

Public Presumptions, Private Doubts: _____

Presumed Innocent and The Burden of Proof

Peter Hutchings reviews Scott Turow's latest film and book.

(Our) decisions have respected the private realm of family life which the state cannot enter.

Prince v Massachusetts, 321 U.S. 158, 166 (1944), an opinion of the United States Supreme Court (epigraph to *The Burden of Proof*.)

Time magazine has described Scott Turow as the "Bard of the Litigious Age". A one-time deputy U.S. prosecutor and now partner in a Chicago law firm Sonnenschein Nath & Rosenthal, Turow has made another public career for himself in the rather private realm of literature. "Private" since, however publicly promoted and discussed it may be, a book's consumption and pleasures are always a private experience.

This tension between public and private is at the core of *Presumed Innocent* (both book and film) and *The Burden of Proof*.

Indeed, it is a tension which threatens to dissolve the lines between public and private, between guilt and innocence, as the publicity material for Alan J. Pakula's film of *Presumed Innocent* suggests: "Attraction. Desire. Deception. Murder. On one is every completely innocent."

What becomes obvious here is that the film is much more explicit in its cynicism about the presumption of innocence, especially when that presumption is seen to allow someone to get away with murder.

In both *Presumed Innocent* and *The Burden of Proof* basic principles of the American justice system become hollow ironies. Justice is a public presumption, and it is only in the "private realm of family life" that justice is any more than a presumption, that it is, in effect, "just".

Turow has stated that:

"I do regard the law as a noble calling, but I can't shake the notion that the law is coming up short in its inability to deal with intimate human situations."

Some of us might think that it is a strange demand of the law that it deal with "intimate human situations" especially when it seems to be structured around divisions between public and private. What may be legal in private - for instance among consenting adults - is not legal in public.

Wemmick, the lawyer's clerk in *Great Expectations*, is a classic example of the kind of split personality resulting from the inter-dependent cults of public realm and private sanctuary. Wemmick is able to provide Pip with one sort of advice in the office and another sort of advice at home, and Dickens provides an hilariously grotesque description of his transformations from corporate Mr Hyde to domestic Dr Jekyll in the course of walking home.

The Burden of Proof establishes this inviolable "private realm" as the locus of a privilege similar to that of the presumption of innocence.

Sandy Stern arrives home from a business trip to find that his wife Clara has committed suicide after withdrawing \$850,000.00 from her substantial trust funds. As he attempts to comprehend this personal tragedy, his brother-in-law and client Dixon Hartnell is the subject of a Grand Jury investigation. Hartnell is apparently guilty of some trading irregularities on the futures exchange, and the investigation comes to involve Stern's entire immediate family.

In fine, the plot hinges upon the corruption of the law that ensues from the attempts to use the law for personal reasons. A point touched upon by one of the characters in *Presumed Innocent*, Raymond Horgan, in the course of his testimony concerning his former Chief Deputy Prosecuting Attorney Rusty Sabich:

"The public should know that things are being done for professional, not personal reasons."

This principle underlies the legal chicanery of both stories. For all that the Sandy Stern of *The Burden of Proof* is somewhat different to the Sandy Stern of *Presumed Innocent*,

both defence cases involve the highlighting of an apparent or actual obscuring of the differences between personal and professional motivations. Sabich notes of Prosecuting Attorney Tommy Molto that:

"Tommy has become the kind of prosecutor that the PA's office too often breeds: a lawyer who can no longer make out the boundaries between persuasion and deception, who regards the trial of a lawsuit as a series of gimmicks and tricks."

In *The Burden of Proof* it is U.S. Attorney Stan Sennett who cannot seem to distinguish between public and private, who uses the Stern family against both Sandy and Dixon in a manner that Assistant U.S. Attorney Sonia Klonsky cannot stomach.

"It's not disembodied principles to him. It's a grudge."

"Sonny, there are no disembodied principles in the practice of law." He spoke with some weight. "There are human beings in every role, in every case. Personalities will always matter."

"It was over the line. The way he handled it."

Turow's scepticism concerning the uses to which the law may be put, is most sharply concentrated upon the institution of the Grand Jury. It is not just that there is nothing grand about its jurors - ordinary, often unemployed people who pay little attention to the proceedings - but that it appropriates to the law the privileges of privacy.

"The grand jury, [Stern] explained, was convened to investigate possible federal crimes. ... The proceedings were secret. Only the witnesses who testified could reveal what happened. If they chose to."

Subjects of Grand Jury investigation need not be alerted to the charges being prepared against them, nor are they represented by counsel. Furthermore, as Alejandro Stern



informs Dixon Hartnell:

"Inside the grand jury room, the burden of proof on the government is minimal - they merely need to convince a bare majority of the jurors that there is probable cause to believe that a crime has taken place. The prosecutors may introduce hearsay, and the target and his lawyer have no right to learn what has taken place or to offer any refutation. It is not what you would describe as evenhanded."

"I'd say," answered Dixon. "Whose idea was this?"

"The framers of the Constitution of the United States," answered Stern. "To protect the innocent."

This is the issue most closely focussed upon in this book, although it is part of the earlier book: there the relaxed burden of proof is met by the presumption of innocence. Turow's concern is with the manner in which the privacy - or secrecy, the more general term for privacy in the public sphere - of this legal instrument makes it amenable to the kind of abuse depicted in *The Burden of Proof*.

Australian law - both Federal and State - provides for no such statutory lightening of the burden of proof, but there has been the development of a practice of deciding that the weight of evidence need be less in prosecutions of public figures. An unwritten Caesar's wife clause. Such an approach to prosecution - as formulated by Ian Temby QC - is based upon some idea that "public" figures are deserving of a qualitatively different legal status, that they should be investigated "in the public interest" upon lesser grounds than would normally be required of a "private" investigation. It is an idea that might draw some of its justification from the anomalies of our libel laws which tend to be biased in favour of public figures.

But Turow's difficulties with the American justice system, and with the conflicts of public and private, seem to resolve themselves into some sort of privatised version of the law. The only escape clause from the legal complexities of the case against Hartnell - which Stern himself is drawn into when he is subpoenaed to appear before the Grand Jury - is, finally, a private one, dependent upon personal networks within the various agencies of the law.

In all of this there appears to be some sort of nostalgia for an uncorrupted, wholly private form of existence. As Paul Gray wrote in *Time*:

"What sets Turow's opinion apart from run-of-the-mill sour grapes is what he has made of it: serious fictional portraits of the present moment, when moral authority is collapsing and the law has become, for better and worse, the sole surviving arena for definitions of acceptable behaviour. Disputes that once might have been resolved by fisticuffs or a few intense minutes in the confessional or private negotiations between squabbling clans now tend to wind up as lawsuits." (Paul Gray, "*Burden of Success*," *Time*, June 11, 1990.)

Consciously or not, Gray's account of the situation addressed in Turow's fiction smacks of a yearning for "old-fashioned values", even as it recalls the words of another lawyer-turned-novelist, Sir Walter Scott:

"The wrath of our ancestors ... was coloured *gules*; it broke forth in acts of open and sanguinary violence against the objects of its fury: our malignant feelings,

which must seek gratification through more indirect channels, and undermine the obstacles which they cannot openly bear down, may be rather said to be tintured *sable*. But the deep ruling impulse is the same in both cases; and the proud peer, who can now only ruin his neighbour according to law, by protracted suits, is the genuine descendent of the baron who wrapped the castle of his competitor in flames, and knocked him on the head as he endeavoured to escape from the conflagration." (*Waverley*, Ch.1.)

On this account, the "Litigious Age" has been with us for some time (*Waverley* was first published in 1814). And so, in line with Turow's individualist predilections, *The Burden of Proof* puts the "baron" back into "robber" the promise back into "parole", with its portrayal of Dixon's chivalric attachment to promises:

"For Dixon, like the others on the exchanges, his word given was exalted. To someone's back a knife could be freely applied, but a deal made eye to eye could not be broken."

Alan J. Pakula's film of *Presumed Innocent* - superbly cast, acted, scripted and directed - foregrounds this issue of a personal compact with the law. The film opens and closes in an empty courtroom, as the voice of Rusty Sabich (played by Harrison Ford) relates one man's version of the American justice system. As the camera focusses upon the empty jurors' chairs of solid wood and leather, we are introduced to the personal elements of the law: its prosecutors, its defendants, its jurors.

In crafting a gripping film from a bestselling book, the film-makers had no mean task. Nothing in cinema could replicate the impact of the book's first person narrative, nor could its surprises be repeated (even if the press kits contained an adjuration that reviewers not reveal the ending). So what the film does is do what cinema can do better than literature: it focusses upon the reactions of those involved in this case. The reactions of accusers and accused, of their family and associates, of judge and jury.

And nowhere is this technique more gripping and effective than in the scene in which all is revealed, a scene in which two people discuss the crime and react to one another's words in almost motionless close-up.

The decorums of cinema echo some of the complexities of the law with which Turow's texts engage. In effect, cinema is constituted by some of the blurring of distinctions between public and private. Cinema is at once a very public spectacle, yet it deals with the personal as it focusses upon how people look when they act or are acted upon.

Something of that blurring is evident in the closing of *Presumed Innocent*. Back in the empty courtroom we hear Rusty Sabich's voice reiterate his opening address. He tells us that: "There was a crime, there was a victim and there is punishment..."

Whose crime, which victim, whose punishment? The suggestion (which needn't be elaborated here) is that the answers to these questions will be found - not in the empty courtroom - but in the hollow sound of Harrison Ford's rendition of Rusty's voice. □