy, and asthma, an “emaciated” Fielding heard his last case at Bow Street in May 1754.<sup>60</sup> Acting on medical advice, Fielding set sail for Lisbon where he died on 8 October 1754, aged 47.

### III TOM JONES – IN CONTEXT

#### A *The Plot*

The story begins when Bridget Allworthy hides her illegitimate son in her brother’s bed, believing that Allworthy’s natural compassion will see him given a home and security. Allworthy decides to bring up the boy he names Thomas<sup>61</sup> as his own son. Bridget pays Jenny Jones to pose as Tom’s mother. Jenny had been the live-in maid of local school teacher, Mr Partridge, and his wife. Although Jenny refuses to name Tom’s father, Allworthy generously sends her away to begin a new life rather than commit her to a Bridewell.<sup>62</sup> Bridget marries Captain John Blifil, with whom she has a son, Blifil.<sup>63</sup> After Mrs Partridge accuses her husband of having an affair with Jenny, rumours naming Partridge as Tom’s father reach Allworthy. Allworthy does not believe Partridge’s denials, and he withdraws support for Partridge’s school. Partridge’s wife dies soon after, and destitute, he leaves the parish. Bridget is widowed a short time later.

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<sup>58</sup> Battestin, above n 7, 544.

<sup>59</sup> Ibid, 499–503.

<sup>60</sup> Rogers, above n 1, 212–13.

<sup>61</sup> Allworthy’s first name.

<sup>62</sup> Originally one of Henry VIII’s palaces, Bridewell had become a prison by 1556. By the 17<sup>th</sup> century, Bridewell had become a generic name for houses of correction which were established to punish and put to work the “idle poor” who committed petty offences such as vagrancy, begging, prostitution, or breach of the peace. See Henry Fielding, Martin R Zirker (ed) *An Enquiry into the Causes of the Late Increase of Robbers and Related Writings* (Clarendon Press, Oxford, 1988) 120, n 1 [Robbers]; see also Robert B Shoemaker *Prosecution and Punishment – Petty Crime and the Law in London and Rural Middlesex, c 1660–1725* (Cambridge University Press, Cambridge, 1991) 166–97.

<sup>63</sup> Blifil’s first name is never revealed.

Blifil and Tom are raised together, with the reverend, Mr Thwackum, and the philosopher, Mr Square as tutors. Everyone except his mother and the neighbouring Squire's daughter, Sophia Western, admire the sober, pious and prudent Blifil. Thwackum and Square dislike Tom who has few friends apart from the gamekeeper, Black George Seagrim. Allworthy dismisses Black George after Blifil "tells tales" about his alleged poaching. Tom's natural generosity and lack of prudence sees him do what he can to help Black George and his family, including daughter Molly. Among other things, Tom sells presents from Allworthy which causes trouble when Blifil "tells more tales".

Sophia becomes fond of Tom while they are still children, but she develops an equal and opposite dislike for Blifil. Her dislike and distrust of Blifil is heightened when he frees the bird, little Tommy, that Tom has given her, and a hawk kills him. Tom's attempts to save the bird finds favour with Squire Western, and Tom spends more time at the Western estate. Tom remains unaware of Sophia's growing affection, and while he admires her, his sense of honour prevents him taking things further. However, Tom's honour is no match for Molly Seagrim's wiles and they have an affair. Molly becomes pregnant, just as events conspire to bring Tom and Sophia together.

When Tom learns he is not Molly's first (or only) lover, his conscience frees him to love Sophia, but as a "foundling" he knows there is no prospect of marriage. He resolves not to see Sophia again but he loves her too much to stay away. Around this time, Allworthy falls ill and while he is lying on his "deathbed", lawyer Dowling arrives with news of Bridget's death. He is seen by Blifil who tells a recovering Allworthy of his mother's death (but *not* Bridget's letter concerning Tom). Tom, hearing that Allworthy is no longer in danger, celebrates by getting drunk.

Soon after, Tom fights with Thwackum and Blifil after they see a chance encounter between him and Molly. Sophia, her aunt, and her father come across the aftermath of the fight and when Sophia faints, Mrs Western believes her concern is for Blifil. Mrs Western acquaints a pleased Squire Western with the "fact" Sophia loves Blifil. Sophia innocently makes it known she loves Tom, scuttling her father's grand plans for a liaison between the Western and Allworthy estates. Western, in his anger, threatens to keep Sophia locked up until she agrees to marry Blifil, precipitating her flight to London. Blifil, meanwhile, tells Allworthy about the fight and Tom's drunkenness during Allworthy's illness. This convinces Allworthy to banish Tom from Paradise Hall.

Tom ends up on the road to Gloucester where he has a chance encounter with Dowling. Along the way, he makes the “professional acquaintance” of a barber-surgeon, Benjamin, who is Partridge, Tom’s putative father. Partridge assures Tom that he *is not* his father, and they strike a pact which sees them continue the journey together. Not long after, Tom helps a woman in distress. She identifies herself as Mrs Waters. Tom assists Mrs Waters to the nearest inn at Upton where they retire to bed, only to be interrupted by the arrival of Mr Fitzpatrick in search of his wife. Events conspire to keep Mrs Waters from meeting Partridge.

Likewise, events conspire to prevent Tom meeting Sophia after she arrives at the Inn having escaped her father. Sophia is on her way to London to stay with her cousin, Lady Bellaston. Sophia learns of Tom’s liaison with Mrs Waters from a servant at the Inn, whom she pays to take her muff to Tom’s room. When Squire Western arrives in pursuit of Sophia, he accuses Tom of stealing the muff, but Tom is “acquitted” by a local justice. Tom and Western separately follow Sophia to London. Tom meets Dowling again, and Dowling persuades Tom to reveal what he knows (and does not know) about his expulsion from Paradise Hall. On the London road, Tom bests a novice highwayman but shows mercy by letting him go.

Sophia arrives in London, and Lady Bellaston contrives to meet Tom at a masked ball. Tom initially believes her to be Sophia’s cousin, Mrs Fitzpatrick, who has been “assisting him” locate Sophia. Lady Bellaston takes Tom as her lover and Tom reluctantly acquiesces because he believes Lady Bellaston will lead him to Sophia. However, Tom’s unease places this liaison in a different category from his earlier, carefree relationships. When Lady Bellaston summons Tom to a tryst at her house, in the mistaken belief that Sophia will be away, Tom discovers he has been misled. Lady Bellaston takes revenge for Tom’s desertion by arranging for Lord Fellamar to rape Sophia, and to have him press-gang Tom. However, Squire Western’s fortuitous arrival interrupts the assault on Sophia. Tom is not so lucky.

Tom escapes the press-gang but only because he is involved in a duel with Mr Fitzpatrick who believes Tom is having an affair with his wife. Tom is imprisoned after Fitzpatrick is “mortally wounded”. Fielding reveals that Blifil has secured lawyer Dowling employment with Allworthy and Western. Blifil covertly instructs Dowling to do what he can to secure Tom’s conviction, but his scheme backfires when Dowling mistakenly approaches Mrs Waters who, since

the incident at the Upton Inn, has been Mr Fitzpatrick's "travelling companion". Fitzpatrick recovers and all charges against Tom are dropped. Partridge sees Mrs Waters, recognises her as Jenny Jones, and for a short while Tom believes he has committed incest with his mother. However, this precipitates the revelations concerning Tom's true parentage, the role of Dowling as Blifil's agent, and Blifil's action in concealing Bridget's letter acknowledging Tom as her son. Tom and Allworthy reconcile.

Western, finding that Tom is Allworthy's heir is as keen for the marriage between Tom and Sophia as he was previously opposed. Sophia, still angry with Tom over his affair with Lady Bellaston, but loving him nonetheless, pretends to accede to Western's wishes while following her own heart. Tom and Sophia retire to the country as a happily married couple, while Blifil is banished as Tom once was.

## **B Contemporary Criticism**

*Tom Jones* was widely read and widely reviewed when it first appeared. It continues to be the subject of scholarly interest today. That it was still being commented on 80 years after its publication by literary luminaries such as Samuel Taylor Coleridge<sup>64</sup> and Sir Walter Scott<sup>65</sup> is a measure of its significance. *Tom Jones*, like Fielding himself, polarised people.

Coleridge believed *Tom Jones* had one of "the three most perfect plots ever planned."<sup>66</sup> Coleridge was impressed Fielding's ability to convey a character's essence independent of the character's deeds: "If I want a servant or mechanic, I wish to know what he does: – but of a friend, I must know what he is. And in no writer is this momentous distinction so finely brought forward as by Fielding."<sup>67</sup> Scott, as the Introduction notes, considered Fielding to be the father of the English

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<sup>64</sup> (1772–1834): Coleridge's works include *The Rime of the Ancient Mariner* (1798) and *Kubla Khan* (1816).

<sup>65</sup> (1771–1832): Scott's works include *The Lady of the Lake* (1810), *Rob Roy* (1818) and *Ivanhoe* (1819). Like Fielding, Scott was a practising lawyer and judge. Scott was called to the Bar on 11 July 1792. He was appointed Sheriff-Deputy (the equivalent of a county judge) for Selkirk on 16 December 1799, and on 8 March 1806, he was appointed as a Clerk of the Court of Session in Edinburgh. For more information see <http://www.walterscott.lib.ed.ac.uk/biography/index.html> (accessed 28 July 2007).

<sup>66</sup> *Table Talk* (1834) quoted in Neil Compton (ed) *Henry Fielding – Tom Jones – A Casebook* (Macmillan, London, 1970) 33. This piece continues with a less than flattering reference to Richardson: "To take [Fielding] up after Richardson is like emerging from a sick-room heated by stoves into an open lawn on a breezy day in May."

<sup>67</sup> H N Coleridge (ed) *Literary Remains* (1836) quoted in Compton, *ibid*, 34.

novel. In a piece published in 1821 he said: “[*Tom Jones*] is truth and human nature itself, and there lies the inestimable advantage which it possesses over all previous fictions of this kind.”<sup>68</sup>

Rival novelist, Samuel Richardson<sup>69</sup> was unimpressed. He insisted that the autobiographical nature of Fielding’s plots and characters reflected the poverty of his own imagination.<sup>70</sup> Richardson refused to read *Tom Jones* and was alarmed at the number of his friends who did!<sup>71</sup> Nor was Samuel Johnson enamoured with Fielding – or *Tom Jones*:<sup>72</sup>

“Fielding [is] ... a blockhead ... a barren rascal ... Richardson used to say ... had he not known who Fielding was, he should have believed he was an ostler ... [T]here is more knowledge of the heart in one letter of Richardson’s, than in all *Tom Jones*.”

*Old England*<sup>73</sup> described *Tom Jones* as “a motley history of bastardism, fornication and adultery”.<sup>74</sup> While the writer acknowledges the use of those themes as plot devices, the balance of this paper, beginning with the following section on the law and language in *Tom Jones*, focuses on Fielding’s particular, contemporary portrayal of lawyers and the law. In the writer’s view this is the single most significant recurring theme in *Tom Jones* and its content, and the way in which Fielding draws the reader in to his legal world, reveals the consummate skill of the lawyer as writer.

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<sup>68</sup> “Henry Fielding” in *The Lives of the Novelists* (1821) quoted in Compton, above n 66, 35.

<sup>69</sup> Richardson (1689–1761) was the author of *Pamela: or Virtue Revisited* (1740), parodied by Fielding in *An Apology for the Life of Mrs Shamela Andrews* (1741). *Shamela*, the reader is informed on the title page, is intended to refute and expose “the notorious Falshoods and Misrepresentations of a Book called Pamela”.

<sup>70</sup> Battestin, above n 7, 5.

<sup>71</sup> Rogers, above n 1, 160.

<sup>72</sup> James Boswell, Christopher Hibbert (ed) *The Life of Samuel Johnson* (Penguin Books, London, 1979) 159. In one of life’s little ironies, on 13 March 1750 Johnson (1709–1784) appeared before Fielding to stand surety (a bond of £20) for Mary Peyton, the wife of “one of the drudges who toiled in Johnson’s attic to produce his great *Dictionary*.” Battestin speculates whether this “brief encounter between these two proud men contributed to the forming of Johnson’s famous opinion of Fielding ...?”, (ie the one quoted above). See Battestin, above n 7, 504.

<sup>73</sup> A newspaper/journal opposed to the Henry Pelham-led government Fielding supported.

<sup>74</sup> Rogers, above n 1, 160.

#### IV *LAW AND THE LANGUAGE IN TOM JONES*

Fielding litters *Tom Jones* with references to lawyers, attorneys, legal hearings and pseudo-hearings, issues of law, language derived from the courts, and questions of evidence. Mutter expresses the view that while Fielding's theatrical career is responsible for the humour in *Tom Jones*, it is his legal training as evinced in the legal language, the parodying of legal institutions and personnel, and the themes of mercy and justice that dominate the book.<sup>75</sup>

Section A contains an analysis of those themes of justice and mercy – and judgment. Section B details Fielding's use of analogy to establish the “trial” as a recurring theme. Section C considers Fielding's use of metaphor, with particular reference to Squire Western and the hunting themes which link directly to contemporary game laws. This section introduces the analysis of Squire Allworthy. Section D identifies how Fielding establishes a role for the reader as judge (or juror) in the legal case that is *Tom Jones*.

##### A *Justice, Mercy, and Judgment*

Fielding constantly juxtaposes notions of justice and mercy, establishing that justice in isolation is a barren concept. This alerts the reader to the hypocrisy of the characters who lack a sense of mercy while professing to admire and abide by the tenets of justice. This has direct consequences when assessing the reliability of their evidence. For example, the reader learns early on that Blifil lacks Tom's quality of mercy, but he exhibits the “higher quality [of] justice.”<sup>76</sup> Similarly, Thwackum and Square talk about mercy but prefer justice.<sup>77</sup> In contrast, Tom acts honourably throughout: mercy, not justice, is his driving motivation. In Book 13, chapter 10, when Tom learns that the highwayman he spared is Mrs Miller's cousin, Mr Anderson, Fielding's explanation of Tom's reaction reveals his distaste of justice absent mercy:<sup>78</sup>

... greatly exulting in the happiness which he had procured [Tom] could [not] forbear reflecting, without horror, on the dreadful consequences which must have attended them, had he listened rather to the voice of strict justice, than to that of mercy when he was attacked on the high road.

<sup>75</sup> R P C Mutter “Introduction” in *Tom Jones*, above n 6, xxvii.

<sup>76</sup> *Tom Jones*, above n 6, 116.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, 600.

Tom's reaction mirrors Fielding's personal approach to justice and mercy. As a magistrate, records show Fielding "often [went] beyond what a strict interpretation of the laws would warrant, to temper justice with mercy, and to influence changes in the laws themselves."<sup>79</sup> Typically, Fielding extended leniency to "those ... yet [to] become incorrigible offenders", or who were driven to minor crime by financial necessity<sup>80</sup> – as Anderson is. Anderson, after Tom bests him, "began to implore *mercy* ... This is the first robbery I ever attempted, and I have been driven by distress to this."<sup>81</sup> Anderson's situation reflects a concern Fielding expresses in his *Robbers* pamphlet: "[W]hat can be more shocking than to see an Industrious poor Creature ... forced by mere Want into Dishonesty ... ." <sup>82</sup> Likewise, when Tom appeals for Sophia's forgiveness concerning his affair with Lady Bellaston, he seeks "mercy, and not justice ... Justice I know must condemn me."<sup>83</sup> Justice, here, would convict Tom solely on the basis of his *deeds*. Evidence of motive or extenuating circumstances would not be admissible – that is why justice absent mercy is a barren concept.

Fielding articulates his distrust of lawyers and judges who lack a sense of mercy in a combined theatrical–legal metaphor at the beginning of Book 11: "Critic ... signifies judgment ... [but] some persons who have not understood the original have concluded that it meant judgment in the legal sense, in which it is frequently used as equivalent to condemnation."<sup>84</sup> Fielding draws a link between critics and lawyers who "[i]n despair, perhaps, of ever rising to the Bench in Westminster-hall, have ... on the benches of the playhouse, ... exerted their judicial capacity, and *given judgment, ie condemned without mercy*."<sup>85</sup>

This analogy helps explain the paradoxical character of Squire Allworthy. The reader is constantly reminded that Allworthy is "good", and he does "[temper] justice with mercy"<sup>86</sup> when he declines to send Jenny to a Bridewell for being an unwed mother, but he presides over several trials that result in substantial injustice. The injustice arises because Allworthy exceeds his formal legal

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<sup>79</sup> Battestin, above n 7, 551.

<sup>80</sup> *Ibid*, 551–52. No doubt Fielding was aware of the irony of the situation when, in April 1752, he was called on to enforce the Licensing Act 1737 against "a poor troupe of amateur players ... Out of compassion for their Youth only bound them over to their good behaviour." See Godden, above n 11, 261–62.

<sup>81</sup> *Tom Jones*, above n 6, 560 (emphasis added). Anderson's distress is "five hungry children, and a wife lying in of the sixth, in the utmost want and misery."

<sup>82</sup> Fielding *Robbers*, above n 62, 172. *Robbers*, the "most distinguished and ambitious of Fielding's social pamphlets" was first published in January 1751 (pp lii–liii).

<sup>83</sup> *Tom Jones*, above n 6, 813.

<sup>84</sup> *Ibid*, 463.

<sup>85</sup> *Ibid* (emphasis added).

<sup>86</sup> *Ibid*, 45.

authority, and he fails to adhere to procedure which would ensure a fair “trial”. “Trials”, formal and informal, dominate much of the action in *Tom Jones*.

### **B Trial by Analogy**

A trial is a mechanism for presenting both sides of a legal case, and for determining guilt or innocence. Fielding’s language reinforces the judicial character of the many “trials” within *Tom Jones*. While the word “trial” appears only rarely,<sup>87</sup> the words one associates with a trial such as court, judge, indictment, charge, plea, guilt, innocence, defence, counsel,<sup>88</sup> evidence, witness, judgment, sentence (and many more) appear regularly, usually in combination. For example, after the discovery of baby Tom, when Mrs Wilkins accosts the supposed mother, Jenny Jones, she (Wilkins) “[puts] on the gravity of a judge” after which she “[proceeds] rather to pass sentence on the prisoner than to accuse her”; Jenny’s “confession” prompts her to pass a “second judgment”.<sup>89</sup> Later, when Partridge’s wife attacks him believing him to be Tom’s father, and he is accused of assault, his “silence [is] interpreted to be a confession of the charge, by the whole court.”<sup>90</sup>

Likewise, when Tom punches Blifil for calling him a “beggarly bastard”, Blifil “appears” before the “court” (of Allworthy and Thwackum) “[i]n which court an indictment of assault, battery and wounding, was instantly preferred against Tom; who ... pleaded the provocation.”<sup>91</sup> And when Tom initially appears blind to Sophia’s charms, the narrator says:<sup>92</sup>

I shall not, perhaps, be able absolutely to acquit him of ... these charges; ... yet, as evidence may sometimes be offered in mitigation, *I shall set forth the plain matter of fact, and leave the whole to the reader’s determination.*

Fielding leaves judgment of guilt or innocence to the “reader’s determination” because from the outset he intends the reader to be the judge (or juror) in the legal case that is *Tom Jones*. Section D below discusses the role of reader as judge (or juror) in more detail. The balance of the current section comprises an in-depth assessment of one particular “trial”. This “trial” demonstrates how Fielding uses

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<sup>87</sup> “Trial” (or “trials”) appears eight times in the text.

<sup>88</sup> And “council”: the spellings were interchangeable at this time.

<sup>89</sup> *Tom Jones*, above n 6, 36.

<sup>90</sup> *Ibid*, 70.

<sup>91</sup> *Ibid*, 101.

<sup>92</sup> *Ibid*, 135 (emphasis added).

*Tom Jones* to express his personal approach to “doing justice”. Direct parallels to Fielding’s work as a magistrate reinforce the “justice tempered by mercy” argument outlined in section A.

### 1 *Trial under law*

The most formal “trial” in *Tom Jones* occurs at the Upton Inn after Squire Western discovers Tom in possession of Sophia’s muff. It closely follows actual 18<sup>th</sup> century procedure, and it reflects a familiarity with the day-to-day operation of the law cognisant with Fielding’s experience at the Bar. Further, when the justice acts inconsistently with his formal legal obligations, Fielding is reflecting the latitude that he exercised as a magistrate.

This particular “trial” is a preliminary hearing of the charges Tom faces. The hearing takes place before a guest who holds a local commission of the peace. Fortuitously, because the justice does not have his “book about justice business”<sup>93</sup> or a clerk with him, Western’s nephew-in-law, Mr Fitzpatrick, with three years experience as an attorney’s clerk is able to substitute.<sup>94</sup> Fitzpatrick advises the justice: “[T]he law concerning daughters was out of the present case;”<sup>95</sup> and he opens the prosecution case: “[S]tealing a muff was undoubtedly felony, and the goods being found on the person, were sufficient evidence of the fact.”<sup>96</sup> The felony is grand larceny,<sup>97</sup> and Tom’s possession of the muff in Sophia’s absence is prima facie evidence of guilt. A preliminary hearing is required because larceny is an indictable offence, tried before a judge and jury.<sup>98</sup>

Unlike modern pre-trial hearings which give the accused the opportunity to fully test the strength of the case against her or him, the Marian Committal

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<sup>93</sup> Ibid, 449. “Books of justice business” were an essential aid to justices who were rarely legally trained, and who could be called upon to deal with a huge range of civil and criminal matters, every aspect of which was governed by statute. As one 18<sup>th</sup> century text put it: “The jurisdiction ... given to justices of peace by particular statutes is so various, and extends to such a multiplicity of cases, that it were endless to endeavour to enumerate them.” See Matthew Bacon *Abridgement of Law and Equity* (3 ed, 1768) quoted in Douglas Hay “Legislation, Magistrates, and Judges: High Law and Low Law in England and the Empire” in David Lemmings (ed) *The British and their Laws in the Eighteenth Century* (The Boydell Press, Woodbridge, 2005) 63. By way of example, 80 separate statutes dealing with master–servant disputes had been enacted by 1700, and at least 26 of these were still relevant in the middle of the century.

<sup>94</sup> *Tom Jones*, above n 6, 449.

<sup>95</sup> The “law concerning daughters” forms part of the discussion in section C below.

<sup>96</sup> *Tom Jones*, above n 6, 449.

<sup>97</sup> “Grand larceny is a felonious and fraudulent taking, and carrying away, by any person, of the mere personal goods of another, above the value of 12d [one shilling] 1 Haw 89.” See Richard Burn *The Justice of the Peace, and Parish Officer* (vol 2, A Millar, London, 1755) 99.

<sup>98</sup> Ibid.

Statute<sup>99</sup> gave suspects few rights. Justices of the peace (JPs) examined the suspect and her or his accusers<sup>100</sup> about the charge, but the evidence was not tested, nor did the suspect have the right to call defence witnesses. Thus, when the Worcester justice asks Fitzpatrick to draw up a commitment at the conclusion of the prosecution case,<sup>101</sup> he errs in not first examining Tom but the point is moot: Tom's evidence would not prevent his committal.

Some JPs did go beyond the strict letter of the law and investigate more thoroughly,<sup>102</sup> as Tom persuades the Worcester justice to do, but the law did not permit JPs to discharge an accused if there was evidence of a felony (even if the accused appeared not guilty). A discharge was possible only if it was established beyond doubt that no felony had been committed,<sup>103</sup> but a JP could not discharge someone charged with a felony on oath.<sup>104</sup> It is debateable whether the strict "no felony" test is met here: Sophia does not give first-hand evidence that she voluntarily parted with the muff; Western does not directly withdraw the charge; and Parson Supple's sworn evidence stands (he indicates an *unsworn* change of heart). However, the evidence indicates the charge is unlikely to succeed at trial. Tom's early acquittal reflects the way Fielding dealt with such cases when he was on the Bench.

As a magistrate, Fielding balanced his enthusiasm for detecting and prosecuting serious crime<sup>105</sup> with an emphasis on identifying and discharging cases unlikely to succeed at trial. Fielding was ahead of his time: judicial pre-trial committal proceedings, including the hearing of defence evidence, were a 19<sup>th</sup> century innovation.<sup>106</sup> Fielding was sometimes able to avoid the "delicate

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<sup>99</sup> 1555 (Eng), 2 & 3 Phil & Mar, c 10.

<sup>100</sup> In the absence of anything resembling a standing police force, nearly all felony charges came from "private" prosecutions, hence Western's declaration: "I'll have him before a justice of the peace this instant" when he discovers Tom with Sophia's muff, and his offer to "lay his complaint before him" when he discovers his fellow guest is a justice of the peace for Worcester. See *Tom Jones*, above n 6, 448–49.

<sup>101</sup> *Ibid*, 450.

<sup>102</sup> John H Langbein *The Origins of the Adversary Criminal Trial* (Oxford University Press, Oxford, 2003) 41 [*Adversary Criminal Trial*].

<sup>103</sup> Richard Burn *The Justice of the Peace, and Parish Officer* (vol 1, A Millar, London, 1755) 88 [*JPO* (vol 1)]. "No felony" means the offence charged was not a felony at law. Burn cites as an example illegal entry to a freehold which is a trespass, not a felony (see p 208).

<sup>104</sup> *Ibid*, 208.

<sup>105</sup> As discussed in Part I F, Fielding was responsible for establishing London's first permanent, salaried police force. Further, his investigations and examination of witnesses were directed at increasing reporting of serious crime, while at the same time he was gathering evidence for trials at the Old Bailey. His work in this regard "anticipated what became the Criminal Investigation Division of Scotland Yard." See John H Langbein "Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources" (1983) 50 U Chi L Rev 1, 63 ["Ryder Sources"].

<sup>106</sup> Trials for Felony Act 1836 (Eng), 6 & 7 Will IV, c 114. See also J H Baker *An Introduction to English Legal History* (Butterworths, London, 1971) 278–79.

question” of the absence of legal authority to dismiss ill-founded felony charges by persuading the victim/prosecutor to withdraw the indictment.<sup>107</sup> On other occasions Fielding went out of his way to find the evidence insufficient in order to justify discharging the accused.<sup>108</sup> Fielding’s own words reveal his distaste for the rigid committal process:<sup>109</sup>

By the Law of England, as it now stands, if a Larceny be absolutely committed, however slight the Suspicion be against the accused, the Justice of the Peace is obliged ... to commit the Party ...

Nor will the trifling Value of the Thing stolen, nor any Circumstance of Mitigation justify his discharging the Prisoner ... should the Party accused appear to a Demonstration innocent, the Justice cannot discharge him, but must commit or bail.

Fielding’s actions could be interpreted as purely pragmatic (why proceed with cases that are bound to fail?), but in the writer’s view it is more likely that Fielding’s principal motivation was concern for those facing spurious charges (Tom’s situation), or for whom the consequences of committal were out of proportion to the gravity of the offence (Jenny’s situation). Regulations governing bail were very strict,<sup>110</sup> and even if bail was technically available, cost was a barrier for those unable to meet the necessary sureties. Provincial assizes (trial courts) sat twice-yearly meaning a person committed to trial faced up to six months in gaol or a Bridewell, in appalling, over-crowded, and disease-ridden conditions.<sup>111</sup>

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<sup>107</sup> Langbein “Ryder Sources”, above n 105, 63.

<sup>108</sup> See, for example, *Covent-Garden Journal No 16* (25 February 1752) in Henry Fielding, Bertrand A Goldgar (ed) *The Covent-Garden Journal and A Plan of the Universal Register Office* (Clarendon Press, Oxford, 1988) 409 [*Covent-Garden Journal*]: “[A] poor Woman, Mother of three small Children, was charged ... with a paultry Larceny of a Cap value 3d, but the Evidence not being positive, she was discharged; and *Covent-Garden Journal No 29* (11 April 1752) in Fielding *Covent-Garden Journal*, 422: “Mary Yardley was charged ... with having stolen a Blanket; but as the Evidence was not very positive, and the Prisoner appeared to be rotting alive with a foul Distemper given her by her Husband, [Fielding], instead of sending the poor Wretch to Gaol, recommended her to a hospital.”

<sup>109</sup> *Covent-Garden Journal No 16* (25 February 1752) in Fielding *Covent-Garden Journal*, *ibid*, 409–10.

<sup>110</sup> See Burn *JPPPO* (vol 1), above n 103, 88–99.

<sup>111</sup> Langbein *Adversary Criminal Trial*, above n 102, 49. By way of illustration, between 1558 and 1625 in the five “home county” assizes adjacent to London at least 1291 prisoners died from starvation or disease. Outbreaks of “gaol fever” (a virulent form of typhus) regularly killed large numbers of inmates (and others). A contemporary report of a 1750 outbreak at Newgate gaol (which spread to the neighbouring Old Bailey) noted that the dead included “two judges, various court staff, the Lord Mayor of London and [o]f less note, a Gentleman of the Bar, two or three Students ... and about Forty other Persons.”

It is consonant with Fielding's views on the need to temper justice with mercy to credit his concern over unnecessary committals as primarily humanitarian. Fielding's *Covent-Garden* column of 25 February 1752 supports this interpretation. Among other things it details the consequences of committal "infinitely beyond the Degree of his Guilt" for many accused.<sup>112</sup> It is highly unlikely that Fielding's concern for the welfare of prisoners developed only *after* he was called to the Bench. Arguably, Tom's "acquittal" in the "trial" at the Upton Inn is an early statement by Fielding as to how the law *should* operate in cases where the evidence or the gravity of the offence does not warrant committal.

However, the Worcester justice's approach to "doing justice" (and Allworthy's refusal to send Jenny to a Bridewell when he believes she is "first offender") are exceptions that prove the rule. The justice that Squire Western *and* Squire Allworthy deliver is frequently found wanting, procedurally and substantively, even though, metaphorically, Allworthy and Western represent different ends of the judicial spectrum.

### C *Law and Metaphor*

Western and Allworthy are one of a number of antithetical pairs that populate *Tom Jones*. Metaphorically (if not practically), Allworthy represents judicial reason tempered by compassion. Fielding constantly reminds the reader that Allworthy is good and sagacious. Fielding encourages this interpretation by alerting the reader to Allworthy's "natural love of justice",<sup>113</sup> and by citing examples of the charity Allworthy dispenses to ameliorate the consequences of that justice.<sup>114</sup> In contrast, Western represents judicial *unreasonableness*. He zealously prosecutes any perceived infraction of his property and parental rights with little regard for the limits of his legal authority. As Fielding notes during one of "trials" Western presides over:<sup>115</sup>

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<sup>112</sup> *Covent-Garden Journal No 16* (25 February 1752) in Fielding *Covent-Garden Journal*, above n 108, 410–11. The consequences Fielding cites include starvation (prisoners were responsible for their own sustenance), loss of business, reputation, and character, corruption by hardened offenders, destruction of family forced to share the prisoner's ruin, and where the accused was the mother of a young child, the child's likely death (gaolers "will not nor can be obliged to receive it."). The column concludes with a specific plan for reform of the committal process.

<sup>113</sup> *Tom Jones*, above n 6, 78.

<sup>114</sup> For example, Allworthy is the "secret benefactor" who supports Partridge and his wife after he "convicts" Partridge of being Tom's father (*Tom Jones*, 80); he gives Black George's wife two guineas after he dismisses the gamekeeper from his service (*Tom Jones*, 115); and he gives Tom £500 after banishing him from Paradise Hall.

<sup>115</sup> *Tom Jones*, above n 6, 291.

In matters of high importance, particularly in cases relating to the game, ... many justices of peace suppose they have a large discretionary power [and] under the notion of searching for, and taking away engines for the destruction of the game, they often commit trespasses, and sometimes felony at their pleasure.

Fielding does not exaggerate Western's de facto power. Enforcement of game laws was a major responsibility for rural justices in the 18<sup>th</sup> century, with most offences tried by way of summary proceedings. At the same time, there was little supervision of justices' authority. It was difficult to mount a challenge to a justice's summary jurisdiction, and it was the poor who were most likely to suffer magisterial abuse and least likely to have access to successful legal recourse.<sup>116</sup>

Fielding uses the game laws as the basis of a metaphor linking Western's love of hunting (specifically hares) and his distaste for vermin (specifically foxes), his love for Sophia and his anger at her rejection of Blifil in favour of Tom, and the chase to London when Sophia runs away. The following analysis reveals the extent of Western's judicial unreasonableness: he is willing to "commit trespasses, and sometimes other felonies" in his attempts to force Sophia to marry Blifil.

*1 Squire Western: Game laws and parental authority (hare today, gone tomorrow ...)*

Hares were a protected species under the Game Act 1670.<sup>117</sup> Game did not belong to the landowner on whose property it was found, rather a property qualification authorised pursuit by qualified hunters,<sup>118</sup> subject only to the weak

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<sup>116</sup> Hay, above n 93, 66–68. While private parties could lodge criminal informations or apply for a writ of certiorari in respect of alleged magisterial misbehaviour, such challenges were very rare. A review of Staffordshire judicial records for the period 1740–1800 gives a conservative estimate of 10,000 summary convictions and committal proceedings involving justices of the peace, but only 24 proceedings against magistrates (13 informations and 11 writs) over the same period. Hay argues persuasively that the paucity of such challenges was a direct result of the substantive and procedural barriers judges erected, and the law that made parties mounting such a challenge liable to meet all the costs of the prosecution, win or lose.

<sup>117</sup> (Eng), 22 & 23 Cha II, c 25. The other protected species were partridges, pheasants, and moor fowl. Deer and rabbits were not protected under game laws, but these animals were typically "enclosed", ie confined to a specific area by the landowner who thereby gained "property" in the animals. Truly wild deer or rabbits were not protected by law (although the landowner might have a cause of action in trespass), but there were severe penalties, including transportation, for taking an "enclosed" animal without the owner's permission. See Peter B Munsche *Gentlemen and Poachers: The English Game Laws 1671–1831* (Cambridge University Press, Cambridge, 1981) 4–5.

<sup>118</sup> Munsche, above n 117, 12. The property qualification which reserved hunting game to the gentry was a freehold worth £100 pa; or leasehold of £150 pa; or persons who were "sons and heirs" of squires or other persons "of higher degree"; or a franchise of a park, chase, or free warren. Income from "business" such as trade or company stocks did not qualify.

sanction of trespass law.<sup>119</sup> The Game Act transferred the responsibility for preservation of game, previously exercised by royal gamekeepers, to the landed gentry.<sup>120</sup> This is significant because Squire Western enjoys greater legal rights over the hares he is charged with protecting than he does as Sophia's father.

Sophia is not the only woman Western refers to as a hare,<sup>121</sup> for example: Mrs Western is the "hare" Sophia loses after they fight;<sup>122</sup> and Molly is the "puss" whose "form"<sup>123</sup> Western spies in the thicket in the aftermath of the fight involving Tom, Blifil, and Thwackum, and who steals away "upon as many feet as a hare generally uses ... ."<sup>124</sup> Sophia is also a "puss" after she rejects Blifil in favour of Tom, and Tom is the poacher. As Western says:<sup>125</sup>

The son of a bitch was always good at finding a hare sitting; ... I little thought what puss he was looking after; ... Little did I think, when I used to love him for a sportsman, that he was all the while after poaching my daughter.

Sophia is still a hare (puss) because she is not yet estranged from her father. Arguably, when Western refers to Sophia as a hare, he is attempting a metaphorical extension of his authority over her because if Sophia is "just" his daughter, he lacks property rights. Hence Fitzpatrick's advice to the justice at the Upton Inn: "[T]he law concerning daughters was out of the present case."<sup>126</sup> The majority in the leading case of *Barham v Dennis* held:<sup>127</sup>

A writ of trespass lies for divers things ... it hath been adjudged that it lies for a parrot, a popinjay, a thrush and ... for a dog ... because the law imputes that the owner hath a property in them; ... But for the taking of a son or daughter not heir, it is not upon the same reason ... Here the father hath not any property interest in the daughter ...

<sup>119</sup> Ibid, 13. Nominal damages only were available, and suits against qualified hunters were discouraged.

<sup>120</sup> *Tom Jones*, above n 6, 94. With specific reference to Western, Fielding refers to "*preservers of the game* [and] the great severity with which they avenge the death of a hare ... ." (emphasis in the original).

<sup>121</sup> Hares were typically referred to as "she", irrespective of their sex, which helps explain why Western uses "hare" in this metaphorical sense. See Nicholas Cox *The Gentleman's Recreation* (6 ed, N Cox and J Wilcox, London 1721) 74 et seq.

<sup>122</sup> *Tom Jones*, above n 6, 277.

<sup>123</sup> "Puss" was a slang term for a hare; equally it was used as an informal term for a young woman. A hare's form is her place of refuge.

<sup>124</sup> *Tom Jones*, above n 6, 215.

<sup>125</sup> Ibid, 248.

<sup>126</sup> Ibid, 449.

<sup>127</sup> *Barham v Dennis* (1600) Cro Eliz 770; 78 ER 1001, 1001 Anderson, Walsmley, and Kingsmil JJ; Glanville J dissenting.

In light of the Sophia–hare metaphor, the child–animal comparison is particularly apt. While wardships giving rise to a cause of action were abolished in 1660,<sup>128</sup> it was possible in some circumstances for a parent to maintain a cause of action analogous to that of a master suing for the inducement of a servant out of his employ.<sup>129</sup>

After Sophia runs away to London, she becomes a vixen and Tom is her mate. Hence Western’s exclamation when he arrives at the Upton Inn in pursuit of Sophia and finds Tom: “We have got the dog fox, I warrant the bitch is not far off.”<sup>130</sup> It is not only Sophia’s challenge to his parental authority that causes Western to change the metaphor from hare to fox.

As indicated above, game did not belong to the landowner, so Western’s rights are limited once Sophia leaves his estate. The leading case is *Sutton v Moody*.<sup>131</sup> Chief Justice Holt’s dictum<sup>132</sup> states that a man who starts game, whether on his own property or a neighbour’s, and maintains “fresh pursuit” is entitled to the property in the animal, irrespective of where it is killed. The key here is “fresh pursuit.” Western did not “start” Sophia and it is doubtful whether he is in fresh pursuit. If Sophia is a hare he lacks property rights. Apart from his anger at Sophia’s defiance, the change from hare to vixen justifies the continued pursuit. Because foxes were vermin, “any where, any time” pursuit was possible in the public interest.<sup>133</sup> *Barham v Dennis* reinforces the “fresh pursuit” requirement (under which the property in game taken by a trespasser can be recovered). No cause of action lies because “if she were not carried away from him, the father hath not any injury.”<sup>134</sup> Tom did not carry Sophia away, but this does not stop Western attempting to reclaim what he sees as his “property”. Metaphorically and practically, Western’s judicial unreasonableness is manifest.

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<sup>128</sup> Rights of wardship (ie the pecuniary interest a parent might have in her or his child’s marriage) which could give rise to a cause of action allowing a parent the right to sue a third party for abducting the child were abolished by statute in 1660 – see Wardship Act 1660 (Eng), 12 Cha II, c 24, s 2.

<sup>129</sup> *Norton v Jason* (1653) Style 398; 82 ER 809. The cause of action was based on *per quod servitium amisit*. It enabled a master to claim compensation for damages arising from injury to his servant.

<sup>130</sup> *Tom Jones*, above n 6, 448.

<sup>131</sup> *Sutton v Moody* (1698) 12 Mod 145; 88 ER 1224, 1224.

<sup>132</sup> The case involved a deer which was not “game”; the dictum was followed in *Churchward v Studdy* (1811) 14 East 249; 104 ER 596; and *Blades v Higgs* (1865) 11 HLC 639; 11 ER 1474.

<sup>133</sup> *Gedge v Minnie* (1614) 2 Bulst 60; 80 ER 958, 960.

<sup>134</sup> *Barham v Dennis*, above n 127, 1001 Anderson, Walsmley, and Kingsmil JJ; Glanville J dissenting.

## (a) Trespass and other felonies

When Western learns that Sophia is staying with Lady Bellaston, he makes it clear that he sees no impediment to recapturing her (whether she is a daughter, hare, or fox): “I have not been in the country so long without having some knowledge ... of the law of the land. I know I may take my own wherever I find it.”<sup>135</sup> In another fox-hunting allusion, he storms to Lady Bellaston’s house: “Where is she? D—n me, I’ll unkennel her this instant. ... I’ll see her above ground ... .”<sup>136</sup> Ironically he saves Sophia from Lord Fellamar, but he then forces Sophia to accompany him to his lodgings where he intends to confine her until she agrees to marry Blifil. This raises three questions of law. First, does Western have a legal right to force Sophia to accompany him? Second, can he confine Sophia against her will? Third, can he force Sophia to marry Blifil?

## (i) Breach of the peace, and assault and battery

Blackstone’s *Commentaries*’ discussion of the remedy of “Recaption or *reprisal*” leaves little room for doubt that Western acts illegally when he forcefully removes Sophia from Lady Bellaston’s house:<sup>137</sup>

[W]hen anyone ... *wrongfully detains one’s wife, child, or servant* ... the husband, parent, or master, may lawfully claim or retake them, where ever he happens to find the; *so it be not in a riotous manner, or attended with a breach of the peace.*

Lady Bellaston is not wrongfully detaining Sophia (her stay is voluntary), and Fielding’s description of Western’s actions reveals an egregious breach of the peace. Further, when Western threatens Sophia, “violently” takes hold of her, and “packs” her into his coach he commits an assault and battery,<sup>138</sup> and he commits another offence when he confines her in his Piccadilly lodgings.

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<sup>135</sup> *Tom Jones*, above n 6, 665.

<sup>136</sup> *Ibid*, 659.

<sup>137</sup> William Blackstone, Wayne Morison (ed) *Commentaries on the Laws of England* (vol 3, Cavendish Publishing Ltd, London, 2001) 4 (p 5) [*Commentaries* (vol 3)] (emphasis added).

<sup>138</sup> *Ibid*, 120 (pp 94–95). “[A]n attempt or offer to beat another, without touching him ... is an assault ... The least touching of another’s person wilfully, or in anger, is battery ... [although] in some cases, justifiable or lawful, as where ... a parent ... gives moderate correction to his child ... .” The force Western uses is neither moderate nor for the purposes of correction.

## (ii) False imprisonment

The chronology indicates that Sophia is around 19 to 20 years old when these events occur. Western's parental rights subsist until "the age of twenty-one; ... or that point which law has established ... when the empire of the father ... gives place to the empire of reason."<sup>139</sup> Arguably, Western's earlier detention of Sophia is not illegal,<sup>140</sup> but the position alters after Sophia's flight to London. Because Sophia has *chosen* to leave his custody, a writ of habeas corpus is not available to compel her return.<sup>141</sup> As Sophia is over age 16, a court is likely to give substantial weight to her views on whether she should be returned to Western.<sup>142</sup> And where the father "shews that ... he has become an unnatural guardian – that he has perverted the ties of nature *for the purpose of injustice and cruelty* ... the Court will not stay its hand ... ."<sup>143</sup> Western is abusing his parental authority "for the purpose of injustice and cruelty". Fielding goes so far as to suggest he is intent on prostituting Sophia to Blifil.<sup>144</sup> Sophia's detention is unlawful. It satisfies the test for false imprisonment.<sup>145</sup>

## (iii) Forced marriage

Blackstone notes that a minor's marriage is void absent parental consent,<sup>146</sup> which Sophia concedes,<sup>147</sup> but Western is deaf to her pleas not to be forced to marry Blifil whom she "despises and hates".<sup>148</sup> Fielding compares Western's lack of empathy to that of a Newgate gaoler.<sup>149</sup> Nevertheless, Sophia has a "*positive* duty of filial obedience" to accept her father's marital preference.<sup>150</sup> In this area alone, Western is exercising his legal rights, even if his actions appear morally reprehensible.

Western's willingness to sacrifice Sophia to cement "an intermarriage between kingdoms",<sup>151</sup> coupled with his disregard for the laws he is charged with

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<sup>139</sup> William Blackstone, Wayne Morison (ed) *Commentaries on the Laws of England* (vol 1, Cavendish Publishing Ltd, London, 2001) 453 (p 348) [*Commentaries* (vol 1)] (emphasis added).

<sup>140</sup> *Tom Jones*, above n 6, 258 et seq.

<sup>141</sup> *Re Agar-Ellis, Agar-Ellis v Lascelles* (1883) 24 Ch D 317, 336 (CA) Bowen LJ.

<sup>142</sup> *Ibid*, 338.

<sup>143</sup> *Ibid*.

<sup>144</sup> *Tom Jones*, above n 6, 698.

<sup>145</sup> Blackstone *Commentaries* (vol 3), above n 137, 127 (p 100).

<sup>146</sup> Blackstone *Commentaries* (vol 1), above n 139, 453 (p 347).

<sup>147</sup> *Tom Jones*, above n 6, 270.

<sup>148</sup> *Ibid*, 235.

<sup>149</sup> *Ibid*, 698.

<sup>150</sup> William G Sayres "A Loophole in the Law: The Case of Black George and the Purse in *Tom Jones*" (1995) 94 *J English and Germanic Philology* 207, 208 (emphasis added).

<sup>151</sup> *Tom Jones*, above n 6, 270.

upholding establishes his character as the model of judicial unreasonableness. He stands in direct contrast to Allworthy as their views on forced marriage demonstrate. Allworthy welcomes the prospect of a liaison between the families, but not at the cost of “violence and injustice” to Sophia.<sup>152</sup>

Now to force a woman into a marriage contrary to her consent or approbation, is an act of such injustice and oppression, that I wish the laws of our country could restrain it; but a good conscience is never lawless in the worst regulated state, and will provide those laws for itself, which the neglect of legislators hath forgotten to supply. This is surely a case of that kind; for, is it not cruel, nay, impious, to force a woman into that state against her will ...

Here, as in the trial at the Upton Inn where the Worcester justice refuses to commit Tom, Fielding makes a statement as to how the law *should* operate.<sup>153</sup> However, the practical consequence of Allworthy’s “justice” is frequently substantial injustice. In that sense, the outcome of Allworthy’s “justice” is not dissimilar to that which Squire Western’s overt unreasonableness delivers. Where Allworthy differs from Western is in the appearance of reasonableness and propriety – but appearances can be deceptive.

## 2 *Squire Allworthy*

Allworthy presides over a number of trials and quasi-trials in *Tom Jones*. As a magistrate he convicts Jenny Jones for giving birth to a bastard (Tom),<sup>154</sup> and Partridge for being Tom’s father;<sup>155</sup> and he tries Molly Seagrim when she becomes pregnant.<sup>156</sup> Acting in a private capacity, but no less judicially, he convicts Tom of poaching after he (and Black George) pursue a partridge onto Squire Western’s land;<sup>157</sup> he dismisses Black George after another report of his poaching activities;<sup>158</sup> and Tom faces charges which Allworthy hears before Tom’s banishment.<sup>159</sup> However, Allworthy’s “natural love of justice”<sup>160</sup> is flawed in its execution. His judicial errors include not informing the accused of

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<sup>152</sup> Ibid, 736.

<sup>153</sup> One wonders if Fielding had his first love, Sarah Andrew, in mind when he wrote this speech for Allworthy. See Part II A above.

<sup>154</sup> *Tom Jones*, above n 6, 37–41.

<sup>155</sup> Ibid, 75–79.

<sup>156</sup> Ibid, 148, 152–53.

<sup>157</sup> Ibid, 95–97.

<sup>158</sup> Ibid, 117.

<sup>159</sup> Ibid, 252–53.

<sup>160</sup> Ibid, 78.

the charge she or he faces; not giving the accused a chance to present her or his defence; admitting inadmissible evidence; and entering convictions on the basis of insufficient evidence. Allworthy is a “good” judge, but he is not a “good judge”.

(a) Charges? What charges?

Allworthy dismisses Black George from his service after Blifil tells a deliberately misleading story about the charges the gamekeeper faces for poaching hare(s) on Squire Western’s land. Black George is never told what “charge” he faces, and the promise of secrecy Blifil extracts from Allworthy<sup>161</sup> denies the gamekeeper the opportunity to confront his accuser and to present a defence. This is a breach of natural justice which Allworthy’s own inclination “against offenders” compounds.<sup>162</sup> Fielding reinforces the injustice by noting that the truth would “have done the gamekeeper very little mischief.”<sup>163</sup> Likewise, Allworthy neglects to tell Tom the details of the charge he faces but which he expects Tom to answer if he is to avoid banishment from Paradise Hall. Again, Fielding emphasises the injustice by noting: “Many disadvantages attended poor Jones in making his defence; ... he hardly knew his accusation ... as Mr Allworthy ... *out of modesty* sunk everything that related particularly to himself, which indeed principally constituted the crime ... .”<sup>164</sup> The reference to “modesty” is ironic; it is probably no more than another reminder that Allworthy does not act out of malice. The “everything”, of course, is Blifil’s misleading account concerning Tom’s drunken behaviour after Tom learns of Allworthy’s recovery.

(b) Evidence? What evidence?

The brief summary above notes that Blifil’s evidence is behind the charges Black George and Tom face, and their subsequent “convictions”. The evidence against Black George is hearsay. Blifil relates the story of the higer to whom Black George sold the *one* hare he took. In accepting this as evidence Allworthy breaches two tenets of contemporary criminal evidence law. First, the hearsay rule disallowed testimony concerning another person’s out-of-court statements. Second, the corroboration rule required independent confirmation of accomplice evidence.<sup>165</sup> Uncorroborated accomplice testimony meant a directed acquittal.<sup>166</sup>

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<sup>161</sup> Ibid, 117.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

<sup>164</sup> Ibid, 252 (emphasis added).

<sup>165</sup> Langbein *Adversary Criminal Trial*, above n 102, 179.

<sup>166</sup> Ibid, 207.

Although it is Western who (apparently) accepts the higher's evidence, Allworthy is at least as culpable by admitting it in hearsay form. Whether this is through ignorance or disregard of the law is not known, but the latter appears more likely given Allworthy's prosecutory "zeal".<sup>167</sup>

Allworthy also breaches the rules of evidence when Partridge is accused of being Tom's father. He admits Mrs Partridge's evidence, breaching both the hearsay rule, and the rule stopping a wife giving evidence against her husband.<sup>168</sup> Further, the mother's evidence was needed to establish paternity in a suit for bastardy.<sup>169</sup> This is where Fielding introduces Allworthy's "natural love of justice". He agrees "to defer his final determination" until Jenny arrives but when he discovers she is not available to give evidence he declares: "[T]he evidence of such a slut as she appeared to be, would have deserved no credit ...".<sup>170</sup>

Allworthy's dismissal of Jenny as a slut says more about Allworthy than it does about Jenny. A "good judge" would not rule on a witness's credibility until she (or he) gives evidence. Reading backwards it appears that Allworthy calls Jenny a slut because of gossip that after leaving the parish, Jenny had "been brought to bed of two bastards"<sup>171</sup> indicating she is a "repeat offender". Allworthy hears of this from Mrs Wilkins.<sup>172</sup> It appears Mrs Partridge believes her husband is the father of these other babies too.<sup>173</sup> While it is unclear what Allworthy believes, his reference to Jenny as a slut indicates he suspects multiple illicit liaisons. Logically, this weakens the case against Partridge making his conviction even more unsound. The convictions Allworthy enters in the other trials he presides over are equally unsound.

While Fielding goes out of his way to excuse Allworthy's (mis)judgment of Partridge,<sup>174</sup> a seemingly casual comment he makes later in the book indicates that while Fielding does not want the reader to judge Allworthy too harshly, he

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<sup>167</sup> *Tom Jones*, above n 6, 117. As a magistrate Fielding was particularly concerned that the corroboration rule meant serious offending went unpunished. He wanted the rule changed so the evidence would be admitted with a warning to the jury about its reliability. Further, he wanted accomplice testimony to shift the burden of proof to the accused. See Fielding *Robbers*, above n 62, 158–163. See also Langbein *Adversary Criminal Trial*, above n 102, 206–08.

<sup>168</sup> *Tom Jones*, above n 6, 77–78. The narrator reminds the reader of what Allworthy forgets or disregards. See also Blackstone *Commentaries* (vol 1), above n 139, 443 (p 340).

<sup>169</sup> Burn *JPO* (vol 1), above n 103, 116–18. Suits for bastardy were not about securing the welfare of the child or mother; rather such suits were brought for the purpose of ensuring the parish was not burdened by the costs associated with bringing up an illegitimate child.

<sup>170</sup> *Tom Jones*, above n 6, 78.

<sup>171</sup> *Ibid.*, 68. Presumably the babies are twins.

<sup>172</sup> *Ibid.*, 74.

<sup>173</sup> *Ibid.*, 68.

<sup>174</sup> *Ibid.*, 79.

disapproves of his mismanagement of the evidence and the resulting unsafe convictions. When Sophia arrives at the Upton Inn after fleeing her father and she thinks he is following her, Fielding compares her fear to: “[T]he common fault of a justice of peace [who] is apt to conclude hastily from every slight circumstance, without examining the evidence on both sides.”<sup>175</sup> That is what Allworthy does, but Fielding expects more of the reader when she or he passes judgment.

#### **D     *The Reader as Judge***

Fielding explicitly recognises the authority of the reader as judge. In Book 1, chapter 1, he offers the reader a “bill of fare” (evidence) that she or he is free to accept or reject. Prospective customers (judges) “... may either stay and regale with what is provided for them, or may depart to some other ordinary better accommodated to their taste”<sup>176</sup> (deliver a verdict of “guilty” or “not guilty”). Fielding alerts the reader that the evidence, while first appearing straightforward: “[We] shall represent Human Nature [in a] plain and simple manner”, will become more complex as the story (trial) unfolds, spiced as it is with the “hash and ragoo ... [of] French and Italian seasoning”.<sup>177</sup> Fielding is warning the reader to reserve judgment until all the evidence is heard. And at the end of the following chapter, after advising the reader that the narrative will digress in directions “of which I myself am a better judge”,<sup>178</sup> Fielding says:<sup>179</sup>

I must desire all those critics to mind their own business, and not to intermeddle with affairs, or works, which no ways concern them: for, till they produce the authority by which they are constituted judges, I shall plead to their jurisdiction.

Having established *his* authority as judge, Fielding invites the reader to adopt a like role, but the reader must demonstrate the critical faculties of a judge, and not leap to conclusions based on a partial hearing of the evidence. As Empson notes:<sup>180</sup>

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<sup>175</sup> Ibid, 497.

<sup>176</sup> Ibid, 23.

<sup>177</sup> Ibid, 25.

<sup>178</sup> Ibid, 24.

<sup>179</sup> Ibid, 26–27.

<sup>180</sup> William Empson *Tom Jones* (1958) 20 Kenyon Rev 217, 249. Although an “early version” of *Tom Jones* was prepared between 1745–47, it was substantially revised during 1748 with “extraordinary corrections” made to the proofs of the first three volumes in September 1748 and Fielding adding numerous “errata and cancellantia” in January 1749. The first edition did not appear until February 1749. See Hugh Amory “The History of the Adventures of a Foundling:

[T]he most unusual thing about Fielding as a novelist is that he is always ready to consider what he would do if one of his characters came before him when he was on the bench ... As to the reader of a novel, Fielding cannot be bothered with him unless he too is fit to sit on a magistrate's bench prepared, in literature as in life, to handle and judge any situation.

The analogy of reader and critic reflects Fielding's theatrical career but, equally, the analogy of critic and judge reflects his training in the law. The reader lacking the critical pretensions of a judge may see prefer to see herself or himself as a juror charged with deciding the merits of the case on the "plain matter of fact"<sup>181</sup> (admissible evidence) the narrator presents. Either way, Fielding assigns the reader the task of exercising judgment.

As author and narrator Fielding "presents evidence, both relevant and misleading, and opinions, right, wrong, or otherwise, about the characters and their deeds."<sup>182</sup> The reader, as judge (or juror), must observe and assess the interrelationship between the credibility of eye-witness testimony, the credibility of the characters' personal narrative, and past and present circumstantial evidence if she or he is to deliver a sound judgment. Defence and prosecution evidence is capable of more than one interpretation, and an astute reader will find her or his interpretation changing as new evidence inviting reconsideration of past events and characters' motivation emerges.

Fielding warns the critic who "[condemns] any of the incidents in this our history" as irrelevant, without knowing the full picture that she or he risks "presumptive absurdity".<sup>183</sup> So, too, does the judge (or juror) who bases her or his verdict on only part of available evidence risk absurdity. Fielding's expectation that the reader as judge (or juror) will reserve her or his judgment until all the evidence can be considered, in context, is no more than any lawyer demands. This, and how Fielding presents the evidence to the reader as judge (or juror) in a way which precludes a *valid* judgment or verdict being delivered until the conclusion of the legal case that is *Tom Jones*, informs the evidential analysis that follows.

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Revising *Tom Jones*" (1979) 27 *Harv Library Bulletin* 277, 284–85. Given that Fielding had taken his first steps towards appointment to the bench in early 1747, the analogy linking Fielding the novelist and Fielding the magistrate is justified. Even though Fielding did not move to the bench until shortly before *Tom Jones*' publication, it is reasonable to conclude that the experienced barrister and aspiring magistrate would be influenced by his current and soon to be future role.

<sup>181</sup> *Tom Jones*, above n 6, 135.

<sup>182</sup> Robert Alter *Nature of the Novel* (Harvard University Press, Cambridge (Mass), 1968) 21.

<sup>183</sup> *Tom Jones*, above n 6, 425.

## V LAW OF EVIDENCE

*Tom Jones* was written at a time when evidence law was in a state of flux. There was no settled law on validity, admissibility, or interpretation. Who was allowed to testify and in what circumstances varied from court to court. Sworn testimony was accepted as legal proof unless directly contradicted.<sup>184</sup> Witnesses could not be questioned about the truth of their testimony, nor could their credibility be questioned, and evidence of intent or motive was inadmissible.<sup>185</sup> Thus when Tom accuses Blifil of lying when he denies calling Tom a “beggarly bastard”, he does so “against all form of law”.<sup>186</sup> This “form of law” did not change until the end of the 18<sup>th</sup> century.<sup>187</sup> As a barrister Fielding would have experienced the difficulties resulting from an inability to cross-examine witnesses about the truth of their evidence, or to request physical proof in place of a witness’s assertion. And as a magistrate he wrote: “[T]here is no Branch of the Law more bulky, more full of Confusion and Contradiction, I had almost said of Absurdity, than the Law of Evidence as it now stands.”<sup>188</sup> The following analysis identifies a number of those absurdities.

Section A considers Fielding’s use of circumstantial evidence to (mis)lead the reader. How (and why) Fielding encourages the reader as judge (or juror) to consider the issue of credibility despite its inadmissibility at the time forms part of the discussion of character evidence in sections B and C. Section D concludes the analysis of Squire Allworthy’s character, and links this to the preceding discussion of character evidence.

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<sup>184</sup> *The Trial of Thomas White, alias Whitebread and others for High Treason [Popish Plot case]* (1679) T B Howell (ed) *A Complete Collection of State Trials* (vol 7, T C Hansard, London, 1816) 311, 358, 411–12. The defendants challenged the testimony of a key prosecution witness, Titus Oates, who said he had seen several letters implicating the defendants in the treason plot. Those letters were never produced in evidence. One of the defendants, John Fenwick, said: “[There] is nothing against us, but talking and swearing . . . .” Lord Chief Justice Scroggs responded: “For all things, all mens lives and fortunes, are determined by an oath; and an oath is by talking and kissing the book, and by calling God to the truth of what is said.” Fenwick and his fellow defendants were convicted and executed. Oates was subsequently tried and convicted for perjury; his appeal to the House of Lords was unsuccessful: *The Trial of Titus Oates* (1685) Howell *State Trials* (vol 10) 1079. See also, Carl R Kropf “Judgment and Character, Evidence and the Law in *Tom Jones*” (1989) 21 *Stud in Novels* 357, 360.

<sup>185</sup> Kropf, above n 184, 359–60.

<sup>186</sup> *Tom Jones*, above n 6, 102.

<sup>187</sup> Kropf, above n 184, 360–61.

<sup>188</sup> Fielding *Robbers*, above n 62, 161.

## A *Circumstantial Evidence*

Before the 18<sup>th</sup> century, inferences associated with circumstantial evidence were known as presumptions.<sup>189</sup> In the early to mid-18<sup>th</sup> century, “presumption”, with its inference of probability, was replaced by the phrase, “circumstantial evidence” which linked evidential facts to the case in issue<sup>190</sup> Further, judges began to advise juries on the advantages and disadvantages of circumstantial evidence when summing up. “Circumstances cannot lie” replaced the “violent [strong] presumption.”<sup>191</sup> Prosecutors placed a heavy reliance on circumstantial evidence because it was seen as difficult to fabricate.<sup>192</sup> However, allowing facts to speak for themselves denies the possibility that facts are open to multiple interpretations as the evidence concerning the nature of the relationship between Tom and Sophia (and Blifil) demonstrates.

Fielding discloses Sophia’s early preference for Tom as he relates the incident of “little Tommy”.<sup>193</sup> However, Tom does not feel a romantic attraction for Sophia until later; around the same time he learns that Molly Seagrim with whom he is having an affair is pregnant.<sup>194</sup> The accident where Tom breaks his arm stopping Sophia’s runaway horse is the catalyst: “[I]t ... operated very strongly on Sophia; and ... the charming Sophia made no less impression on the heart of Jones [who] has for some time become sensible of the irresistible power of her charms.”<sup>195</sup> However, Allworthy, Squire Western, and Mrs Western are unaware that Tom and Sophia love each other. This lack of insight causes them to ascribe a quite different meaning to subsequent events, thus precipitating Sophia’s flight from her father and the events that follow.

After Tom’s arm heals, Squire Western encourages him to remain as his guest “and Jones, either from his love of sport, *or from some other reason*, was easily persuaded ... .”<sup>196</sup> The other reason – Tom’s love for Sophia – does not

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<sup>189</sup> Alexander Welsh *Strong Representations – Narrative and Circumstantial Evidence in England* (The John Hopkins University Press, Baltimore, 1992) 20.

<sup>190</sup> *Ibid*, 21.

<sup>191</sup> *Ibid*, 24. Welsh quotes from the summing up in Trial in Ejectment between James Annesley and Richard Earl of Anglesea (1743) *State Trials* 17:143:

“Witnesses, gentlemen, may either be mistaken themselves, or wickedly intend to deceive others. God knows, we have seen too much of this in the present cause on both sides! But circumstances, gentlemen, and presumptions, naturally and necessarily arising out of a given fact, cannot lie.”

<sup>192</sup> *Ibid*, 30, 40.

<sup>193</sup> *Tom Jones*, above n 6, 125.

<sup>194</sup> *Ibid*, 147–48.

<sup>195</sup> *Ibid*, 160–61.

<sup>196</sup> *Ibid*, 192 (emphasis added).

occur to Western. Shortly afterwards, Western, his sister, and Sophia come across the aftermath of a fight between Tom, Thwackum, and Blifil (“in whom there was little sign of life”<sup>197</sup>). Sophia faints “from the sight of blood, or from fear for her father, *or from some other reason . . .*”<sup>198</sup> The other reason is the sight of Tom, “almost covered with blood, part of which was naturally his own”,<sup>199</sup> and her fear that he is hurt. However, Sophia’s reaction convinces her aunt that her concern is for Blifil.

Mrs Western, with her “wonderful sagacity”, sees that Sophia is in love,<sup>200</sup> but she mistakenly identifies Blifil as the object of Sophia’s affections:<sup>201</sup>

Did she not faint away on seeing him lie breathless on the ground? Did she not, after he was recovered, turn pale again the moment we came up to that part of the field where he stood?”

This convinces Squire Western: “I remember it all. It is certainly so . . .”,<sup>202</sup> but Western lacks insight and objectivity: his desire to see his and Allworthy’s estates “joined together in matrimony”<sup>203</sup> predisposes him to accept Mrs Western’s mistaken interpretation of events. The chain of evidence is complete when Sophia, in an attempt to assuage what she believes is Mrs Western’s suspicion about her love *for Tom*, “[addresses] her whole discourse to Mr Blifil, and [takes] not the least notice of poor Jones . . .”<sup>204</sup>

Here, as elsewhere in *Tom Jones*,<sup>205</sup> allowing “facts to speak for themselves” is misleading because facts do not speak with one voice. And as Western’s acceptance of the “spin” his sister puts on events demonstrates, an uncritical acceptance of another’s judgment can compound the original error.

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<sup>197</sup> Ibid, 212 (emphasis added).

<sup>198</sup> Ibid, 212.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid, 221.

<sup>201</sup> Ibid, 223.

<sup>202</sup> Ibid, 223.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid, 225.

<sup>205</sup> Consider, for example, why Bridget “silly” causes Thwackum to whip Tom “whereas she had never given any such orders concerning young Blifil.” (*Tom Jones*, 109); or the reason Blifil sets out to convince Western and Allworthy that he loves Sophia: “[T]he estate of Mr Western; which was all to be settled on his daughter and her issue . . .” (*Tom Jones*, 281); and why he persists in his desire to marry Sophia despite knowing she despises him: “[N]othing but the loss of her fortune, or some such accident could lessen, his inclination to the match . . .” (*Tom Jones*, 713). And “circumstances” convince Jenny (Mrs Waters) that Dowling acts on Allworthy’s instructions when he visits her, believing her to be Mrs Fitzpatrick and offering to assist with Tom’s prosecution following his duel with Fitzpatrick, but a different view of the “circumstances”, in context, convince Allworthy that Dowling is acting for Blifil (*Tom Jones*, 708).

Equally, when facts admit more than one possible meaning, a lawyer's job is to present the evidence in a way that persuades the judge or jury to accept her or his view of events. As the following examples demonstrate, this may involve presenting a particular conclusion that fits all "available" facts, or it may mean that for strategic reasons the lawyer reserves evidence until later in the trial.

1 (Mis)leading evidence / (mis)leading conclusion

The aftermath of the Tom–Blifil–Thwackum fight discussed above contains an example of the first situation. When Sophia faints Tom rushes to her assistance. Sophia is "restored to life" just as the others arrive, and Tom releases his hold:<sup>206</sup>

... but [he gives] her at the same instant a tender caress, which, had her senses been then perfectly restored, could not have escaped her observation. As she expressed, therefore, no displeasure at this freedom, *we suppose she was not sufficiently recovered from her swoon at the time.*

Here, the reader can justifiably reject the narrator's deliberately narrow interpretation. The reader knows that Sophia does not object because she welcomes Tom's caress, but absent the knowledge that Tom and Sophia love one another, the narrator's explanation is quite plausible. It fits all (other) facts *then available* to the others present, but those facts tell only half the story. In this way, Fielding reinforces the importance of considering all the evidence, in context. The narrator (Fielding) shows the importance of strategic management of circumstantial evidence at the conclusion of Partridge's "trial for Incontinency".

Partridge, accused of fathering Tom, vehemently maintains his innocence. However, Mrs Partridge's evidence concerning her husband's "relationship" with Jenny<sup>207</sup> and his "confession" satisfies Allworthy of Partridge's guilt.<sup>208</sup> After assuring the reader that this evidence is "more than sufficient to convict him", the narrator casts doubt on both the conviction and the accuracy of Mrs Partridge's evidence by revealing the "possibility that [Partridge] was entirely innocent."<sup>209</sup> There is cogent circumstantial evidence in the form "of a lad near eighteen" living

<sup>206</sup> *Tom Jones*, above n 6, 213 (emphasis added).

<sup>207</sup> For details of Mrs Partridge's suspicions see *Tom Jones*, above n 6, 64–66, 68, 71.

<sup>208</sup> *Tom Jones*, above n 6, 78. Partridge asserts the confession was made under duress ("she would never leave tormenting him"), and with the added inducement of Mrs Partridge's promise never to again mention his "affair" with Jenny: "[T]ho' he was innocent ... he believed he should have confest to a murder from the same motive" (*Tom Jones*, 76).

<sup>209</sup> *Ibid.*, 79.

in the same house as Jenny around the time Tom is conceived and “between whom, and Jenny there had subsisted a sufficient intimacy to found a reasonable suspicion; and yet, so blind is jealousy, [it] never once entered into the head of the estranged wife.”<sup>210</sup>

It is not until Fielding reveals the truth of Tom’s parentage that the reader learns this “lad” is a red herring. When this fact speaks it misleads. It is not *false* evidence (Fielding is a gentleman barrister; he would not suborn perjury), but Fielding is doing what all advocates do, that is, manage what evidence he presents and in what order before making his final submission. He does not want the reader as judge (or juror) to leap to a premature conclusion. As the narrator later observes: “[I]t is not our custom to unfold at any time more than is necessary for the occasion.”<sup>211</sup> Fielding’s use of the narrator to convey evidence that he does not want the reader to question is significant. The narrator is a character in his own right,<sup>212</sup> but because he appears both neutral and wise the reader is more likely to accept his pronouncements at face value. Few of the other characters in *Tom Jones* enjoy that level of credibility.

## **B “Character” Evidence**

Fielding establishes his main characters by contrast, for example: Squire Allworthy is “good” and wise, Western is coarse and foolish; Tom is good-natured and generous but imprudent, Blifil is malicious and hypocritical but prudent; until Tom develops prudence he acts on impulse but never intends harm, from the outset Blifil is selfish, precise and scheming; Thwackum preaches hellfire and damnation, Square advocates a philosophical “law of right”; Sophia is chaste and innocent, Molly is neither. Fielding’s use of antithetical pairs is one way in which he encourages the reader to assess the relative credibility of witnesses. Equally, the antithetical pairs enable Fielding to develop his characters without exposing their inner motivations – as he would have been obliged to do as a barrister or magistrate examining a witness at a time the law disallowed evidence of intent or motive.

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<sup>210</sup> Ibid.

<sup>211</sup> Ibid, 663.

<sup>212</sup> See John E Loftis “Trials and the Shaping of Identity in *Tom Jones*” (2002) 34 *Stud in Novels* 1, 2. Loftis describes the narrator as a magistrate judging another judge, Allworthy. See also Melinda Snow “The Judgment of Evidence in *Tom Jones*” (1983) 48 *Sth Atlantic Rev* 37, 38, quoting Charles A Knight “*Tom Jones: The Meaning of the ‘Main Design’*” (1979) 12 *Genre* 379–99, 397: “Because we repeatedly find [the narrator] perceiving matters of their true character, we tend to trust the narrator as we read ... .”

While Fielding allows the characters to make speeches explaining their actions, and to give evidence concerning others' actions, the reader does not know what they are thinking.<sup>213</sup> Before Mrs Partridge confronts Partridge concerning the rumour that Jenny Jones is Tom's mother, Fielding tells us: "[It] is our province to relate facts, and we shall leave causes to persons of much higher genius."<sup>214</sup> Similarly, when Fielding reveals Blifil knows Sophia prefers Tom's gaiety over his "sober disposition" he tells the reader:<sup>215</sup>

[It] would be an ill office in us to pay a visit to the inmost recesses of his mind, as some scandalous people search into the most secret affairs of their friends, and often pry into their closets and cupboards, only to discover their poverty and meanness to the world.

Early on, Fielding warns the reader to use "the wonderful sagacity of which he is master"<sup>216</sup> to predict how the main characters will act without being told:<sup>217</sup>

[It] is a more useful capacity to be able to foretel the actions of men, in any circumstance, from their characters, than to judge of their characters from their actions. The former ... requires the greater penetration; but may be accomplished by true sagacity, with no less certainty than the latter.

Later, after first meets Partridge, Fielding notes that Tom has yet to develop the capacity to see beyond appearances.<sup>218</sup> Tom, "satisfied with the truth of what [Partridge] had asserted", demonstrates "[a] blameable want of caution, and diffidence in the veracity of others".<sup>219</sup> This "externalisation" of the characters mirrors the situation a judge or juror faces when considering the truthfulness of a witness. It reinforces the analogy of reader as judge or juror.

Today, it is axiomatic for the reader to assume a judge who knows either the defendant or plaintiff, or a witness will recuse herself or himself from the case. Similarly, potential jurors who know any of the parties or witnesses must declare

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<sup>213</sup> Irvin Ehrenpries *Fielding: Tom Jones* (Edward Arnold Publishers, London, 1964) 9.

<sup>214</sup> *Tom Jones*, above n 6, 67.

<sup>215</sup> *Ibid*, 125.

<sup>216</sup> *Ibid*, 91.

<sup>217</sup> *Ibid*, 92.

<sup>218</sup> Simon Varey *Henry Fielding* (Cambridge University Press, Cambridge, 1986) 102.

<sup>219</sup> *Tom Jones*, above n 6, 346.

that knowledge; she or he (he in the 18<sup>th</sup> century<sup>220</sup>) is then excused from further service. However, the boundaries were less clear-cut when Fielding was practising law. While 18<sup>th</sup> century juries were no longer picked for their knowledge of the parties and events (as they were until the mid-15<sup>th</sup> century),<sup>221</sup> juries were drawn from the immediate locality and as their deliberations were public,<sup>222</sup> it is no surprise that their decisions frequently reflected “the attitudes of much of village society.”<sup>223</sup> A judge or juror identifying too closely with a witness, or who has a vested interest in the outcome of a “trial” (as many of the characters in *Tom Jones* do), is likely to lack the ability to assess objectively the evidence presented. Fielding’s “externalisation” of the characters ensures the reader is not under the same disability.

The “externalisation” of characters (and events) mirrors the way in which a lawyer makes submissions to the court of behalf of her or his client. Submissions set forth arguments, marshal evidence, and outline the law. They should be factual and dispassionate, even where the substance is likely to stir emotions.<sup>224</sup> Further, defence and prosecution submissions imply that the facts (and the law) lead to a particular *preferred* conclusion.

### C *Lies, Damned Lies ...*

Fielding informs the reader that there is more than one way of giving evidence. Shortly after Tom is banished by Allworthy, “Blifil had the satisfaction of conveying a lie to his uncle without telling one.”<sup>225</sup> Sophia reluctantly agrees to accept a visit by Blifil, as a suitor, but the meeting does not go well and Sophia’s “hatred and scorn” for Blifil is reciprocated.<sup>226</sup> However, when questioned by Allworthy who will not agree to a forced marriage, Blifil replies: “I

<sup>220</sup> Before the passage of the Sex Disqualification (Removal) Act 1919, women in England could not be admitted to the bar or qualify as solicitors (and by extension could not serve on the bench), nor were they permitted to sit on juries.

<sup>221</sup> R S Deans *The Student’s Legal History* (4 ed, Stevens & Sons, London, 1921) 35.

<sup>222</sup> Until the middle of the 17<sup>th</sup> century, the practice of county assize juries was to hear all the evidence in several cases before retiring to consider the verdicts. A new jury was empanelled to hear the next tranche of cases, and so on. Because of problems finding enough jurors for the succession of alternative juries, practice changed so that juries deliberated in open court in conclusion of each case, and delivered their verdict immediately. This practice was adopted at the Old Bailey in 1738. See John Hostettler *The Criminal Jury Old and New: Jury Power from Early Times Until the Present Day* (Waterside Press, Winchester, 2004) 77.

<sup>223</sup> Thomas A Green “A Retrospective” in J S Cockburn and Thomas A Green (eds) *Twelve Good Men and True – The Criminal Trial Jury in England, 1200–1800* (Princeton University Press, Princeton (NJ), 1988) 394.

<sup>224</sup> Welsh, above n 189, 8–9.

<sup>225</sup> *Tom Jones*, above n 6, 281.

<sup>226</sup> *Ibid*, 280.

would not ... consent to marry this young lady, if I was not persuaded she had all the passion for me which I desire she should have.” Allworthy accepts this assurance at face value,<sup>227</sup> but the reader knows that Blifil has *no* desire that Sophia have *any* passion for him. Blifil has “[conveyed] a falsehood with the heart only, without making the tongue guilty of an untruth.”<sup>228</sup>

Similarly, when Allworthy confronts Dowling over withholding the information that Bridget was Tom’s mother, he accepts Dowling’s explanation shifting responsibility to Blifil. Earlier in this interview, Dowling admits briefing the witnesses to Tom’s fight with Fitzpatrick: “There are two ways of giving evidence.”<sup>229</sup> And the reader is told that in blaming Blifil, Dowling is “[conveying] a lie in the words of truth.”<sup>230</sup> Blifil did tell Dowling that he had informed Allworthy of the contents of Bridget’s letter, but the material rewards Blifil promises is what motivates Dowling’s silence.<sup>231</sup> He is not under any other obligation.

The “spin” witnesses (usually “briefed” by lawyers) put on evidence is something that juries and judges face every day. Whether one sees through the spin depends in part on one’s knowledge of the facts, but a significant consideration is one’s perception of each character’s (witness’s) credibility. As noted above, the law at the time did not allow a *direct* challenge to a witness’s credibility, but *indirect* challenges were possible and, then as now, judges and juries had to assess the credibility of witnesses.

### 1 *Witness credibility*

Indirect challenges to credibility took a number of forms. Rebuttal witnesses could be called to contradict previous testimony, and the accused could call alibi and “character” witnesses (if the accused called witnesses to provide evidence of “good” character, the prosecution could call evidence of “bad” character).<sup>232</sup> This did not involve a direct challenge the *truth* of other *sworn* testimony,<sup>233</sup> but it put the *reliability* of evidence in issue, and in particular it

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<sup>227</sup> Ibid, 282.

<sup>228</sup> Ibid.

<sup>229</sup> Ibid, 792.

<sup>230</sup> Ibid, 793.

<sup>231</sup> Ibid, 794.

<sup>232</sup> Langbein *Adversary Criminal Trial*, above n 102, 192.

<sup>233</sup> It should be noted that an accused was not able to give evidence on oath until 1898. This had the effect of lessening the credibility of any statement by the accused relative to that of sworn prosecution witnesses. Although defence witnesses were able to testify on oath from 1702 in felony trials (and from 1696 in treason trials) the extension of this privilege was not so much to

encouraged the judge or juror to consider the connection between a witness' character and the reliability of her or his evidence.<sup>234</sup> It is this connection between character and reliability that Fielding emphasises in *Tom Jones*.

Fielding's use of antithetical pairs begins the process by which he encourages the reader to consider who the credible witnesses are. As noted in Part III A above, part of this process involves comparing and contrasting particular character traits (such as justice and mercy) to alert the reader to the need to look beyond what the characters say when judging their credibility and the (relative) reliability of their evidence. Actions often speak louder than words. For example, when Molly's pregnancy becomes public knowledge it is Square who attempts to persuade Allworthy that Tom "supported the father, in order to corrupt the daughter ...".<sup>235</sup> Earlier, Tom assures Allworthy that his motives were purely altruistic.<sup>236</sup> Allworthy gives Square's views considerable credence,<sup>237</sup> but Fielding presents evidence of Square's actions and his character that lead the reader to reach a different conclusion.

That evidence includes the revelation that Square is attracted to Molly. He sees Molly at church before anyone (except her mother) knows she is pregnant and later that same day he contrives to see her again. When Square learns that Molly's "virtue had already been subdued" he acts on his desires. Until then his finely tuned sense of self-preservation holds sway.<sup>238</sup> Further, before any of these events unfold, the reader learns that Square hates Tom whom he sees as a rival for Bridget Blifil's affections.<sup>239</sup>

The "spin" Square puts on Tom's generosity to Black George and his family *could* represent the truth. But Square is a hypocrite<sup>240</sup> and an "object of derision".<sup>241</sup> This character evidence, combined with Square's enmity towards

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address the imbalance in favour of the prosecution, rather it was "to expose defence witnesses to prosecution for perjury". The full name of the 1702 Act in which this measure was included shows its prosecution bias: An Act for Punishing Accessories to Felonies, and Receivers of Stolen Goods, and to Prevent the Wilful Burning and Destroying of Ships 1702 (Eng), 1 Anne 2, c 9. See Langbein *Adversary Criminal Trial*, above n 102, 52, 96–97.

<sup>234</sup> Kropf, above n 184, 360.

<sup>235</sup> *Tom Jones*, above n 6, 155.

<sup>236</sup> *Ibid*, 113: "[The] poor gamekeeper, with all his large family, ... have been perishing with all the miseries of cold and hunger. I could not bear to see those poor wretches naked and starving, and at the same time know myself to have been the occasion of all their suffering."

<sup>237</sup> *Ibid*, 155: "[T]hose considerations ... were too plausible to be ... rejected, ... [W]hat Square had said sunk very deeply into his mind [and ] stamped in the mind of Allworthy the first bad impression concerning Jones."

<sup>238</sup> *Ibid*, 139, 143, 184–85.

<sup>239</sup> *Ibid*, 110.

<sup>240</sup> *Ibid*, 100.

<sup>241</sup> *Ibid*, 101.

Tom and his personal interest in the outcome of the “case” (access to Molly and/or Bridget), establishes that Square’s testimony is unreliable. Similarly, Fielding uses “character evidence” to expose the unreliability of Thwackum, another hypocrite and object of derision; the self-serving, venal nature of Mrs Wilkins, the “truly great politician”<sup>242</sup> who takes her lead from who she is with at the time;<sup>243</sup> and the absolute reliability of Sophia who is the best judge of character in *Tom Jones* (she is the first to see through Blifil), but who is rarely called on to deliver judgment in a formal sense. In contrast, Allworthy’s name is evidence *of his* character, but this does not make him a good judge *of* character.

#### **D Squire Allworthy**

There are two main reasons why Allworthy is such a poor judge of character. First, his own virtue blinds him to possibility of evil or duplicity in others. After Square suggests that Tom’s charity to Black George’s family was motivated not by friendship, but “in order to corrupt the daughter”, Fielding notes: “The goodness of Allworthy had prevented those considerations from occurring to himself ... .”<sup>244</sup> Likewise, Blifil’s “malicious purpose” in releasing the bird, little Tommy, never occurs to him.<sup>245</sup> Paradoxically, Allworthy’s moral rectitude leads him to judge harshly those whose actions do not accord with his own strict sense of morality. As Fielding notes: “[T]his worthy man had never indulged himself in any loose pleasures with women, and he greatly condemned the vice of incontinence in others.”<sup>246</sup>

Although Allworthy is willing to balance Tom’s “incontinence” with Molly with “the honour and honesty of his self-accusation”,<sup>247</sup> Jenny and Partridge are not treated as leniently. As noted in Part III C 1 b above, Allworthy judges Jenny to be a slut after he (finally) hears the rumours concerning her further “incontinence”. Allworthy is the last to hear these rumours because he is so out of touch with the local community. This is the second reason why he is such a poor judge of character.

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<sup>242</sup> Ibid, 43.

<sup>243</sup> For example, when Allworthy calls for her after discovering the baby, Tom, her first inclination is to call the baby a “misbegotten wretch”, but he becomes a “sweet little infant” after Allworthy indicates his approval (*Tom Jones*, 29). Likewise, Mrs Wilkins waits for a cue from Bridget before going into rhapsodies over the baby’s beauty and virtue (*Tom Jones*, 32–33).

<sup>244</sup> *Tom Jones*, above n 6, 155.

<sup>245</sup> Ibid, 128.

<sup>246</sup> Ibid, 153.

<sup>247</sup> Ibid.

Allworthy is unaware of the gossip that Partridge is Tom's father, or that Jenny has had two more children until Captain Blifil tells him (for his own purposes) and Mrs Wilkins confirms it. The narrator notes: "Mr Allworthy ... was perhaps the only person in that country who had never heard of it."<sup>248</sup> Similarly, it is a full year before Allworthy hears that Black George faces charges for poaching a hare from Squire Western's estate.<sup>249</sup> Even then he only finds out because Blifil chooses to enlighten him for his own malicious purpose.

Fielding is at pains to point out that "[s]candal never found any access to [Allworthy's] table" because his natural inclination to "relieve the distresses of others"<sup>250</sup> makes him loath to believe anything to a person's disadvantage. Fielding implies that people simply tell Allworthy what he wants to hear (or what they want him to hear) whether it is true or not:<sup>251</sup>

[B]y attending to the conversation at a great man's table, you may satisfy yourself of his ... entire disposition [and] *much the greater part of mankind ... accommodate their conversation to the taste and inclination of their superiors.*

This reinforces why Allworthy is such a bad judge of character. His "transcendent generosity of mind"<sup>252</sup> inclines him to accept the conversation (evidence) at his table (court) at face value. He does not recognise that the conversation is tailored to his sensibilities (the evidence is "spun"); and he hears only favourable evidence except, perhaps, where the charge is one of poaching or sexual incontinence. As a consequence Allworthy does not recognise when he is being misled by villains such as Blifil and his father before him, and by characters such as Thwackum and Square (and Blifil) who "counterfeit generous motives"<sup>253</sup> to disguise their self-interest. As Harrison notes, "Allworthy ... is too isolated, by reason of his wealth and virtue"<sup>254</sup> to understand what makes people "tick". The following section comprises an in-depth discussion of the character of Blifil's confidante, lawyer Dowling, and what makes him "tick".

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<sup>248</sup> Ibid, 75. Captain Blifil's ulterior motive in repeating the gossip at this stage is to alienate Allworthy and Tom. Having married Bridget in anticipation of eventually inheriting Allworthy's estate, he wants to eliminate every obstacle in the way of his intended goal.

<sup>249</sup> Ibid, 116.

<sup>250</sup> A reference to the charity Allworthy dispenses throughout *Tom Jones*. The irony here is that Allworthy's own definition of "true" charity is "[bestowing] on another what we really want ourselves ... to share ... by giving what even our own necessities cannot well spare." whereas he compares "[relieving] our brethren only with our superfluities" to "[gratifying] any other idle, ridiculous vanity ... ." (*Tom Jones*, 74). Allworthy dispenses superfluities, most often to those he first dispenses justice to.

<sup>251</sup> *Tom Jones*, above n 6, 76 (emphasis added).

<sup>252</sup> Bernard Harrison, Arnold Kettle and A K Thorlby (eds) *Henry Fielding's Tom Jones – The Novelist as Moral Philosopher* (Sussex University Press, London, 1973) 107.

<sup>253</sup> Sheldon Sacks *Fiction and the Shape of Belief – A Study of Henry Fielding with Glances at Swift, Johnson and Richardson* (University of California Press, Berkeley, 1964) 114.

<sup>254</sup> Harrison, Kettle and Thorlby, above n 252, 107.

## VI MR DOWLING, ATTORNEY

Dowling, the only lawyer who appears regularly through the novel, is an exception to the “character pairs” rule. Is this because Fielding has nothing good to say about lawyers (and the law)? Or does it reflect the “cab rank principle”? That is, as an advocate available to all who wish to instruct him Dowling does not need an “opposite”? As the following discussion of Dowling’s character shows, Fielding’s portrayal of attorneys and their conduct in *Tom Jones* reflects a contemporary, commonly held, negative perception of lawyers. Equally, it reflects Fielding’s personal perspective as someone who was the social, intellectual, educational, and professional superior of those inhabiting the “lower ranks” of the law. Further, the analysis demonstrates the reader as judge (or juror) must reserve judgment until the totality of the evidence is available, in context.

Fielding warns the reader against “[borrowing] our idea of a man from our opinion of his calling”.<sup>255</sup> However, three chapters before this Fielding makes the point that juries *do* judge lawyers less favourably than others.<sup>256</sup> A reasonable inference is that Fielding expects the reader to have an open *but sceptical* mind.

Dowling is an ambiguous character, at one time appearing to assist the hero, Tom, and at others, the villain, Blifil. Dowling is the attorney from Salisbury<sup>257</sup> who arrives with news of Bridget’s death.<sup>258</sup> This is significant because it is Dowling’s evidence of his meeting with Blifil and the revelation that Blifil knows that Tom is his elder half-brother which leads to Blifil’s downfall.<sup>259</sup> However, for the reader, the additional significance of this revelation lies in the insight it provides concerning Dowling’s motives. Armed with this knowledge, the reader reviewing Dowling’s earlier appearances discovers that he, like Blifil, is a villain. It reinforces the dominant themes of “mystery, jargon and avarice”<sup>260</sup> that mark Fielding’s depictions of lawyers in *Tom Jones*.

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<sup>255</sup> *Tom Jones*, above n 6, 542.

<sup>256</sup> *Ibid*, 531. When Partridge contemplates forcibly returning Tom to Allworthy (before he knows why Tom left) one of his companions, an attorney’s clerk, says: “Suppose an action of false imprisonment be brought against us? ... [I]t doesn’t look well for a lawyer to be concerned in these matters, unless it be as a lawyer. Juries are always less favourable to us than to other people.”

<sup>257</sup> In another autobiographical twist, there is evidence to suggest that Dowling is modelled on another “shifty” Salisbury attorney, Robert Stillingfleet, who handled the sale of Fielding’s share of the farm at East Stour. Stillingfleet had apparently bilked Fielding of some of the money due from the sale. There is evidence suggesting that shortly after his admission to the Bar in 1740, Fielding issued proceedings in respect of the conveyance of East Stour property, but no record of the verdict has been traced. See Rogers, above n 1, 98–100.

<sup>258</sup> *Tom Jones*, above n 6, 196.

<sup>259</sup> *Ibid*, 793.

<sup>260</sup> Ehrenpries, above n 213, 31.

The analysis that follows begins by placing the various terms Fielding uses when discussing “officers of the law” in their contemporary legal and social context. Three sections analysing Dowling’s actions, his motives, and his relationship and dealings with Tom, Blifil, and Allworthy follow.

### A *Barristers, Attorneys, and Petty-foggers*

Popular perception in the 17<sup>th</sup> and early to mid 18<sup>th</sup> centuries saw an attorney as “a man with only a smattering of learning which he used badly while trying to make as much money as possible.”<sup>261</sup> A petty-fogger<sup>262</sup> (“pettifogger”) was (is) an attorney who supports (his) practice by fomenting and extending litigation for (his) own benefit. Pettifogging was an “inevitable” consequence of the rapid expansion in numbers of attorneys in the 16<sup>th</sup> and 17<sup>th</sup> centuries; there were “too many lawyers for them all to make an honest living.”<sup>263</sup> Attorneys and pettifoggers were also looked down on because they were in every respect considered to the social and professional inferiors of barristers.

Attorneys were attracted to the profession as a means of improving their social status. In the 17<sup>th</sup> and early 18<sup>th</sup> centuries almost anyone could hang up (his) shingle and commence practice.<sup>264</sup> It was not until 1729 that legislation was passed prohibiting practice as an attorney without proper admission to the Roll.<sup>265</sup> However, attorneys’ training, such as it was, remained a form of apprenticeship with clerks of the court, or (more commonly) attorneys “previously sworn and admitted.” Attorneys were wholly dependent on the diligence (or lack thereof) of their masters for the quality of their training, unencumbered, as it was, by the “more useless frills of education.”<sup>266</sup>

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<sup>261</sup> Christopher W Brooks *Pettyfoggers and the Vipers of the Commonwealth – The ‘Lower Branch’ of the Legal Profession in Early Modern England* (Cambridge University Press, Cambridge, 1986) 178–79.

<sup>262</sup> “A little dirty attorney, ready to undertake any litigious or bad cause: it is derived from the French words petit vogue, of small credit, or little reputation.” See Francis Grose *The 1811 Dictionary of the Vulgar Tongue* available at <<http://www.gutenberg.org/dirs/etext04/dcvgr10.txt>> accessed 25 July 2007.

<sup>263</sup> Robert Robson *The Attorney in Eighteenth Century England* (Cambridge University Press, Cambridge, 1959) 139. *Animadversions on the Present Laws of England etc.*, a pamphlet published in 1749 (as was *Tom Jones*) illustrates contemporary attitudes which saw law, in the hands of lawyers, as a source of oppression rather than relief says (quoted by Robson at p 138):

“Some ... inferior practitioners not only instigate the unwary to unjust and unreasonable litigations, but whilst their money lasts, dissuade them from amicable and equitable accommodations; and instead of being peace-makers, are promoting the breach thereof, even among the best united friends.”

<sup>264</sup> Robson, above n 263, 10–11.

<sup>265</sup> An Act for the Better Regulation of Attornies and Solicitors 1729 (Eng), 2 Geo II, c 23, ss v–vi.

<sup>266</sup> Robson, above n 263, 53.

“Gentleman barristers”, however, were typically drawn from the landed gentry and nobility (as Fielding was), enjoyed a liberal education, usually in the classics or science, before being admitted to one of the Inns of Court where they received in depth training in the law.<sup>267</sup> Attorneys’ lower social status, and particularly the prejudice against their “mechanical learning”, compared with the “scientific learning” of barristers, is revealed in the classification of law at the time as “... consisting of two parts, practice and judgment. The former was the preserve of attorneys; that latter, that of barristers.”<sup>268</sup> Dowling belongs to the former group as Fielding’s subtle mocking of his lack of knowledge of Latin and the classics reveals. At the alehouse on the road to Coventry, Tom quotes a lengthy passage from Horace’s Ode 1.22, assuming that Dowling will recognise passage and understand the allusion he is making (“dear *Lalage*” is Sophia).<sup>269</sup> And it is to “counsel” that Dowling turns to when Allworthy asks for advice on prosecuting of Black George for the theft of Tom’s £500.<sup>270</sup>

### ***B Tom’s First Meeting with Dowling***

Dowling makes his second appearance at the Bell in Gloucester where Tom is staying after leaving Paradise Hall. When Tom leaves the dinner table, another guest (a self-styled lawyer, a “vile petty-fogger”) informs Dowling who Tom is. Dowling responds to this news “a little eagerly”,<sup>271</sup> implying that he is *very* eager to hear more. Why? – Because he perceives he may be able to turn this knowledge to his benefit. A reasonable inference, based on the petty-fogger’s explanation concerning Tom’s departure from Paradise Hall, is that Dowling concludes Blifil has not told Allworthy that Bridget was Tom’s mother. Fielding reveals more about Dowling’s character when he and Tom next meet.

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<sup>267</sup> Brooks, above n 261, 179–80; Richard Abel *The Legal Profession in England and Wales* (Basil Blackwell, Oxford, 1988) 46–47, 74.

<sup>268</sup> Brooks, above n 261, 179.

<sup>269</sup> *Tom Jones*, above n 6, 543–54. The first published versions of *Tom Jones* did not contain any translation of Horace’s Ode 1.22. The writer has checked several digitised copies of early editions which quote only the Latin. The partial translation (of the first stanza) that appears in the Penguin edition matches the partial translation that appears in volume three, page 210 of the Feltrinelli edition, published in 1780. The Project Gutenberg (online) edition includes the following translation of the second stanza:

Place me beneath the burning ray,  
Where rolls the rapid car of day;  
Love and the nymph shall charm my toils,  
The nymph who sweetly speaks, and sweetly smiles.

<sup>270</sup> *Tom Jones*, above n 6, 791.

<sup>271</sup> *Ibid.*, 351.

### C *On the Road to Coventry*

Tom and Dowling meet in the yard of an inn on the Coventry road where Tom is attempting to procure horses to continue his pursuit of Sophia. Dowling persuades Tom to stay for a glass of wine before he continues his journey, and he offers a toast to Allworthy and Blifil, the “very honest gentleman”, to whom he conveyed news of his mother’s death.<sup>272</sup> But an honest gentleman would not have withheld details of his mother’s deathbed confession, and Dowling *knows* that Blifil has not told Allworthy. The implication is that Dowling detains Tom to find out what he knows. Tom, unsurprisingly, decries Blifil’s villainy which has seen him estranged from Allworthy, to which Dowling responds: “[It] is a pity that such a person should inherit the great estate of your *uncle* Allworthy.”<sup>273</sup> A reader unaware that Dowling knows that Allworthy *is* Tom’s uncle may pass this over as a slip of the tongue, but everything Dowling does is calculated. Tom does not pick up on Dowling’s strong hint and is persuaded to tell his “life story”. Fielding reveals:<sup>274</sup>

Mr Dowling was indeed very greatly affected with this relation; for he had not divested himself of humanity by being an attorney. Indeed, nothing is more unjust than to carry our prejudices against a profession into private life, and to borrow our idea of a man from our opinion of his calling. Habit, it is true, lessens the horror of those actions which the profession makes necessary ... A butcher ... would feel compunction at the slaughter of a fine horse: ... The common hangman ... is known to have trembled at his first operation on a head: ... the very professors of human blood, who in their trade of war butcher thousands ... without remorse; ... in times of peace ... become very gentle members of civil society. In the same manner an attorney may feel all the miseries and distresses of his fellow creatures, *provided he happens not to be concerned against them.*

But Dowling *is* “concerned against” Tom; he is withholding information concerning Tom’s parentage for his own purposes. Dowling’s self-serving observation that “very ill offices must have been done to [Tom] by somebody”<sup>275</sup> confirms this. The somebodies are Blifil and Dowling. The implication is that Dowling is aware of, or suspects, Blifil’s role in Tom’s expulsion from Paradise Hall, but he needs to confirm what Tom knows before confronting Blifil.<sup>276</sup>

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<sup>272</sup> Ibid, 540.

<sup>273</sup> Ibid, 541 (emphasis added).

<sup>274</sup> Ibid, 542 (emphasis added).

<sup>275</sup> Ibid, 542.

<sup>276</sup> Tom, as the reader knows, is unaware of Blifil’s involvement – see *ibid*, 251, 452.

The knowledge that Dowling is “concerned against” Tom completely alters the meaning an informed reader ascribes to this passage. Tom is not Dowling’s client (as is revealed in the next section, Dowling is acting for Blifil), so Dowling can feel sorry for Tom in the abstract while conspiring against him. Fielding reveals his contempt for Dowling by comparing him to a butcher, hangman, or warmonger. This should alert the reader that, notwithstanding Fielding’s initial warning, it may be appropriate to equate our idea of this man with “our opinion of his calling.”

When Fielding says there may be another opportunity to comment on Dowling’s apparent compassion, “should [we] happen to meet Mr Dowling [again]”<sup>277</sup> he is telling the reader two things. First, this *is not* the last time Dowling features. Second, no judge can deliver a verdict without considering all the evidence. Further, relevant evidence is available concerning Dowling’s relationship with Blifil.

#### ***D Dowling, Blifil, and Allworthy***

Dowling does not reappear until the end of Book 17, chapter seven. Fielding reveals that Dowling has become:<sup>278</sup>

... a great favourite with Mr Blifil, and whom Mr Allworthy, at the desire of his nephew, had made his steward; and had likewise recommended him to Mr Western from whom [Dowling] had received a promise of being promoted [to steward] upon the first vacancy; and in the meantime, was ... transacting some affairs which the squire then had in London.

The adage, “keep your friends close, keep your enemies closer”, springs to mind. The writer concludes that after his meeting with Tom at the Coventry road inn, Dowling confronts Blifil with the evidence he is concealing the truth concerning Tom’s parentage, while conspiring to alienate Tom and Allworthy. A reasonable inference is that Dowling was (is) blackmailing Blifil, explicitly or implicitly. Blifil rewards Dowling’s silence by ingratiating him with Allworthy and Western; this forms part (at least) of the promises Blifil makes “to [induce] him to secrecy”.<sup>279</sup>

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<sup>277</sup> Ibid, 544.

<sup>278</sup> Ibid, 752.

<sup>279</sup> Ibid, 794.

Dowling appears briefly in Book 18, chapter three,<sup>280</sup> where Mrs Miller recognises him as the lawyer seen interviewing witnesses to Tom's duel with Fitzpatrick.<sup>281</sup> The exchange that follows indicates the importance of considering evidence in context. Mrs Miller does not question Dowling's motives when he urges the witnesses to tell the truth as she believes Allworthy sent Dowling to intercede on Tom's behalf. However, the revelation that Blifil instructed Dowling causes her to have second thoughts.<sup>282</sup> Blifil convinces Allworthy that he told Dowling to "soften" the witnesses' evidence. He receives support from Nightingale who says: "[This] is the light in which it appeared to me from the gentleman's [Dowling's] behaviour."<sup>283</sup> But as previously noted, Fielding warns against judging a person's character from her or his actions (or her or his words). What Dowling does *not* say reveals more about his character and his motives as Mrs Waters' account of their meeting demonstrates.

Dowling, acting on Blifil's instructions, approaches "Mrs Fitzpatrick", offering to pay for Tom's prosecution for murder, but Dowling mistakes Mrs Waters for Mrs Fitzpatrick. He does not identify himself or his principal, the "very worthy gentleman ... well apprized with [the] villain [Tom]."<sup>284</sup> Mrs Waters, too, infers that Dowling acts for Allworthy, but only after Partridge informs her who Dowling is.<sup>285</sup> Why does Dowling conceal his and Blifil's identities? The logical explanation involves "... the deepest and blackest villainy".<sup>286</sup> Dowling conceals his (and Blifil's) part in Tom's downfall in order to protect his sinecure with Allworthy – and the prospect of further rewards from Western. However, confronted with evidence of his involvement, Dowling attempts to recover the situation by asserting that he was acting on Blifil's instructions.<sup>287</sup> Again, what Dowling does *not* say reveals the true extent of his villainy.

Part V C above notes how Dowling "[conveyed] a lie in the words of the truth".<sup>288</sup> Fielding goes further, finally laying bare Dowling's motivation, both for his prior actions and for disclosing Blifil's role in Tom's downfall:<sup>289</sup>

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<sup>280</sup> Ibid, 771.

<sup>281</sup> Ibid, 777.

<sup>282</sup> Ibid, 777–78.

<sup>283</sup> Ibid, 778.

<sup>284</sup> Ibid, 787–88.

<sup>285</sup> Ibid, 788.

<sup>286</sup> Ibid.

<sup>287</sup> Ibid, 792.

<sup>288</sup> Ibid, 793.

<sup>289</sup> Ibid, 794.

... he very plainly saw he should not be able to keep them, he thought proper now to make this confession, which the promises of forgiveness, joined to the threats, ... extorted from him, ... besides [he was] taken unawares, and had no time to consider of evasions.

The “them” Dowling cannot keep are the “promises Blifil had made” to secure his silence.<sup>290</sup> Dowling, the blackmailer, knows Blifil’s villainy has been exposed. Blifil can only keep his promises (“pay the blackmailer”) as long as he enjoys Allworthy’s confidence. Fielding implies that had Dowling had been forewarned, he may yet have tried to conceal the true extent of his involvement. But the evidence is overwhelming and Dowling knows that the case is lost. His only alternative is to attempt a plea in mitigation. Allworthy reinforces his failure as a judge (and as a judge of character) when he declares himself “well satisfied with this [plea] ... .”<sup>291</sup>

## VII THE TRIFLING INCIDENT OF LITTLE TOMMY

The battle between Sophia, Tom, and Blifil, and what Blifil stands for lies at the heart of *Tom Jones*, and the incident of little Tommy is a preface to the main action. Tom has given Sophia a present of a songbird (“little Tommy”) which he has raised from a nestling. Sophia is very fond of tame little Tommy. Sophia, although wary, lets Blifil hold him, but Blifil releases the bird which flies away. Tom responds to Sophia’s distress and falls into the canal while trying to recover little Tommy who, unfortunately, is taken by a hawk. The incident concludes with a discussion of Blifil’s motives and the relevant law.<sup>292</sup>

The episode itself is a parable that “moves from personal predicament to moral judgment,”<sup>293</sup> but equally it is a metaphor presaging the action and themes central to *Tom Jones*. For example, little Tommy’s foolishness reflects Tom’s imprudence and his flight from the safety of his cage with its fatal ending parallels Tom’s flight from Sophia, his banishment from the security of Paradise Hall and his near fate at the end of a hangman’s rope.<sup>294</sup> Further, this incident introduces Blifil as the instrument of Tom’s downfall, while the two justices, Allworthy and Western, who lack the insight a true judge of character requires, accept Blifil’s

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<sup>290</sup> Ibid.

<sup>291</sup> Ibid.

<sup>292</sup> Ibid, 125–29.

<sup>293</sup> John Preston “Plot as Irony: The Reader’s Role in *Tom Jones*” in Compton, above n 66, 251.

<sup>294</sup> Alter, above n 182, 23.

explanation(s) at face value,<sup>295</sup> as they do until the final denouement. And, as the discussion that follows demonstrates, Fielding presents this incident and the evidence from which the reader arrives at her or her own judgment in a way that mirrors the structure (and presentation) of a legal case.

Section A considers what the reader knows about Tom's and Blifil's characters from their past deeds, their past words, and what others say about them. Section B analyses how Fielding separates deed and doer in the mind of the reader, and compares this to the way counsel presents a case to the court. Section C uses the conclusions from sections A and B to assess Blifil's moral and legal liability over the loss of little Tommy. Part D draws together the threads of the previous discussion to show how the structure of *Tom Jones* mimics the legal case the incident of little Tommy embodies.

## A *Character Evidence*

Fielding devotes Book 3 to building a careful picture of Tom and Blifil, from their words and actions, and through the eyes of Thwackum, Square, and Allworthy. Book 3 covers Tom's life from age 14 to age 19, so most if not all the evidence postdates the incident of little Tommy (which takes place when Sophia is "about thirteen"<sup>296</sup>). However, Fielding is presenting an "opening address" that alerts the reader how unwise it would be to "let the facts speak for themselves", in isolation, at any stage. This "opening address" reinforces the need to consider the totality of the evidence and to be wary of the judgment of those aligned against Tom, and for Blifil. A strictly chronological approach would not be as enlightening.

Fielding declares that his intention is to "guide [his] pen throughout by the directions of truth". As a prosecuting or defence counsel would do, he presents evidence that contrasts Tom's "vices" with Blifil's "virtues."<sup>297</sup> Tom is honest, brave, and generous, but he lacks prudence. In this way Fielding establishes process that he follows throughout *Tom Jones*. He uses a combination of external observations and the characters' personal explanations to relate the action and the characters' motivations. But neither is objective. External observers' perceptions (and prejudices) influence the meaning they ascribe to events. The characters'

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<sup>295</sup> Arnold Kettle "*Tom Jones*" in Compton, above n 66, 56.

<sup>296</sup> *Tom Jones*, above n 6, 125.

<sup>297</sup> *Ibid*, 93.

personal explanations frequently are incomplete or self-serving and, as noted in Part V B, the reader is not made aware of the characters' inner motivations.

### 1 *Tom Jones*

As Tom's defence counsel, Fielding acknowledges his client's faults while his submission presents alternative interpretations of key events that lead the reader to question whether Tom was "certainly born to be hanged."<sup>298</sup> The reader learns that Tom has been "convicted of three robberies", but the fruits of his "crimes" have, both literally and figuratively, been given to the gamekeeper, Black George, for his family. And when Tom strays onto Squire Western's land in pursuit of a partridge (another crime), he accepts a severe beating rather than break his promise to conceal Black George's involvement. Fielding thus establishes Tom as a person to whom honour matters, although Allworthy obtusely refers to this as "mistaken honour".<sup>299</sup> When Tom sells his horse and bible, both presents from Allworthy, he does so for the selfless purpose of assisting Black George whom Blifil causes to be dismissed.<sup>300</sup> This "character" evidence establishes Tom is truthful and trustworthy, even if he is yet to learn the value of prudence.

### 2 *Master Blifil*

As counsel prosecuting Blifil, Fielding adopts a similar, but diametrically opposed strategy. He begins by describing Blifil as "sober, discreet, and pious, beyond his age,"<sup>301</sup> but the evidence reveals Blifil is "treacherous, lecherous, hypocritical and self-seeking."<sup>302</sup> He calls Tom a "beggarly bastard," but his denial is unconvincing (as is the narrator's suggestion of a genuine oversight), particularly as Blifil uses this opportunity to reveal that Black George was with Tom when Tom chased the partridge on to Western's land.<sup>303</sup> There could be an innocent reason why Blifil praises Square and Thwackum to Allworthy, but Fielding subtly implies otherwise.<sup>304</sup>

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<sup>298</sup> Ibid.

<sup>299</sup> Ibid, 97, 103.

<sup>300</sup> Ibid, 104.

<sup>301</sup> Ibid, 93.

<sup>302</sup> Kettle, above n 295, 56.

<sup>303</sup> *Tom Jones*, above n 6, 93.

<sup>304</sup> Ibid, 105.

Similarly, when Fielding describes Blifil's prudence in buying Tom's bible, after which Blifil ensures that Thwackum becomes aware of Tom's "crime",<sup>305</sup> the reader infers that Blifil's aim is to cause trouble for Tom. By the time Blifil "[forgets] the distance of time" and adds an "s" to the hare Black George poaches from Squire Western,<sup>306</sup> the reader is even less inclined to accept he is genuinely mistaken. Fielding's submission for the prosecution, while ostensibly leaving the final judgment to the reader, implies that the only possible verdict is "guilty".

### 3 *Thwackum, Square and Allworthy*

Fielding also uses Book 3 to alert the reader to the reasons why those who judge Tom lack "sagacity" and the consequences this has. As noted above, Blifil ingratiates himself with Thwackum and Square via the comments he knows Allworthy reports back. Thwackum is continually upset at the leniency Allworthy shows Tom when he wants to beat prudence and virtue into him,<sup>307</sup> characteristics Blifil already has. Thwackum and Square see a way to get into Bridget Blifil's good books by persecuting Tom<sup>308</sup> (they see her animosity towards Tom as genuine, affirming their lack of judgment).

Square, Fielding notes, develops an "implacable hatred" for Tom when village gossip pits Tom as his rival for Bridget's affections.<sup>309</sup> At the same time, Bridget's *real* animosity towards Blifil, and her growing fondness for Tom cause an equal and opposite reaction in Allworthy.<sup>310</sup> Fielding uses the revelation that "Master Blifil was absolutely detested ... by his own mother"<sup>311</sup> to introduce Allworthy's deficiencies as a judge, and as a judge of character. First, the reader learns that the "compassion" (mercy) marking Allworthy's attitude towards Tom will be "subdued" by the "steel of *justice*".<sup>312</sup> Second, Allworthy transfers his compassion to Blifil, "the effects [of which] in good and benevolent minds, I need not here explain *to most of my readers*".<sup>313</sup> *Most readers*, that is, those who use their sagacity as judges or jurors know that Allworthy lacks objectivity. This leads on to the third point, namely the "eye of compassion"<sup>314</sup> is blind to Blifil's true nature. It causes Allworthy to magnify Blifil's virtues while his faults

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<sup>305</sup> Ibid, 114.

<sup>306</sup> Ibid, 117.

<sup>307</sup> Ibid, 103.

<sup>308</sup> Ibid, 109.

<sup>309</sup> Ibid, 110.

<sup>310</sup> Ibid, 110–11.

<sup>311</sup> Ibid, 110.

<sup>312</sup> Ibid (emphasis added).

<sup>313</sup> Ibid.

<sup>314</sup> Ibid, 110.

“[become] scarce perceptible”; conversely, it predisposes Allworthy to believe the worst of Tom.<sup>315</sup> In this way, Fielding introduces the reader to the nature of the plot involving Allworthy, Blifil, and Tom, while reinforcing who these characters *are*.

Fielding continues this exposition of the characters while ostensibly delivering a homily to the “well-disposed youths” who are his readers. He advises the reader of need to match her or his own “inner beauty” (“goodness of heart, and openness of temper, ... [and] designs [and] actions [that] are intrinsically good”) with a “fair outside” (“prudence and circumspection”). The reader who fails to maintain an outward manifestation of virtue risks being blackened by “malice and envy”, thus preventing “the sagacity and goodness of an Allworthy [being] able to see thro’ it, and to discern the beauties within.”<sup>316</sup> The inner beauty is Tom’s. The malice and envy is Blifil’s. And it is Allworthy’s “sagacity and goodness” that Fielding emphasises. But it is Allworthy’s judgment, not his character that is suspect. Allworthy’s judgment is clouded by compassion for Blifil so he is predisposed to “those impressions”<sup>317</sup> (to his benefit and to Tom’s detriment) that Blifil carefully cultivates.

Here, Fielding chooses to identify himself and not the narrator as the storyteller.<sup>318</sup> The lawyer as writer is speaking. In the writer’s view, Fielding explicitly adopts the role of defence counsel for Tom. He begins the defence by acknowledging that evidence to Tom’s detriment will be presented, that is, “his wantonness, wildness, and want of caution.”<sup>319</sup> Such evidence cannot be ignored but the craft of the lawyer reveals itself in the way Fielding encourages the reader as judge (or juror) to give it appropriate (lesser) weight than evidence which shows that Tom, “however innocent”, is the “best of men”. His appeal to the reader’s “inner beauty” encourages the reader to identify with Tom, in the same way a lawyer works to persuade the judge or jury to sympathise with her or his client. The allusion to Blifil’s malice and hypocrisy, coupled with the appeal to the reader’s sagacity is a warning not to be taken in by Blifil as Allworthy is. And by referring to readers as his “worthy disciples”,<sup>320</sup> Fielding is saying: “You, too, can deliver the right verdict.”

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<sup>315</sup> *Ibid*, 111.

<sup>316</sup> *Ibid*.

<sup>317</sup> *Ibid*.

<sup>318</sup> The chapter is titled: “In which the Author himself makes his Appearance on the Stage.”

<sup>319</sup> *Tom Jones*, above n 6, 111.

<sup>320</sup> *Ibid*.

## **B Deed and Doer**

As noted in Part II B, Fielding’s ability to convey who a character *is* independent of her or his *deeds*, or what she or he *says* is central to the way in which Fielding develops the narrative in *Tom Jones*. The reader who attempts to deduce the characters’ intentions (their “character”) from their actions (or explanations) cannot be certain of an individual’s guilt or innocence. This “externality” serves a second purpose: Fielding is drawing attention to the “narrow-minded notion that judgment should be based on the facts” at a time the “the facts” excluded direct evidence of motive or witness credibility.<sup>321</sup> An examination of Blifil’s actions and his likely motive for releasing little Tommy indicates why being able to assess who a person *is* separate from what she or he *does* is an essential requirement for a good judge of character.

Blifil’s action in releasing little Tommy, the deed, could be as he asserts, a simple act of charity in returning a captive bird to its lost liberty.<sup>322</sup> The deed, separate from Blifil as its agent, is neither good nor bad. Blifil says that if he had been aware of the distress his actions would cause Sophia, he would never have let little Tommy go,<sup>323</sup> but this assertion is not credible in light of the other evidence. Blifil knows that bird is a present from Tom to Sophia; he only asks for the bird after “observing the extreme fondness” Sophia has for little Tommy.<sup>324</sup> Why? – Because he is jealous of Tom and his friendship with Sophia. Sophia sees what the “superior sagacity” of Thwackum and Square does not.<sup>325</sup> Sophia suspects Blifil’s motives, hence her initial reluctance to give him the bird. She is proved right when Blifil immediately releases little Tommy. Sophia does what Fielding urges the reader to do, that is, “foretel the actions of men ... from their characters, [rather] than to judge their characters from their actions”.<sup>326</sup>

The disjunction between deed and doer is significant at law. No lawyer wants her or his client condemned for who they are, or because of the nature of the charge the client faces. Separating the two assists an objective assessment of the evidence. Further, the separation of deed and doer maintains the distinction between the *actus reus* (deed) and *mens rea* (intention). This separation is important in distinguishing moral culpability and legal liability.

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<sup>321</sup> Kropf, above n 184, 361. See also Part V above.

<sup>322</sup> *Tom Jones*, above n 6, 126.

<sup>323</sup> *Ibid.*

<sup>324</sup> *Ibid.*, 125.

<sup>325</sup> *Ibid.*

<sup>326</sup> *Ibid.*, 92.

### C *Blifil – Guilty or Not Guilty?*

After little Tommy is taken by the hawk, the adults present convene to “judge” Blifil.<sup>327</sup> Thwackum focuses on Blifil’s statement that he thinks it unchristian to confine the bird. His verdict? Not guilty under the laws of God. Square, with his focus on the “law of right” and a Lockean natural law emphasis on individual freedom and liberty, praises Blifil for what he does. His verdict? Not guilty, because the law of nature takes precedence over man-made law. He challenges Allworthy’s distinction based on whether property rights vest in the bird.<sup>328</sup> Allworthy maintains his belief that Blifil acts from a generous motive, but he concedes that moral liability could lie if his motive was “unworthy”. Of greatest interest is Western’s reaction. He is the only person present to consider that irrespective of the *law*, it was wrong for Blifil to cause Sophia such distress.

In this case Western’s judgment is sound. He inadvertently identifies Blifil’s true motive. Blifil’s malice fully manifests itself only when the hawk carries away little Tommy. Whether that is a matter of accident or design is unclear, but that is irrelevant in assessing his moral culpability. Western’s verdict? Guilty, morally – and if he had his way, legally too, as his concern that Thwackum and Square’s logic could lead him to be deprived of his partridges demonstrates.<sup>329</sup> The lawyer who happens fortuitously to be present advises Western that property laws protect his partridges, but not the songbird and there the matter rests.<sup>330</sup>

In this one short chapter Fielding introduces three levels of law: divine law, natural law, and positive, man-made law which is where the final decision rests. Those present decide no offence has been committed. The reader, knowing that Blifil is not a credible witness, is likely to arrive at a different conclusion, at least in terms of moral culpability. Exercising judgment, moral *and* legal, is the role Fielding assigns the reader. How Fielding keeps the reader engaged in her or his task until the final chapter forms part of the closing submissions that follow.

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<sup>327</sup> Ibid, 127–29.

<sup>328</sup> Ibid, 128.

<sup>329</sup> Ibid, 129.

<sup>330</sup> Ibid. The lawyer’s advice is not strictly correct, and the errors reinforce the inference that he is not a “gentleman barrister”, but they do not go so far as confirming he is Dowling (or perhaps the petty-fogger/hack-attorney Fielding introduces at the Bell Inn and whom Fielding later reveals is “well known to Mrs Honour”, Sophia’s maid (*Tom Jones*, 460). The partridge is protected under the Game Act 1670, not because it is enclosed. See Part III C above. Further, a person *could* gain property rights by enclosing a wild animal not protected by game laws, and under common law a claim for restitution was possible. See Munsche, above n 117, 4.

### **D Closing Submissions: The Legal Case that is Tom Jones**

The incident of little Tommy and the discussion of “character” evidence which precedes it embodies every element that one expects to see in a legal case. There is a charge, witnesses (including the defendant, Blifil) give evidence, the evidence facilitates an assessment of the witnesses’ credibility, defence and prosecution submissions point to a particular preferred conclusion, there is a summing-up, and the judges (jurors) deliver their verdict. Further, the way the evidence is presented reflects how one would expect a legal case involving multiple witnesses with different perspectives to evolve. In this way Fielding establishes the pattern that he follows throughout the legal case that is *Tom Jones*.

Fielding does not unfold the events in *Tom Jones* in a tidy linear narrative, nor is the significance of particular events immediately apparent, but that is how a legal case develops. As witnesses tell their stories, time goes backwards and forwards and new facts emerge which casts new light on previous evidence. Fielding explicitly goes back in history when relating the incident of little Tommy. He intends this incident, which serves as a symbolic introduction to the main action of *Tom Jones*, to influence the meaning an informed reader ascribes to future events, when they occur.<sup>331</sup> Of equal importance from the perspective of the reader as judge (or juror) is “retrospective awareness”<sup>332</sup> where knowledge of future events influences understanding of *past* events. This is why Fielding precedes the incident of little Tommy with a Book devoted to *future* events from which the reader readily infers Blifil’s motive. From this point on, it is up to the reader to “join the dots” but this is why the reader remains engaged until the last piece of evidence is available.

For example, the true nature of lawyer Dowling’s involvement emerges only when Jenny/Mrs Waters and Mrs Miller expose his role in the charges Tom faces after the duel with Fitzpatrick. This forces Dowling to reveal that he has known all along that Bridget was Tom’s mother.<sup>333</sup> It is this “retrospective awareness” that Dowling is “concerned against” Tom that causes the reader to reassess earlier events and conclude that Dowling is blackmailing Blifil. Likewise, the knowledge that Square wants to replace Tom as Molly’s lover makes his assertion that Tom “supported the father in order to corrupt the daughter” even less credible. The reader’s “retrospective awareness” is analogous to the position of a judge or juror after the summing-up at the end of a trial.

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<sup>331</sup> *Tom Jones*, above n 6, 124. The chapter title makes this explicit: “Wherein the History goes back to commemorate a trifling Incident that happened some years since; but which trifling as it was, had some future Consequences.”

<sup>332</sup> Alter, above n 182, 24.

<sup>333</sup> *Tom Jones*, above n 6, 793.

Fielding strategic management of the evidence prior to the “summing-up” includes regular reminders to the reader as judge (or juror) not to disregard any evidence as irrelevant. For example, Sophia’s muff links many of the key events in *Tom Jones*. After establishing the muff as a symbol of Tom’s and Sophia’s unspoken love,<sup>334</sup> Fielding relates another “trifling incident” where Squire Western throws the muff into a fire from where Sophia recovers it with “utmost eagerness”, and which had a “violent effect on poor Jones”.<sup>335</sup> The “little incident of the muff” makes Tom realise the true extent of his love for Sophia.<sup>336</sup> Sophia leaves the muff at the Upton Inn to symbolise her anger at Tom’s infidelity with Mrs Waters,<sup>337</sup> precipitating Tom’s “trial” for larceny, his journey to London in pursuit of Sophia, and all that follows.

Immediately before the events at the Upton Inn Fielding warns the reader against condemning as “impertinent” incidents whose relevance to the “main design” is not immediately apparent.<sup>338</sup> For example, readers who consider Tom’s role in facilitating Nightingale’s marriage to Nancy Miller is “impertinent to the main design” are likely to conclude that the “main design ... is to bring Mr Jones to the gallows, or if possible to a more deplorable catastrophe.”<sup>339</sup> But this incident *is* relevant to Tom’s defence: it reinforces Tom’s altruism and his willingness to help others before he helps himself; and his assistance to the Miller family (including Mr Anderson), provides him with an independent character witness in Mrs Miller.<sup>340</sup> And the “main design” *is not* to see Tom hang. Fielding, as Tom’s defence counsel, reminds the reader that the judge or juror who delivers a judgment or verdict before the conclusion of the case and without considering the totality of the evidence is likely to condemn unfairly an innocent man.

Tom is guilty of no more than youthful imprudence, and a “blameable want of caution” in accepting at face value what others tell him. But Fielding makes even this “negative” part of Tom’s defence: Tom’s natural honesty means he does not perceive dishonesty in others.<sup>341</sup> In the end Allworthy’s “goodness”,

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<sup>334</sup> Sophia gives the muff to her maid, Honour, but when Honour tells Sophia that Tom “put his hands into it” and “kissed it again and again” (*Tom Jones*, 164), Sophia makes an excuse to take the muff back. Honour tells Tom, adding “[Sophia] has worn it ... almost ever since, and I warrants hath given it many a kiss when nobody hath seen her” (*Tom Jones*, 179).

<sup>335</sup> *Tom Jones*, above n 6, 179.

<sup>336</sup> *Ibid*, 179–80.

<sup>337</sup> *Ibid*, 443.

<sup>338</sup> *Ibid*, 423. See also Part IV D above.

<sup>339</sup> *Ibid*, 675.

<sup>340</sup> *Ibid*, 730–33.

<sup>341</sup> *Ibid*, 346.

Sophia's love, and "reflexion on his past follies" sees Tom acquire both discretion and prudence.<sup>342</sup>

### VIII CONCLUSION

*Tom Jones* is more than a comic novel. It is also an astute commentary on society and the law in mid-18<sup>th</sup> century England. Fielding accurately portrays the rigid class structure dividing society at the time. Landed gentry such as Squire Western and Squire Allworthy exercised substantial de jure and de facto power over the "lower classes", and someone treated unjustly had little recourse. The themes of "bastardism, fornication and adultery" decried by *Old England* reflect the "do as I say, not as I do" upper class attitude towards sexual morality. Tom is merely the latest in a long line of Lady Bellaston's lovers, but the woman "whom everybody knows to be what nobody calls her"<sup>343</sup> is protected by her position and wealth from overt criticism. Bridget's mistake is to get pregnant. Bridget is not at risk of being sent to a Bridewell (as Jenny and Molly are) but rather than risk social opprobrium, she pays Jenny to pass herself off as Tom's mother. Fielding, too, made the "mistake" of getting his dead wife's maid pregnant, but he defied convention by marrying her.

While these social and class attitudes inform the plot of *Tom Jones*, it is Fielding's particular, contemporary portrayal of lawyers and the law that is the single most important recurring theme throughout. A practising barrister when *Tom Jones* was written, Fielding had been elevated to the bench by the time of the book's publication. Fielding integrates his knowledge of the law with his views of how the law *should* operate: there is Allworthy's speech on forced marriage, his refusal to commit Jenny to a Bridewell because she is a "first offender", and the Worcester justice's refusal to commit Tom for trial on a charge of larceny. There are direct parallels between these "ought to" statements, Fielding's personal approach to "doing justice" as a magistrate, and his extra-judicial writings. The recurrent trial motif reinforces the analogy linking the structure of the *Tom Jones* to that of legal case. However, it is the way in which Fielding draws the reader into the legal case that is *Tom Jones* which reveals the consummate skill of the lawyer as writer.

Fielding establishes a role for the reader as judge (or juror), but he first exposes the deficiencies of the Squire Western and Squire Allworthy as judges. Fielding uses the game laws as the basis of a metaphor that reveals Western's

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<sup>342</sup> Ibid, 822.

<sup>343</sup> Ibid, 677.

judicial unreasonableness. The “good” Allworthy, nominally Western’s metaphorical opposite, is also found wanting as his tendency to jump to conclusions based on a partial hearing of the evidence reveals. Fielding expects more of the reader when she or he exercises judgment.

The judgment Fielding requires the reader to exercise may be legal or moral. Fielding encourages the reader to approach questions of legal liability and moral culpability with an open mind, weighing up the evidence for and against a particular proposition, and to be willing to revisit her or his opinion as new evidence emerges. He begins by establishing his main characters by contrast, and without exposing their inner thoughts. Lawyer Dowling is an exception to the character pairs rule, but Fielding reveals the true nature of his character by reference to his place in the “lower ranks” of the law. While the characters offer explanations concerning their own actions, and the actions of others, their true motives are left to the reader’s determination. Fielding’s externalisation of the characters reflects the way a lawyer makes submissions to the court. It enables the reader to develop and maintain an informed objectivity the protagonists lack. This is a key part of the assessment of the characters’ (witnesses’) relative credibility. Further, externalisation of characters increases the relative importance of circumstantial evidence.

*Tom Jones* was written at a time the law was moving from a reliance on witness testimony to a belief that “circumstances do not lie”. Fielding demonstrates that circumstances are less likely to lie than witnesses. Nevertheless, he reflects a lawyer’s trained scepticism which encourages the reader to exercise caution when considering whether facts really do speak for themselves. For example, is it Tom’s love of sport *or some other reason* that persuades him to stay with Squire Western after his broken arm heals?; and is the sight of blood, or fear of Western *or some other reason* that causes Sophia to faint when she sees the aftermath of the fight between Tom, Blifil and Thwackum? In this way, Fielding emphasises the importance of considering all the available evidence, in context.

Fielding reinforces the importance of context by constantly shifting time. Legal cases, too, do not unfold in a tidy linear narrative. Evidence from later witnesses offers a different perspective on past events. It is “retrospective awareness” deriving from future events that enables the reader reviewing lawyer Dowling’s actions to conclude that he is a villain, just as Blifil is. And it is the “future” character evidence preceding the trifling incident of little Tommy that assists the reader determine Blifil’s moral culpability.

The incident of little Tommy serves as a symbolic introduction to the main events of *Tom Jones*. It embodies all the elements one would expect to see in a legal case, including a charge, a defendant, multiple witnesses giving their views on events, a panel of judges (or jurors), and a verdict. In this way, Fielding establishes the template for the legal case that is *Tom Jones*. Although Blifil is the defendant here, it is Tom who is “on trial” for the balance of the book. Tom faces a number of “charges” which require the reader to arrive at a series of judgments before arriving at a final conclusion. Those judgments include assessing Tom’s credibility relative to that of the “prosecution witnesses”. Fielding carefully develops the case for the defence by exposing the fallibility of the judges and witnesses who condemn Tom. Fielding does not conceal Tom’s vices but his skill as a lawyer is evident in the way he presents “vices” such as Tom’s inability to see through others’ duplicity as a virtue. In the end, Tom’s only true “crime” is a lack of prudence, coupled with a naïve belief that the social mores of the time would allow a penniless bastard to court an heiress like Sophia. This latter difficulty is overcome following Tom’s final acquittal after the exposure of Blifil’s villainy, and Allworthy welcomes Tom as his heir.

The Tom–Sophia relationship, and Tom’s acquisition of “[p]rudence and circumspection [virtues] necessary even to the best of men”,<sup>344</sup> through his love for Sophia, underpins much of the action in *Tom Jones*. In many ways Tom’s journey and acquisition of prudence mirrors Fielding’s life and developing maturity as a husband, father, barrister, and magistrate. Fielding spent the first 30 years of his life avoiding the law, and his theatrical writings reflect a contemporary, widespread dissatisfaction with many aspects of lawyers and the law. The character of lawyer Dowling reflects the continuing, popular, negative perception of those inhabiting the “lower ranks” of the law. But Fielding, lawyer and writer, balances the negative with the positive. Although Allworthy is not always a “good judge” or a good judge of character, he does attempt to temper justice with mercy, as Fielding did at Bow Street. Finally, by structuring *Tom Jones* as a legal case, Fielding shows that the law can deliver a just outcome when all available evidence is considered, in context. And that is the responsibility Fielding assigns to the reader as judge (or juror).

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<sup>344</sup> Ibid, 111.

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