

Evan Whitton was Editor of *The National Times*, Chief Reporter at *The Sydney Morning Herald*, and Reader in Journalism at Queensland University. He received the Walkley Award for National Journalism five times, and was Journalist of the Year 1983 for 'courage and innovation' in reporting an inquiry into judicial corruption. He began researching the West's two legal systems in 1991 after observing how each system dealt with the same criminal, police chief Sir Terence Lewis. He is now a columnist on a legal journal, *Justinian* This is his eighth non-fiction book

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\**The Cartel: Lawyers and Their Nine Magic Tricks* (1998)

\**Serial Liars* (2005)

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# **OUR CORRUPT LEGAL SYSTEM**

**Why Everyone Is a Victim  
(Except Rich Criminals)**

**Evan Whitton**

**For dearest Noela, without whom not a word of  
any of my books would have been written.**

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## **Significant events**

- c. 2700 BC. Egypt says justice means truth.
- c. 450 BC. Sophists teach Athens lawyers to lie.
- 449 BC. Truth-seeking Roman law begins.
- 476 AD. Roman Empire falls.
- Dark Ages (post-476). England, West Europe use anti-truth system, verdict by deity.
- 1072. British Empire begins.
- c.1090-1300+. Trade of authority totally corrupt.
- 1166. Common law begins.
- c.1180. Extorting judges, lawyers form cartel to run law as a business.
- 1215. June. King John signs magnates' tax evasion scheme, Magna Carta, at sword-point.  
November. Pope Innocent III's Fourth Lateran Council promulgates reversion to truth-seeking.
- 1215+ West Europe courts revert to truth-seeking system; judges torture suspects.
- 1219. Cartel rejects truth-seeking system.
- 1275. Libel law biased in favour of magnates
- c.1300. Lawyers run judicial appointments, legal education.
- c.1350. Lawyers dominate Parliament.
- c.1385. Chancery Court opens for business
- 1460. Lawyers use pleadings to start getting control of civil system.
- c. 1650. Chancery lawyers/Chancellors begin 265-year collusion to steal from deceased estates.
- c. 1700. British lawyers begin to defend criminals.
- 1754. Judicial torture abolished in Prussia.

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- 1758. First common law school (Oxford).
- 1775. William Blackstone, first academic, says God dictated system; lies about self-incrimination.
- 1786. Judicial torture abolished in Italy.
- 1789. Judicial torture abolished in France.
- c. 1790. Lawyers now prominent in British criminal courts. Judges start concealing evidence.
- 1791. US locks Blackstone's self-incrimination lie into Constitution as Fifth Amendment.
- 1792. Justice Buller changes law on lawyer-client secrecy. Beneficiaries: criminal clients. Judges lose libel verdicts.
- 1798. Deceased estate case, *Jennens v Jennens*, model for *Jarndyce v Jarndyce*, begins in Chancery Court.
- 1800. Napoleon begins to reform truth-seeking system. It becomes the world's most widespread, accurate and cost-effective system.
- 1801. Judicial torture abolished in Russia.
- 1882. Justice Brett makes discovery open-ended.
- 1894. Lord Herschell conceals pattern evidence.
- 1914. Lord Reading enables judges to conceal all evidence.
- 1915. *Jennens v Jennens* ends after 117 years; entire estate 'devoured'.
- 1932. Lord Atkin biases negligence law against defendants.
- 1936. Lord Atkin biases tax law against pay-as-you-earners.
- 1957. A lie by Australian judges, 'absolutely' does not mean 'absolutely', benefits tax lawyers, tax evaders.

### *Significant Events*

- 1961. Justice Tom Clark, probably appointed by Mafia, changes US search law; criminals benefit.
- 1964. US Supreme Court ends common law libel bias against media. Bias remains elsewhere.
- 1965. Luckily for wrongly convicted 'terrorists', e.g. Birmingham Six, Britain abolishes execution.
- 1970. RICO: US lets jurors hear pattern evidence against organised criminals, including judges.
- 1972. US Supreme Court abolishes execution.
- 1974. Torture of Birmingham Six produces false confessions, murder convictions.
- 1974. Australian judges' lie, a profit is a loss, makes billions for tax evaders.
- 1976. US Supreme Court restores execution.
- 1981-94. RICO convicts 23 Mafia bosses, 20 Chicago extorting judges, 50 lawyer-bagmen.
- 1991. Birmingham Six acquitted.
- 1992. Runciman inquiry into criminal system learns innocent rarely charged, let alone convicted, in truth-seeking France and Germany.
- 1993. 1219 revisited: Runciman inquiry rejects truth-seeking system. Recommends truth-seeking body to look into possible wrong convictions.
- 1998. British Criminal Cases Review Commission (CCRC) begins.
- 1999. Report: 12 of 285 (4.2%) prisoners on Illinois Death Row wrongly convicted since 1977.
- 2000. US Supreme Court chooses President.
- 2009. January. 3297 on US Death Rows; 132 (4%) probably innocent.  
September. CCRC reports 281 guilty verdicts overturned, including four who were hanged.

## Abbreviations

Butterworths. Butterworths Concise Australian Legal Dictionary (Butterworths 1997).

DPP. Director of Public Prosecutions.

CDNB. The three-volume Concise Dictionary of National Biography (OUP 1992).

Columbia. The Columbia Encyclopaedia (Columbia University Press, fifth edition 1993).

Macquarie. The Macquarie Dictionary (Macquarie Library, 1985)

NSW. New South Wales, a state of Australia. The capital, Sydney, has a population of 4.5 million.

OxfordSC. The Oxford Companion to the Supreme Court of the United States ed. Kermit L Hall (OUP 1992).

OxfordLQ. The Oxford Dictionary of American Legal Quotations ed. Fred Shapiro (OUP 1993).

## **Foreword**

This is one of the most important books I have ever read on the common law legal system.

Over the years, I have reluctantly come to believe that there are many legal academics and lawyers who believe that the system is there for them, rather than the “clients” they purport to serve. I have been critical of the work of Oxford law professors and others who have produced a good many published articles in books and prestigious law journals which, quite frankly, were shallow, wrong and disrespectful to the work of others.

At the time I thought I was being “bold” by stating clearly that these people had not only made serious errors, but that the errors were so fundamental that they should have known at the time that what they were doing was fundamentally flawed.

It was not until I became involved in work on miscarriages of justice, nearly ten years ago, that I began to realise just how bad the system was. It was around this time that I came across the work of Evan Whitton. I must admit I liked the boldness of his approach, which, by comparison, made my own previous efforts look distinctly timid.

I also appreciated the scholarship involved with his work. He left nothing to be taken for granted, or to be accepted just because he said it was so. Unlike the Oxford professors, Whitton provided footnotes for all of his propositions, so if there was to

be any doubt, any one of us could go forth and check it out for ourselves.

There is much in what Whitton says, which seems self-evident when clearly stated. I have always thought it odd that lawyers, who have spent a good many years advocating for one side or the other, can upon appointment to the Bench become impartial arbiters of disputes. They haven't been trained for it and they have had no practice at it. Whitton reckons if we were to train them as judges (as they do in Europe), then they might just become good at it.

How can juries possibly understand what expert witnesses have to say when everything has to be tediously extracted from them by question and answer with frequent interruptions and objections? Why is it, that most of what we need to know to place the knowledge in context in trials is ruled to be inadmissible? If this were all part of a game with no real consequences, then one might allow the intellectual challenge to outweigh the pointlessness of the task. However, when Whitton points out that, "the result of the system's emphasis on winning is that as many as 50 prisoners in every 1,000 are innocent", then that is truly shocking. One only has to have contact with a single case of a serious miscarriage of justice to appreciate the devastation which is wrought upon the family, friends and those who just live up the street from someone falsely convicted.

The answer of course is to have a system which not only cares about the truth, but which actively

seeks to find it. When Britain introduced a “truth-seeking” component to their adversarial system, the results were remarkable. The Criminal Cases Review Commission, in the first ten years of its work, has led to the overturning of some 250 convictions, which otherwise had exhausted all avenues of appeal. Some 50 of those convictions were for murder. In four of the cases, the people convicted had been hanged.

Australia still continues to pretend that things do not go wrong with the legal system, and that if they do, then the appellate system can fix that up – when that is self-evidently not so.

When Australia used a truth-seeking method (a Royal Commission) in the case of Lindy Chamberlain it found out that virtually all of the scientific evidence which has been given at the trial was wrong. When it used that same method (a Royal Commission) in the case of Edward Splatt, it found out again that of the numerous pieces of scientific evidence given at the trial, not one of them was without error.

The Chamberlain and Splatt Royal Commission made recommendations, but they were not properly implemented. Since then, the official response to alleged miscarriages of justice has been to ignore them.

In one case from South Australia (*R. v. Keogh*), the chief prosecution (expert) witness has given sworn evidence in formal proceedings in 2004 and 2009 (the trial took place in 1995) in which he has contradicted the evidence which he gave at the



trial in a number of important respects. There have been numerous legal proceedings in this case over those years, and in none of them has the court actually considered the “merits” of the arguments to be put forward.<sup>1</sup>

The Court of Appeal says that once an appeal has been heard, thereafter, the Court cannot re-open the appeal. The High Court of Australia has said that the contradictions of the trial evidence constitute “fresh” evidence, and that cannot be heard in the High Court. As Justice Kirby has stated:

The rule [prohibiting the High Court from receiving fresh evidence] means that where new evidence turns up after a trial and hearing before the Court of Criminal Appeal are concluded, whatever the reason and however justifiable the delay, the High Court, even in a regular appeal to it still underway, can do nothing. Justice in such cases, is truly blind. The only relief available is from the executive Government or the media -- not from the Australian judiciary.<sup>2</sup>

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1 The details of this case and the legal proceedings referred to can be found at the Networked Knowledge web site – [netk.net.au](http://netk.net.au)

2 Justice Michael Kirby, “Black and White Lessons for the Australian Judiciary” (2002) 23 *Adelaide Law Review*, 195-213 at 206. See also *Sinanovic’s Application* (2001) 180 ALR 448 at 451 per Kirby J. “By authority of this court [the High Court of Australia] such fresh evidence, even if it were to show a grave factual error, indeed, even punishment of an innocent person, cannot be received by this court exercising its appellate jurisdiction ... [the prisoner] would be compelled to seek relief from the Executive.”

The reference to the “executive government” really means the state Attorney-General. Although there are at least 40 separate points (in the case referred to), any one of which would warrant the overturning of the conviction, the Attorney-General fails to see any issue which would justify returning the matter to the court for review. So, an innocent person has to remain in prison, so as to avoid being an embarrassment to the legal and political system which put him there.

Although at times witty and amusing, Whitton does have a very serious agenda to his work. His objective is to argue that it is the adversarial nature of the system which leads to the appalling costs and outcomes. As the Chief Justice of South Australia said (3 June 2007) the civil law system in South Australia is hopelessly struggling against such a backlog of cases that he is at a loss to know what can be done about it. I would advise him to read Whitton's book. The remedy is severe, but at least attainable. The "system" must be radically changed. We must adopt the inquisitorial system which operates in Europe and many other parts of the world. In doing so, we will have to increase the number of judges, at the same time ensuring that they are properly trained for the job they are to do, and not for some other task.

Although the inquisitorial system will require more judges, the compensating advantage is that it will require considerably fewer lawyers. Disputes, both civil and criminal, will be resolved quicker, cheaper and have more acceptable outcomes. Given

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the flood of miscarriages of justice which will be revealed in the next few years, and the considerable costs associated with putting them right - Mr Whitton's remedy might look extreme now - but in the years to come, it will represent the conventional wisdom.

In the meantime, this book should be required reading on Introduction to Law courses in all law schools across the country.

Dr Bob Moles ACII (UK) LLB (Hons) (Belf) PhD  
(Edin) netk.net.au Adelaide January 2010

## **Preface**

First, some definitions:

**Justice.** Maat, goddess of justice in Egypt c. 2700 BC, had a feather in her cap. It symbolised justice, truth, morality. A US judge, Harold Rothwax, said: 'Without truth, there can be no justice.' An Australian judge, Russell Fox, said justice means fairness; fairness to all and morality require a search for the truth; truth means reality. He also said: 'The public estimation must be correct, that justice marches with the truth.' The public thus know you can only be fair if you first find out what happened.

**Common law.** Judge-made law used in Britain and its former colonies, including the United States, India, and Australia. It developed in five stages. 1. Corrupt judges and lawyers formed a cartel late in the 12<sup>th</sup> century. 2. Judges rejected truth as the basis of justice in 1219. 3. Judges let lawyers take over control of the civil process from 1460, and (4) of the criminal process in the 18<sup>th</sup> century. 5. In the past 200 years judges have invented five rules which conceal evidence and get the guilty off. As Sir Ludovic Kennedy noted, and Napoleon demonstrated, justice is too important to be left to judges.

**Sophistry.** The art of lying is to make others believe things the liar knows are false. The motive is gain. Sophists, described by Socrates as morally bankrupt and by Plato as charlatans, taught Athenian lawyers how 'to make the weaker argument appear the stronger' 2500 years ago.

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Nothing changes. A US lawyer, Charles Curtis, said a lawyer's function 'is to lie for his client ... He is required to make statements as well as arguments which he does not believe in.'

US film critic Joel Siegel said. 'It's only the 99% of lawyers who give the rest a bad name'. In fact, the bad name comes mainly from trial lawyers, some 40% of the total. The other 60% may be really nice persons who would never tell a lie. Common law judges are former trial lawyers untrained as judges.

**Corrupt.** The Latin *corruptus* means broken in pieces. This book explains why and how justice is broken in our adversary system. It is instructive to compare it with the world's most widespread, accurate and cost-effective system: Napoleon's investigative (inquisitorial) system, now used in European countries, their former colonies, and Japan, South Korea and other countries.

	Investigative system	Adversary system
Seeks truth	Yes	No
Conceals evidence	No	Yes
In charge of evidence	Judges	Lawyers
Length of civil hearings	About a day	Months, years
Conviction rates	95%	Under 50%
Innocent in prison	Rare	1% - 5%

Why are they so different? It is bootless to ask common lawyers. Law schools, in business for only 200 years, teach little legal history and slide round problems of truth and lawyer-control. George Orwell said: 'The most powerful lie is the omission.' The following may repair some omissions.

Roman law sought the truth, but in the Dark Ages after the Empire fell in 476, England and West Europe regressed to an anti-truth accusatorial system (A accused B; B said: Prove it!), barbaric ordeals and verdict by deity. Suspect witches were trussed and thrown in the river. If they sank, they were innocent. If they floated, they were guilty, and were fished out and hanged or burned to death. (Malignant cross-examination to defeat truth is the modern ordeal; rape victims have vomited on the witness box.)

Dickens said: 'The one great principle of the English law is to make business for itself', i.e. trial lawyers. In an irony that would have amused Bonaparte, it was a French organised criminal who was the remote cause of the bidness dagger being thrust into the heart of British justice. William II, son of Guillaume le Batard, institutionalised trickle-down extortion in the trade of authority (and was shot dead on 2 August 1100).

When the common law began in 1166, every public office, from Chancellor down, was thus for sale; buyers in turn extorted from people who had to deal with the office. Extorting judges and their lawyer-bagmen formed an alliance to protect and advance their business interests, including the graft.

Richard Posner, a US economist and appellate judge, said lawyers and judges have always been 'a cartel' aiming 'to secure a lustrous place in the financial and social status sun'. The relationship has given trial lawyers power unique in legal systems. The common law might be termed cartel-made law.

After November 1215, European courts adopted an investigative system, but judges infected by the GSF – they believed that torture produces truth – perverted the system for five centuries. Lawyers' role in a truth-seeking system is necessarily limited; in 1219, the cartel decided to reject the investigative system and to retain the accusatorial system.

As the truth door shuts, the sophistry door opens, to judges as well as lawyers. London's population in 1219 was about 25,000. The public are entitled to ask judges and lawyers: why should we be robbed of justice because 800 years ago a few crooks in a small town in England decided that truth does not matter?

Lawyers have been the 'dominant influence' in English-speaking legislatures since about 1350. That is not fair to untrained liars.

Adversarial justice is an oxymoron, like military intelligence and legal ethics: it is a variation of the anti-truth accusatorial system. The adversary system dates from 1460, when trial lawyers began to take over civil evidence. Controlling evidence enables them to omit the damaging bits; spin out the pre-trial and trial process; and procure enough pelf to comfortably retire, if they choose, to the social status of untrained, uninformed and passive judge.

Judges of course do the decent thing: they try to stay awake – Lord Thankerton knitted – but do they suddenly give up sophistry? Alan Dershowitz, a US lawyer, said ‘lying, distortion, and other forms of intellectual dishonesty are endemic among judges’. Two examples. A lie is the basis for the rule which saves criminals from giving evidence and so gets 25% off. A lie – absolutely does not mean absolutely – has cost Australian pay-as-you-earn taxpayers billions, but has made a lot of money for tax lawyers.

Extortion was not a 12<sup>th</sup> century aberration. In the 18<sup>th</sup> century, Lord Chancellor Macclesfield extorted bribes worth £500,000 today from barristers who wanted to be Masters in Chancery in order to extort from litigants. Francis Elde delivered the gold and notes to Macclesfield and his bagman, Master Peter Cottingham, in a clothes-basket. In the late 20<sup>th</sup> century, 20 extorting Chicago judges and 50 of their bagmen went to prison.

Members of a cartel, e.g. the oil cartel and the Australian cardboard box cartel, collude to increase prices, typically by 15%-25%. From about 1650, Chancery judges refused to finalise will cases for decades. Why? Lawyers were paid from the deceased estates. *Jennens v Jennens*, the model for Dickens’ *Jarndyce v Jarndyce*, began in 1798. It ended in 1915, when lawyers and judges had ‘devoured’ the remnants of an estate worth some £500 million today.

Trial lawyers did not defend accused until the rise of blue collar organised crime in the 18<sup>th</sup> century made it worthwhile. The low conviction



rate is due to the invention since 1790 of 20 anti-truth devices, including six rules which conceal evidence from jurors. Lawyers say it makes trials fair, but fairness means truth. No other system hides evidence.

Dershowitz said: 'The American criminal justice system *is* corrupt to its core ... The corruption lies ... in its *processes* ...' He said all defence lawyers, prosecutors and judges know 'almost all' (say 95%) of accused are guilty. They are thus almost always, in effect, accomplices after the fact. In 1994, NSW judges sitting alone (and hiding evidence from themselves) convicted only 25% of accused. Honest cops doggedly investigating crime are plainly of more use to society than judges and trial lawyers.

Napoleon had time to begin to reform and codify the investigative system only because, by a fluke, his generals, Desaix, Marmont and Kellermann, crushed Austria at the Battle of Chicken Marengo in 1800. His system is generally accurate because trained judges search for the truth, and is cost-effective because they have no incentive to spin the process out. On average, the cost of a libel action in England is 140 times that of a libel action in Europe.

The adversary system is biased **against** people in business, industry, medicine, and the media, and **in favour of** criminals. The bias makes business for trial lawyers and [makes] the rule of law a joke in the worst possible taste. Citizens on sophistry watch must have the hopeless feeling that any judgment or verdict may be right, or it may not.

## *Preface*

The remedy is simple. Common law countries already use an investigative system when they need to find the truth. Six times as many judges (and fewer lawyers) will be needed, but the law will be cheaper as well as more just. Academics will have to be retrained, but searching for the truth is easier than mugging up 24 ways to conceal or otherwise defeat it. The cartel can then be dismantled by training judges separately from lawyers, as they do in Europe.

All we are saying, is give truth a chance. But trial lawyers, academics and, behind the scenes, legal bureaucrats will offer noisy resistance, as in India (conviction rate 16%) when an inquiry recommended changing to a truth-seeking criminal system.

Lawyers are only 0.2% of the population, and their utterance may be mere sophistry informed by the Gadarene Swine Fallacy, but their access to the media is as disproportionate as their numbers in legislatures. The parrot-house, however, can be safely ignored. The public know that justice means truth; the vast majority of voters will support change to a What happened? system.

**Note.** *Our Corrupt Legal System* is an updated and restructured version of *Serial Liars* (2005)

- Evan Whitton, Sydney, January 2010

## A. What is justice?

Everyone except common lawyers knows that truth is central to justice. The feather in the cap of Maat, the Egyptian goddess of justice nearly 5000 years ago, symbolised justice, truth and morality. Roman law was based, however shakily, on truth. The world's most widespread system, the investigative system, has sought the truth since early in the 13<sup>th</sup> century.

Judge Harold Rothwax, of the New York State Supreme Court, wrote in *Guilty: The Collapse of Criminal Justice* (Random House, 1996): 'Without truth there can be no justice.' The Hon Russell Fox QC (b. 1920), a former Justice of the Australian Federal Court, opens his book, *Justice in the 21<sup>st</sup> Century* (Cavendish 2000), with this:

For present purposes, truth can be taken to mean the reality of what happened and is happening. This is what the ordinary person understands by the word, and the undoubted view of the general public is that the findings of a court, human error aside, represent the truth in this sense.

Justice Fox's book, the product of 11 years of research, has the *imprimatur* of a joint launch by Sir Gerard Brennan, former Chief Justice of the Australian High Court, and (by video link) Lord Woolf, Lord Chief Justice of England and Wales.

At the launch, Sir Gerard introduced me to the author. Justice Fox made ticking signs in the air and

said: 'I read your book [*The Cartel*, 1998)]. You'll be able to tick off where I agree with you.' Thanks, judge, but it's more the other way round. Justice Fox wrote:

... in legal procedure the meaning which approximates most closely to it [justice] is 'fairness' ... the public estimate must be correct, that justice marches with the truth. Only in this way does the concept present a moral face, as distinct from one where the winner is the person with the greatest resources and best advocacy. This is the view taken on the continent and in other countries, where the whole system of justice proceeds on the footing that the truth is to be ascertained. Hence the investigational, or inquisitorial, approach of the French, which even provides that, the true facts having been found by a judicial officer, their presentation is not to be polluted by the parties.' [That is, by the parties' lawyers.]

In short, everything turns on truth. Justice means fairness, fairness to all and morality require a search for the truth; and truth means reality.

Sir John Mortimer QC (1923-2009), author of *Rumpole of the Bailey*, was one of the few common lawyers to admit that the adversary system ticks none of those boxes; it fails every test of justice. In *Where There's a Will* (Viking 2003), Sir John noted 'the gulf between the law and reality, the law and morality or, in many cases, the law and justice ... or even common sense'.

The gulf between common law and common sense is not a problem for common lawyers. Dr John Forbes, of the University of Queensland, noted in

*Similar Facts* (Law Book Company, 1987) that New Zealand appellate judges said in *R v Hall* (1887): 'Viewed in the light of science or common sense ... the common law must often result in what the public may regard as a failure of justice. That is really not our concern.'

Nor are common lawyers concerned about the gulf between law and reality. The little girl who tumbled down the rabbit hole would find a common law trial almost as unreal as the trial of a knave for alleged tart theft which ends *Alice's Adventures in Wonderland* (Macmillan, 1865). The judge, a cardboard figure, the King of Hearts, says from time to time: 'Consider your verdict'. Not yet, his associate, a White Rabbit, gently advises. Like Lady Coleridge (see below, The judge as Humpty Dumpty), the judge's wife sits on the bench. She frequently shouts: 'Off with her head!', and 'Sentence first – verdict afterwards.'

The gulf between law and reality exists because England has not tried to find the truth for 1500 years, and specifically rejected truth as the basis of justice in 1219 and again in 1993. Judge Rothwax noted: 'Our system is a carefully crafted maze, constructed of elaborate and impenetrable barriers to the truth.' The barriers are at least 24 mechanisms which defeat truth, including six rules which conceal relevant evidence.

Justice Fox said the adversary system relies 'on the parties [i.e. their lawyers] for the gathering and presentation of the facts. They are presented as the true facts, and there was a stir quite some years ago

[in 1982] when I showed how wide of the mark our system takes us.'

Common lawyers claim that concealing evidence makes trials fair to accused but, as Judge Fox noted, fairness to all requires a search for the truth. In what may be termed the Manuel Test, Gilbert Manuel, an Australian boilermaker who became a conciliation commissioner, said in a 1971 unfair dismissal case that his task was to deliver 'a fair go all round'.

Justice Geoffrey Davies, of the Queensland Court of Appeal, wrote in a paper, *The reality of civil justice reform: why we must abandon the essential elements of our system* (Australian Institute of Judicial Administration, 2002:

... to invest our system with the virtues of ascertaining the truth or of achieving fairness between the parties does not stand up to close examination. In truth, it achieves neither ...at least by the 1980s, judges had come to recognize that ... it was not effective to ascertain the independent truth, [but this] would, I suspect, come as a considerable surprise to most members of the public who see the legitimacy of our system in its capacity to ascertain the truth whilst according procedural fairness.

If other judges knew by the 1980s that the system achieves neither fairness nor truth, why did they not try to change it?

Investigating the truth is not lawyers' *metier*, but many are found in regulatory bureaucracies, including the US Securities and Exchange

## Our Corrupt Legal System

Commission (SEC), whose mission is 'to protect investors'. For instance, Bernie Madoff (b. 1938) founded Madoff Investment Securities in 1960, promising returns of 20-25%. It was a Ponzi scheme; he paid old investors with money from new investors. The scheme was remarkably durable because the SEC failed to investigate indications that something was wrong. When Madoff confessed and was charged with fraud in December 2008, it was alleged that he had defrauded investors of \$50 billion. *The Philadelphia Bulletin's* Marc Kramer interviewed Erin Arvedlund, author of a book about Madoff's operation, *Too Good to Be True* (Penguin, 2009) in September 2009.

Kramer: Why do you think the government never really caught on even with various people expressing their doubts?

Arvedlund: The SEC Inspector General's report says it all; once I read it I didn't know whether to laugh or cry. Biggest upshot: fire the lawyers and hire real fraud examiners at the SEC.

## B. Origins of the two systems

Evelin Sullivan wrote in *The Concise Book of Lying* (Picador, 2002): 'The liar's intention is to make others believe what the liar knows to be untrue ... the motive is to gain something by doing so.' US lawyer Charles P. Curtis wrote in *The Ethics of Advocacy* (1951): '... one of the functions of a lawyer is to lie for his client ... He is required to make statements as well as arguments which he does not believe in.' Evelin Sullivan wrote:

Lawyers have been notorious for duplicity, if not bald-faced deception, for so long that the lying lawyer is a cliché even for those people – a happy lot – who have not required their services ... Ask the man in the street (or the woman) whether lawyers ever lie, and the answer is likely to be: 'This is a joke, right?'

Lawyers have been trying to make others believe what the lawyers know to be false for at least 2500 years, since the Sophists showed Athenian lawyers how to 'make the worst appear the better reason', and were denounced by Socrates as morally bankrupt and by Plato as charlatans.

David Pannick QC wrote in *Advocates* (OUP 1992): 'The central objection to advocacy ... is that expressed by Socrates: that oratory is employed in the service of evil and so impedes the punishment of wrongdoing.'

Billy Flynn (Richard Gere), the 'greasy Mick lawyer' in the film, *Chicago* (2002), called lying tap-



dancing. He reminded film critic Joel Siegel (1943-2007), of an old joke: 'It's only the 99% of lawyers who give the rest a bad name.' The bad name actually comes largely from the 40% who are trial lawyers. The other 60% may be really nice persons who would never tell a lie or pervert justice. One of the really nice lawyers, Chaz Wannon, gave me some lawyer jokes. One was: How do you save a lawyer from drowning? Chaz said: 'Shoot him before he hits the water.' In this book, 'lawyers' generally refers to certain trial lawyers.

A truth-seeking system thus keeps lawyers on a tight leash. Roman law sought the truth – however shakily – and judges controlled the process, but the *Columbia Encyclopaedia* (Fifth Edition, 1993) says it was 'confused, contradictory or redundant'. Roman law was not codified.

The West Roman Empire collapsed in 476 when Odoacer's Goths deposed the last Emperor, Romulus Augustulus. Roman law disappeared in West Europe for more than seven centuries (and in England forever) but continued in the East Roman (Byzantine) Empire.

A Byzantine emperor, Justinian (482-565, Emperor 527-65), instructed Tribonian and other lawyers to codify Roman law. They completed the *Corpus Juris Civilis* (the law of the people) in 535. It remained in use in the Byzantine Empire until superseded by Islamic (Sharia) law after Constantinople (formerly Byzantium) fell to the Ottoman (Turkish) Empire in 1453.

Western Europe and England meanwhile regressed to mumbo jumbo during the Dark Ages (c.476-750) and until relatively late in the Middle Ages (c.750-1453). The *Judicium Dei* (Judgment of God) was an accusatorial (prove it) system: A accused B; B said: Prove it; an inscrutable deity gave the verdict.

The form of trial varied. The most convenient for accused was the wager (contract/oath) of law. For example, a person accused of not paying a debt could swear he had repaid it. When the deity did not strike him down, he was clearly telling the truth. In serious cases, he could produce character witnesses (compurgators) prepared to swear his oath could be trusted. The modern equivalent of the wager of law is self-regulation. An accused cleric had to swallow food containing a feather. If he choked on the 'cursed morsel', he was guilty.

The Judgment of God included such barbaric ordeals as walking on hot ploughshares, carrying a hot iron for nine feet, and taking a stone out of boiling water. Three days later, an expert inspected the damage and interpreted the deity's verdict.

In 'swimming a witch' (trial by cold water), the accused was trussed and thrown in a stretch of water blest by a priest. If the water 'received' her, i.e. she sank, she was not a witch. If the water 'rejected' her, i.e. she floated, she was a witch, and was fished out and hanged or burned to death. Alleged witches were swum and hanged in England as late as 1647, and 20 were hanged in Salem, Massachusetts, in 1692.

The Church opposed trial by ordeal from the time of Agobard, Bishop of Lyons (d. 840), on the ground that it was naughty to tempt the deity, but the spectacle was too exciting to be successfully proscribed.

William the Conqueror, King of England 1066-87), introduced trial by battle also known as the wager of battle, trial by combat, and the judicial duel. Accuser and accused swore they were telling the truth and then fought a duel. The deity ensured that the winner was the one in the right. The loser, if still alive, was hanged.

Accused women and children were allowed to hire a professional 'champion' to do the duelling. I asked Sir John Mortimer QC in 2001 where the adversary system came from. He said it began with trial by battle. In fact, it began four centuries later.

Trial by ordeal nominally ended in England in 1219 but some aspects, e.g. swimming a witch, persisted in isolated cases. In 1817, a judge thought Trial by Battle was still available. He allowed Abraham Thornton to get off a murder charge when the accuser did not pick up a gauntlet thrown down by Thornton. Parliament had to legislate to repair the judge's error.

## **1. Organised criminals start common law**

The British and European systems are different because of accidents of history. At the crucial moments in the 13<sup>th</sup> century, organised criminals ran

the British system and the master of Europe was a quite upright churchman.

In *Organized Crime and American Power: A History* (University of Toronto Press, 2001), British historian Michael Woodiwiss defines organised crime as 'systematic criminal activity for money or power'. He says the definition applies to the powerful and respectable as well as the Mob. A criminal enterprise is the vehicle through which organised crimes are committed. For instance, the Cook County court system was the vehicle through which Chicago judges systematically extorted bribes from accused late in the 20<sup>th</sup> century. Lawyers and court officials were the judges' bagmen.

Woodiwiss notes that in 1930 Raymond Moley said Europe's feudal system was 'a good deal of a [protection] racket'. Lords extorted goods and services from peasants in return for 'protection against other plundering lords and vagabonds'. Woodiwiss says 'William of Normandy did most to establish such a system in early Britain.'

Richard Condon said modern man thinks money brings power. Medieval man knew power brings money. William I (1027-87) and his son, William II (c.1056-1100), had standard medieval minds. After William I's 6500 Norman mercenaries defeated King Harold's 7000 troops at Hastings in 1066, William franchised 90 per cent of the country to 300 favourites, and established a property system based on trickle-down extortion.

The 300 'magnates' or 'great men of the realm' were part-time judges and full-time organised

criminals. They franchised land to freemen and extorted goods and services from them; extorted from merchants travelling through their land; and 'sometimes led or employed bands of brigands to plunder towns and villages'. The freemen in turn franchised land to its original owners and extorted from them.

The British Empire was a criminal enterprise based on theft of land, and later of human beings. The empire dates from 1072, when William I compelled the Scottish King, Malcolm III, to do him homage. It expanded to South Wales in 1079, to Ireland in 1172, and to Virginia in 1607. Britain then developed a triangular trade in goods and slaves between Africa, America and England.

Britain was always as corrupt as any country in Europe, if not more so, and incomparably the best at what Harvard ethicist Arthur Applbaum calls a 'strategy of redescription'. Bribes and/or extortions were redescribed as gifts, presents, favours, patronage, *doucens*, commissions, gratuities, honoraria, unofficial taxes, kickbacks. The colonies learned well: bribes are juice in California, ice in Florida, grease in New York.

King (1087-1100) William II institutionalised organised crime in the trade of authority. History professor John Gillingham, of the London School of Economics, noted in *The Oxford History of Britain vol II The Middle Ages* (OUP 1992) that William II put every public office, from Chancellor down, on sale, and the buyer in turn extorted bribes from people who had to deal with the office. The Chancellor was

head of Chancery, the royal secretariat, and hence a sort of mediaeval Prime Minister. The Chancery also became a court late in the 14<sup>th</sup> century, and some Chancellors continued their corruption into the 20<sup>th</sup> century.

The common law and the jury system are held to date from the Assize of Clarendon in 1166, during the reign of Henry II (1133-89, monarch 1154-89). When a crime was reported, 12 neighbours were asked to use local knowledge to suggest a suspect. This offered the chance to blacken an enemy. The trial was still by ordeal and a deity still gave the verdict.

The common law is judge-made law as opposed to statute law, and is common to the whole country. Henry II began the practice of sending judges out to make the whole country subject to common rather than local law in 1166. In the culture of the time, justices in *eyre*, i.e. travelling judges, were more inclined to extort bribes than to deliver justice. Cambridge law professor J. H. Baker (Sir John, as he became in 2003) (b. 1944) wrote in *An Introduction to English Legal History* (Third Edition Butterworth 1990):

The general *eyres* begat fear and awe in the entire population. The justices did not always proceed according to modern standards of probity or fairness ... we read of complaints that the *eyre* of 1198 reduced the whole kingdom to poverty from coast to coast ... Counties might pay heavy fines for lenient treatment, or even buy off an *eyre* altogether.

## 2. The legal cartel begins

British judges and lawyers were first professionalised, i.e. paid, towards the end of the 12<sup>th</sup> century. Professor Theodore Plucknett, of the London School of Economics, says in *A Concise History of the Common Law* (fifth edition Butterworths 1956) that lawyers were first paid when they appeared in a new civil court (later called the Court of Common Pleas) set up by Henry II in 1178. They received clients at particular pillars in the courts at Westminster Hall, a section of Westminster Palace, the king's residence.

Professor J. H. Baker says in *An Introduction to English Legal History* (third edition, Butterworths 1990) that judges were paid by 1200 and 'England possessed from an early date a bench and bar united by their membership of a common profession'. Adam Smith (1723-90), spiritual father of the greed is good business theory, said in *Inquiry into the Nature and Causes of the Wealth of Nations* (1776): 'People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices'.

Chief Judge Richard Posner, a Chicago economist and appellate judge, wrote in *Overcoming Law* (1995):

The legal profession in its traditional form is a cartel of providers of services related to society's laws ... The history of the legal profession is to a great extent, and

despite noisy and incessant protestation and apologetics, the history of all branches of the profession, including the professoriat [from the late 18<sup>th</sup> century] and the judiciary, to secure a lustrous place in the financial and social-status sun.

Members of a cartel collude to further their interests, including maximising profits, typically by adding 25% to the price of an item. The legal cartel's additions to the price of 'justice' are incalculable.

In view of the total corruption in the trade of authority when the lawyer-judge cartel began to operate, it can be assumed that its aims included getting their share of the graft, and that judges used lawyers as cut-outs or bagmen, as Chicago judges did quite recently.

It can also be assumed that the cartel aimed to arrange the system in ways which would increase business for lawyers. Charles Dickens, who worked for a law firm when he was 16, observed in *Bleak House* (1853): 'The one great principle of the English law is to make business for itself.' Today, large law firms calculate 'profit per partner'.

### **3. Origin of the investigative system**

A digest of Justinian's codification of Roman Law, *Corpus Juris Civilis*, was discovered in Italy about 1070 and was studied by scholars at the West's oldest university, Bologna, founded 1088.

Lotario de Conti di Segni, son of Count Trasimund of Segni and nephew of Pope Clement III, was born



in 1160 or 1161. He studied theology at the University of Paris and jurisprudence – the philosophical basis of law – at the University of Bologna. Gregory VIII ordained him sub-deacon in 1187. Clement III made him a Cardinal in 1190.

Justice Ken Marks, of the Victorian Supreme Court, wrote in *'Thinking up' about the right of silence* (1984) that Segni 'devised inquisitorial techniques [to investigate alleged clerical misbehaviour] in a series of decrees beginning in 1189-90'. Professor Richard Jackson, of Cambridge, wrote in *The Machinery of Justice in England* (seventh edition 1977):

[The] technique was to send a trusted person along to inquire into the allegations. This founded the inquisitorial concept of a trial, whereby the judge is expected to find out for himself what has happened, and he will do this by examining all persons, including the accused or suspected person, who may be able to enlighten him.

Pope Celestine III died, aged about 92, on 8 January 1198. Segni was elected Pope the same day and chose Innocent III as his papal name. He was zealous in extirpating simony, i.e. selling ecclesiastical office, the clerical equivalent of selling public offices in England. Innocents' term (1198-1216) was the high point of the papacy's temporal power. He had authority over Sicily and was virtual lord of Christian Spain, Scandinavia, Hungary, and the Latin East. He made Frederick II German king and was overlord of England and Ireland.

On 19 April 1213, Innocent issued a papal Bull inviting spiritual and temporal princes to attend an ecumenical council in Rome in November 1215.

#### 4. Magna Carta: a tax evasion scheme

Magna Carta is invoked to support all manner of legal claims, but it was essentially an attempt by the magnates to evade tax and dilute the power of the king. Arthur Marriott QC, of London, said in *Breaking the Deadlock* a lecture on international arbitration in Sydney in October 2005: 'Magna Carta was of course a charter for the feudal aristocracy.'

Scutage was a tax in lieu of military service. When King (1199-1216) John insisted that magnates pay scutage when they refused service in France, the great men gathered outside London in June 1215, and demanded at sword-point that the king sign a charter. Some sections with comments:

Section 21: 'Earls and barons shall not be amerced [fined] except through their peers.' Peers were unlikely to order other peers to pay scutage.

Section 39: 'No freeman shall be ... imprisoned ... except by the lawful judgment of his peers or by the law of the land'. Freeman owned freehold land and were one level below the magnates. They were unlikely to imprison their peers.

Section 40: 'To no one will we sell, to no one will we refuse or delay, right or justice'. That tends to confirm that a bribe would buy justice, and a job as a judge.

To gain time, John signed the charter and then, as a vassal of Innocent, appealed to Rome. The Pope annulled the charter in August 1215 on the ground that John had signed under duress and without the Pontiff's consent. The charter was thus in force for nine weeks.

## **5. The Fourth Lateran Council**

Innocent III's ecumenical council was a "glittering" church-state affair. Justice Ken Marks says it was attended by ambassadors from King John of England, the king of the Holy Roman Empire, Frederick II, King Philip II of France, the Latin Emperor of Constantinople, and the kings of Aragon, Hungary, Cyprus, and Jerusalem. Also present were 71 archbishops, 412 bishops, and 900 abbots and priors.

The conference is called the Fourth Lateran Council because it was the fourth ecumenical council held in the Lateran basilica. It began on 11 November 1215 and Innocent's 70 canons (decrees) were approved by the end of the month. Canons 8 and 18 were the keys to the future of European law.

Canon 8 confirmed his investigative system of investigating clerical misbehaviour. It said superiors must 'carefully inquire into the truth' of the allegations. The suspect was to be allowed to defend himself in the presence of 'the seniors of the church so that if they prove to be true, the guilty party may be duly punished without the superior being both accuser and judge in the matter'.

Canon 18 banned 'any blessing' by clerics to 'judicial tests or ordeals by hot or cold water or hot iron'. That effectively ended trial by ordeal.

Temporal courts in Europe shortly adopted Innocent's version of Roman law. The investigative system is now the most widespread system in the world, but few common lawyers have heard of Innocent or the Lateran Council. Innocent is not mentioned in Professor Baker's *Introduction to English Legal History*, nor did he make the cut in US law professor Darien McWhirter's *The Legal 100: A Ranking of the Individuals Who Have Most Influenced the Law* (Citadel, 1998).

Erle Stanley Gardner (1889-1970), a lawyer-novelist, was 99<sup>th</sup> in *The Legal 100*. His 80 Perry Mason books and television productions based on them give readers and viewers two quaint impressions: 1. All accused are innocent. 2. The truth of their innocence always emerges at trial.

Sir John Mortimer QC placed 100<sup>th</sup>. Despite his view that there is a gulf between law and reality, morality, and common sense, *Rumpole* gives the impression that justice somehow happens at trial.

## 6. The cartel rejects truth

While Europe opted for truth, England hesitated. Henry III was nine when he succeeded John in October 1216. The decision was left to the judges, which in practice meant the cartel. Professor Theodore Plucknett said of the relationship in the 13<sup>th</sup> century: 'When the same half-dozen judges are

constantly being addressed by the same score or so of practitioners, these two small groups cannot help influencing each other.'

Europe had spoken, but English lawyers and judges were making a lot of money from the accusatorial system, and the role of lawyers in a truth-seeking system would necessarily be minimal. In 1219, the cartel accepted that trial by ordeal had to go, but decided to reject the investigative system and to persist with the accusatorial system, minus the ordeal and with inscrutable jurors instead of the inscrutable deity.

Professor Theodore Plucknett said a trial was now 'just a newer sort of ordeal ... the jury states a simple verdict of guilty or not guilty and the court accepts it, as unquestionably as it used to accept the pronouncements of the hot iron or the cold water'.

Professor Richard Jackson said: 'Jury trial simply replaced trial by ordeal, the verdict of the jury having the same finality and the same inscrutability as the Judgment of God.'

Ethnocentrism is a 'belief in the inherent superiority of one's own group and culture accompanied by a feeling of contempt for other groups and cultures', e. g. 'Wogs begin at Calais'. Professor Richard Jackson said 'an insular dislike of things foreign' was a cause of the rejection of the truth-seeking system.

Nothing changes. An inquiry into the British criminal system began in 1991 after it emerged that police had used torture to procure false confessions. In 1993, its report rejected a truth-seeking system

because: 'Every system is the product of a distinct history and culture, and the more different the history and culture from our own, the greater must be the danger that an attempted transplant must fail.'

An effect of the rejection of truth in 1219 is that the common law can prefer legal fictions to truth, form to substance, rights to justice, and appearance to reality. The parol (oral) evidence rule of contracts developed in the 13<sup>th</sup> century held that documentary evidence takes precedence over oral evidence. For instance, if a man paid a debt but did not make sure the bond was cancelled, it was useless to bring witnesses to prove he paid the debt: the bond was held to be incontrovertible proof that the debt was still owed. The parol evidence rule still obtains in some common law jurisdictions.

## **7. Judicial torture in England**

Trial judges had an incentive for trial to begin; they got a share of the fines they imposed. But trials could not start until the accused pled one way or the other, and some refused to plead: if convicted, their goods were forfeit and their families would be destitute, particularly if he was hanged. In the 13<sup>th</sup> century, judges tried prison to encourage a plea. That did not work. In the 15<sup>th</sup>, they tried crushing accused with large boulders. That did not always work either.

Sir William Holdsworth (1877-1944) noted in *A History of English Law* (the 1927 edition) that it was not until 1827 that Parliament told judges to take a refusal to plead as a plea of not guilty.

Judges apparently also used torture to obtain confessions, just like the despised continentals. The CDNB laconically notes that in 1628 Sir Thomas Richardson (1569-1635), Chief Justice of the Common Pleas, 'refused to allow [John] Felton to be racked to induce confession, a step which marks an epoch in the history of criminal jurisprudence'. Felton (1595?-1628) assassinated the incompetent and unpopular 'favourite' of James I, the Duke of Buckingham (1592-1628), at Portsmouth in 1628. Felton was 'described as a national benefactor in popular ballads', but was hanged.

## 8. Judicial torture in Europe

The investigative system soon had odious features. Some trials were secret; some suspects were not informed of the allegations; and some judges fell into anti-truth error. While some British judges resorted to extortion to get the money, some European judges resorted to torture to get, as they wrongly believed, the truth.

Their methods of torture included simulated drowning or 'waterboarding'. (In a war on a high-order abstraction, 'terrorism', that followed a terrorist attack in New York on 11 September 2001, US administration lawyers advised the Central Intelligence Agency that 'waterboarding' is not

torture.) David Gitlitz, professor of Spanish Studies at the University of Rhode Island, says medieval judges did not pretend water-boarding was not torture. He wrote in *The Providence Journal* of 8 February 2008: 'Since the middle of the 13th century it [waterboarding] had been used by European civil and ecclesiastical courts.'

There were no jurors in the investigative system and it was recognised that judges' power risked oppression. An impossibly high standard of proof was required: judges could convict only on the basis of two eyewitnesses or a confession. That eliminated circumstantial evidence; two eyewitnesses were rare; and criminals might not dutifully confess.

Suspects were given some protection. Torture could only be used where there was one reputable eyewitness or compelling circumstantial evidence, and it was permitted only to elicit facts, not a confession. The judge was not to suggest the answer he wanted.

In practice, the torture rules were as futile as Anglo-American Bar Associations' ethics rules. Torture is notoriously unreliable: the tortured are likely to confess to anything, e.g. the Birmingham Six, who were tortured by British police in 1974. Professor John Langbein, of Yale, noted in *The Origins of Adversary Criminal Trial* (OUP 2004):

... efforts at surrounding coercion with safeguards proved illusory. In case after case, the true culprit was ultimately discovered after the innocent person had confessed under torture and been convicted and executed ... but long into



the eighteenth century the law of torture remained a defining feature of the Continental tradition in criminal procedure.

European judges did not begin to stop torturing suspects until 1754.

## **9. British judicial extortion in the Middle Ages**

Westminster Palace was the centre of power and money in the later Middle Ages. The king lived there; the magnates sat in the House of Lords; the cartel operated in Westminster Hall.

Simon de Montfort invented the House of Commons in 1265 during a second failed attempt to usurp the king's power, the Barons' War of 1264-68. Lawyers migrated to the Commons to hear the sound of their own voices; to protect their legal system; and to intrigue against the king. It took them four centuries to destroy the monarchy.

Professor John Gillingham said William II's system of 'patronage', i.e. trickle-down extortion, was still operating in the reign of Edward I (1272-1307), when London had a population of about 35,000. Lawyers could still buy the office of judge, and judges still had an incentive to convict: a share of the fines.

The great men of the realm also continued to be effectively white collar organised criminals. To stop people stating the truth about them, Edward I invented a crime, *Scandalum Magnatum*, slandering the magnates (Statute of Westminster, 1275).

Judges were accused of corruption, sorcery and murder in 1289. The Chief Justice of Common Pleas fled the country, and seven judges were dismissed. They included Ralph de Hengham, Chief Justice of the King's Bench (criminal trials), but in 1301 he was appointed Chief Justice of the Common Pleas, presumably by bribing Edward I.

Venality means open to bribery. A poem from the early 1300s was titled *Song on the Venality of the Judges*. Another, *The Simonie*, from about 1321, has a poor man standing outside the court while a rich man bearing 'gifts' is welcomed inside.

Lawyers took effective control of Parliament about 1350. Professor Theodore Plucknett said: '... the middle of the fourteenth century coincides with Parliament's first assertions of its powers ... and the dominant interest in it were the common lawyers ... bench, bar and Parliament, therefore, were alike under the influence of the conservative professionalised lawyer.' Hence the view that for more than 650 years democracy in the English-speaking world has been defined as government of the lawyers, by the lawyers, and for the lawyers. The *Scandalum Magnatum* was re-enacted in 1378 to stop people muttering about judges, prelates, and certain named officials, many no doubt as corrupt as the great men of the realm.

Richard II made the royal secretariat, the Chancery, a court in the 1380s. It purported to be a court of equity (fairness) to provide a remedy for the rigidities and injustices of the common law courts, but the traditionally corrupt Chancellor was its

judge and jury; the Chancery Court inevitably became as corrupt as the others. Professor J. H. Baker says 'already by 1393 there were complaints of its abuse'.

The cartel's executive was effectively the Order of Serjeants-at-Law (Order of the Coif). Serjeants were originally an order of ecclesiastic lawyers; the coif, a piece of silk worn on the head, represented the clerical tonsure. Professor Theodore Plucknett said: 'In the course of the 14<sup>th</sup> century the Serjeants [became] a close guild in complete control of the legal profession ... By the close of the 14<sup>th</sup> century the judges are all members of the order of Serjeants, and Serjeants alone can be heard in the principal court, that of Common Pleas.' (Civil cases.)

The Serjeants thus had a monopoly of work in the civil courts, a monopoly of appointment as judges, and a monopoly of legal education. Fewer than 1000 Serjeants were appointed from about 1400 until their monopoly ended in 1846.

Today, some US law schools give bright students an Order of the Coif. Perhaps they should think about that. Professor John Baker says 'ministers sold the coif for bribes' in the 17<sup>th</sup> century, but the opportunities for corruption clearly made it worth buying in the 14<sup>th</sup>, although London's population was then only about 45,000. Professor Theodore Plucknett says Serjeants' wealth in the 14<sup>th</sup> century 'must have been enormous'. On appointment, they were obliged to hold feasts 'comparable to a king's coronation, and to distribute liveries and gold rings in profusion'.

Professor Plucknett said that in the Middle Ages Serjeants lived together during term time in the Serjeants' Inns, 'and discussed their cases informally together simply as Serjeants, without distinction between those on the bench and those at the bar'. They presumably also used the Inns to divide up the extortions.

*London Lickpenny* (c.1400-1450) is a poem about a poor ploughman from Kent. He seeks justice in Westminster Hall but, lacking money, can find no justice in the King's Bench, the Common Pleas, or the Chancery Court.

Jack Cade's revolt in 1450 was partly caused by dissatisfaction with the legal system. Cade briefly controlled London, and according to Shakespeare's *Henry VI Part II* (1594), agreed with Dick the Butcher's final solution: 'Let's kill all the lawyers', but Cade was himself killed.

## 10. Origin of the adversary system

Academics tell law students the adversary system is the best system of justice, but few, if any, know when and how it began. (There is no entry for 'adversary system' in J.H. Baker's *An Introduction to English Legal History*.) Professor John Langbein wrote in *The Origins of Adversary Criminal Trial*:

... we know relatively little about the conduct of civil trials before the 19<sup>th</sup> century. The law reports tell us about pleading, about decisions on issues of law, and about the

post-verdict review of trial outcomes, but they do not tell us much about how civil trials actually transpired.

Some academics place the beginning of the adversary system in the 18<sup>th</sup> century, when lawyers began to get control of the criminal process, but lawyers had control of the civil process much earlier. If you control the evidence, you control the money. Lawyers started getting control with pleadings, and judges did not stop them. What follows comes mainly from *Pleadings – Sacrificing the Sacrosanct* by a Perth barrister, Nicholas Mullany (BCL Oxon) for the West Australian Law Reform Commission in 1998.

Written pleadings are now the first step in the civil process, but were the second last step when barristers pled orally before a judge, much as they do today in France and Germany. Cambridge law professor Frederic Maitland (1850-1906) said the lawyers and the judge ‘licked the plea into shape’, presumably in an hour or two. Sir William Holdsworth described the process in *A History of English Law* (the third edition, 1923):

... the debate between opposing counsel, [was] carried on subject to the advice or the ruling of the judge ... Suggested pleas will, after a little discussion, be seen to be untenable; a proposition to demur will, after a few remarks by the judge, be obviously the wrong move. The counsel feel their way towards an issue which each can accept and allow to be enrolled. If the issue was a question of fact, the matter was then ready to go before a jury.

Lawyers began to get control of evidence when they started sending written pleadings to each other, thus cutting the judge out of the first stage of the process. Professor Holdsworth said the first record of a paper (written) pleading was in 1460. Sir John Prisot (d.1460), Chief Justice (1449-60) of the Common Pleas suggested, perhaps with his dying breath, that written pleadings would make it easier for lawyers to lie. He said:

It is not the practice to put in such papers when the party is represented by counsel without pleading them at the bar openly; for if this be allowed we shall have several such papers in time to come which will come in under a cloak, and matter which a man's counsel will not plead [openly] can be said to be suspicious.

Professor John Baker says that 'by Charles I's time [1625-49]' oral pleadings were 'a thing of the past'. Sir John Prisot's suspicion proved correct; US law professor E. R. Sunderland wrote in 1937:

The great weakness of pleading as a means for developing and presenting issues of fact for trial lay in its total lack of any means for testing the factual basis for pleaders' allegations and denials. They might rest upon the soundest evidence, or they might rest upon nothing at all. The parties could assert or deny whatever they chose. But whether the pleadings represented fact or fancy was something with which the rules of pleading had nothing to do.

That supports the view that justice is broken in the adversary system.

## 11. British corruption from 1455

Lawyers and the rest of us know little about the origin of the civil adversary system, but we know a lot about events that happened at the same time, the Wars of the Roses (1455-85). They were really skirmishes between the houses of Lancaster (red rose) and York (white rose) for power and money, i.e. control of the monarchy. The 17 melees totalled three months over 30 years and did not unduly inconvenience citizens, but the crown changed hands five times: Henry VI, Edward IV, Henry VI, Edward IV, Richard III, Henry VII.

The last man standing was a Lancastrian, Henry Tudor (1457-1509), who became Henry VII (1485-1509). The CDNB says Henry VII 'practised much extortion', but that after all was the point of the wars.

Of the Tudor period (1485-1603), Justice James Thomas, of the Queensland Court of Appeal, says in *Judicial Ethics in Australia* (Law Book Company, second edition 1997):

With few exceptions, all officials (including judges) were ... corrupt. [Cardinal] Wolsey [Henry VIII's Lord Chancellor 1525-29] received gifts and in turn bribed others ... In those days [judges] considered it proper to receive gifts or bribes from one or both parties and yet thought they could still render justice.

From 1534, when King (1509-47) Henry VIII (1491-1547) made himself head of the Church of England, common lawyers claimed that judicial torture in Europe confirmed the superiority of the British system. Professor John Langbein said that from the time of the Reformation:

... disdain for Continental criminal procedure became enmeshed in English hostility to the leading Continental regimes – the papacy, the French, and the Spaniards. At least from the time of Foxe's *Book of Martyrs* (1563) the Spanish Inquisition was held up for particular vilification ... English writers from [Sir John] Fortescue [1394?-1476?; his *De Laudibus Legum Angliae* was first printed 1537] to Sir Thomas Smith [1513-77] to [William] Blackstone [1723-80] extolled the superiority of England's torture-free procedure.

That merely confirms that lawyers lie. As we have seen, British judges engaged in torture as well as extortion. Corruption remained universal in the trade of authority. Justice James Thomas notes that in 1554 the Count of Egmont, having bribed the entire Royal Council, reported to Philip of Spain that 'more could be done with money in England than anywhere in the world'.

A lie in 1568 by Chief Judge Sir James Dyer is the remote cause of millions of criminals escaping justice by way of the privilege against self-incrimination. His lie by omission concerned the canon (church) law on self-incrimination, which derived from a fourth-century lawyer and prelate, St John Chrysostom. Translated from the Latin, the



canon law stated: 'Although no one is compelled to accuse himself, yet one accused by rumour is compelled to present himself to show his innocence, if he can, and to clear himself.'

Dyer omitted everything except 'no one is compelled to accuse himself' (*nemo tenetur seipsum prodere*), and used that to free an accused who refused to speak. For two centuries, however, judges ignored Dyer's lie.

Samuel Pepys (1633-1703), a corrupt naval bureaucrat, diarist, womaniser, and hypocrite, was in the great British tradition of calling bribery something else. Claire Tomalin reported (*Samuel Pepys*, Viking, 2002) that in 1663, John Luellin, a cut-out for a timber merchant, John Dering, offered Pepys £200 a year (at least £20,000 today), and 50 gold pieces immediately if he took timber.

Tomalin wrote: 'Pepys explained he was not to be bribed, but was prepared to accept an "acknowledgment" of his services'. He took £50 (c. £5000) on the spot, and gave Luellin £2 (c. £200) 'for his trouble'.

In cases of disputed wills in the Chancery court, lawyers were paid, not by clients, but from the deceased estates. From at least 1650 to early in the 20<sup>th</sup> century, the court was a criminal enterprise involving elements of the cartel. The sole Chancery judge, the Chancellor, was a curiosity. Until 2003, he was at once head of the judiciary and a politician, with a seat in Cabinet. Professor John Baker wrote:

For two centuries before Dickens wrote *Bleak House* [i.e. from about 1650], the word 'Chancery' had become synonymous with expense, delay and despair; throughout the 17<sup>th</sup> and 18<sup>th</sup> centuries 10,000 to 20,000 cases were pending, and the time taken to dispose of them could be as long as 30 years ... Two distinguished chancellors [Bacon 1621, Macclesfield 1725] were dismissed for accepting 'presents' ... Gold or silver could open paths through the Chancery morass.

Tulkinghorn, the pseudonym of a lawyer who writes for *Justinian*, extracted some of the details from historian David Lemmings' *Professors of the Law* (OUP, 2000). This excerpt of four paragraphs from Tulkinghorn's *Justinian* piece on 30 March 2007 appears here with his permission:

'Australian history professor David Lemmings wrote: "There are substantial grounds for suspicion that the eighteenth century Chancery was operating an elaborate racket in the administration of the law, which amounted to a conspiracy for making the most out of a declining source of work." He backs up his suspicion with many pages of evidence in his book ... leaving one in no doubt. Charles Dickens, writing in the 1850s, made it quite clear that his novel *Bleak House*, which exposed the Chancery racketeering, was grounded in fact.

'In England, from 1580 to 1640, there was a civil litigation boom. Litigation lawyers charged reasonable fees, typically less than 10 per cent of the amount at stake. In 1640 there were about 29,000

cases in “advanced stages” in the national courts. The boom was followed by a long “bust”, which cannot be blamed on the English civil war, but on a policy adopted by the leading litigation lawyers. They would not meet the market any more. They would focus on cases that could support higher fees, and then find ways to extract those fees. Successful lawyers still operate on that principle today.

‘By 1750 increased fees had dramatically reduced the supply of willing civil litigants, and the number of cases being actively pursued was a *sixth* of the 1640 figure. However, the number of lawyers had not gone down, and the total amount of litigation activity being generated by that reduced number of cases, and the amount of legal fees being paid, had actually gone up. Seventy-five per cent of the barristers of England, faced with declining work in Kings Bench and Common Pleas, had turned to the Chancery Court (which dealt with deceased estates) and became litigational racketeers.

‘By 1800 the Court of Chancery was finalising only 30-90 cases a year, but creating 5,000 to 7,000 “hearings” per year, in order to give lawyers something to do. Chancery judges were obviously in on the racket, and all judges would have known about it. Payment came from the assets of the deceased estates.’

## 12. Origin of criminal adversary system

Lawyers tend to prate about their sacred obligation to defend criminals, and accused should certainly

have someone to speak for them, but they were on their own for more than five centuries after the common law began in 1166. The only people at a criminal trial were the accused, his (private) accuser, their witnesses, the judge, and the jurors.

It is said that lawyers were not allowed in the criminal courts, but they had enough power to get control of civil evidence; if they wanted to defend criminals, judges would not have stopped them. The reality is that criminal work was not a business proposition. The *Scandalum Magnatum* protected wealthy white collar organised criminals from being accused, and ordinary criminals were not rich. Jeremy Bentham said: '... plunderable matter was seldom to be found' in the purses of accused. Professor Stephan Landsman said: 'Not even the judges, who received sizable fees in civil litigation, could hope to profit from the criminal docket.'

Trade in goods and slaves made England rich and populous in the 17<sup>th</sup> century. London's population is estimated to have tripled, from 200,000 to 600,000, between 1600 and 1700. Unrespectable organised crime followed; lawyers discovered a tender care for the rights of accused. They began to appear in criminal courts after a 1692 Act offered a reward of £40 (c. £4000 today) for information leading to the conviction of highway robbers and other thieves. Trial lawyers easily exposed those who made false accusations to get the £40, but they did not appear in numbers until the end of the 18<sup>th</sup> century.

Research on Old Bailey trials by University of Toronto law professor John M. Beattie showed that lawyers appeared in 2.1% of trials in the 1770s, 20.2% in 1786, and 36.6% in 1795. Since 1790, judges have agreed to a series of anti-truth devices which make it relatively easy to get rich criminals off.

### **13. A glorious lawyer-driven revolution**

Sir John Evelyn (1620-1706) recorded in his diary (published 1818-19) of 26 November 1686 that four senior members of the cartel, including Lord Chancellor (1685-89) George Jeffreys (1644-89), admitted to systematic theft from clients. Evelyn wrote:

I din'd at my L. Chancelors, where being 3 other Serjeants at Law, after dinner being cherefull and free, they told their severall stories, how long they had detained their clients in tedious processes, by their tricks, as if so many highway thieves should have met and discovered the severall purses they had taken. But God is not mocked.

In 1688, lawyers in Parliament organised the overthrow of the monarch, James II, and the installation of a Dutch king. Professor Theodore Plucknett said: 'It was the common lawyers who were mainly instrumental in making parliamentary supremacy a fact.'

A Whig conspirator in the overthrow, John Locke (1632-1704), justified the treason in *Two Treatises of Government* (1690). The second, which

continues to have a profound effect in the United States, said citizens have certain natural rights, including a sacred right to property, and that governments which do not protect those rights can legitimately be overthrown. Since no government can protect every right, including the right not to be lied to, Locke supplied a pretext for any usurpation, at home or abroad.

The overthrow of the monarchy was called a 'Glorious Revolution', perhaps because organised criminals among the Whig oligarchs who ran Britain for much of the 18<sup>th</sup> century rightly anticipated making glorious sums of money. In *English Society in the Eighteenth Century* (Penguin, 1982), historian Roy Porter noted some of their techniques:

Offices could be traded ... Many offices further allowed the incumbent to take commissions from contractors, to accept *doucens*, and handle astronomical sums of public money, with which they would play the Exchange privately for the duration ... The Paymaster Generalship made the fortunes of Marlborough, Cadogan, Amherst, Sir Robert Walpole, Bubb Dodington, Henry Fox, James Brydges and others. Brydges [first Duke of Chandos] cleared £600,000 [c. £60 million today] from his tenure of office between 1705 and 1713.

None of those white collar organised criminals was hanged. Jonathan Wild (1682?-1725) was. A blue collar organised criminal, he ran a gang of thieves, took his share of the proceeds, informed on gang members for the reward, and was hanged in 1725. Wild lives on in thinly-disguised portraits of

Walpole in John Gay's *Beggars' Opera* (1728), Henry Fielding's *The History of Jonathan Wild the Great* (1743), and *The Threepenny Opera*, by Kurt Weill and Bertolt Brecht (1928).

Walpole (1676-1745), Prime Minister 1715-17 and 1720-42, said of politicians: 'All these men have their price.' The Duke of Newcastle (Thomas Pelham-Holles, 1693-1768), was the oligarchy's bagman from 1724-62. He was Prime Minister 1754-56 and 1757-62. Most judges were former Whig politicians. Justice James Thomas wrote:

An analysis of appointments between 1714 and 1760 shows that approximately 77 per cent of the Chief Justices and senior appointees to the Bench were members of Parliament ... For the majority of this period, one or other of Robert Walpole and the Duke of Newcastle was involved in nearly all senior judicial appointments and many of the junior ones.

Thomas Parker, Lord Macclesfield (1666?-1732), a Whig, was Lord Chancellor 1718-25. He extorted bribes of £5000 [c. £500,000 today] from barristers who sought appointment as Masters in Chancery *The Oxford Book of Legal Anecdotes* (OUP 1986) records an account by Theobald Mathew (1866-1939) of the case of a barrister, Francis Elde, who had to use a clothesbasket to convey the bribe to Lord Macclesfield and his bagman, Master Peter Cottingham:

Anxious to be appointed, Mr Elde saw the Lord Chancellor himself, who was even more delicate than Mr Cottingham. Lord Macclesfield said he thought Mr Elde would make a good officer, and asked Mr Elde to consider of it. Mr Elde considered of it accordingly for two days, and then returned to say that 'if his Lordship would admit him he would make him a present of £5000.' To this Lord Macclesfield virtuously replied: 'You and I must not make bargains.' A few days later Mr Elde met Cottingham. Cottingham, when told of his offer of £5000 to Lord Macclesfield, significantly rejoined: 'Guineas are handsomer.' Determined to secure the office, Mr Elde repaired to his chambers, found a clothes-basket, placed in it 5000 guineas in cash and notes, handed it to Mr Cottingham at the Lord Chancellor's house, saw Mr Cottingham carry it upstairs, was invited to dine by the Lord Chancellor, and was sworn in after dinner. Some months later his basket was returned to him but, added Master Elde, with no money in it.

Following an inquiry, Lord Macclesfield resigned in January 1725 and was impeached (accused) in May 1725. He was found guilty and fined £30,000 (c.£3 million today). He paid the fine in six weeks.

Justice James Thomas said William Murray, Lord Mansfield (1705-93), was 'another senior judge of this period who was trained in the service of the Whig oligarchy and continued to be closely involved in government after he was elevated to the bench'. Mansfield became a Serjeant and Lord Chief Justice in 1756. He sat in corrupt Cabinets, where he favoured coercing American colonists, until 1774, and remained an active politician until 1784.



Judges were still extorting bribes from barristers in return for legal office in 1810.

#### 14. Origin of law schools

For the first six centuries of the common law, senior lawyers ran legal education on an apprenticeship basis. It must have been rather like Mr Alphonse Capone mentoring promising thugs. In 1753, William Blackstone (1723-80), began lecturing at Oxford on what purported to be the common law. Charles Viner (1678-1756) used the copyright to his *Abridgment of Law and Equity* (23 vols, 1742-53) to endow a common law chair, scholarships and fellowships at Oxford. Blackstone became the first Vinerian professor in 1758. Law schools followed at Cambridge in 1800, Harvard in 1817, and Sydney in 1855.

Blackstone was a fat, near-sighted charlatan with a grating voice and a fondness for port. As a former trial lawyer, he must have known that the common law held that truth does not matter; that liars controlled the civil process and were beginning to appear in the criminal courts; that judges were untrained and mostly corrupt; and that the Chancery Court, for one, was a criminal enterprise. Blackstone said none of that; he said the law was 'dictated by God Himself'. That would mean the deity does not care for morality, but Blackstone meant the system is incapable of fundamental error. His successors have dutifully adhered to that line.

Jeremy Bentham (1748-1832) was a child prodigy who went to Oxford at 12, got a bachelor's degree at 15, a master's at 18, and was called to the Bar at 21. He heard Blackstone lecture and judged him to be defective. He saw in Blackstone a 'spirit of obsequious quietism' which 'scarce ever let him recognise a difference' between what the law is and what it should be.

Professor Plucknett kindly said Blackstone lacked 'excessive learning'; that he regarded 'legal history as an object of "temperate curiosity" rather than exact scholarship'; that his 'equipment in jurisprudence was also somewhat slender'; and that he was led 'to tolerate' the system by a 'romantic fancy' which compared 'it to a picturesque old Gothic castle'.

Blackstone published his lectures as *Commentaries on the Laws of England* in four volumes from 1765 to 1769. Jeremy Bentham described the work as 'ignorance on stilts', but fairy tales are popular: sales of the book in Britain and America made Blackstone's fortune. He was made a judge in 1770.

Lawyers like to quote Blackstone's assertion: 'Under our system of justice, it is better that 10 guilty men go free than that one innocent man be convicted.' That provided an excuse to help the new breed of criminal defence lawyer with a series of get-the-guilty-off devices. Thomas Starkie, a Cambridge academic, improved on Blackstone in 1824. He said: 'The maxim of the law ... is that it is better that 99 ... offenders shall escape than that one innocent man be

condemned.’ The reality today is that in 100 cases up to five innocent men are convicted and more than 50 guilty men escape justice. Truth-seeking systems are much better at both.

Blackstone’s successors have generally adopted a posture of ostrichism about the system’s history and vices, but some ease their consciences by writing papers critical of an aspect of the system (but not the system as a whole or its basis), safe in the knowledge that judges and trial lawyers will ignore the papers and they will be unintelligible to the public. As St Paul almost said, academics discussing justice are but as sounding brass or tinkling cymbals.

## **15. US fatally persists with common law**

William Jefferson and other lawyers favoured changing to the pro-truth investigative system when the American colonies broke with England in 1776, but it seems that Blackstone fatally persuaded James Madison (1751-1836) to persist with the common law. Madison was not a lawyer but he read law books, and in 1791 he was largely responsible for the first eight amendments to the Constitution which are taken to be the Bill of Rights.

The Seventh Amendment says: ‘... no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.’ That suggests that the common law applies only to appellate courts, and that lower courts could search for the truth. The Bill of Rights says nothing about the adversary system

for the sufficient reason that lawyers did not admit it is an adversary system until the mid-20<sup>th</sup> century.

Blackstone had repeated Justice Dyer's 1568 lie that no one is compelled to accuse himself, and Madison entombed it in the Constitution as the Fifth Amendment: '... nor shall be compelled in any criminal case to be a witness against himself.'

## 16. *Jennens v Jennens (Jarndyce v Jarndyce)*

*The Sporting Magazine* reported in 1794: 'A water lawyer, or in plainer terms a shark, was caught last month near Workington.' US law professor John Banzhaf said: 'Like sharks smell blood, lawyers smell money.' Judge-lawyer collusion continued in the Chancery Court. By 1800, the Chancellor was holding 6000 hearings a year, but finalising only about 60 cases, or 1%. Sir Thomas Erskine May (1815-86), a barrister, described the reality of civil litigation at the start of the 19<sup>th</sup> century in *Constitutional History of England Since the Accession of George III 1760-1860*. The work appeared in 1861-63. Erskine May wrote:

Heart-breaking delays and ruinous costs were the lot of suitors. Justice was dilatory, expensive, uncertain and remote. To the rich it was a costly lottery; to the poor a denial of right, or certain ruin. The class who profited most by its dark mysteries were the lawyers themselves. A suitor might be reduced to beggary or madness, but his advisers revelled in the chicane and artifice of a lifelong suit and grew rich.

The Jennens matter lasted several lifetimes. William Jennens, 97, an unmarried loan shark, was the richest commoner in England, worth about £500 million of our money. He went to a solicitor to make a will but forgot his spectacles, and the solicitor's did not fit. He died a few days later, on Tuesday, June 19, 1798, the unsigned will in his pocket.

In a rational system, a judge would determine Jennens' wishes by examining the solicitor and the will, and dispose of the case in an hour. Not in a system which insists that appearance trumps reality. Jane Mulvagh writes in *Madresfield: The Real Brideshead* (Black Swan 2009): 'A will was found in his [Jennens'] coat pocket, sealed but not signed and therefore useless.'

Details of subsequent events are to a degree obscure. Mulvagh says part of the estate was shortly split between distant cousins in the Lygon (pron. Lignon), Andover and Curzon families, and that the Lygon share was 'the equivalent in today's terms of forty million pounds'. If the Andovers and Curzons got a similar amount, it would leave the equivalent of some £380 million today to be picked over.

It seems that 32 successive Chancellors, beginning with Lord Eldon (Chancellor 1801-06 and 1807-27) let *Jennens* run. Dickens was born in 1812. In 1852-53, he used *Jennens* as the model for *Jarndyce v Jarndyce* in *Bleak House*, and it was still going when he died in 1870. It was not until 1915 that the Chancery vultures and/or water lawyers had totally 'devoured' the remainder of the estate, and *Jennens v Jennens* ended.

A few things may be noted by way of footnotes to the *Jennens* saga. The Lygon share was the basis of a renewed fortune. *Madresfield*, the family seat, in the west midlands was extended and, in the time-honoured cash for honours way, Lord Lygon's wife, Catherine, bribed George III with £10,000 (£10 million today) in 1815 to have her husband made Earl Beauchamp.

William Lygon, seventh Earl Beauchamp (1872-1938), was the Lord Lundy in one of Hilaire Belloc's *Cautionary Tales for Children* (1907):

"Sir! you have disappointed us!  
We had intended you to be  
The next Prime Minister but three:  
The stocks were sold; the Press was squared:  
The Middle Class was quite prepared.  
But as it is! . . . My language fails!  
Go out and govern New South Wales!"

The seventh Earl Beauchamp, 26, was a generally popular Governor of NSW from 1899, although some exception was taken to his remark about the 'birthstain' of the citizenry, a reference to the convict ancestry of most of the British invaders. Homesick, the Earl returned to England after 18 months in 1900. He was made Lord Warden of the Cinque Ports in 1914.

Evelyn Waugh (1903-66) became a pal of the Earl's son, Hugh Lygon (1904-36) at Oxford in 1922, and often visited him at Madresfield. Like his father, Hughie was a homosexual, which was then a crime.

Earl Beauchamp's brother in law, the second Duke of Westminster (1879-1953), was a serial adulterer – one of his mistresses was the French courtesan and couturier, Gabrielle (Coco) Chanel (1883-1971) – and tax evader (see below, Larceny by trick). In 1930, the Duke outed the Earl to King George V. George said: 'I thought men like that shot themselves.' The Earl went into exile. Hughie died when he fell out of a car in Bavaria and hit his head on the concrete.

In Waugh's novel, *Brideshead Revisited* (1945), Brideshead is based on Madresfield, Lord Marchmain on Earl Beauchamp, and Lord Sebastian Flyte on Hughie.

## 17. Bonaparte reforms investigative system

Johann Graefe's *Tribunal Reformation* (1624) spurred opposition to judicial torture in Europe, and the Enlightenment ended it. Frederick the Great abolished torture in Prussia in 1754. In 1764 an Italian lawyer, Cesare Beccaria, argued in *An Essay on Crimes and Punishments* that torture punished the innocent and should not be necessary to prove guilt. His book was translated into 22 languages. Judicial torture was abolished in Italy in 1786, in France in 1789, and in Russia in 1801.

Revolutionary France proposed a fair society and laws based on rational principles. Jean Jacques Cambacères spent the decade from 1789 grappling with a code but all his drafts were rejected. The issue

was decided by another accident of history in Piedmont, North Italy, on Saturday, 14 June, 1800.

The first Battle of Marengo was between a French army under First Consul Napoleon Bonaparte and an Austrian army under General Michael von Melas. Bonaparte, wrongly believing that Melas would retreat to Genoa, sent General Louis Desaix to cut off his presumed retreat, but Melas attacked at 9 am. Bonaparte sent a message to Desaix: 'For God's sake, come back, if still you can.'

Archie Macdonell noted in *Napoleon and His Marshals* (Macmillan 1934, Prion 1996) that one of Bonaparte's generals, Nicolas Soult, had been wounded and captured in a skirmish outside Genoa and was taken to an Austrian hospital at Alessandria near Marengo. Macdonell wrote:

All day long on June 14, 1800 Soult ... listened to the sound of the guns at Marengo. He knew very well that the fortune of France was at stake, and that the First Consul, by coming over the St Bernard instead of making a frontal attack along the coast route, was staking everything on a single battle. For hours there was no news at Alessandria, but Soult's expert ear told him all that he needed to know. The bombardment was getting fainter and fainter, and that could only mean that the First Consul was being driven back. A French victory meant that Melas was fatally cut off from Vienna. But the coin had two sides, and an Austrian victory meant that Bonaparte was fatally cut off from France.

By 2 pm that afternoon, Melas had forced the French to retreat for two miles. Macdonell: 'In the afternoon



of that thundery summer's day the first Austrian wounded began to come in to Soult's hospital with their stories of victory all along the line, and at 4 pm there was a terrible silence in the east.' Rumours shortly reached Paris that Bonaparte was probably dead and certainly finished.

But Desaix had arrived on the field at 3 pm and breezily advised the First Consul: 'This battle is completely lost, but it is only two o'clock [sic]; there is time to win another.' Macdonell: '[General Auguste Marmont, commanding the guns, had fought furiously all day until he had only five pieces left. Five more were brought up from reserve and Desaix had eight.'

The so-called (at least by the present writer) Battle of Chicken Marengo began at 5 pm with a 20-minute bombardment by Marmont's artillery. Bonaparte's greatest achievement, the reform of the investigative system, turned on what happened in a few minutes after 5.20 pm. Macdonell briskly reported:

The French counter-attack was, by chance, one of the most perfectly timed tactical operations by combined infantry, artillery, and cavalry in the whole history of warfare... Suddenly, through the dense smoke, [Marmont] saw, not 50 yards in front, a battalion of Austrian Grenadiers advancing in perfect formation to counter the counter-attack, and some of Desaix's men were tumbling back in confusion. Marmont, whatever his faults might be, was a quick thinker, and he unlimbered his four guns and fired four rounds of canister at point-blank range into the compact battalion, and at that precise moment, while the

Austrians were staggering under the blow and an Austrian ammunition-wagon was exploding with a monstrous detonation, Desaix went forward with a shout [and was killed by a bullet to his head], and young [Francois] Kellermann, son of old Valmy [Francois Christophe] Kellermann, came thundering down on the flank, through the mulberry trees and the tall luxuriant vines, with a handful of heavy cavalry. A minute earlier, or three minutes later, and the thing could not have succeeded, but the timing was perfect, and North Italy was recovered in that moment for the French Republic ... at eight o'clock ... the Austrian surgeons came rushing to their distinguished guest [Soult] with the news of the utter rout of their men.

Bonaparte rightly gets the credit for reforming the investigative system but without Desaix, Marmont and Kellermann, the system might still be a shambles of local variations and interpretations.

Bonaparte, who did not eat before a battle, was famished. His cook, Dunand, invented a meal from the materials to hand, a chicken, some tomatoes, mushrooms, eggs, prawns, and a crayfish, all cooked in brandy flames. Today's Pollo Marengo is essentially chicken, mushrooms and tomatoes.

Austria sued for peace; Bonaparte hastily showed himself in Paris, falsely claimed credit for the victory, and in the breathing space acquired by the Austrian capitulation, applied his intellect and energy to drafting a code of civil law. He said he wanted everyone to be able to read and understand the code and so know his duty.

In August 1800, Bonaparte set up a committee of four lawyers, of whom the most significant were Jean-Étienne-Marie Portalis, nearly blind, 54, and François-Denis Tronchet, 73. They met in Tronchet's house, and had a draft printed by 1 January 1801. Judges added their comments and the draft was discussed clause-by-clause at more than 90 meetings of the Council of State (*Conseil d'Etat*) between July and December 1801.

Bonaparte read law books to prepare himself and chaired more than half the meetings. A council member, Antoine Thibaudeau, said Bonaparte 'took a very active part in the debates, beginning, sustaining, directing, and reanimating them by turns. General Marmont, 26, hero of Marengo, attended a number of sessions. He said Napoleon was:

... silent at first, until members had put forward their opinions, he would then begin to speak, and often presented the question from an entirely different point of view. He commanded no eloquence, but had a flowing delivery, a compelling logic, and a forcible manner of objection. He was extremely fertile in ideas, and his speech gave evidence of a wealth of expression which I have experienced in no one else. His extraordinary intellect shone out in these debates, where so many topics were entirely foreign to him.

Bonaparte himself said:

In these discussions I have sometimes said things which a quarter of an hour later I have found were all wrong. I have no wish to pass for being worth more than I really

am ... Tronchet, I admire your intelligence and the strength of your memory. For a man of your age, it is exceptional and deserves to be pointed out. Portalis, you would be the greatest of speakers if you only knew when to stop ... Cambacères, I sometimes suspect you of behaving like a talented lawyer who can defend a case or reject an idea without the slightest reference to his own personal feelings.

Portalis presented the first eight articles of the Code to the Tribunate on 24 November 1801, but it was rejected 65-13. Napoleon withdrew the draft on 3 January 1802 and removed obstructive Tribunes. The 36 sections of the Civil Code, largely written by Portalis, were enacted, one after the other, from March 1803 through to March 1804. In all, the code had 2281 clauses.

Other codes produced at Bonaparte's instigation were the *Code de Procedure Civile* (1806), *Code de Commerce* (1807), *Code d'Instruction Criminelle* (Code of Criminal Investigation 1808), and *Code Penal* (1810). Along with the Civil Code, they are regarded as the Napoleonic Code. The Criminal Code invented the *juge d'instruction* (investigating magistrate) and reinforced the objective, 'the manifestation of the truth'.

Bonaparte said: 'My glory is not to have won forty battles, for Waterloo's defeat will blot out the memory of as many victories. But nothing can blot out my Civil Code. That will live eternally.' Yale law professor Morris L. Cohen wrote in *Law: The Art of Justice* (Levin, 1992):

The Napoleon codification successfully achieved a number of goals. The law was to be accessible to all, uniform throughout France and based on democratic principles and economic liberalism. The code is still considered a masterpiece of French prose, and has been called the greatest book of French literature by the poet Paul Valéry. The Civil Code was supposed to have been read regularly by the novelist Stendahl as a stylistic model for his own writing. It was quickly translated into many languages and its popularity spread throughout Europe. Similar codes were enacted in most of the countries of the world which were not under the common law system. What had started as a French achievement became a model for a worldwide legal revolution.

Professor George Dargo, of the New England School of Law, says in *OxfordSC* that the European system, 'is the most widespread and important legal tradition in the modern world'.

Bonaparte placed 36<sup>th</sup> in Professor Darien McWhirter's list of 100 people who most influenced the law.

## **18. The moral failure of law schools**

Academics were awkwardly placed when they became part of the cartel. Universities are supposed to find and teach the truth; Justice Russell Fox says the search for truth gives a legal system its moral face; English law had not sought the truth since about 500 AD. Blackstone cunningly dodged every issue of truth, fairness, justice, morality, and reality

by asserting that a deity invented the system. Another implausible and partial solution was to say morality does not matter. Those who took that position include Harvard's Christopher Columbus Langdell and Oliver Wendell Holmes Jr in the 19<sup>th</sup> century, and Oxford's H.L.A. Hart in the 20<sup>th</sup>.

Christopher Columbus Langdell (1826-1906), dean of the Harvard law school 1875-95, wore a long beard. A psychiatrist might ask: 'What is that man hiding?' Perhaps the effects of his invention, the case method of teaching law. In *The Moral Failure of Law Schools* (*Troika*, November-December 1996), Alan Hirsch, later Professor of Legal Studies at Williams College, Massachusetts, explained how the case method corrupts law students and destroys their idealism:

... the primary method of legal instruction in the US is a blunt weapon for destroying a commitment to the public interest. ... the so-called Socratic method carries out the mission not of Socrates but of his adversary, the sophist Protagoras, to show that clever arguments can be made on behalf of any proposition and that there are no right answers. The teaching of sophistry in law schools is subtle but pervasive. The student called on to start the Socratic inquiry is often told by the professor which position to defend, or simply told to take any position willy-nilly, without regard for what she may regard as correct. Sometimes, in the midst of the student's analysis, the professor will tell her to shift gears and advocate the other side of the case. ... Much of the academic community [seems] to agree with the Harvard professor, who as

legend has it, snapped at a student: 'If it's justice you want, go to divinity school.'

Law professor Nancy Lee Firak, of Northern Kentucky University, wrote in '*Ethical Fictions as Ethical Foundations*': *Justifying Professional Ethics* (Osgoode Hall Law Journal, 1986): 'Lawyers are trained to cast the facts of a single event in several different (even contradictory) forms and are then taught how to argue that each form accurately represents reality.' In short, how to lie. That suggests law schools stand foursquare for artifice, chicanery and greed.

Charles Kingsfield, the thug Harvard professor played with reptilian menace by John Houseman in *The Paper Chase* (1973), said: 'You come here with minds of mush; you leave thinking like lawyers.' He meant learning how to get money by arguing either side with precision.

Oliver Wendell Holmes Jr (1841-1935) graduated from Harvard Law School in 1867 and was briefly a professor there in 1882. He wrote in *The Path of the Law* (1897): 'For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether.' President Theodore Roosevelt put Holmes on the Supreme Court at 61 in 1902, but they disagreed on the Sherman Act (1890), which made price-fixing by cartels a crime. Roosevelt said of Holmes: 'Out of a banana, I could carve a firmer backbone.' Holmes stuck to the court like a limpet

until 1931 when Chief Justice Charles Evan Hughes told him that, at 90, it was time to go.

On his *Legal 100*, Professor McWhirter places Holmes 18<sup>th</sup>, Langdell 43<sup>rd</sup>, and Oxford professor Herbert Lionel Adolphus Hart (1907-92) 89<sup>th</sup>. He says Hart argued 'throughout his career that law and morality should be separated', and was 'the most important legal philosopher of the 20th century'. Hart, however, is perhaps better remembered for being cuckolded by a number of Oxford dons, including Sir Isaiah Berlin (1909-97). Perhaps they took the view that if justice and morality should be separated, so could adultery and morality.

Thane Rosenbaum is a former corporate lawyer who teaches law at Fordham University, New York. He wrote in *The Myth of Moral Justice: Why Our Legal System Fails to Do What's Right* (HarperCollins, 2004):

Morality does not appear in a law school syllabus ... Fact is a legal term; truth is a moral one. The legal system's notion of justice is served by merely finding legal facts without also incorporating the moral dimensions of emotional and literal truth ... The public however, finds this situation intolerable, and it contributes to a kind of moral revulsion toward the legal system for its complacency about discovering truth.

Professor Rosenbaum told me in 2005 that he agrees with Justice Russell Fox that a legal system gets its moral face from a search for the truth. It follows that the adversary system has no moral



centre, and that judges and lawyers are also reviled because they say things they know are not true.

Malcolm Turnbull (BCL Oxon), an Australian politician, was encouraged by elements of his (Liberal) party in November 2009 to say that global warming was over-rated. Declining, he said he was no longer a barrister, and hence could not run an argument in which he did not believe.

In his book, Professor Rosenbaum suggested a formula that would at least relieve judges of hypocrisy:

I am required by law to do what I must do today, even though I realize that it will strike some, including me, as immoral ... Neither can I pretend that the result is just, because I know it is not. Nonetheless, I am bound to apply the law in this way, which will paradoxically produce both the correct legal result and the wrong moral outcome.

Has any judge said something like that?

## **19. Judicial corruption in common law world**

**USA.** Historian Michael Woodiwiss said 'the US legal and criminal justice systems were set up in ways that showed a great deal of latitude to certain kinds of organised criminal activity', in particular organised crime conducted by powerful and respectable industrialists. Those largely responsible, with their positions in Professor McWhirter's *Legal 100* in brackets, were William Blackstone (13), John

Locke (16), James Madison (1), Alexander Hamilton (2), and John Marshall (3).

The contributions of Locke and Blackstone were noted earlier. McWhirter said: 'No figure in history had a greater effect on the "law" of later generations than James Madison.' Madison was responsible for the US retention of the anti-truth system.

McWhirter said Alexander Hamilton (1757-1804) was 'America's first great business lawyer ... he saw, as few did at the time, the connection between banking, industry, and national power. The statutes he drafted and the institutions he created launched America on course toward becoming the world's greatest industrial power'.

Hamilton believed that the business of America is business and that government by an oligarchy of rich business men was the best way to build a powerful country. Perhaps inspired by Britain's corrupt Whig oligarchy, he advised a constitutional convention in 1787:

All communities divide themselves into the few and the many. The first are the rich and the well-born, the other the mass of the people ... The people are turbulent and changing; they seldom judge or determine right. Give therefore to the first class a distinct permanent share in government ... Nothing but a permanent body can check the imprudence of democracy.

The Constitution was ratified in 1789. Article II Section 2 effectively resulted in government by oligarchy. It says the President, 'with the advice and

consent of the Senate, shall appoint ... public ministers', including members of Cabinet.

Smart business types can thus shuffle round a revolving door of business and government for decades. In 2004 Donald Rumsfeld, 72, had been on the shuffle for 47 years when President George W. Bush sacked him as Minister for War. In 2008, former President G.H.W. Bush, 83, had been shuffling for 42 years, and Dick Cheney, 67, for 38.

The Yazoo matter offers a glimpse of how judges would accommodate respectable organised criminals. *OxfordSC* reported:

In 1794, after notorious bribery involving virtually every member of the Georgia legislature, two US Senators, and many state and federal judges [including Supreme Court Justice James Wilson], the Georgia legislature authorized the sale of 35 million acres in the Yazoo area (present-day Alabama and Mississippi) to four land companies for 1.5 cents an acre. The land companies on-sold millions of acres.

The corrupt Georgia politicians were voted out in 1796; the new legislature rescinded the Yazoo grant and invalidated all sales from it. Investors sought an advisory opinion from Alexander Hamilton. He told them what they wanted to hear: the cancellation was unconstitutional. A Yazoo test case, *Fletcher v Peck*, ground through the courts.

President John Adams (63 in *The Legal 100*) stacked the courts at 'midnight' of the day he was to leave office, 20 January 1801. He made John

Marshall (1755-1835), a land speculator and protégé of Alexander Hamilton, Chief Justice. *Chambers Biographical Dictionary* (Larousse, sixth edition 1997) says Marshall 'is the single most influential figure in US legal history ... His most important decision was in the case of *Marbury v Madison* (1803), which established the principle of judicial review, asserting the Court's authority to determine the constitutionality of legislation.'

Judges should clearly have the power to act as a brake on bad legislation, but only if they are properly trained and appointed. Judicial error is inevitable when the court consists of untrained former trial lawyers appointed by dubious politicians, e.g. *Gore v Bush* (2000).

Alexander Hamilton took part in a duel with Aaron Burr (1756-1836) at Weehawken, New Jersey, on Wednesday, 11 July, 1804. Hamilton, lawyer and gentleman, aimed high. Burr, lawyer, shot him in the stomach. Hamilton died next day but his Yazoo opinion lived on in *Fletcher v Peck* (1810): Marshall gave the green light to respectable organised criminals. *OxfordSC* says the Contracts Clause of the Constitution seemed to be on Georgia's side, but Marshall said the Yazoo cancellation was unconstitutional. He upheld the corrupt grants and voided the legislation which cured them. Article II Section 4 of the Constitution says bribery warrants removal of a President, but Marshall took the view that bribery is appropriate for business. He said:

It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state.

Historian Gustavus Myers said *Fletcher v Peck* was 'the first of a long line of court decisions validating grants and franchises of all kinds secured by bribery and fraud'. Michael Woodiwiss says that in the later 19<sup>th</sup> century success in business went to those 'best able to bribe, blackmail, extort, exploit, and intimidate'.

The great disclosure journalist, Ida Tarbell, reported in 1904 that John D. Rockefeller's Standard Oil became dominant by 'force and fraud', and that similar methods were 'employed by all sorts of businessmen, from corner grocers up to bankers. If exposed, they are excused on the ground that this is business'. Or 'bidness', as Mafiosi call it.

A century after Chief Justice John Marshall gave the green light to corruption, the New York culture barely distinguished between organised crime in the judiciary, politics and on the streets. Jimmy Breslin reported (*Damon Runyon*, Ticknor and Fields, 1991) that in the 1920s Tammany boss Jimmy Hines, a business partner of another organised criminal, Arthur (Dutch Schultz) Flegenheimer, extorted \$10,000 (perhaps \$200,000 today) from lawyers who wanted to be Criminal Court judges.

A lawyer named Macrery paid the \$10,000; Hines procured a five-year appointment. Judge Macrery later told Hines: 'I only pay once', but

shortly died of alcoholic poisoning. A Tammany lawyer called for an investigation. He said Judge Macrery had been beaten to death. Judge George Ewald's wife went to Hines's waiting room and announced: 'I am here to pay the ten thousand dollars now. It is not time yet, but I would rather pay it now than have my husband killed later on.'

Hines told Runyon at Lindy's delicatessen: 'All I know is that calling for an investigation was a great move. I never had to ask anybody for a dollar after that. So I wasn't an extortionist any more. I didn't have to extort nobody. People gave me gifts.'

FBI boss (1935-72) J. Edgar Hoover (1895-72) accepted Mafia bribes in the form of tips on fixed horse races supplied by a cut-out, reporter Walter Winchell.

Cook County (2003 est. pop. 5.35 million), Illinois, includes Chicago (2000 census 2.9 million). Respectable organised criminals on the bench and at the bar have probably infested its court system since the county was created in 1831.

Carl Sifakis noted a scale for bribing judges in *The Mafia Encyclopaedia* (Checkmark, second edition 1999). Jake (Greasy Thumb) Guzik (1887-1956), a fixer for the Chicago Mob, devised the scale. Guzik got his nickname from counting out banknotes for police and politicians at his table at St Hubert's Old English Grill and Chop House. The Guzik Scale should be multiplied by perhaps 20:

You buy a judge by weight, like iron in a junkyard. A justice of the peace or a magistrate can be had for a five-

dollar bill. In municipal courts he will cost you ten. In circuit or superior courts he wants fifteen. The state appellate court or the state supreme court is on a par with the federal courts. By the time a judge reaches such courts he is middle-aged, thick around the middle, fat between the ears. He's heavy. You can't buy a federal judge for less than a twenty-dollar bill.

Sifakis records a definition of justice supplied by another Chicago fixer, Murray (The Camel) Humphreys (1899-1965), the only Welshman to reach the higher echelons of the Mafia. He said: 'The difference between guilt and innocence in any court is who gets to the judge first with the most.'

The American Bar Association rated the Cook County Circuit Court as the best court system in a major US city in 1971. In 1980 the Justice Department and the FBI began Operation *Greyford*, a RICO investigation into organised crime in the Cook County court system. The 1970 RICO (Racketeer-influenced and Corrupt Organizations) legislation is an exception to the common law rule which conceals evidence of a pattern of criminal behaviour, respectable and otherwise. It seems probable that Chief Justice John Marshall would have found a way to rule RICO unconstitutional, at least for pin-striped organised criminals, but the legislation got past the appellate courts. Between 1984 and 1994, RICO imprisoned 20 judges, 50 lawyers, and sundry police and court officials in the Cook County system for extortion and bribery. Judge Tom Maloney was

convicted of taking bribes in three murder cases. He served 12 years.

Three San Diego judges, G. Dennis Adams, Michael Greer, and Judge of the Year James A. Malkus, took bribes from Lawyer of the Year Patrick Frega. They coached him on running cases; pressured opposing lawyers to settle, and gave his cases to 'friendly' judges. They all went to prison in 2000. Jurist Walter Olson observed: 'To paraphrase Oscar Wilde: losing one local judge in a corruption scandal is a misfortune. Losing two looks rather like carelessness. Losing three suggests a pattern.'

In a 'cash for kids' extortion, Pennsylvania judges Mark Ciavarella and Michael Conahan were accused in 2008 of taking US\$2.6 million in bribes to send alleged juvenile offenders to private prisons. In February 2009, they plea-bargained the penalty down to seven years, but a judge rejected the bargain. Ciavarella and Conahan then changed their plea to not guilty and were charged on 48 counts of racketeering, extortion and bribery. In October 2009, the Pennsylvania Supreme Court expunged the convictions of some 6500 juveniles sent to prison by Ciavarella.

**Britain.** England is England yet. It would be idle to suppose that Britain, home of systemic corruption from the 11<sup>th</sup> century, desisted in the 20<sup>th</sup>.

An insider-trading scandal in 1912 concerned the British Marconi company, then about to get a major order from the Liberal [formerly Whig] Government. Cabinet Ministers who bought shares in Marconi's US subsidiary included David Lloyd



George (Chancellor of the Exchequer), Herbert Samuel (Postmaster-General), and Sir Rufus Isaacs (Attorney-General). Rufus (1860-1935) was brother of Godfrey Isaacs, managing director of the British Marconi company.

An inquiry whitewashed the crimes, and Rufus, now Lord Reading, became Chief Justice in 1913. This gave him the chance in 1914 to invent a discretion (see *Christie* below) which enables judges to conceal ALL evidence against people like, well, him. Now Marquis of Reading, he decently waited for a year after his wife's death in 1930 before marrying his private secretary, Stella, 37.

The *Honours (Prevention of Abuses) Act* of 1925 came into being because a pair of organised criminals, Prime Minister (1916-22) David Lloyd George (1863-1945), a lawyer, and his bagman, Maundy Gregory, extorted bribes for honours. Gregory charged what the traffic would bear. Lloyd George invented the Order of the British Empire (OBE) in 1917; by 1922, he had awarded 25,000 OBEs. Discussing the bribes in a 1998 Churchill Society Lecture, John Lidstone said multiplying the 1920s values of the bribes by 100 gives rough current values. The scale, with current values in brackets, were: OBE £100 (£10,000). Knight: £10,000-£15,000 (£1 million-£1.5 million). Baronet: from £25,000 (£2.5 million). Baron: £30,000-£50,000 (£3 million-£5 million). Viscount: £80,000-£120,000 (£8 million-£12 million).

Lloyd George decently gave the Liberal Party some of the proceeds, but kept an estimated £1.5

million (£150 million) for himself. Gregory got a flat £30,000 a year (£3 million, £18 million) over the six years Lloyd George was Prime Minister. In 1933, Maundy Gregory was charged and got six months and a fine of £50 (£5000), but Lloyd George was not charged. In 1945, he was made an Earl.

There has been suspicion that later politicians and their bagmen extorted bribes for honours, but Maundy Gregory remains the only person charged under the 1925 Act.

**India.** The Chief Justice of India, Sam Bharucha, implied in 2001 that upwards of 20% of judges were corrupt. He said: ‘ ... more than 80 per cent of the Judges in this country, across the board, are honest and incorruptible. It is that smaller percentage that brings the entire judiciary into disrepute.’

**Australia.** Chief Justice Sir Garfield Barwick was accused in 1980 of not disclosing his interest in companies before the court. The offence carried a maximum prison sentence of two years. Barwick said, but not on oath, that he was the best judge of his impartiality, and was not charged.

Lionel Murphy, Attorney-General in a Labor Government, went up to the High Court in 1975. In 1985, Justice Murphy was charged with attempting to pervert justice on behalf of “my little mate”, lawyer Morgan Ryan. Justice Murphy was found guilty but got a re-trial and was acquitted. An inquiry by three retired judges found 14 instances of his possible criminal behaviour, but the inquiry died with him in 1986 and a Labor Government sealed the inquiry papers until 2016.

A Sydney organised criminal, George Freeman, used the J. Edgar Hoover technique to bribe NSW Chief Magistrate Murray Farquhar, but did not bother to use a cut-out. He rang Farquhar every Wednesday with tips which were 97-98% accurate, according to Farquhar's clerk, Camille Abood, who put the money on and collected the winnings. Farquhar was imprisoned in 1985 for perverting justice in a case of theft of \$55,000.

## C. What Common Lawyers Do

This section is a collation of views on various aspects of lawyers' activities. As noted, the Sophists taught lawyers how to lie 2500 years ago.

### 1. Down the ages

Some of the following disobliging references to lawyers come from Marlyn Robinson's *The Mouthpiece: Lawyerly Quotations from Popular Culture* (Tarlton Law Library, University of Texas):

Cicero (106-43BC), Roman lawyer (4 in *The Legal 100*): 'When you have no basis for an argument, abuse the plaintiff.'

Gaius Verres, Governor of Sicily 70-73BC: 'What I steal the first year goes to increase my own fortune, but the profits of the second year go to lawyers and defense counsels, and the whole of the third year's take, the largest, is reserved for judges.'

Gaius Cornelius Tacitus (c.55-120AD), Roman lawyer and historian: 'No commodity was so publicly for sale as the perfidy of lawyers.'

Tacitus quoted Gaius Silius (either the father or son of that name who were Roman consuls in the 1<sup>st</sup> century; both came to bad ends): 'If no one paid a fee for lawsuits, there would be less of them! As it is, feuds, charges, malevolence and slander are encouraged. For just as physical illness brings revenue to doctors, so a diseased legal system entices advocates.'

Henry Brinkelow (d. 1546): 'The lawyer can not vnderstond the matter tyl he fele his mony.'

Jonathan Swift (1726): '... a Society of Men among us, bred up from their Youth in the Art of proving by Words multiplied for the Purpose, that *White* is *Black*, and *Black* is *White*, according as they are paid.'

Jeremy Bentham (1821): 'The duty of an advocate is to take fees, and in return for those fees to display to the utmost advantage whatsoever falsehoods the solicitor has put into his brief.'

Mexican curse: 'May your life be filled with lawyers.'

Don Vito Corleone: 'A lawyer with a briefcase can steal more than a thousand men with guns.' – Mario Puzo, *The Godfather*, 1969.

Seymour Washman: 'All successful criminal lawyers I know are egomaniacs... there isn't a criminal lawyer I know – certainly including myself – who hasn't interpreted a not guilty verdict as proof of his unique gift, his insight into how to manipulate people.' (*Confessions of a Defense Attorney*, *Village Voice*, 28 September 1978.)

Lamar Quin: 'Mouthpieces for sale to the highest bidder, available to anybody, any crook, any sleazebag with enough money to pay our outrageous fees ... you'll meet so many crooked lawyers you'll want to quit and find an honest job.' (John Grisham, lawyer-novelist, *The Firm*, 1991.)

On the other hand, Viscount (Frederick) Maugham (1866-1958), Chancery judge 1928-34, Lord Chancellor 1938-39 said: 'Lawyers are the

custodians of civilisation, than which there can be no higher or nobler duty.'

## 2. Serial lying

Harvard ethics professor Arthur Applbaum said in *Professional Detachment* (Harvard Law Review, 1995): 'Lawyers might accurately be described as serial liars because they repeatedly try to induce others to believe in the truth of propositions, or in the validity of arguments, that they believe to be false.'

Lawyers said what they do is zealous advocacy sanctioned by the system. Professor Applbaum replied in *Ethics for Adversaries* (2000) that this was 'a strategy of redescription': the Executioner of Paris, Charles-Henri Sanson, was sanctioned by the state but he was still a serial killer. Sanson had the 'professional detachment' of lawyers; he did not distinguish between enemies of the Bourbon regime, Louis XVI himself, and leaders of losing republican factions. In 1793, at the height of the Terror, he beheaded 300 men and women in three days. His son Gabriel slipped in the blood, fell off the guillotine, and was himself killed. That seems fair.

Not all lawyers lie without shame. Law professor James R Elkins, of the University of West Virginia, author of *The Moral Labyrinth of Zealous Advocacy* (21 Cap. U. L. Rev. 735 (1992)) and *Can Zealous Advocacy Be a Moral Enterprise?* has said: [Taking] zealousness to its adversarial limits (all the while promoting the adversarial system as a system of justice) poses a serious moral problem. Basically, we need to

admit that there is occasion for shame in our profession. It would be overly dramatic to say that it is a surplus of shame that is driving lawyers from the profession, but something is.

Professor Elkins noted an American Bar Association poll in 1988. It showed that '41% of a representative sample of lawyers would choose another profession if they had to make the choice again', and that 'alcoholism among lawyers is almost twice as high as for the general population'.

An Australian survey for a young lawyers' body found in 2004 that almost half of the respondents did not see themselves practising law in five years' time. *The Sydney Morning Herald* (7 September 2006) reported: 'LawCover, an Australian insurer reported a disturbingly high number of lawyers with depression, stress, alcohol dependency, and gambling addiction.' In 2006, a survey of 7,000 professionals by Beaton Consulting found lawyers were the second unhappiest [behind patent attorneys] of all occupations.

Lawyers in the US had the highest rate of depression of more than 100 occupations in a 1990 study by Johns Hopkins University, and were almost four times as likely to experience it as the general population.

The question is: if lawyers did not have to lie and pervert justice, but got less money, would they be less, or more, unhappy, depressed, drunk, and likely to gamble?

### **3. Ethics**

Some lawyers, no less than some journalists, take the view that ethics is a county in south-east England, home of the succulent Colchester oyster. Sanson, Executioner of Paris, did not invent the system which sanctioned his ghastly work, but lawyers did invent the adversary system and its 'ethics' which sanctions theirs. Professor Lester Brickman, of New York's Cardozo School of Law, said in 1997: 'When the ethics rules are written by those whose financial interests are at stake, no one can doubt the outcome.'

Ethics and morals are synonymous. Professor David Luban wrote in *Lawyers and Justice: An Ethical Study*: '... the standard conception [of lawyers' ethics] simply amounts to an institutionalized immunity from the requirements of conscience.' He said Professor Murray Schwartz, of UCLA, was criticizing lawyers' ethics when he wrote in *The Professionalism and Accountability of Lawyers* (*California Law Review*, 1978): 'When acting as an advocate for a client, a lawyer ... is neither legally, professionally, nor morally accountable for the means used or the ends achieved.' I mentioned that to a Sydney psychiatrist, Dr Elizabeth O'Brien. (No relation to my daughter.) She said: 'That sounds like psychopathy.' Psychopaths have no conscience.

Reporter Ross Coulthart asked Justice Geoffrey Davies, of the Queensland appeal court, about ethics in a television programme, *The Justice System Goes on Trial* (*Sunday*, August 23, 1998):



Do you think there's a case to argue that some of the ethical rules that lawyers have actually almost encourage dishonesty among lawyers? – Yes I do. One of the examples is that a lawyer can ethically deny an allegation in the opponent's pleading knowing it to be true.

You're kidding. So you can basically lie? – Well, what lawyers would say is that you are putting the other side to proof.

It's a lie though, isn't it? – It is.

Law professor Charles Wolfram, of Cornell University, New York, wrote in *Modern Legal Ethics* (West, 1986): '[The lawyer's role is] institutionally schizophrenic . . . a lawyer's objective within the system is to achieve a result favorable to the lawyer's client, possibly despite justice, the law and the facts.'

Legal ethics are thus self-contradictory. Lawyers are not supposed to deceive the court, but they claim a 'sacred duty' to do whatever it takes to get the best result for the client. If he is in the wrong, the best result is to win the case; if he is a criminal, the best result is to get him off. Both results necessarily deceive the court and pervert justice.

Bruce Anthony Hyman, 48, is said to be only British lawyer in 800 years to go to prison for pervert justice. Hyman, a barrister, represented a woman whose ex-husband, representing himself, was seeking greater access to their daughter. Hyman forged a document, anonymously sent it to the ex-husband, and denounced him as the probable forger when he tendered it. Exposed as the source, Hyman

got 12 months in September 2007, but was released in two months.

Professor Luban begins his book on ethics with *The Case of the Wicked Uncle*. The following summary is drawn from his book and the CDNB which spells the uncle's title as Anglesey rather than Anglesea.

The uncle, Richard Annesley (b. 1694), was a white collar organised criminal. When his brother, Lord Latham, died in 1727, he used bribery to steal the title from his nephew, James Annesley (b.1715), and had the boy kidnapped and sent into slavery in America. He succeeded a cousin as sixth Earl of Anglesey in 1737.

James Annesley escaped and returned to Dublin in 1741. His uncle offered a Dublin solicitor, James Giffard, £10,000 (some £1 million today) to get the young man hanged for an accidental shooting. 'If I cannot hang James Annesley,' the Earl said, 'it is better for me to quit this kingdom and go to France, and let Jemmy have his right.'

Giffard prosecuted James for murder, but a jury at London's Old Bailey found him not guilty. Giffard charged the Earl £800 (c.£80,000 today), but Anglesey refused to pay. Giffard sued for the money and their conspiracy to procure a judicial killing emerged at the action. James then sued his uncle to be declared the rightful Lord Latham.

The trial began in the Dublin Court of Exchequer on 11 November 1743 and ran for a then record 15 days. When Giffard was called as a witness for James, Anglesey's new lawyers adopted a strategy that could have credence only in an Alice

in Wonderland system. They argued that the attempt to procure Annesley's execution was 1) A perfectly proper legal proceeding, and 2) So wicked that no one could believe a lawyer and his client would be party to it. Thomas Burroughs, for Anglesey, put the second argument to Giffard:

Did you suppose from thence that he [the Earl] would dispose of that £10,000 in any shape to bring about the death of the plaintiff? – I did.

Did you not apprehend that to be a most wicked crime? – I did.

If so, how could you ... engage in that project, without making any objection to it? – I may as well ask you, how you came to be engaged for the defendant in this suit?

Giffard was thus claiming in 1743, 10 years before Blackstone began lecturing on a system 'dictated by God himself', that the system allows lawyers to engage in systematic criminal activity for money.

Justice Sir James Mathew (1830-1908) observed: 'Justice is open to all, like the Ritz Hotel.' James Annesley was awarded the verdict and the title of Lord Latham, but his uncle's lawyers procured – by bribery, it was believed at the time – a writ of error to set the verdict aside. James had no money to pursue his claim in the House of Lords. Anglesey continued as Lord Latham until he died in 1761, a year after the real Lord Latham.

Lawyers' 'sacred duty' to do whatever it takes comes from the fertile brain of Henry Brougham

(1778-1868): he invented *The Edinburgh Review* (1802), London University (1828), a single-steed, four-wheel conveyance (1829), and Cannes (1834). In 1820, he defended Queen Caroline in a divorce action brought against her by George IV (1762-1830), who 'looked more like an elephant than a man', in the House of Lords. Brougham informed their lordships:

An advocate, by the sacred duty which he owes his client ... must not regard the alarm, the suffering, the torment, the destruction which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client's protection.

That sounds good, if a little overripe, and Professor Dershowitz notes it approvingly in *The Best Defense*, but Professor Franklin Strier, of California State University, indicates in *Reconstructing Justice: An Agenda for Trial Reform* (University of Chicago Press, 1994) that Brougham later admitted it was blackmail, which is the crime of theft by extortion. The *Act of Settlement* (1701) said a king who marries a Catholic must be treated 'as if he were naturally dead'. Brougham's words were a threat, in code, to His Most Sacred Majesty that, unless he dropped the action, Brougham would reveal that he had secretly married a Catholic, Mrs Maria Fitzherbert. That was an offer George could not refuse: it would inevitably rob him of the crown, the palaces and the money.

Lawyers today routinely resort to blackmail in negligence and libel cases. A more polite term, greymail, is used when they demand documents they know governments dare not disclose. Compared to blackmail and conspiracy to murder, lying may seem relatively mild, but lawyers control evidence and habitual lying necessarily poisons justice at the fount.

Law professor Monroe Freedman, then of George Washington University Law Center, published *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions* in the *Michigan Law Review* in 1966. The questions, with his answers in brackets, were:

Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth? [Yes]

Is it proper to put a witness on the stand when you know he will commit perjury? [Yes]

Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury? [Yes]

Professor David Luban said in his study of ethics that Professor Freedman 'later reversed himself' on the third question in *Lawyers' Ethics in an Adversary System* (Bobbs-Merrill, 1975), but a study by Kenneth Mann (*Defending White-Collar Crime: A Portrait of Attorneys at Work*, Yale University Press 1985) indicated that lawyers typically follow Freedman's original advice. Professor Luban continued:

But he [Professor Freedman] reiterated his position on his first two points, intensifying his exposition of the second with a ghastly hypothetical. According to Freedman, the lawyer defending an accused rapist who claims that the victim consented should be willing to cross-examine the rape victim about her sex life in order to make the case that she is promiscuous enough to solicit strangers – even though the client has privately told the lawyer that he had actually raped her.

In short, even if a client tells his lawyer he is guilty of rape, the lawyer can let the rapist go in the box and falsely deny his crime on oath, and can back up that lie by cross-examining the girl about her sex life to falsely suggest she consented. The technique of ‘destroying’ such witnesses is at once brutal and pornographic, and tends to confirm the view of Professor James R Elkins, that the adversary system’s philosophy of cruelty leads to ‘professional malevolence’.

Age has not wearied Professor Monroe Freedman. Now of Hofstra University (founded 1970), New York, in 2006 he published *In Praise of Overzealous Representation – Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct* (Hofstra Law Review, vol 34). The abstract says:

This article concludes that there are circumstances in which a lawyer can ethically make a false statement of fact to a tribunal, can ethically make a false statement of material fact to a third person, and can ethically engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Dishonest, fraudulent and deceitful trial lawyers become judges without missing a beat.

A Sydney lawyer, Stuart Littlemore, stated lawyers' ethics accurately when Andrew Denton interviewed him on Channel 7, a television station, in October 1995:

Denton: It's a classic question. If you're in a situation where you are defending someone who you yourself believe not to be innocent - can you continue to defend them?

Littlemore: Well, they're the best cases; I mean, you really feel you've done something when you get the guilty off. Anyone can get an innocent person off; I mean they shouldn't be on trial. But the guilty - that's the challenge.

Denton: Don't you in some sense share in their guilt?

Littlemore: Not at all.

Court TV's Nancy Grace wrote in *Objection! How High-priced Defense Attorneys, Celebrity Defendants, and a 24/7 Media Have Hijacked Our Criminal Justice System* (Hyperion, 2005):

'I was just doing my job.' That's the tired excuse offered up by every defense attorney whenever they're asked how they do what they do - how they pull the wool over jurors' eyes to make sure the repeat offender they're defending walks free. I'll never know how they can look in the mirror when their client goes out and commits another crime, causing more suffering to innocent victims. I've heard, 'I'm just doing my job - it's in the Constitution,' too many times to count

.

Sydney lawyer John Marsden (1942-2006) admitted in *I Am What I Am* (Viking, 2004) that he used a false consent defence to get Ivan Milat off rape in 1974:

Then I put to her something that has haunted me to this day ... I suggested that her sexuality might have had something to do with what had occurred with Ivan Milat. Crying and under stress, she ended up agreeing – and in that moment I knew we had won ... we had put into their [jurors] minds that the sex may indeed have been consensual ... I am not proud of my conduct that day, but ... I had to act according to the ethics of the profession... I had a job to do and I did it.

Milat went on to rape and murder seven young backpackers from, variously, Germany, England and Australia, in circumstances similar to the 1974 case. He was found guilty of the murders and sent down for life in 1996.

Professor Monroe Freedman defended two lawyers' dubious behaviour on the ground that they 'had kept faith with their client, and that is essential to the proper working of the adversary system'. Professor David Luban commented:

Everything rides on this argument. Lawyers have to assert legal interests unsupported by moral rights all the time – asserting legal rights is what they do, and everyone can't be in the right on all issues. Unless zealous representation could be justified by relating it to some larger social good, the lawyer's role would be morally impossible. That larger social good is supposed to be the



cluster of values – procedural justice and the defense of rights – that are associated with the adversary system.

Professor Luban quoted Professor Murray Schwartz's response to that argument:

It might be argued that the law cannot convert an immoral act into a moral one ... by simple fiat. Or more fundamentally, the lawyer's non-accountability might be illusory if it depends upon the morality of the adversary system, and if that system is immoral ... the justification for the ... Principle of Non-accountability ... would disappear.

As we have seen, the system IS immoral because, apart from everything else, it does not search for the truth. The Principle of Non-accountability thus disappears.

Aristotle's *petitio principii* fallacy says if the major premise is false, the conclusion is invalid. The adversary system syllogism goes something like this:

Major premise: The adversary system is the best system.

Minor premise: It requires trial lawyers to pervert justice.

Conclusion: Perverting justice is ethically acceptable.

The adversary system is demonstrably not a system of justice, let alone the best. Lawyers' ethics are thus based on a fallacy.

#### **4. The cartel: law as business**

Common lawyers like to think they are members of a learned profession, but the law has effectively been a business since the lawyer-judge cartel was formed to maximise profits (partly by extorting from litigants) more than 800 years ago.

Lawyers may say: 'Cartel? What cartel?' Chief Judge Richard Posner's description was noted in the section on the origin of the common law. Chief Judge Dennis Jacobs is head of the federal Court of Appeals for the Second Circuit, which is based in New York and covers New York State, Connecticut and Vermont. His lecture, *The Secret Life of Judges*, delivered at Fordham University on 20 November 2006, was published in the *Fordham Law Review* in May 2007. Chief Judge Jacobs said judges have:

... a habit of mind that, among so many admirable features of the judicial mentality, amounts to a serious and secret bias ... an inner turn of mind that favors, empowers, and enables our profession and our brothers and sisters at the bar ... It is an insidious bias because it is hard to make out in the vast maze of judicial work ... that are woven together like an elaborate oriental rug in which the underlying image of the dragon emerges only after you stare for a while. I discern in this jumble a bias in favour of the bar lawyers: what they do; how they do it; and how they prosper in goods and influence. This is the figure in the carpet.

Associate Professor Benjamin Barton, of the University of Tennessee College of Law, put the

question, *Do Judges Systematically Favor the Interests of the Legal Profession?* in the *Alabama Law Review* of December 2007. In what may be termed the Barton Hypothesis, he answered his question thus at page two of his 52-page (14,821 words) paper:

Here is my lawyer-judge hypothesis in a nutshell: many legal outcomes can be explained, and future cases predicted, by asking a very simple question: is there a plausible legal result in this case that will significantly affect the interests of the legal profession (positively or negatively)? If so, the case will be decided in the way that offers the best result for the legal profession.

Max Weber (1864-1920), the German polymath who taught law, political economy, economics, and sociology, wrote in 1915.

In England, the reason for the failure of all efforts at a rational codification of law were due to the successful resistance against such rationalisation offered by the great and centrally organised lawyers' guilds, a monopolistic stratum of notables from whose midst the judges of the High Court are recruited ... they successfully fought all moves towards rational law which threatened their material position.

If Larsen E. Pettifogger (*The Kingdom of Id*) were a little smarter, he would be the quintessential lawyer-businessman. In *Greed on Trial* (*The Atlantic Monthly*, June 2004), Alex Beam quoted Robert Popeo, a plaintiff's lawyer who was seeking an extra US\$1.3 billion for starving tobacco lawyers, as saying: '... the

law is an industry now, not a learned profession.’ An editorial in *The Financial Times* of 16 June 2005, stated:

A looming shake-up of legal regulation is prompting British law firms to rethink their business models. A recent survey shows two-thirds of the top 100 firms plan to admit non-lawyers as partners, one in five intends to seek outside investors and one in 10 aims to list on the stock market ... As for the supposedly dangerous profit motive, law firms have been ruthlessly pursuing profit for years.

People in business do not have a privilege of secrecy in their dealings with each other. Professor David Luban has noted: ‘[If a] lawyer is really just another businessman, [lawyers] lose whatever claim they have to the perquisites and immunities of the legal profession, [including] such invaluable goodies as the attorney-client privilege.’

## **5. A feeding frenzy of lawyers**

The *Wikipedia* states: ‘Several economic studies and legal decisions of antitrust authorities have found that the median price increase achieved by cartels in the last 200 years is around 25%.’ That may be the norm, but trial lawyers have never been satisfied with 25%, e.g. *Jennens v Jennens*. That raises a question: are they the most avaricious of all businessmen? Some pointers:

As noted, law professor John Banzhaf, of George Washington University, Washington, DC,

said in 2002: 'Like sharks smell blood, lawyers smell money.' In *Anatomy of a Murder* (1958), Judge John Voelker (1903-91) has lawyer Paul Biegler echo the Mafia motto, 'Get the money, and trust no-one.'

Lawyer Arthur Train wrote in *The Confessions of Artemus Quibble* 77 (1924):

There are three golden rules in the profession ... the first ... thoroughly terrify your client. Second, find out how much money he has and where it is. Third, get it.'

Johnnie Cochran knew that O.J. Simpson was guilty of murder but took US\$500,000 to pervert justice on his behalf. At Cochran's funeral in April 2005, Simpson said: 'I thought he represented ... the best in what our adversarial legal system was about.'

Robert Blake, a US actor found not guilty of murdering his wife, said in March 2005: 'You're innocent until proven broke.' He said he had spent US\$10 million on his defence. Alec Baldwin, a US actor, said in 2008 that his divorce had cost him \$20 million, and that judges were 'like pit bosses, keeping the money flowing'.

*Lawyers Weekly* reported in May 2002 that a survey for the American Bar Association's Litigation Section found that fewer 'than 20% of Americans have confidence in the legal profession', and that the reason boiled down to 'a single word: character'. The organ continued:

The American public says lawyers are greedy, manipulative, corrupt and do a poor job of policing

themselves ... Specifically, respondents said that lawyers: are more interested in winning than seeing that justice is served (74%); spend too much time finding technicalities to get criminals off (73%); are more interested in making money than serving clients (69%).... A respondent said: "'Lawyers] get into a courtroom and they are like sharks. They want that money".'

It should be said that common lawyers do not have a monopoly of avarice. In April 2005, Reinder Eekhof, a Dutch law school graduate, accidentally sent an e-mail saying he had 'finally finished this stupid education' and was 'now looking for someone crazy enough to dump a suitcase full of money in my lap every month'.

## **6. The law as game**

Geoffrey Robertson QC, author of *The Justice Game* (Random House, 1998), was asked in 1998: 'Should justice be a game?' He replied: 'Should it? No. Is it? Yes. We can't avoid the fact that the adversary system ... does make justice a game.'

US jurist John Henry Wigmore (1863-1943) referred to 'the game of litigation'. Judge Learned Hand (1872-1961) recalled that he once said to Justice Oliver Wendell Holmes Jnr: 'Well, sir, goodbye. Do justice!'

'That is not my job,' Holmes replied. 'My job is to play the game according to the rules.'

In *We, the Jury* (Basic Books 1994), Jeffrey Abramson, a lawyer and Professor of Politics at Brandeis University, Massachusetts, quoted Stephen

Adler, of *The Wall Street Journal*, as reporting that jury consultants openly admit that:

... if a client needs prejudiced jurors, the firm will help find them ... they defend the ethics of their profession by pointing out that they obey the same imperatives lawyers do in our adversary system: they seek their clients' advantage within the rules of the game ... Media accounts strongly reinforce the notion that jury selection is the only game in town and the game is crooked.

Justice Geoffrey Davies, of the Queensland appeal court, and J.S. Leiboff wrote in *Reforming the Civil Litigation System: Streamlining the Adversarial Framework* (Queensland Law Society Journal, 1995): '... the adversarial imperative encourages, each party to ... even deny specifically facts known to be true ... By such tactics the parties [lawyers] are playing a very expensive game.'

Norman Mailer (1923-2007) told me in 2000: 'I've always looked upon our legal system as a high-stakes game played at the top by very skilful men, and once in a while even justice is served.'

The adversary system may be a game, but the playing field is not level. Later sections note how the game is rigged to get money for lawyers.

## **7. Zealous prosecutors**

Prosecutors must know the system is unfairly rigged against victims, detectives, jurors, the community, and themselves, but they do not agitate for a fair

system, and some try to balance defence lawyers' dirty tricks with their own. The win-at-all-costs culture thus gets the worst of both worlds. Criminals get off and the innocent – particularly the poor and those whose colour is different from those in the majority – go to prison.

Claire Cooper, of *The Sacramento Bee*, noted in February 2004 that in two trials in Solano County, California, prosecutors identified Jonathan Shaw and Mango Watts as the single robber who held a gun to a restaurant manager's head. Cooper said three appellate judges said the prosecutions were 'something between stunningly dishonorable and outright deplorable', but that they could not reopen the case because the Supreme Court had 'never directly addressed the issue of whether due process permits two persons to be convicted for a crime that only one committed'.

Irving Younger (1932-88) was a defence lawyer, judge, academic, inventor of the sodomised parrot defence (see below, Diminished responsibility), and hypocrite. He complained (*The Perjury Routine*, *The Nation*, 3 May 1967) that judges do not assume that 'arresting officers are committing perjury'. Younger said:

Why not? Every lawyer who practices in the criminal courts knows that police perjury is commonplace. The reason is not hard to find. Policemen see themselves as fighting a two-front war against criminals in the street and against 'liberal' rules of law in court.



If it is wrong for police to lie to put criminals in prison, it is wrong for lawyers to lie to keep them out.

## 8. The judge as Humpty Dumpty

When lawyers got control of the process, judges had to be passive, but they do the decent thing: they try to stay awake. Lord Coleridge's wife sat on the bench and nudged him. A Sydney judge, Roddy Meagher, had his tipstaff at the ready to kick him. Lord Thankerton's solution enraged barristers; he took to knitting on the Bench.

Given the system's distance from reality, it is appropriate that judges' mindset is accurately described in *Through the Looking Glass, and What Alice Found There* (Macmillan, 1871):

'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean -- neither more nor less.'

'The question is,' said Alice, 'whether you *can* make words mean so many different things.'

'The question is,' said Humpty Dumpty, 'which is to be master -- that's all.'

US Chief Justice (1969-86) Warren Burger (1907-95) confirmed the Humpty mindset. Bob Woodward and Scott Armstrong reported in *The Brethren* (Coronet, 1979) that Burger told his brother judge, John Marshall Harlin II: "We are the Supreme Court and we can do what we want."

In *Bush v Gore* (Monday, December 13, 2000), five Humpties effectively said democracy means you don't count all the votes. They stopped the counting of Florida votes which, research showed a year later, would have made Albert Gore President rather than George W. Bush. There is a view that some consequences were not good. The Humpties were: William Hubbs Rehnquist (1924-2006, judge 1972-2006), Sandra Day O'Connor (b. 1930, judge 1981-2006), Antonin Scalia (b. 1936, judge 1986-), Anthony Kennedy (b. 1936, judge 1988-), and Clarence Thomas (b. 1948, judge 1991-). A dissenter, Justice John Paul Stevens (b. 1920, judge 1975-) observed:

Although we may never know the winner, the loser is perfectly clear. It is the nation's confidence in the judge as an impartial guardian of the rule of law.

Don Vito Corleone said lawyers can steal more than 1000 gangsters, but he did not say how they are helped by judges, e.g. Justice Brett on discovery (1882), Lord Atkin on negligence (1932) and tax evasion (1936), Chief Justice Owen Dixon on tax evasion (1957), and Chief Justice Garfield Barwick on tax evasion (1964-81). Their actions, detailed later, tend to support the Barton Hypothesis.

Judging is different from advocacy, but judges are not trained as judges; they are lawyers one day and judges the next. Abimbola A. Olowofoyekuw, a lawyer, pointed out in *Suing Judges: a Study of Judicial Immunity* (Oxford, The Clarendon Press, 1993):

With all the training given to physicians (college, pre-med, medical school, internship, years of specialist training) no hospital in the world would permit a general practitioner (or a dermatologist) to do surgery. But with no special training, the law permits a real estate lawyer, a banking counsel or a legal scholar to become a judge one day and on the morrow sentence a defendant to thirty years in prison, grant a divorce, adjudicate insanity, render judgment in an accident case, hold a director liable for damages, grant an injunction in a labor dispute, provide for custody of children, reapportion a legislative district, punish for contempt or reduce the tax assessment on an office building. How long does it take a new judge to get a smattering of the learning necessary to do all these things? ... Does it not make sense to train the judges before they go on the bench ... Should not the judge be trained in his special discipline before being given the awesome responsibility of sitting in judgment on others?

Since judges' only training is as lawyers, do they suddenly stop lying and perverting justice when they go aloft? Alan Dershowitz wrote in *The Best Defense*:

... lying, distortion, and other forms of intellectual dishonesty are endemic among judges ... The courtroom oath – 'to tell the truth, the whole truth and nothing but the truth' – is applicable only to witnesses. Defense attorneys, prosecutors and judges don't take this oath – they couldn't!

People who persistently make mistakes are dismissed, but it is difficult to get rid of judges who are persistently wrong. In Europe, judges are trained

separately from lawyers and appointed on the basis of rigorous examinations.

In the common law world, a judge is said to be a lawyer who knows a politician. A US judge, Curtis Bok, said in 1941: 'It has been said that a judge is a member of the Bar who once knew a Governor.'

In *Trial by Jury* (1875), barrister W. S. Gilbert has a judge admit: 'It is patent to the mob/That my being made a nob/Was effected by a job.' Chorus: 'And a good job too.' During the administration (2001-2009) of President George W. Bush, potential appointees to the Supreme Court were subjected to questioning by Vice-President Richard Cheney. In 2009, President Barack Obama (Harvard Law School) continued the procedure with Sonia Sotomayor.

Chief Justice (NSW) Jim Spigelman said Sir Owen Dixon (1886-1972, High Court 1929-64, Chief Justice 1952-64) was 'Australia's greatest jurist' and that his court was 'one of the great common law benches of history'. Spigelman must have been unaware that Dixon took court further into fraud. He wrote judgments for Justice Sir George Rich (1863-1956, High Court 1913-50), and let Rich put his name on them. He also wrote judgments at variance with his own and let other judges sign them. Lawyers could use the fraudulent judgments in argument before the court.

The origin of lawyers' immunity from suit is a brazen example of the Barton Hypothesis. Courtesy of jurist Brett Dawson, we can name the guilty men: Sir Jonathan Pollock (1783-1870), Sir William Watson (1796-1860) and Sir George Bramwell (1808-92). In

*Swinfen v Lord Chelmsford* (Exchequer Court, 1860), the judges were put to the exigency of protecting a former – and, as it turned out, future – Lord Chancellor who had cheated his client.

Lord Chelmsford (1794-1878) had a glittering career. Born Fred Thesiger, at 13 he was a plucky little midshipmite at the Battle of Copenhagen. Perhaps tiring for the moment of rum, sodomy and the lash, he left the Navy at 17 and took to the bar and Tory politics. He rose to Solicitor General, Attorney General, and Lord Chancellor in 1858, but the 14<sup>th</sup> Earl of Derby's Government fell in 1859, and he fell with it.

Down on his luck and with mouths to feed – his son, Alf, a future appellate judge, was still at Oxford – Lord Chelmsford had to resort to the bar. A client, Ms Patricia Swinfen, instructed him by telegram not to settle but, finding himself double-booked, he took the time-honoured course of settling the action which promised the smaller fee, Ms Swinfen's.

A June 2004 editorial in FLAC (For Legally Abused Citizens) Australia noted how Pollock *et al* defrauded Ms Swinfen and established immunity. The 'reasoning' of the court was: we can't find any case where a barrister has been successfully sued for negligence. Therefore, it must be the law that barristers cannot be sued for negligence. That notion still obtains in Australia, if in few other countries.

The most recent assertion of lawyers' immunity – largely on the ground that legal actions must have some finality – was *D'Orta-Ekenaike v Victoria Legal Aid* (Australian High Court, March 10, 2005). Those

in favour were Murray Gleeson CJ and Michael McHugh, Bill Gummow, Ken Hayne, Dyson Hayden, and Ian Callinan JJ. When the lone dissenter, Justice Michael Kirby, shortly had an emergency heart bypass operation, *Justinian*, commented: 'It's sad to see that the only judge on the court with a heart is now having trouble with it.' A barristers' carousing song might go: O, the moon shines tonight/On Mrs Porter'/And on her D'Orta.

In May 2006 the Ontario Chief Justice's Advisory Committee on Criminal Trials defined the function of judges thus:

Central to the adversary system is the concept that it is the lawyers who prepare and present the case ... Trial judges would prefer to be, *and should be*, passive observers ... there is no need for the trial judge to become involved in trial management.

It is preferable for judges to be awake when concealing evidence, and when telling the jurors to decide what the remaining evidence means, but for the rest of the trial they might as well be the scarecrows described by T.S. Eliot:

We are the hollow men  
We are the stuffed men  
Leaning together  
Headpiece filled with straw

Sleeping is fairly passive, but Australian High Court judges ruled in September 2008 that two men found

guilty on drug charges did not get a fair trial because the trial judge, Ian Dodd, was sometimes asleep. The judges, who were paid AU\$7,254.42 a week, were apparently unaware that no trial is fair because fairness means truth.

Oxford law professor Patrick Atiyah wrote in *Justice and predictability in the common law* (NSW Law Journal 1992): '... less predictability in the law means more litigation.' Justice Sir Frank McKinnon (1871-1946) said in *Salisbury v Gilmore* (1942) that the law lords are 'the voices of infallibility, by a narrow majority'. David Goldberg QC, a London tax lawyer, said in 1997:

It is, I think, generally accepted that every case or virtually every case which goes to the House of Lords could be decided either way. At any rate Lord Reid is reported by Alan Patterson in his book *The Law Lords* as saying that at least 90% of the cases which came before him [1948-75] could have been decided either way.

That means appeal courts are effectively casinos, lacking only scantily-clad young ladies offering the gamblers high-octane cocktails. Lawyers can thus advise clients to have another roll of the dice; they might win, however dubious their case.

Lawyers can get two bites of the appeal cherry because many common law countries have appeal courts for provinces and another for the nation. Britain has two appeal courts, the Court of Appeal and the judicial committee of the House of Lords.

Sir Alan Herbert (1890-1971) was called to the Bar in 1918 but never practised, perhaps because he feared he could not keep a straight face. He put the casino question in *Why Is the House of Lords?* (Punch, 1933). In *Board of Inland Revenue v Haddock*, he has the Master of the Rolls (head of the Court of Appeal) admit:

The institution of one Court of Appeal may be considered a reasonable precaution; but two suggest panic ... the legal profession is the only one in which the chances of error are admitted to be so high that an elaborate machinery has been provided for the correction of error ... In other trades to be wrong is regarded as a matter of regret; in the law alone is it regarded as a matter of course.

Harold Clough, a Perth engineer and former President of the Australian Chamber of Commerce, said in 1998:

We avoid litigation like the plague. When we have differences of opinion with our clients and we are stalemated in positions from which neither can move, rather than bring in the lawyers I suggest we toss for it. Tossing a coin has great advantages. It is quick, it is cheap, it is decisive and in my view equally as fair as any court case.

Some judges usurp the role of the jury. Three classic cases:

During the 'troubles' in Northern Ireland in the 1970s, it was said that accused are presumed



innocent until proved Irish. At the 1974 trial of the innocent Birmingham Six, Justice Sir Nigel Cyprian Bridge (1917-2007) told the jury: 'I am of the opinion, not shared by all my brothers on the bench, that if a judge has formed a clear view it is much better to let the jury see that.' Bridge summed up for a conviction. Mike Mansfield QC noted his technique in *Presumed Guilty: The British Legal System Exposed* (Heinemann, 1993):

In a careful, almost total demolition of every defence witness and the lauding, sometimes verging on deification, of prosecution witnesses, the jury was corralled into the guilty pen as though driven by a diligent sheep-dog.

Justice Sir Joseph Cantley (1910-93) presided at the 1979 trial of Jeremy Thorpe, a barrister/Liberal politician, who was accused of conspiring to have Andrew (Gino) Newton murder Thorpe's former lover, Norman Scott, in 1975. Cantley summed up for an acquittal. He said the evidence of the chief prosecution witness, Peter Bessell (1921-85), a Liberal politician, was 'a tissue of lies'. The jury was originally split 6-6, but eventually found Thorpe not guilty. A few days later, Peter Cook (1937-95) detonated a parody of Canley's summing-up at the Secret Policeman's Ball for Amnesty International. Cook, who had said: 'I could have been a judge, but I never had the Latin', called his summing-up *Entirely a Matter for You*, which is judgespeak for 'entirely a matter for yours truly'. Cook said:

We have heard for example from a Mr Bex Bissell, a man who by his own admission is a liar, a humbug, a hypocrite, a vagabond, a loathsome spotted reptile and a self-confessed chicken-strangler. You may choose if you wish to believe the transparent tissue of odious lies which streamed on and on from his disgusting, reedy, slaverling lips. That is entirely a matter for you ... We have been forced to listen to the whinings of Mr Norman St John Scott, a scrounger, a parasite, a pervert, a worm, a self-confessed player of the pink oboe, a man, who by his own admission, chews pillows ... On the evidence of the so-called hitman, Mr Olivia Newton John, I would prefer to draw a discreet veil. He is a piece of slimy refuse, unable to carry out the simplest murder plot ... You are now to retire, as indeed should I, carefully to consider your verdict of Not Guilty.

Justice Sir Bernard Caulfield (1914-94) presided at a 1987 libel case in which a politician, Jeffrey Archer, falsely denied having resorted to a dwarfish prostitute, Monica Coghlan. Caulfield seemed entranced by the icy charm of Mrs Mary Archer, who stood by her man. Caulfield asked the jury:

Has she elegance? Has she fragrance? Would she have, without the strain of this trial, radiance? ... Has she been able to enjoy rather than endure her husband Jeffrey? Is she right when she says to you – you may think with delicacy – Jeffrey and I lead a full life? ... Is he in need of cold, unloving, rubber-insulated sex in a seedy hotel?

The jury gave Archer £500,000, and Caulfield added costs of £700,000. Prime Minister John Major made

Archer a peer in 1992. In 2001, Lord Archer got four years for perjury at the libel trial.

## **9. A country's values**

Business economist James R. Forcier wrote in *Judicial Excess: The Political Economy of the American Legal System* (University Press of America, 1994):

A nation's values and problems are mirrored in the ways in which it uses its ablest people. In Japan, a country only half our size, 30 percent more engineers graduate each year than in all the United States. But Japan boasts a total of less than 15,000 lawyers, while American universities graduate 35,000 every year.

Japan uses a truth-seeking system. When Forcier wrote, the population of Washington DC was 500,000, but Washington alone then had 50,000 lawyers, three times as many as Japan. In 1992, France, had 22,000 lawyers.

## **D. The corrupt civil process**

Judge Learned Hand (1872-1961), said in 1921: 'I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.'

Civil litigation is like a cancer; it grows exponentially because lawyers can spin the process out. Trained French and German judges dispose of civil cases in a few hours. Justice Russell Fox wrote in *Justice in the 21<sup>st</sup> Century*:

... there is many a crack in the image of the ideal [of justice]. Mostly these arise from the practice of leaving the practitioner in charge of the collection and presentation of the evidence, which means that the judge may only hear incomplete or inaccurate or unreliable evidence; some of what is relevant may be deliberately withheld.

Philip K. Howard, a US lawyer, notes in *Life Without Lawyers* (Norton, 2009): 'In 2007, 384,330 cases were filed in federal trial and appellate courts, not including bankruptcy cases. In the state courts there were 47.3 million, not including traffic cases.'

One of the cases Howard noted was *Pearson v Chung*. In 2005, Judge Roy Pearson had asked South Korean immigrants named Chung, who had a Washington dry cleaning business, to alter his trousers. By mistake, they went to another branch, where they were altered according to Pearson's

instructions and returned some days after the due date, May 5, 2005.

Judge Pearson refused to accept the trousers and sued the Chungs for US\$67 million. He claimed inconvenience, mental anguish, and lawyers' fees of \$500,000 for representing himself.

In what must be noted as exceptions to the Barton Hypothesis, 13 judges ruled against Judge Pearson: Judge Judith Barntoff in June 2007, three appellate judges in December 2008, and nine appellate judges in March 2009. Donors met the Chungs' lawyers' fees, \$100,000, but the stress of four years of litigation cannot be calculated.

Sir Hugh Laddie QC (b. 1946), a former Justice of the UK High Court, reflected on the length and cost of civil litigation in *Legal Week* on May 26, 2006. He wrote: "Go back to the drawing board and consider the possibility that the adversarial system is past its sell-by date."

*Legal Week* polled senior partners at 100 law firms on whether the system had passed its sell-by date. The organ reported on June 8, 2006 that 40% agreed. The other 60% said the adversary system is 'an essential pillar of British justice'.

On May 22, 2007, Sir Hugh Laddie, now Professor of Intellectual Property Law at University College London, noted in *The Times* that a small to medium patent case costs three to 10 times more in England than in Germany or the Netherlands.

Sir Hugh wrote: 'Perhaps it is time to do the unthinkable and start making our system much more like that used by our continental colleagues.'

## **1. Interminable pleadings**

Edward Jacob KC (d. 1841) was editor of *Chancery Reports*. Nicholas Mullany noted in *Pleadings* that Justice Sir William James remarked in *Hall v Eve* (1877):

This case reminds me of a saying of the late Mr Jacob that the importance of questions was in this ratio: first, costs, second, pleadings, and third, very far behind, the merits of the case.

Written pleadings, the vehicle for the invention of the adversary system, are supposed to narrow the issues but are largely useless: as noted earlier, judges have allowed lawyers to lie in pleadings for five centuries. Speaking on behalf of the West Australian Law Reform Commission in 1998, Mullany, said:

The pleading rules ‘stop short’ of requiring the parties [and their lawyers] to be frank about what they allege. There is a tendency of parties to make allegations which they do not believe to be true ... and to deny allegations which they know to be true ... There is, in other words, a lack of ‘truth’ in pleadings.

Lawyers can go on lying in pleadings interminably in see-saw fashion: statement of claim, defence, reply, rejoinder, surrejoinder, rebutter, surrebutter, counter-claim, defence to counter claim, reply ...

Judicature Acts introduced by Lord Chancellor Selborne in 1873 and by Lord Chancellor Cairns in 1875 purported to reform pleadings, but Mullany

said 'they did not introduce a system which operated to define the issues in dispute between the parties'. A committee chaired by Lord Chief Justice Coleridge in 1881 'supposed' from the statistics for more than 20,000 cases in 1879 that 'pleadings were of little use', but all further attempts at reform have been sabotaged.

Mullany quoted Peter Hayes QC, of Melbourne, as stating in a 1998 paper for the Law Institute of Victoria:

I think that pleadings are a big heap of crap, essentially ... the rules - call it anal retentiveness - ... are nonsense, are all an impediment these days to justice.

In 1998, the WA law reform commissioners – WA Bar Association President Wayne Martin QC, law professor Ralph Simmonds, of Murdoch University, and Crown Counsel Robert Cock QC – reported:

It is our opinion that for so long as the Australian litigation system is based on the adversarial tradition ... attempts to bring about *substantial* reform of the current system of written pleadings with a view to facilitating the more efficient administration of justice will fail. (Their emphasis.)

They recommended a procedure which 'resembles most closely that prevailing in Germany'. In effect, they recommended a return to the oral method of pleading that obtained before the invention of the adversary system. Lawyers would presumably still

lie in oral pleadings, but at least the pleadings would be over in a day.

Martin, Simmonds and Cock said the change could generally be made ‘without the assistance of the legislature’. That is, the judges could make the change themselves. That was in 1998. Simmonds went on to the WA Supreme Court in February 2004, and Martin became Chief Justice in April 2006, but in 2009 the court had not yet ended paper pleadings.

## **2. Interminable discovery**

Discovery is moving documents from one law office to another. A courier will do it for a few dollars; lawyers can charge millions. Lawyers for one client ask lawyers for the other to ‘discover’ and hand over documents which might help their side or hinder the other’s. The other side responds with lists of the documents they are prepared to reveal, those no longer available and why, and those they want to conceal on grounds of privilege, e.g. client-lawyer secrecy.

Discovery was originally a monopoly of equity lawyers, i.e. those who worked in the corrupt Chancery Court, but was extended to other lawyers by the Common Law Procedure Act of 1854.

A few words by Lord Justice (of Appeal) William Balfour Brett (1815-99) in the guano discovery case, *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Company* has made billions for lawyers. Brett said any document is discoverable if it *might*, directly or indirectly, lead to a ‘train of



inquiry' which might help the lawyer's case or damage his adversary's. (Emphasis added.)

That made discovery open-ended. Brett became Master of the Rolls in 1883, Baron Esher in 1885, and Viscount Esher on his retirement, aged 82, in 1897. Thanks to him, millions of documents can be discovered, but only a very few are relevant. A UK appellate judge, Lord Justice Johan Steyn said in 1992:

[Discovery] contributes to the tyranny of modern litigation ... It is the experience of Commercial judges that usually 95% of the documents contained in the trial bundle are wholly irrelevant and never mentioned by either side.

Justice David Ipp, then of the WA Supreme Court, said, in Part II of *Reforms to the Adversarial Process in Civil Litigation* (Australian Law Journal, 1995):

... the usual result is that the number of those documents that are critical to the result of the trial are substantially less than 50 [but] sometimes hundreds of thousands [are] discovered.

Lawyers say that if they don't turn over every stone, they could be done for negligence. *The Economist* reported in 1992 that discovery accounts for 60% of the time and money spent on US lawsuits, and that in 1988 a Louis Harris survey showed:

... a big majority of litigators for both plaintiffs and defendants said that discovery is used as a weapon to

increase a trial's cost and delay to the other side (nearly half said lawyers use it to drive up their own charges) ... In an IBM antitrust [monopoly] suit, discovery took five years and produced 64 million pages of documents ... A partner at a big [US] law firm bragged to law school students about a long anti-trust case: 'My firm's meter was running all the time – every month for 14 years.'

The admissions indicate that many trial lawyers habitually use discovery to extort from their own clients.

Lawyers also use discovery as a tool of blackmail. Perth barrister Paul Mendelow noted in *Discovery: Should the Whistle-blowers Stop the Train of Inquiry?* (WA Law Reform Commission, 1998): 'Parties may attempt to force favourable settlement by driving up costs [of discovery] beyond the value of the case.' Mendelow quoted a 1994 article, *Some Lessons from Santos*, by Justice Peter Heerey, concerning *Trade Practices Commission v Santos Ltd and Sagasco Holdings Ltd* (1993), in which discovery lasted for a year. Mendelow wrote:

Justice Heerey's focus of criticism ... was that it was a mistake to have a general, unqualified order for discovery - in accordance with the test of relevance propounded by the *Peruvian Guano* case. The circumstances pertaining to discovery in this matter resulted in practitioners being 'recruited into a burgeoning army engaged in discovering, inspecting, filing, listing, copying, storing, carrying about, and otherwise dealing with 100,000 documents which had been accumulated for the purposes' of this litigation. An expression that developed

amongst junior practitioners who had been ensnared in the discovery process was: 'I have been Santossed'.

*BT [British Telecom Australasia] v the State of NSW and Telstra* arose out of a contract signed in 1992 by which BT was to supply certain telecommunications services to NSW. Telstra was also to be a supplier directly or indirectly through BT. NSW terminated the contract in August 1995. BT began proceedings in the Federal Court against NSW and Telstra.

By May 1998, lawyers for the parties estimated that the costs of discovery alone had reached AU\$19 million (AU\$32 million at 2009 rates), much of it down to taxpayers. Justice Ronnie Sackville (b. 1943) said:

I have repeatedly said that all parties [i.e. their lawyers] in this litigation have given insufficient attention to the need to control their own request for discovery in the interests of keeping the discovery process within manageable bounds. One consequence of the approach taken by the parties is that discovery in this case has assumed mammoth proportions. A second is that the parties are in continuous disputation as fresh discovery issues are raised, each said to require the time of the Court to resolve. Not only is this extraordinarily costly and, in my opinion, wasteful, but it diverts attention from the need, in a case that has now been going on for three years, to prepare for trial. It also imposes a disproportionate burden on the Court.

In what was reported to be 'a highly unusual move', Justice Sackville said he wanted to see the principals

at the next sitting. In June 1998, he urged three senior executives of the actual 'parties' to consider mediation. He said: 'This is not a case which is incapable of resolution. After all, it only involves money.' The trial was expected to run for six months, but Sackville's advice was taken. Former Federal Court Justice Trevor Morling QC (b. 1927) took all concerned to Singapore, presumably to concentrate their minds, and mediated a settlement in a week. On February 15, 1999, a cryptic press release said Morling described the settlement as 'eminently reasonable' but the terms were secret.

### **3. Unfair bias in favour of plaintiffs**

Jurist Brett Dawson says aspects of civil law, notably libel (outside the US) and negligence, are unfairly biased in favour of plaintiffs' lawyers. He says the bias encourages people to sue, and the sued have to pay lawyers to defend them.

The bias is compounded by the fact that in eight centuries jurors have never had to give reasons. They can thus award unjust sums against defendants in the belief that they are redistributing wealth and punishing rich companies. In reality, they enrich lawyers and punish shareholders.

**Negligence.** Lord (James) Atkin (1867-1944, Lord of Appeal in Ordinary 1928-44) had a dome as bald and as conical as that of Humpty Dumpty or M. Hercule Poirot, and he was as capable of talking drivel as either. Lord Atkin opened the negligence floodgates in *Donoghue v Stevenson* (House of Lords,

1932), an appeal concerning an alleged (but unproved) snail in a bottle of Scottish ginger beer. He said:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour ... You must take *reasonable* care to avoid acts and omissions which you can *reasonably* foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my acts that I ought *reasonably* to have them in contemplation .... (My emphasis.)

When lawyers hear the word ‘reasonable’, they rub their hands together: it has as many meanings as there are human beings. Atkin did not say the neighbour should exercise common sense and personal responsibility, e.g. in avoiding tobacco or a hole in the road. Justice Russell Fox demolished Atkin thus: ‘The simple fact is that no one can define negligence, nor in most cases is it possible to form an accurate view of the facts.’ He said Atkin’s ‘principle’:

... sounded good and proved very durable ... in theory, one can talk in terms of ‘proximity’ and ‘reasonable foreseeability’, and ‘what a reasonable person would have done’. In practice, these are but shibboleths which offer no obstacle to the inclination of judges and juries to provide compensation for the injured (or damaged) plaintiff... Many are not worried by this phenomenon, recognising it as a convenient form of injury (and damage) insurance, and governments are saved the necessity of introducing a

scheme to achieve a similar result. It is however a very expensive pseudo-scheme because to each claim are added legal costs and these can be 30, 40 or 50% of the amount recovered, sometimes more. Eventually, the community at large, or a large percentage of it, bears the burden, and insurance companies (if they are cautious) and lawyers profit.

The US system does not always oblige losing litigants to pay the winner's costs, and it allows lawyers to charge a contingency (speculative) fee of up to 40% of the payout. It also allows jurors to make punitive awards.

The annual Stella Awards for outrageous negligence verdicts are in honour of Stella Liebeck, 79, who spilled coffee on her lap at McDonald's in 1992, and was initially awarded US\$2.86 million by the New Mexico District Court.

Florida plaintiff lawyers traditionally took 40% of the first \$1 million in medical liability payouts, 30% of the second \$1 million, and 20% of any higher amount. In November 2004, 63% of Florida voters approved a legislative amendment which capped lawyers' fees at 30% of awards up to \$250,000 and 10% of amounts over \$250,000. The lawyers would thus get \$500,000 of a \$5 million payout, but Jane Musgrave reported in *The Palm Beach Post* of July 24, 2005: '... personal injury lawyers quickly found a way around the new limits: They simply ask clients to waive their constitutional right to larger shares of any malpractice award they might get.'

The US Surgeon-General warned against smoking in 1964. Richard Boeken, 57, smoked 40 Marlboro cigarettes a day and got cancer, but swore he did not know smoking was dangerous until 1994. In 2000, Los Angeles jurors ordered Philip Morris shareholders to pay Boeken US\$3000 million, of which his lawyers presumably expected to get at least \$1000 million. On appeal, the payout was reduced to US\$50 million.

Brett Dawson says that even in a small country like Australia, lawyers get \$1200 million a year from personal injury litigation, largely from lump sum payouts. A boy got eight cuts at a Sydney school in 1984. In 2002, a jury gave him \$2.5 million, or \$312,500 per cut. Obstetricians, i.e. their patients, pay A\$140,000 a year for negligence insurance. Swedish obstetricians pay the equivalent of A\$500 a year.

Justice David Ipp, now of the NSW Supreme Court, told a conference of anaesthetists in Perth in May 2004 (*Personal Responsibility in Australian Society and Law: Striving for Balance*) that, particularly since the 1970s, 'courts throughout the common law world have awarded damages to plaintiffs without paying any regard to the concept of personal responsibility'. And:

Since ancient times, taking personal responsibility for one's own behaviour has been regarded as fundamental to what it means to be fully human, to lead an ethical life and, therefore, to participate in a just society. Without a fully realised concept of personal responsibility, society cannot be ordered in a fair way.

It presumably follows that lawyers who do not take personal responsibility for perverting justice are not fully human, do not lead an ethical life, do not participate in a just society; and prevent society from being ordered in a fair way.

Justice Russell Fox said his concern about negligence law stemmed from 'the waste in cost involved, and court time, and damage to court integrity'. He noted that Justice Rae Else-Mitchell, of the NSW Supreme Court, said in 1972:

... the case for all claims arising out of motor vehicle and industrial accidents being decided on a no-fault basis by an administrative tribunal is unanswerable ... more people would be able to go to court and the taxpayer would be better off in the end.

Gough Whitlam QC (b. 1916), Labor Prime Minister of Australia 1972-75, sought to introduce no-fault compensation for injury, but noted in *The Curtin Lecture* (1985) that his Government was thwarted by the stone-walling tactics of interested parties 'aided and abetted by Labor lawyers who specialised in work for unions.' He said:

The basis of their [Labor lawyers'] thriving practices is to charge unions for the expert advice in cases of accidents to unionists at work and on the way to and from work and at the same time to render gratuitous advice to union officials on methods to entrench themselves in office.

A no-fault scheme eliminates lawyers because there is nothing to argue about, and thus eliminates



blackmail and increases the money available to care for victims. It also eliminates Santa Claus judges and jurors, but lawyers say it deprives people of basic common law rights. There is more money in rights than justice.

**Libel.** Criminal law has a presumption of innocence for defendants and judges conceal the truth about them. Libel law has a presumption of guilt for defendants and judges conceal the truth about plaintiffs. Witnesses for defendants can say they believe the plaintiff's reputation is not good, but they can't say why.

Libel law has thus protected rogues, including organised criminals, some powerful and respectable, for seven centuries. It began in 1275 when Edward I's Statute of Westminster invented the crime of *Scandalum Magnatum*, slandering the magnates, most of whom were robber barons. Truth, at least nominally, was a defence. The legislation was re-enacted in 1378 to include judges, prelates, and certain officials.

The printing press, introduced to England by William Caxton in 1477, threatened the reputations of the powerful. The Licensing Act of 1538 forbade books to be printed without a licence, thus enforcing pre-publication censorship. *Scandalum Magnatum* was re-enacted in 1554 and 1559 with new clauses on 'seditious words' which might cause disaffection against authority. The punishment fitted the crime: ears were cut off for a spoken slur; the right hand for a written slur.

The Star Chamber dealt with some libel cases. Professor Theodore Plucknett said in *A Concise History of the Common Law* that by the time the chamber was abolished in 1641, 'it was settled that truth was not a defence', and that this 'was a break with Roman authority'.

The corrupt Whig oligarchs were tricked into letting the Licensing Act lapse in 1695. Modern journalism, with its intrinsic threat to the power and corruption of politicians and judges, was thus able to begin on 19 February 1704, when Daniel Defoe's *The Review* appeared. Face prevented the reimposition of the Licensing Act, but otherwise all the apparatus of a corrupt trade of authority were immediately deployed to silence the Press: secrecy – always the bottom line on corruption – taxation, bribery, and libel law. Reporting what was said in Parliament became a crime, and *the Review* and other journals, including Addison and Steele's *The Spectator*, were taxed out of existence in 1712.

Many proprietors were bribed for the rest of the century. Francis Williams, the historian of the British Press, says in *Dangerous Estate* (Longmans Green 1957): 'There was hardly a newspaper in those years [the 18th century] that was not in receipt of secret subsidies of one kind or another.' Prime Minister (1721-42) Robert Walpole used the secret police to pay more than £50,000 (about £5 million at today's rates) to newspapers and pamphleteers between 1732 and 1742. Agents for Pitt the Younger (1759-1806), the Tory Prime Minister 1783-1801 and 1804-06, paid bribes of at least £5000 [£500,000 today] a

year to newspapers at the time of the French Revolution. Nine newspapers got an annual bribe; *The Times* got £300 (c. £30,000)

Libel law, however, has proved the most effective and enduring method of silencing the Press. Professor Theodore Plucknett says that in 1704 (the year modern journalism began) Chief Justice (1689-1710) Sir John Holt (1642-1710) said 'it is very necessary for all governments that people should have a good opinion of it'. Professor Plucknett said it seemed to follow that:

any publication which reflected upon the Government was criminal ... Until 1792 the strict legal theory has been accurately summed up in these words: 'A seditious libel means written censure upon any public man whatever for any conduct whatever, or upon any law or institution whatever.

Judges had thus made it a crime to write the truth about corrupt politicians and judges, about bad laws, and about institutions run as criminal enterprises, e.g. Parliament and the courts. To ensure conviction, judges gave the verdict in libel cases; jurors' only role was to decide whether the accused had published the slur.

The Zenger case helped make the US the only English-speaking country in which freedom of speech and information are not legal fictions. John Peter Zenger, proprietor of *The New York Weekly Journal*, criticised the colonial Governor, William Cosby, and was tried on a charge of seditious libel

on 4 August 1735. Zenger's Philadelphia lawyer, Andrew Hamilton, admitted that he had published the slurs, but argued that citizens should have a right to tell the truth about public officials, and offered to prove the slurs were true. The jurors insisted on finding Zenger not guilty.

The verdict did not change the law, but it did diminish prosecutions for seditious libel, and it did help to establish the notion that, at least in libel, truth is so important that it should be an absolute defence, and that jurors should give the verdict.

Lord Mansfield (1705-93, 7<sup>th</sup> in *The Legal 100*) was Leader of the House when the oligarchy's bagman, the Duke of Newcastle, was Prime Minister 1754-56, and was ineffably obtuse on policy towards American colonists. In his other role, Lord Chief Justice (1756-88), Mansfield invented a brilliant lie: the greater the truth the greater the libel. That is, the more corrupt a politician or judge is, the greater the penalty for exposing him.

The first academic, Blackstone, supported Mansfield's lie on libel, but public outrage resulted in Charles James Fox's Libel Act (1792), which gave libel verdicts to jurors. Judges apparently feared that jurors would refuse to convict journalists who exposed their corruption and that of politicians. Professor Theodore Plucknett said the Act 'was passed in spite of the unanimous opinion given by the judges at the demand of the House of Lords'.

James Madison's First Amendment (1791) to the US Constitution stated: 'Congress shall make no law ... abridging the freedom of speech, or of the press;

or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’ But for 173 years the onus of proof in US libel cases, as in other common law countries, lay on the defendant rather than the complainant.

Anthony Lewis (b. 1927) notes in *Freedom for the Thought that We Hate – A Biography of the First Amendment* (Basic Books 2008) that libel law in several US States had what lawyers called the ‘three galloping presumptions’:

1. ... any publication that was challenged in a libel action was presumed to be false; the burden was on the publisher to prove it was true.

2. ... damage was presumed. The person suing did not have to prove actual damage, say to his career, as he or she would have to prove in other civil damage cases, such as medical malpractice.

3. ... the publisher’s fault was presumed.

In *New York Times v Sullivan* (1964), the Supreme Court voted 9-0 to repudiate those plainly false presumptions, and to rule that the First Amendment implied freedom of information.

For the court, Justice (1956-90) William Brennan (1906-97) said public officials could only win a libel case if they could show that the slur derived from ‘actual malice’, i.e. ‘knowledge that the [material] was false’, or from a ‘reckless disregard of whether it was false or not’. Actual malice was later extended to cover public ‘figures’. Most significantly, *NYT v Sullivan* shifted the onus of proof from the defendant

to the complainant. In other common law countries, the onus remains on the defendant.

Law professor Ray Watterson, of the University of Newcastle (Australia), noted in *Media Law in Australia* (Oxford, second edition, 1988) that Lord Atkin 'conceded in *Sim v Stretch* (1936) that judges and textbook writers alike have found difficulty in defining with precision the word "defamatory".' Professor Watterson explained how libel law works:

The mere publication of words defamatory of the plaintiff gives rise to a *prima facie* cause of action ... a plaintiff has the benefit of the presumptions of falsity and of damage. He is not required to prove that the words are false; the law presumes in his favour that they are. The law also presumes that defamatory words cause harm. Thus it is not necessary for the plaintiff to ... to prove that he suffered material or financial loss ... Furthermore, a plaintiff is not required to establish that the defendant intended to harm his reputation ...

Libel law thus oppresses defendants (and the community) outside the US because seven obviously false presumptions unfairly bias the system in favour of plaintiffs. Appearance (reputation) is preferred to reality (character). The private right to reputation is preferred to the public right to information. A slur is always false. The author of a slur is always guilty. The subject of a slur is always innocent. A slur is always intentional. A slur always causes damage.

Geoffrey Robertson QC wrote in *The Justice Game*: 'London is the libel capital of the world

because English law heavily favours plaintiffs ... So there have been celebrated cases where newspapers have published the truth, yet lost.' Sydney cannot be far behind. John Wicklein, reported in the *Columbia Journalism Review* (November/December 1991):

By a recent count, 142 defamation actions against newspapers, most of them filed by politicians and businessmen, were pending in Sydney, which has been called the libel capital of the world. This is nearly twice the libel suits filed in the entire United States in any one year.

The bias against defendants encourages 'libel terrorism' and/or blackmail as practised by Robert Maxwell (1923-91), an organised criminal, asset stripper, newspaper proprietor, and megalomaniac. Libel lawyer David Hooper wrote in *Reputations Under Fire: Winners and Losers in the Libel Business* (Little, Brown, 2000):

Robert Maxwell learned early in his career that English libel law was an extremely useful device for concealing the truth about his reputation and his business methods. Defendants had to prove the truth of what he had striven successfully to cover up, and that was both costly and difficult ... Over a period of 30 years Maxwell developed a policy of using the law of libel to terrorise his opponents. His libel actions covered every aspect of his career: publishing, politics, newspapers and football. As his business empire collapsed, so he fired out his last bevy of writs to muzzle the press.

Maxwell won only one libel action, but he was able to use libel terrorism to rob the public of their right

to information for three decades before he jumped, or was pushed, or fell off his boat and drowned in 1991.

SLAPP suits (strategic lawsuits against public participation) can amount to libel terrorism. Julian Petley noted in *Free Press* 108 (Jan/Feb 1999) that professors Penelope Canan and George Pring, of the University of Denver, invented the acronym when they noticed 'that corporations were increasingly threatening individuals in the environment movement with actions for defamation, conspiracy, invasion of privacy, interference with business, etc'.

The unfair bias against defendants also means that liars and their lawyers get money from honest soldiers for truth. A short list:

Pianist Wladziu Valentino Liberace, who falsely swore he was heterosexual.

British politicians Aneurin Bevan, Dick Crossman and Morgan Phillips, who falsely denied they were 'pissed as newts' at a conference of Italian Socialists in Venice.

Lord (Bob) Boothby, who falsely denied he had a sexual relationship with an organised criminal, Ronnie Kray.

Dr John Bodkin Adams, who falsely denied he was a serial killer of Eastbourne widows who changed their wills in his favour.

Jeffrey Archer, who falsely denied he had sex with a prostitute.

Juni Morosi, a secretary, who falsely denied she had sex with the Deputy Prime Minister of Australia, Dr Jim Cairns.



Fred Hanson, Police Commissioner of New South Wales, who falsely denied he was corrupt.

Murray Farquhar, chief Stipendiary Magistrate of New South Wales, who falsely denied he was corrupt.

Sir Les Thiess, a Queensland developer, who falsely denied he bribed the Premier of Queensland, Sir Johannes Bjelke-Petersen.

Sir Bob Askin (1907-81, NSW Premier 1965-75, falsely denied he was an organised criminal and would probably have got money from an honest politician, John Hatton, but died before the case got on.

In 2005, Australia's first law officer, Philip Ruddock, announced a plan to allow people to sue from the grave. I reminded him in *Justinian* that Voltaire observed in 1785: 'We owe respect to the living; to the dead we owe only truth', and that his legislation would inevitably be dubbed the Askin/Murphy clause in honour of Askin and High Court Justice Lionel Murphy, who was also a criminal. Ruddock eventually dropped the plan.

'Libel tourism' is the practice of suing US authors and publishers in London because in the US the complainant has to prove the slur is false, but in England the defendant has to prove the slur is true. However, US judges have taken the view that libel defendants cannot get justice in Britain. US courts usually enforce orders made by overseas courts but not when the orders are based on laws 'repugnant' to US law. In 1997, a Maryland court refused to enforce a British libel verdict because, on

fundamental issues of free speech and a free Press, British law 'is totally different' from First Amendment principles 'in virtually every significant respect'. But if publishers have assets in England, they have to pay.

Libel tourist, convicted paedophile, and fugitive from US justice Roman Polanski sued New York-based *Vanity Fair* in London. The organ had reported in 2002 that in 1969, days after Polanski's actress-wife Sharon Tate was murdered, he tried to seduce a Swedish model in Elaine's restaurant by promising to get her into films. At the trial in 2005, the judge, Sir (a knighthood is automatic for High Court judges) David Eady (b. 1943), concealed from the jury the full details of Polanski's offer to the girl, 13, in the paedophile case to get her into *Vogue*. Polanski gave evidence by video link from Paris. When the jury found in his favour, Eady gave him £50,000; *Vanity Fair's* costs were reported to be some £1.5 million.

Khalid bin Mahfouz (1949-2009) owned 20% of the Bank of Credit and Commerce International (BCCI) between 1986 and 1990. BCCI engaged in all manner of doubtful practices, including fraud, bribery, money-laundering, arms trafficking, and supporting terror. Mahfouz sued or threatened to sue people who accused him of knowingly supporting terrorism 33 times. Mahfouz, who lived in Ireland and was worth US\$3.2 billion, thus contrived to be at once a libel terrorist, a libel tourist, and a libel lawyer's dream.

*Funding Evil* (Bonus Books, 2003), by a New York scholar, Dr. Rachel Ehrenfeld, was not published in England, but 23 books got into the country via online purchases. Mahfouz sued in London. Dr Ehrenfeld did not waste money on defending the action in 2005. In her absence, the libel judge, Sir David Eady, specifically rejected assertions that Mahfouz was forum shopping, gave him US\$230,000 and ordered Dr Ehrenfeld to apologise to him and destroy all existing copies of her book.

Reacting to the Mahfouz-Ehrenfeld case, state legislators in New York unanimously passed a law to protect New York authors and publishers against libel tourism in 2008.

Signing the legislation on 1 May 2008, Governor David Paterson said: 'The statute combats such "forum shopping" in two ways. First, it bars New York courts from enforcing a foreign libel judgment unless the country where it was decided grants the same or better protection as US standards for freedom of speech. Second, it expands an individual's ability to have a court declare a foreign libel judgment invalid in New York. Without this statute, an author could be forced to live indefinitely under the pall of a libel judgment, deterring publishers from disseminating that author's work.' Rory Lancman, a member of the New York Legislative Assembly said: 'Today we reaffirm New York's place as the free speech capital of the world.'

A Free Speech Protection Act was introduced into the US Congress in 2008. If enacted, the

legislation would allow US authors and publishers to countersue and gain triple damages if a jury found that a foreign suit is part of a scheme to defeat the constitutional right to free speech.

#### **4. Blackmail (theft by extortion)**

Lawyers and clients get money in cases of alleged negligence and libel by pitching doubtful claims at a sum lower than the cost of litigation. The calculation is that the target company will make a commercial decision to submit to the extortion.

Brett Dawson says a woman who asked a married man to pay her to keep quiet about their adultery could be charged with extortion, but if she went through a lawyer, it would be regarded as a legal settlement.

#### **5. US workplace disputes: not a fair go all round**

It was in a workplace dispute case in 1971 that Gilbert Manuel, a NSW Conciliation Commissioner, enunciated the Manuel Test, 'a fair go all round' for employee and employer. US juries tend to be unfair to defendant employers. Jurist Walter K. Olson says workplace disputes take up roughly half the business of US civil courts.

Jerold Mackenzie, who worked at the Miller brewery in Milwaukee, related an incident from *Seinfeld*, a television comedy of manners, in 1993. The 'office scold' complained; Mackenzie was dismissed. Under the Manuel Test, Mackenzie might

have got six months' wages, perhaps \$30,000, or been reinstated on two conditions: that he apologise to the lady, and that she stop making a nuisance of herself. In *Mackenzie v Miller Brewing* (1997), Milwaukee jurors gave Mackenzie US\$26.6 million. His San Francisco lawyers, Littler, Mendelson, presumably got at least US\$8 million.

Emily Couric reported in *The Trial Lawyers: The Nation's Top Litigators Tell How They Win* (St Martins Press, 1990) the case of a New York man dismissed for engaging in auto-eroticism in his office. Jurors agreed that the employer had negligently failed to protect him from sexually harassing himself and gave him \$2.1 million.

Other verdicts: an American Airlines manager got \$US7 million for 'discrimination' when she was not promoted; a Texaco female employee got \$US20 million when she was not promoted; a sacked employee got \$US1.4 million for 'emotional pain and trauma' resulting from an unfavourable reference.

## **6. Larceny by trick: tax evasion**

Larceny by trick is the crime of theft by fraud or deceit. If systematic, it is organised crime. Tax evasion is devised by lawyers, judges, accountants, and bankers. David Marr observed in *Barwick* (Allen & Unwin, 1980):

... the best minds of the Bar are engaged, as [Garfield] Barwick QC was engaged, in tax avoidance, and from the best minds at the Bar High Court judges are chosen. The

High Court has an inbuilt tendency to be a tax avoider's forum.

London tax lawyers can make £2 million a year. H. L. Mencken (1880-1956) observed:

If all the lawyers were hanged tomorrow, and their bones sold to a mah-jongg factory, we'd be freer and safer, and our taxes would be reduced by almost half.

Justice Russell Fox noted in *Justice in the 21<sup>st</sup> Century* that the British legal system was originally designed to benefit landowners, and was 'later adjusted to the requirements of the wealthy and the powerful'. Adam Smith, who knew about cartels and that greed is good, said that the man who evades tax is 'in every respect, an excellent citizen'. Hugh Richard Grosvenor, second Duke of Westminster, evaded tax, loved Hitler and hated Jews, but had the saving grace of owning much of Mayfair and Belgravia. In *Inland Revenue Commissioners v Duke of Westminster* (1936), Lord Atkin said:

... the deeds were ... a device by which [the Duke] might avoid some of the burden of sur-tax. I do not use the word device in any sinister sense; for it has to be recognized that the subject, whether poor and humble, or wealthy and noble, has the legal right to so dispose of his capital and income as to attract upon himself the least amount of tax.

Atkin's decision applied only to the rich. Poor and humble wage and salary earners cannot evade tax; it

is deducted at source. Australia was a vaguely 'fair go all round' sort of country. Section 260 of the Income Tax Assessment Act 1936 proclaimed:

Contracts to evade tax void. Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly ... relieving any person from liability to pay any income tax ...defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or preventing the operation of this Act in any respect; be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act ...

The operative word is 'absolutely'. The task for tax lawyers and judges was thus to defeat the Parliament's intention. A friend of Garfield Barwick (1903-97), Clyde Cameron, said of him: 'I'd never known anyone who is able to so easily explain in a way that is so uncontroversial that a piece of white paper is jet black and a piece of black paper is snow white.'

In *Keighery v Federal Commissioner of Taxation* (High Court, 1957), Barwick argued that 'absolutely' does not mean absolutely; there could be exceptions. Five judges agreed: Chief Justice Sir Owen Dixon, who was capable of fraud (see above, The judge as Humpty Dumpty), and Justices Sir Dudley Williams, Sir Eddie McTiernan, Sir Frank Kitto, and Sir Alan Taylor. Only Sir William Webb dissented. The five

judges' lie opened the tax evasion floodgates in Australia.

Barwick went into politics in the conservative interest in 1958. It was said that Robert Menzies QC (1894-1978; Prime Minister 1939-41 and 1949-66), saw Barwick, 'the undisputed lion of the Sydney Bar', as his eventual successor. He made him Attorney-General. The security section of Barwick's *Crimes Act* 1960 had a presumption of guilt for persons of 'known character'. The leader of the Opposition, Gough Whitlam QC, referred to the section as 'this odious provision'. Barwick, like most lawyers, had a useful capacity for self-deception. Professor Jenny Hocking, author of *Gough Whitlam* (Melbourne University Press, 2008), wrote:

Barwick was accustomed to unquestioned respect, to reverent acceptance of his legal opinion; this depiction of his proposals as dangerous, draconian and undemocratic besmirched his reputation and disturbed him.

Whitlam refused to withdraw his claim that Barwick was a liar; he told the House: 'This truculent runt thinks he can get away with anything.' Barwick got away with it at the Bar and on the Bench for 54 years but not in Parliament. A colleague, Harold Holt (who, as Prime Minister in 1967, swam out to sea and got eaten by sea lice), kindly led Barwick, weeping, from the chamber. Professor Hocking said Barwick's political career 'was effectively over'.

Menzies tried Barwick as Foreign Minister but he failed there too. A job had to be found for him



outside Parliament. Menzies could have sent him somewhere harmless, like Ambassador to Uttar Pradesh or the US, but in 1964, he made him Chief Justice, where his lies on tax matters were frankly criminal. In *Casuarina P/L v the Federal Commissioner of Taxation* (1970), Barwick, Sir Victor Windeyer, Sir Harry Gibbs, and Sir William Owen finished off the 1936 Tax Act. David Marr said *Casuarina* concerned 'a wholly artificial scheme ... to avoid tax ... The *Casuarina* case became the cornerstone of the tax avoidance industry'.

Barwick, Gibbs, and Sir Douglas Menzies committed another fraud on the revenue and pay-as-you-earn taxpayers in *Curran v Federal Commissioner of Taxation* (1974). The lie this time was that a profit of \$2782 was a loss of \$186,046. John Ahern, a Brisbane accountant, explained how *Curran* worked in *A Taxing Time* (1990, Copyright Publishing). This is a précis of Ahern's explanation:

A company with shares worth \$100 issues 100,000 bonus shares at \$1 a share. The shares are now deemed to be worth \$100,100 but are actually worth about \$100. The shares are sold for, say, \$200, a profit of \$100, but Barwick *et al* would say it is a loss of \$99,900.

Self-employed people, e.g. doctors, rushed into schemes based on *Curran*. John Ahern, who adopted the posture of Barwick & Co, went to prison, but the judges were not charged, let alone sent to prison.

The amount of tax money 'liberated' from the Treasury in the eight years after *Casuarina*: was

\$A800 million, some A\$10.8 billion at 2009 rates. Treasurer John Howard resorted to retrospective legislation in 1978 to try to get back some of the money lost through *Curran* and similar schemes.

Economics Professor Russell Mathews said in 1980 that Australian wage and salary earners paid 81.2% of all income tax. In 1981, Howard's Part IVA to the 1936 Act again purported to bar 'blatant, artificial or contrived arrangements', but judges and lawyers can always defeat the English language. In 1985 Professor Mathews said:

Australian taxation policies have more in common with the protection rackets operated by the Mafia, where relatively poor and defenceless citizens are taxed for the benefit of the rich.

Don Vito would understand.

An Australian tax office survey in the early 1990s found that 'a significant segment of the BRW [*Business Review Weekly*] magazine's Rich List claimed to have a taxable income below the minimum wage'. Michael Carmody, the Australian Tax Commissioner, said in 1999 that tax schemes had caused '\$3.5 billion in claims and rising'. Brian Toohey reported in *The Australian Financial Review* of July 2-3, 2005:

When the Howard government was elected in 1996, the Income Tax Act was about 3000 pages. It is now estimated to be more than 10,000 pages, not counting the

innumerable interpretative guidelines and rulings issued by the ATO [Australian Tax Office]...

In *The Cheating of America: How Tax Avoidance & Evasion by the Super Rich Are Costing the Country Billions* (Morrow, 2001), Charles Lewis and Bill Allison, of the Center for Public Integrity, reported that in 1998 the Internal Revenue Service Commissioner, Charles Rosotti, said that avoidance and evasion were costing each taxpayer \$1600 a year, some \$480 billion, and that:

... thousands of the most affluent individuals and corporations routinely avoid and evade paying billions of dollars in taxes each year. And the level of unabashed greed seems to be increasing. Everyone from the principals of the largest accounting, law and brokerage firms to the sleaziest, fly-by-night Internet shysters are promoting offshore, cyberspace, and other avoidance schemes, and many of the most respected corporations and individuals are heeding their advice.

Secrecy is always the bottom line on corruption. Swiss banks sell secrecy. In February 2009, a leading Swiss bank, UBS, admitted to criminality in selling offshore banking services which facilitated tax evasion, and paid fines of US\$780 million. In August 2009, UBS agreed to turn over 4450 US accounts suspected by the Internal Revenue Service of tax evasion to Swiss authorities for onpassing to the IRS. Clients were expected to stonewall the disclosures in Swiss courts. *The [London] Financial Times* reported in April 2004:

An international task force to combat tax avoidance is to be set up by the US, Australia, the UK and Canada. The task force, which is expected to be based in New York, will focus on tax avoidance schemes employed by business and take joint action against such schemes.

The remedy is simpler: 1) Legislation proclaiming that artificial schemes to evade tax are absolutely forbidden because they are unfair to pay-as-you-earners. 2) Any judge who finds an exception will be instantly dismissed.

## **7. Class actions**

The Duke of Newcastle, bagman for the corrupt Whig oligarchy, had to find 'pasture enough for the beasts that they must feed'.

Likewise the law. There were 213,000 lawyers in the US in 1960; in 1991 there were 772,000. More pasture had to be found. Jurist Walter K. Olson says (*The Rule of Lawyers* St Martin's Press, 2003) that in the mid-1970s proposals 'that judges create some new right to sue' were 'all but ubiquitous'. He saw Ralph Nader (b. 1934, Harvard Law School graduate 1958) as being useful in that cause. Olson wrote:

The trial bar's most valuable asset of all in public debate, of course, has long been its ally Ralph Nader, one of the few public figures who can obtain news coverage just by showing up somewhere, and who, since his emergence in public life nearly forty years ago, has reliably been on hand to hold press conferences and tape commercials for

whatever the trial lawyer cause of the moment may happen to be.

Nader and Mark Green edited *Verdicts on Lawyers* (Crowell 1976). Beverley C. Moore, a lawyer who worked for Nader for five years, and Fred Harris, a Democratic Senator, wrote a chapter called *Class Actions: Let the People In*. Olson wrote:

Moore and Harris argued that courts should act to make it much easier for lawyers to file class-action suits against American business. [They had] a long list of the injuries, ailments, frustrations, and indignities of everyday life over which, in their opinion, the courts should permit class-action lawsuits. The list enumerated some 24 varieties of harm, paired in each case with the various businesses that could be sued over them. 'Tooth decay ... Sugar industry (food manufacturers)' was no. 15, "Air, water, noise, other environmental pollution ... Business enterprises generally" was no. 23. The ill effects of smoking and liquor consumption, of course, could be laid at the door of the tobacco industry and the producers of alcoholic beverages ... Food manufacturers would [also] face law suits over ... a wide range of other maladies, including heart disease, concerns linked to fat intake, and adult-onset diabetes. As befits an essay in a book co-edited by Ralph Nader, automakers would come in for a particularly rough time of it ...

Olson concluded:

By even a conservative reckoning, the items on the list would have led to the redistribution of well over \$1 trillion a year back in 1976, at a time when the gross

national product (GNP) of the United States stood at \$1.8 trillion ... More than half the nation's GNP, in other words, would be routed through lawyers' offices. A lot of it would stay there: Moore and Harris enthusiastically endorsed the arrangements by which courts let class-action lawyers collect fees for their efforts, amounting to a share of the class's claimed recovery – sometimes as high as a third.

It seems to me that executives who have guilty knowledge of harmful practice and/or products should be dealt with in the criminal courts, and that the Manuel Test should apply to others involved: victims, shareholders, lawyers. In *Justice in the 21<sup>st</sup> Century*, Justice Russell Fox showed how class actions relating to asbestos, tobacco, intra-uterine devices, breast implants, and the like can be dealt with at minimum cost. He wrote:

... the vital evidence usually consists of what information the defendant had at any relevant time and what it should have done as a result ... there should, absent an admission, be a single inquiry, preferably a judicial inquiry, into the information reaching the manufacturer or producer and as to the causal connection. The inquirer(s) will be assisted by counsel, but not a host of counsel. It would probably be as well to have two laymen, with a judge, or even two judges and three laymen, because the results will be available as evidence in any action. The vital matter will be to search effectively the files of the manufacturer, and ascertain the knowledge of its directors and employees, with no legal excuse allowed to stand in the way. The other matter, of causation, will inevitably be the subject of scientific evidence.

The great Tobacco-Medicaid wheeze of the 1990s should dispel any doubt that the adversary system is a business. The venture offended a rule which 'bars a lawyer from charging or collecting a clearly excessive fee', and some cases involved 'pay to play', i.e. a lawyer donates to a law officer's election campaign and in return gets public legal work. The American Bar Association deplores the practice.

The Surgeon-General warned that smoking is a risk in 1964. Most tobacco suits thereafter failed on the ground that the complainant failed to exercise personal responsibility. In 1993, a Mississippi lawyer, Mike Lewis, gave Mike Moore, the Mississippi (Democrat) Attorney-General, the idea of shifting the goalposts from individuals to taxpayers who paid the Medicaid funds which cared for sufferers. Moore invited Dickie Scruggs – surely a Dickens invention – to research and develop a Medicaid case.

Scruggs (b. 1946), a Democrat, had contributed to Mike Moore's election campaign, and had earlier worked with an Alabama lawyer, William Roberts Wilson Jnr on asbestos cases. Wilson later claimed that Scruggs cheated him out of millions from the asbestos litigation and used the money to fund tobacco claims. Wilson's case against Scruggs was still on foot in 2009.

In May 1994, Moore sought from tobacco companies \$940 million said to have been spent by Mississippi on people with tobacco-related illnesses. To persuade other state attorneys-general to join the

action, Moore and Scruggs, known as Mo and Scro, traversed the country in Scruggs's Lear Jet.

Walter Olson said most Attorneys-General who joined the action gave the business to private lawyers 'who were often among their most important campaign donors ... a pay-to-play scandal [was] waiting to happen'. Catherine Crier, a former Texas judge who became host of *Catherine Crier Live* on Court TV, says in *The Case Against Lawyers* (Broadway, 2002) that in 1998 it was alleged that Texas Attorney-General Dan Morales (Democrat) 'had solicited large sums' from five law firms he hired to do the tobacco work, and that lawyer Joe Jamail was quoted in *The Houston Chronicle* as saying: 'Morales solicited \$1 million from each of several lawyers he considered hiring.'

With 46 Attorneys-General on board, the tobacco companies folded. In November 1998, they put their names to a Master Settlement Agreement (MSA) of US\$246 billion over several decades. Cigarette prices shortly rose by 45 cents a pack. In view of the millions they stood to gain, lawyers decently waived their usual contingency fee of 40% of the payout. Walter Olson said the fees ranged from 3% to 25%. Scruggs' firm was reported to have been rewarded with as much as \$848 million.

Lawyer Robert A. Levy, author of *Shakedown: How Corporations, Government and Trial Lawyers Abuse the Judicial Process* (Cato Institute, 2004), said in 1999: 'In Florida, judge Harold J. Cohen ... denounced the state's 25 percent contingency contract, observing that the fee, \$233 million per lawyer, 'shocks the



conscience of the Court.' The average contingency fee worked out at about 8.8%. Levy told me in May 2005:

Attorneys for the 46 states that were part of the Master Settlement Agreement received \$750 million in the first year and \$500 million each year thereafter. If you figure 25 years out, that's a total of \$13.3 billion (without adjustment for present value). Four states were not part of the MSA. Their attorneys received the following amounts (in billions of dollars): Minnesota 0.5, Florida 3.4, Texas 3.3, Mississippi 1.4. Total for 50 states: \$21.9 billion.

Texas Attorney-General Dan Morales was charged by Federal investigators with falsifying documents to try to get US\$520 million from the tobacco settlement for a lawyer friend, Marc Murr, who had done little or no work on the tobacco action. In 2003, Morales plea-bargained his sentence down to four years.

In March 2007, Dickie Scruggs and others offered a Mississippi judge, Henry Lackey, a bribe in return for a favourable ruling in a squabble over money with another law firm. Informed by Judge Lackey, FBI agents wired him and set up a sting. In October 2007, Scruggs was involved in payments totalling \$50,000 made by others to Judge Lackey.

A federal grand jury indicted Scruggs and four others in November 2007 on charges of conspiracy to bribe a judge. If convicted, he would face up to 75 years in prison. A December party at his mansion to raise funds for Mrs Hillary Clinton's presidential

campaign was hurriedly cancelled. Scruggs plea-bargained his sentence down to seven years. In March 2008, he pleaded guilty to conspiracy to bribe and went to prison. It was reported in September 2009 that lawyers Lee Young and Charles Mikhail had filed a federal lawsuit claiming Scruggs still owed each of them \$194,000 from the 1998 tobacco agreement.

Australia has a quasi-contingent system; lawyers can get more than normal costs for speculative litigation, but not 40%. It was reported in 2003 that lawyers Maurice Blackburn Cashman got \$15 million (13.4%) of a \$112 million payout to 23,099 shareholders in an insurance company, GIO.

No win, no fee sounds good, but what if you lose? A judge ordered a tobacco company to pay a Melbourne cancer victim, Rolah McCabe, \$700,000 in 2002, but the Victorian appeal court reversed the decision; the children of the now-dead Mrs McCabe became liable for fees said to be at least A\$4 million.

And what if you win? A Queensland law firm, Baker and Johnson, whose logo is a charging two-horned rhinoceros, got \$5000 compensation for a woman's back injury. They kept the \$5000 and asked her for another \$7000.

## **8. Defence of civil adversary system**

Defenders of the civil adversary system say its virtues include client control and neutral and passive judges. Professor Stephan Landsman, now

of DePaul University, Chicago, wrote in a section called *Defense of the Adversarial Process* in his *Readings on Adversarial Justice: The American Approach to Adjudication* (West, 1988, sponsored by the American Bar Association): 'The adversary process provides litigants with the means to control their lawsuits. The parties are pre-eminent in choosing the forum, designating the proofs, and running the process.'

However, Professor David Luban stated in a paper, *Twenty Theses on Adversarial Ethics*, for a 1997 Brisbane conference, *Beyond the Adversarial System*:

As for the idea that advocates offer clients vicarious participation in their own cases, it simply fails the test of reality ... In an American trial, the client is little more than a marionette being moved by a lawyer/puppet-master.

Professor Landsman also wrote:

When litigants direct the proceedings, there is little opportunity for the judge to pursue her own agenda or to act on her biases ... One of the most significant implications of the American adoption of the principles of neutrality and passivity is that it tends to commit the adversary system to the objective of resolving disputes rather than searching for material truth.

If resolving disputes – not making money for lawyers – is really the objective, America would be better off using the lawyer-free method invented by Confucius (551-479 BC) at about the same time the Sophists were teaching Athenian lawyers how to lie.

In the Confucian system, mediators decide cases on the circumstances rather than by reference to an abstract system. Despite Mao Zedong, China's system is still vaguely based on Confucian benevolence and reciprocity. Among 1200 million, there are said to be 800 qualified lawyers and 10 million mediators, not all, one trusts, members of the secret police. Pro-rata, the US would have 180 lawyers, England 40, and Australia 12. London would have five lawyers, Washington two-fifths of a lawyer, and Canberra one-fifth of a lawyer. That sounds about right.

## E. 24 anti-truth devices

\* indicates a rule which conceals evidence

Defence lawyers had a business problem when they appeared in the criminal courts in increasing numbers in the last decade of the 18<sup>th</sup> century. On my calculation, the criminal system then had only four devices which could be used to defeat the truth: the accusatorial system itself, cross-examination, inscrutable jurors, and double jeopardy. (Blackstone's lie about not having to give an explanation was inserted into the US Bill of Rights in 1791, but it did not become entrenched in British law until the middle of the 19<sup>th</sup> century.)

Criminal trials, run by judges rather than lawyers, were nasty, brutish and short. The average was half an hour; conviction was fairly certain. Rich criminals probably tended not to waste money on lawyers. Since 1800, however, judges have increased the anti-truth mechanisms from four to at least 24, including six rules which conceal evidence from jurors. The devices give rich criminals a good chance of avoiding the consequences, and so encourage them to pay lawyers. At least 10 were used to get a murderer, O. J. Simpson, off.

Most accused are guilty. Harvard law professor and criminal lawyer Alan Dershowitz wrote in *The Best Defense* that the first two rules of 'the justice game' (his term) are:

Rule I: Almost all criminal defendants are, in fact, guilty.

Rule II: All criminal defense lawyers, prosecutors and judges understand and believe Rule I.

We can take 'almost all' to mean at least 90-95%. Hence the observation by US lawyer Maurice Nadjari. 'You can't make a living defending innocent men.' In effect, defence lawyers (and judges sitting alone) are almost invariably accessories after the fact.

Justice is fairness. The bottom line is that judges have unfairly skewed the system in favour of defence lawyers and their criminal clients, and against victims, detectives, prosecutors, witnesses, jurors, and the public. Professor Dershowitz wrote in *The Best Defense*:

The American criminal justice system *is* corrupt to its core: it depends on a pervasive dishonesty by its participants ... The corruption lies not so much in the *results* of the justice system as in its *processes* ...' (His emphasis.)

Dershowitz was quoted in the *U.S. News & World Report* of 9 August 1982 as saying:

The defendant wants to hide the truth because he's generally guilty. The defense attorney's job is to make sure the jury does not arrive at that truth. The prosecution wants to make sure the process by which the evidence was obtained is not truthfully presented, because, as often as not, that process will raise questions.

The community are entitled to expect the media to report what is concealed from their representatives, the jurors, at important trials. The splash in *The* (Brisbane) *Courier-Mail* on the day after the verdict in the corruption trial of Queensland police chief Sir Terence Lewis in 1991 (see below: *Concealing any or all evidence*) was WHAT THE JURY DID NOT HEAR, by Jason Gagliardi. The Editor, Desmond Houghton, then instructed his court reporters to stay in court during legal argument in major trials and note and later report the concealed evidence.

The trial of John Thomas Sweeney (b. 1956) on a charge of first degree (premeditated) murder illustrates some of the anti-truth devices noted below. After an actress, Dominique Dunne (1956-82), left Sweeney, he strangled her in November 1982. The medical evidence at his 1983 trial was that it takes a strangler at least four minutes to kill his victim.

Among the evidence concealed by Judge Burton Katz was evidence by a Lillian Pierce that Sweeney had assaulted her 10 times during a two-year relationship, and evidence by the victim's mother, Ellen Dunne, that Dominique had come to her in hysterics when Sweeney first beat her. Katz concealed the evidence on the ground that the 'prejudicial effect outweighed the probative value.' (See below *The Christie* discretion.) He also concealed all the victim's statements in the last five weeks of her life to her agent, fellow actors, and friends that she feared Sweeney. (See below: *Concealing second-hand evidence*.)

The case shows how lawyers and judges are prey to what George Orwell called 'doublethink', holding two contradictory beliefs at the same time, also known as 'cognitive dissonance'. Katz knew it was premeditated murder, but at the end of the prosecution case, having felt obliged to conceal evidence of planning, he eliminated first-degree murder, and told the jury they could only consider manslaughter and second-degree murder. The jury went for voluntary manslaughter.

At the sentencing a month later, Katz said: 'I will state on the record that I believe this is murder. I believe that Sweeney is a murderer and not a manslaughterer ... This is a killing with malice.' He gave Sweeney the maximum for manslaughter, 6 ½ years. He served 4 ½. The procedure shocked the victim's father, Dominick Dunne (1925-2009). His report, *A father's account of the trial of his daughter's killer*, appeared in *Vanity Fair* in March 1984.

The order of the anti-truth devices given here is roughly the way they appear in the pre-trial and trial processes. The rules for concealing evidence are marked with an asterisk

### **\*1. Concealing suspects' evidence**

The privilege against self-incrimination, of which the 'right' of silence is a part, allows suspects to say nothing to police or jurors. At bottom, the immunity from supplying evidence derives from two lies. The correct formulation of the duty of a suspect or accused is attributed to St. John Chrysostom (c. 347-



407), a Syrian lawyer who became Archbishop of Constantinople. The suspect's duty became canon law and was quoted by Justice Ken Marks, of the Victorian Supreme Court, in his 25,000-word article, *'Thinking up' about the right of silence and unsworn statements* (Victorian Law Institute Journal, 1984).

The canon law was: *Licet nemo tenetur seipsum prodere, tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare*. That is: 'Although no one is compelled to accuse himself, yet one accused by rumour is compelled to present himself to show his innocence, if he can, and to clear himself.'

Justice Marks noted that in 1568 Sir James Dyer, Chief Judge of the Court of Common Pleas, omitted everything except 'no one is compelled to accuse himself' (*nemo tenetur seipsum prodere*), and freed a suspect on that basis. A lawyer, Rick McDonnell, drew Justice Marks's paper to my attention in 1997, 13 years after it appeared. When I asked the judge for a copy, he said I was only the second person to speak to him about it.

Judges ignored Dyer's lie for 200 years. Yale professor John Langbein's research (published in 1994) on the period 1660-1800 showed there was not 'a single case in which an accused refused to speak on asserted grounds of privilege, or in which he makes the least allusion to a privilege against self-incrimination'. However, Blackstone wrote in his *Commentaries* (1765-69): 'At the common law, *nemo tenebatur prodere seipsum*.' (No-one was compelled to accuse himself.). That was not the common law at

all, but James Madison fatally entombed it in the US Constitution as the Fifth Amendment in 1791.

Justice Michael McHugh referred to *The Privilege Against Self-Incrimination: Its Origins and Development* (University of Chicago Press, 1997), in [Joseph] *Azzopardi v The Queen* (Australian High Court, 2001). McHugh said the book, by Dick Helmholz, Charles Gray, John Langbein, Eben Moglen Henry Smith, and Albert Alschuler, demonstrated that the immunity ‘did not become firmly established as a principle of the criminal law until the mid-19th century or later’.

Jeremy Bentham observed in 1827 that the privilege is irrational and was perpetuated only by those ‘duped and corrupted by English lawyers’, e.g. Blackstone. The dupes, willing or otherwise, included Sir Harry Gibbs (1917-2005), who famously said in 1974 that a profit was a loss, and became Australia’s Chief Justice in 1981. Gibbs defined the privilege in *Sorby v The Commonwealth* (1983). Quoting *Lamb v Munster* (1882), Gibbs said a suspect cannot be compelled ‘to answer any question, or to produce any document or thing, if to do so “may tend to bring him into the peril and possibility of being convicted as a criminal”.’

The privilege tends to confirm Brett Dawson’s view that criminal law is a get-the-guilty-off game. Cambridge law professor Glanville Williams said in *The Proof of Guilt: A Study of the English Criminal Trial* (Stevens, 1963):

... immunity from being questioned is a rule which by its nature can protect the guilty only. It is not a rule that may operate to acquit some guilty for fear of convicting some innocent.

US Chief Justice (1953-69) Earl Warren (1891-1974) thus spoke truer than he knew when he said in *Miranda v Arizona* (1966) that the privilege is 'the essential mainstay of our adversary system'.

Alun Jones QC said: 'I am told that over half of all defendants in America decline to give evidence.' Law lecturer Dave Dixon, of the University of NSW, said in 1997 that about half those who remained silent are convicted, i.e. 25% of the total. Blackstone's lie is thus one of his great legacies to criminals and their lawyers.

Justice Lionel Murphy, of the Australian High Court, was charged with perverting justice. He gave evidence, was seen to be shifty and evasive and was found guilty. He got a retrial on a technicality, refused to give evidence, and got off in 1986.

O. J. Simpson got off murder charges largely because of race, but the 'right' of silence helped. He had to give evidence at his civil trial in 1996, and was seen to be shifty, evasive and contradictory. He was found responsible for the murders.

As a matter of human dignity, suspects can refuse to talk but silence risks adverse inference. They would probably demonstrate their innocence if they could, but judges in the second half of the 20<sup>th</sup> century compounded Blackstone's lie: they gave silent suspects immunity from adverse inference.

Justice Geoffrey Davies, of the Queensland Court of Appeal, noted that immunity from inference offends reality and common sense. He wrote in *The Prohibition Against Adverse Inferences from Silence: A Rule without a Reason?* (Part 1, *Australian Law Journal*, 2000):

An obvious example is a parent asking a child, cricket bat in hand, whether he hit the ball through the broken window. Could it be seriously suggested that the parent should never draw an adverse inference from the child's refusal to answer? ... it suits the view of many, including most defence lawyers, that nothing should change.

The Australian High Court edged towards removing immunity from adverse inferences in *Weissensteiner v Her Majesty* (1993), and British legislators abolished it in 1994, but Australian legal bureaucrats largely restored the immunity in the Commonwealth and NSW *Evidence Acts* of 1995. Section 20 (2) of the NSW Act says judges - but not prosecutors - can comment on an accused's refusal to speak, but cannot suggest it was because he was guilty.

## **2. Prove it!**

As noted in the Origins section, the criminal adversary system is a quite recent and lawyer-run version of the anti-truth accusatorial (Prove it!) system that came out of the Dark Ages. In the new version, prosecutors are required to prove a case after evidence has been concealed. That reaches its

logical conclusion when a judge conceals ALL the evidence and then invites a bemused prosecutor to prove his case. That happened in an Australian case which concerned an alleged white collar theft of \$66 million. (See below. *Concealing evidence said to have been improperly gained.* )

Three New York detectives, Gescard Isnora, Michael Oliver and Marc Cooper, fired 50 shots into an unarmed man, Sean Bell, in November 2006. They were charged with manslaughter. An ounce of evidence is said to be worth a pound of demeanour. In April 2008, Judge Arthur Cooperman, 74, sitting without a jury, rejected the evidence of all 50 prosecutions witnesses, partly, he said, because of their demeanour. The detectives refused to give evidence. Judge Cooperman was thus not able to assess their demeanour. He found them not guilty.

### 3. Legal aid

A British (Labour) Attorney-General, Sir Hartley ('We are the masters [now]') Shawcross (1902-2003) invented legal aid in 1949. Arthur Marriott QC, of London, told a Sydney audience in October 2005: 'Perhaps the main impact of the [Legal Aid] Act was the extraordinary growth in the numbers of practising lawyers.'

Legal aid is effectively a fraud on the public and taxpayers in almost all criminal cases because the accused are guilty. Accused are entitled to a defence, but legal aid lawyers should not be allowed to use public moneys to defeat truth and pervert justice.

At least in two Australian states, there is a gulf between the budgets for legal aid and the Director of Public Prosecutions (DPP). Tony Koch reported in *The Australian* (17 May, 2008) that the Queensland DPP's budget was less than a third of legal aid from state and federal sources: the DPP got about \$30 million to try to put criminals in prison; trial lawyers got \$101.3 million a year to try to keep them out.

In New South Wales, the DPP's budget for 2007-08 was \$96 million; the legal aid budget was \$214 million. In 2009, DPP Nicholas Cowdery QC was obliged to drop some prosecutions, and could not provide lawyers for some courts.

#### **4. Improper use of presumption of innocence**

The presumption of innocence is a nice legal fiction; if taken literally, no criminal would be charged. The reality is a presumption of agnosticism: the suspect/accused may be innocent, or he may not. The presumption is not absolute; some jurisdictions have a presumption of guilt for such cases as goods in custody: if police find heroin in the trunk of a car, it is presumed to be the owner's unless he can prove otherwise.

In itself, the presumption of innocence is a relatively harmless fiction; it becomes a vice when used to prop up other anti-truth devices, e.g. the rule against self-incrimination and the rule against evidence of a pattern of criminal behaviour.

Lord Chief Justice Rayner Goddard got a severe birching for saying of pattern evidence (*R v Sims*,

1946): 'If one starts with the general proposition that all evidence that is logically probative [tending to prove guilt] is admissible unless excluded [by a specific rule], then evidence of this kind does not have to seek a justification.' The law lords said (*R v Hall*, 1952) Goddard was wrong because his view tended to subvert the presumption of innocence. He might have replied that all probative evidence tends to subvert the presumption of innocence, but he had to toe their lordships' line.

## 5. Precedent

*Stare decisis* (the decision stands) means abiding by precedents set by judges who may have been wrong or corrupt, but lock bad law into the system. Judges and lawyers can also riffle through precedents until they find one that suits their agenda.

Precedent also offends the rule against hearsay (see below), which conceals the evidence of speakers who are not available for cross-examination which might show they were wrong. The corrupt Lord Eldon said in *Sheddon v Goodrich* (1803): '... it is better the law should be certain than that every judge should speculate upon improvements in it.' Unfortunately, Lord Eldon is not available for cross-examination.

It was only after criminal work became a business proposition for lawyers that judges became bound by precedent, however bad. Professor Theodore Plucknett wrote in *A Concise History of the Common Law*: '... even as late as the days of Baron

Parke [1782-1868; Court of Exchequer 1834, created baron 1856] ... it was possible for that very learned judge to ignore decisions of the House of Lords ... The 19<sup>th</sup> century produced the changes which were necessary for the establishment of the rigid ... theory as it exists today.'

David Pannick QC, of London, wrote in *Judges* (Oxford 1988): 'There are many things wrong with the English legal system. A large proportion of them can be explained by our reverence for the doctrine of precedent. We do things not for any rational reason but because they have previously been done that way.' He noted an 18th century judge, Samuel Lovell, who was 'overtaken by the tide', but refused to escape drowning unless a precedent could be quoted for judges mounting the coach-box.

## **6. The theory of the case: fabricating a defence**

Although lawyers know that almost all accused are guilty, they claim that legal 'ethics' allow them to do whatever it takes, including fabricating a defence, to create a 'reasonable' doubt in the mind of a juror.

Techniques vary, but most involve attempts to shift the blame from the client to, variously, the victim, police, prosecutor, the media, or some other person or thing. That is called the theory of the case: it is not our guy; therefore it must be some other person or thing. A criminal trial can thus be a lavishly-produced charade. The judge, who will have used the theory of the case in his days as a trial



lawyer, may mentally tick off the fabrications as they are produced.

John Dobies, a Sydney lawyer, pilloried the theory of the case in what he called The Polar Bear Defence. If there were scratches on the body of a murder victim, the murderer may have been a polar bear. The lawyers would hire witnesses expert on the incidence of polar bears in Sydney, and others prepared to swear they saw a polar bear that day.

Professor David Luban wrote in *Lawyers and Justice*:

... the adversarial lawyer reasons backward to what the facts must be, dignifies this fantasy by labelling it the 'theory of the case', and then cobbles together whatever evidence can be offered to support this 'theory'. For example, a 'large, reputable law firm' defended an insurance company against a claim concerning a woman who drowned in her swimming pool. The lawyers decided that if the death was a suicide, their client wouldn't have to pay ... Suicide became their 'theory of the case' ... to the consternation of their bewildered and appalled adversaries.

Lawyer/reporter Jeffrey Toobin wrote in *The Run of His Life: The People v. O. J. Simpson* (Touchstone 1997):

Of course, Robert Shapiro and Johnnie Cochran [Simpson's lawyers] knew from the start what any reasonably attentive student of the murders of Nicole Brown Simpson and Ronald Lyle Goldman could see: that O. J. was guilty of killing them. Their dilemma, then, was

... the most common quandary of the criminal defense attorney: what to do about a guilty client? The answer, they decided, was race ... they sought to create for the client – a man they believed to be a killer – the mantle of victimhood. [They] sought to invent a separate narrative, an alternative reality, for the events of June 12, 1994. This fictional version ... posited that Simpson was the victim of a wide-ranging conspiracy of racist law enforcement officials who had fabricated and planted evidence in order to frame him for a crime he did not commit.

The SOD Defence is that some other dude did it. Toobin noted that another member of the Simpson team, Professor Gerald Uelmen, of the Santa Clara law school, said the murder ‘bears all the hallmarks of a drug-related homicide, in which the frequency of multiple victims, the use of knives, the use of stealth, is much more frequent than it is in the case of domestic violence’. Toobin commented: ‘As Uelmen uttered the words “drug-related”, there was an audible intake of breath in the courtroom. The suggestion was (and remains) preposterous, even on Uelmen’s own terms ...’

In June 2008, an Australian lawyer, Robin Tampoe, admitted that he concocted a defence for Schapelle Corby, who was found guilty of importing 4.5 kilograms of marijuana into Bali, Indonesia, in 2005, and got 20 years. Tampoe said the defence, that corrupt airport baggage handlers in Australia put the marijuana in her bag, was false. Miss Corby’s Indonesia lawyer, Erwin Siregar, described Tampoe’s statement as ‘a crazy admission’. In June 2009, a Queensland judge, Roslyn Atkinson, struck

Tampoe off for bringing the profession into disrepute. She said:

A person acting as a criminal defence legal practitioner cannot under any circumstances invent facts or invent a defence. To say such a thing is scandalous and is likely to cause the public to lose confidence in not only the legal profession but in the criminal justice system, because it suggests that in response to a criminal charge what one should do is find a legal practitioner who will make up a defence for the alleged offender. Nothing could be further from the truth.

## **7. The abuse excuse**

Lyle and Erik Menendez, of Hollywood, murdered their parents to get their money in 1989. They had the same trial, but with separate juries, in 1993. Leslie Abramson, for Erik, claimed years of verbal and physical abuse by their father, Jose, drove them to do what they did. A psychiatrist said Erik's brain had been 're-wired by fear'. She supported this claim with her research on snails. Both sets of jurors were deadlocked; some jurors thought they were guilty of manslaughter only.

At the second trial in 1996, the judge ruled much of the abuse evidence irrelevant but admitted a claim that Erik suffered from Post Traumatic Stress Disorder which prevented him from formulating thoughts necessary for premeditated murder. Both were found guilty of murder and sentenced to life without parole.

## 8. The self-abuse excuse

Noa Nadruku, of Canberra, Australia, was charged with assault on three women in 1997. His defence was that he could not form a guilty intent because he had drunk 16 pints of beer and half a bottle of wine in 11 hours. A magistrate found him not guilty.

## 9. The lecture

When the lawyers have decided on the theory of the case, they may coach the accused – subtly or otherwise – in case they decide to let him give evidence. Judge (1957-59) John Voelker (1903-91), of the Michigan Supreme Court, published *Anatomy of Murder* in 1958 under the pen name Robert Traver. It was inspired by a case in which Voelker was the defence lawyer. Fred D. Shapiro quoted from the book in *OxfordLQ*: :

The Lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching ... 'Who, me? I didn't tell him what to say,' the lawyer can later comfort himself. 'I merely explained the law, see.'

Judge Voelker showed how a lawyer, Paul Biegler, helped his client fabricate a defence to a murder charge:

'You mean, that my only possible defense in this case is to find some justification or excuse?'

My lecture was proceeding nicely to schedule. 'You're learning rapidly,' I said, nodding approvingly. 'Merely add legal justification or excuse and I'll mark you an A.'

'And you say that a man is not justified in killing a man who has just raped and beat up his wife?'

'Morally, perhaps, but not legally.'

Biegler told his client a murderer might not be guilty if he was temporarily mad, and advised him to go back to his cell and think about it. The client took the hint, and got off. One remedy is to make lawyers take an oath to tell the truth.

## 10. Delay

Delay helps criminals. Witnesses die or forget; prosecutors tire or calculate the costs. Peter Faris QC, former head of Australia's National Crime Authority (NCA), told the 6<sup>th</sup> International Criminal Law Congress in Melbourne in 1996:

Excellent books have been written discussing criminal defences. In my view, the major criminal defences, in order of importance, are as follows:

1. Delay.
2. Confusion.
3. Allegations of conspiracy by the police and prosecuting authorities to conceal and tamper with the evidence, thus raising a reasonable doubt.
4. Defences set out in the excellent books.

Mervyn Wood (1917-2006), a corrupt NSW Police Commissioner (1976-79), confirmed Faris's point about delay. He colluded with a corrupt magistrate, Murray Farquhar, to fix a drug case in 1979; was charged in 1986 with attempting to pervert justice; and committed for trial in 1989. In 1991, a Dizzo (District Court) judge, John Sinclair, permanently stayed the perversion charge because of the delay (seven years) in charging Wood.

Lawyers supervised the (Australian) NCA's investigations into suspected organised crime. A case concerning John Dorman Elliott and others (see below: Concealing evidence said to have been improperly gained) began in 1989; charges alleging theft of \$66 million were laid in 1993; the case collapsed in 1996 when the judge wrongly concealed the evidence of some 130 witnesses. The NCA lawyers' dismay was recorded by its oversight body, the Parliamentary Joint Committee (PJC), in its *Third Evaluation of the NCA* (1998). The PJC reported that Greg Melick, a barrister member of the NCA, said:

... a person with enough funds and properly advised could probably delay the Authority's investigative processes by some three to four years before they could actually be forced to answer relevant questions before a hearing ... three and a half years of litigation, in which they [Elliott *et al*] did not win one stage but they delayed the matters by a substantial amount of time ... anybody who can afford it can probably avoid the consequences because, if you have got the money – and it takes millions of dollars – you can protract the system for as long as you like.

## 11. Plea-bargaining

Professor John Langbein wrote in *The Historical Origins of the Privilege Against Self-Incrimination at Common Law* (Michigan Law Review, March 1994):

... when our criminal procedural system crumbled in the twentieth century under caseload pressures, our response was to dispense with trial altogether, transforming the pre-trial process into our no-trial plea-bargaining system.

Caseloads are a factor, but plea-bargaining is an admission that the system's anti-truth devices make it difficult to get convictions. Prosecutors offer suspects a no-risk bargain: accept a large fine or a few years in prison against the possibility of going to prison forever. Plea-bargaining works two ways. It can put the innocent in prison and give the guilty a much lighter sentence and thus deprive victims and the community of justice.

Judges (and jurors) in France and Germany do not accept guilty pleas. They have to find the truth for themselves, and they know a guilty plea can be false because of torture, coercion or to protect others.

## 12. Preliminary (committal) hearings

Preliminary hearings presume that prosecutors are incompetent. A minor judicial officer has to decide whether the prosecution's evidence is sufficient to commit an accused for trial. Apart from making more money for defence lawyers and depleting

prosecution budgets, preliminary hearings are all one way: only the prosecution case has to be revealed. This helps defence lawyers to fabricate a defence, to 'destroy' key witnesses out of the sight of jurors, and to deter them from giving evidence at the trial.

Ottawa lawyer Michael Edelson outlined his approach to sex assault cases at a 1988 seminar for lawyers. Speaking of 'whacking the complainant' at preliminary hearings, Edelson said: 'You've got to attack the complainant hard with all you've got so that he or she will say: "I'm not coming back in front of 12 good citizens to repeat this bullshit story that I've just told the judge".'

Peter Faris QC told an international criminal law congress in 1996: 'There is no justification for the delay and cost of trying issues twice. Committals should be abolished.' The truth-seeking system does not have preliminary hearings.

### **13. Separate trials**

Several defendants in the same case may get separate trials if some evidence against one is different from that against others. Also, a person charged with several similar crimes can get a separate trial on each charge because the evidence of all the victims might reveal a devastating pattern (see below Concealing a pattern of criminal behaviour). Natasha Wallace reported in *The Sydney Morning Herald* of 2 July 2004:



Brother John Maguire has faced eight [separate] trials on child sex abuse charges. Eight times, including yesterday, he has been acquitted, with none of the jurors ever told of the other allegations against him ... Jurors at each trial, before Judge Megan Latham at the NSW District Court since last November, were therefore unaware of the extensive allegations against Brother Maguire ... 'It becomes one person's word against another', one complainant said yesterday.

The children may have wondered what Judge Latham thought as she sat passively through the eight trials.

#### **14. Only a bit mad: diminished responsibility**

In most crimes, the prosecution has to prove both a wrongful act (*actus reus*) and a wrongful intent (*mens rea*). It is not a crime to think about murder, nor is it a crime to commit murder if you were mad at the time. The latter derives from a House of Lords opinion in *M'Naghten* (1843).

Diminished responsibility is a relatively recent wrinkle on *M'Naghten*. In the 1960s, judges began to accept lawyers' arguments that if the accused was only a little bit mad, he might be only a little bit guilty. Trials tended to become contests between psychiatrists.

The Hon Burton S. Katz, no longer a judge, wrote in *Justice Overruled: Unmasking the Criminal Justice System* (Warner, 1997):

If a man commits a crime, I believe that he is responsible for his crime - not his mommy and daddy, not racism, not an abusive spouse, not recovered memories of childhood abuse, not his potty training. He alone is responsible. He made the decision to murder. Then he murdered. He made the decision to rape. Then he raped. Until we firmly re-establish that principle in our courts, our justice system will cease to have much meaning.

Three cases in point:

**Twinkies.** Dan White was dismissed from the San Francisco public service in 1978. He got a gun; evaded metal detectors by climbing through a City Hall basement window; evaded Mayor George Moscone's bodyguards; killed Moscone with four shots; reloaded; went to the office of another official, Harvey Milk, and killed him with five shots.

White was charged with first degree (premeditated) murder. It was argued on his behalf that his new addiction to junk food, including Twinkies, a confection with a high sugar content, confirmed that losing his job had depressed him, and that depression had prevented premeditation. Dr. Martin Blinder, a psychiatrist, said excessive sugar could have aggravated a chemical imbalance in his brain. The jury found White not guilty of premeditated murder, but guilty of manslaughter. He got six years.

**Bobbitt.** Lorena Bobbitt got a kitchen knife and sliced off half her husband's penis while he was in a drunken slumber in 1993. In 1994, a jury found her not guilty of malicious wounding on the ground that

her temporary insanity gave her an irresistible impulse to wound.

**Anu Singh.** Helen Garner reported in *Joe Cinque's Consolation: A True Story of Death, Grief and the Law* (Picador, 2004) that Anu Singh, 25, a self-obsessed drama queen and final year law student in Canberra, Australia, got advice on how to inject an overdose of heroin in September 1997.

During the night of Saturday, 25 October 1997, Singh put a knockout drug, Rohypnol, in the coffee of her amiable boy friend, Joe Cinque, 26, a civil engineer. At about 3 am on the Sunday, Singh injected heroin into Cinque's body, but he failed to die. She went out, bought more heroin and injected him again at about 10 am. He died about 2 pm. She was charged with murder.

In April 1998, the trial judge, Ken Crispin, sitting without a jury, agreed with psychiatrists who said Singh's responsibility was diminished because she was somewhat mentally disturbed. He found she was not guilty of murder but guilty of manslaughter. He gave her a minimum of four years, backdated to the date of her incarceration, October 26, 1997.

Sing passed her law finals in prison, and was out in October 2001. A glittering career was predicted. Adversarial cross-examination is the Theatre of Cruelty. The cruellest action is robbing a person of his life.

Garner noted 'the ugly divide between morals and the law'. She asked whether 'the moral failure of the law' gives judges an 'icy chill'? The answer is no.

If the system's lack of morality chilled judges, they would do something about it.

### **\*15. Concealing client-lawyer conspiracy**

Raymond Chandler's Philip Marlowe said in *The Long Goodbye* (1953): 'How long do you think the big-shot mobsters would last if the lawyers didn't show them how to operate?'

The privilege of client-lawyer secrecy is a major plank of Professor Benjamin Barton's theory that judges favour lawyers' interests. Judges say the privilege helps the administration of justice. That confirms that common lawyers have a peculiar idea of justice; the privilege protects the guilty and does not protect the innocent.

The privilege resided in the lawyer, not the client when it first appeared in *Berd v Lovelace* (1577). Perhaps indulging a taste for irony, Justice Michael Kirby, said in *The Commissioner, Australian Federal Police and Others v Propend Finance Pty Ltd and Others* (Australian High Court, 1997): 'Early cases suggested that [the privilege] belonged to a solicitor and derived from his honour as a "professional man and a gentleman".'

A gentleman presumably would not waive the privilege and disclose details of his criminal conspiracy with a client, but rich criminals got a nasty surprise in 1743 when, as noted in the section on ethics, James Giffard, a lawyer but no gentleman, revealed that he conspired with an organised criminal to procure a judicial killing.

Justice Sir Francis Buller (1746-1800) did the decent thing. In *Wilson v Rastall* (1792) he decided earlier judges were wrong, and that the privilege belongs to the client, not the lawyer. Rich criminals could now conspire with lawyers safe in the knowledge that only criminals could waive the privilege.

In 1827, Jeremy Bentham, whose clothed skeleton still gazes amiably at passers-by in the seat of learning he founded, University College London, formulated an unanswerable argument: if the client is innocent, the lawyer has no guilty secret to betray; if guilty, no injustice flows from its absence. He said the privilege thus had no legitimate purpose, and should be abolished.

Henry Brougham, who had successfully blackmailed George IV in 1820, was Lord Chancellor 1830-33. Lord Brougham ruled that any legal transaction might lead to litigation; all transactions involving lawyers must therefore be secret.

Justice Sir James Knight-Bruce (1791-1866) made an argument for secrecy in *Pearse v Pearse* (1846). He begins with a lie; descends into puerility and finally invokes Othello to claim that truth does not matter. He said:

The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice, [but] surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser ... are too great a price to pay for truth ...

Truth, like other good things, may be loved unwisely, may be pursued too keenly, may cost too much.

Professor David Luban says that the privilege cannot exist if lawyers are in business. It is clear that the common law has been a business since it began in the 12<sup>th</sup> century.

Richard Ackland, proprietor of *Justinian*, noted the reality in *The Sydney Morning Herald* of 2 April 2004:

The truth is that companies of various shapes and sizes have for many years wheeled barrowloads of documents through the portals of the large law firms on the pretext of getting legal advice, but really hoping to achieve an ambit privilege from disclosing all sorts of unattractive details of their day-by-day conduct.

As noted, the courts have been trying to shut the Press up since Defoe invented modern journalism in 1704. The super-injunction – an order to conceal the existence of an injunction to conceal something – is merely the latest wrinkle.

Carter-Ruck, a London law firm, obtained super-injunctions in 2009 on behalf of a shipping company Trafigura, to: 1) Prevent *The Guardian* from publishing details of data covered by client-lawyer secrecy; 2) Prevent disclosure that an injunction had been obtained; 3) Prevent disclosure that a member of Parliament had put a question about the matter on the notice paper. *The Economist* reported the upshot:

This week a national newspaper ran a fascinating story about absolutely nothing. *The Guardian* reported on its front page on October 13th that a question had been tabled by an MP in Parliament, but that the newspaper could not reveal 'who has asked the question, what the question is, which minister might answer it, or where the question is to be found'. The reason, it explained no less cryptically, was that 'legal obstacles, which cannot be identified, involve proceedings, which cannot be mentioned, on behalf of a client who must remain secret'.

The super-injunction implying that judges could also shut members of Parliament up was a step too far; freedom of speech in Parliament has been absolute since 1771. Politicians were furious.

In any event, *The Guardian* article and an equally obscure and/or cunning Twitter by the editor, Alan Rusbridger, had led to discovery of the question on a parliamentary website. The data injunctioned via client-lawyer secrecy were also published on Wikileaks and discussed on SideWiki. The horse having bolted, Carter-Ruck withdrew the injunction and super-injunctions.

A message from the Trafigura episode may be that data which judges conceal from jurors, e.g. evidence in criminal and civil actions, could likewise get into the public domain while a case is proceeding

The privilege damns itself doubly: it protects the guilty but not the possibly innocent. A judge sent me the judgment in *Carter v Managing Partner Northmead Hale Davey and Others* (Australian High Court 1995). He said: 'Read this and weep.'

Louis James Carter, a Brisbane accountant was charged with fraud. He said certain documents said to be covered by the privilege would prove his innocence. Should judges opt for justice or law? The voices of infallibility went for law, by the usual narrow margin. Justices Mary Gaudron and John Toohey said Carter should get the documents. Chief Justice Sir Gerard Brennan, Justice Michael McHugh and a rather apologetic Justice Sir Billy Deane said he should not. Carter got four years.

#### **\*16. Concealing hearsay**

In the investigative system hearsay evidence is weighed, not concealed. That was also the common law practice until lawyers got control of the criminal process. Professor Julius Stone and former Justice W.A.N. Wells wrote in *Evidence: Its History and Policies* (Butterworths, 1991):

This need of care in receiving hearsay testimony was recognised by our courts as one of wisdom and policy as long ago as the middle of the 16<sup>th</sup> century ... As a categorical rule of the English law of evidence, however, it was probably only settled at the end of the 18<sup>th</sup> century ... with the remarkable result that the former cases of admission and use of such testimony as a matter of course were transformed in the 19<sup>th</sup> century into a limited number of exceptions to a rule excluding all hearsay evidence.

The excuse for concealing second-hand evidence is that the original speaker is not available for cross-



examination which might show he was wrong, confused, or simply lying. If that were a valid excuse for concealing evidence, judges would not be bound by precedents made before, say, 1900. Nor would we accept that the US broke from Britain, or that Britain won the Battle of Waterloo.

O.J. Simpson was accused of having cut the throat of his wife, Nicole, on Sunday, 12 June, 1994. In January 1995, Judge Lance Ito used the hearsay rule to conceal evidence of her diary entries in which she said she was afraid Simpson might kill her, and evidence that she rang a refuge five days before her murder and said Simpson was stalking her and that she was afraid. Judge Ito said:

To the man or woman on the street, the relevance and probative value of such evidence is both obvious and compelling ... it seems only just and right that a crime victim's own words be heard [but precedent] clearly held that it [the hearsay evidence] is reversible error.

Lord Justice Stephen Sedley said (*Howzat? London Review of Books*, 25 September 2003) that the English and US criminal process is still caught up in:

... the absurdities of the rule against hearsay evidence ... which even lawyers have difficulty in understanding and applying. (Is it permissible to testify that when the accused ran off, someone shouted 'Stop thief!' and so on.)

An exception to the rule against hearsay is a statement by someone who knows he is dying. Acting Leading Stoker A.R. Gordon, in company

with Stoker E.J. Elias, stabbed Stoker J.J. Riley 14 times on the battle cruiser HMAS *Australia* in March 1942 to prevent him reporting their homosexual activities. Before he died, Riley told three officers that Gordon had stabbed him, but their evidence was concealed because a doctor did not tell Riley he was going to die. Gordon and Elias were convicted on circumstantial evidence.

### **\*17. Concealing a pattern**

Justice Russell Fox says an understanding of facts depends heavily on context, but as Dr Bob Moles notes in the Foreword to this book: ‘... most of what we need to know to place the knowledge in context in trials is ruled to be inadmissible ...’

The rule against ‘similar facts’ specifically hides evidence of a pattern of criminal behaviour. In another lie by omission, prosecutors are obliged to falsely imply that the accused is a first offender. For instance, in 2003 an incompetent Welsh thief’s 247 previous convictions were concealed from the jury. He was found not guilty of theft. The rule thus eliminates much context, truncates the chronology – always the first element of deduction – and protects repeat criminals, e.g. serial rapists and organised criminals such as extorting judges and the Mob.

The rule, a relatively recent concoction, derives from a case of systematic murder of babies. Sydney ‘baby-farmers’ John and Sarah Makin took in unwanted babies for a fee; murdered them; and buried the bodies in their back yards. They were

charged with murdering one baby. The trial judge let in evidence of 12 other dead babies found in the yards of their various previous homes. The guilty verdict was appealed up to the Privy Council in England on the basis that evidence of the other 12 murders was unfair to the Makins.

In *Makin v Attorney-General of NSW*, the Privy Council dismissed the appeal, but Lord Chancellor (1886 and 1892-95) Farrer Herschell (1837-99) used words which have been taken to mean that pattern evidence will almost never be admitted. Herschell said:

It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely to have committed the offence for which he is being tried.

Dr John Forbes said in *Similar Facts* that, 'despite complaints that *Makin* is vague if not almost vacuous', Herschell's remarks 'still enjoy scriptural status'. Dr Forbes noted a US version in *People v Molineux* (1901): 'The State cannot prove against a defendant any crime not alleged in the indictment ... as aiding the proofs that he is guilty of the crime charged.' Oliver Cyriax, a lawyer, wrote in *The Penguin Encyclopedia of Crime* (1996):

It is generally agreed that the date-rape case against William Kennedy Smith failed on the first day of the trial,

2 December 1991, when the prosecution was barred from calling evidence of similar assaults by Smith. The rules against 'similar evidence' are strict. Nothing is more likely to lead a jury to a finding of guilty – on the 17<sup>th</sup> occasion – than to hear the suspect committed (or has been acquitted of committing) the same offence 16 times before ... evidence of prior acts is only admissible if the crimes show a clear and unique 'signature' or *modus operandi*.

Jason Van Der Baan committed a number of sex crimes in Sydney between 1994 and 1996. In 2001 he was convicted on two sex crimes and sentenced to eight years. He was then charged with the murder of his aunt, Mrs Irene Wilson, 39, at her home in 1995. She was found face down on a bed with her hands tied behind her back and a cord around her neck. In 2002, the trial judge, Greg James, felt that the law obliged him to conceal:

- Van Der Baan's two previous convictions for sexual assault.
- His confession to an undercover police officer in prison.
- Evidence that he tied up other victims in the same way as the murderer of Mrs Wilson.
- Evidence that he was obsessed with her and had stolen her underwear and cut out the crotch.

The defence was of the SOD variety. A friend of Mrs Wilson was cross-examined as if he was a suspect. He was not allowed to sit with the family in court because it would be unfair to the accused if the jury

could see he was still a friend of the family. The jury took only three hours to find Van Der Baan not guilty. Even Dominick Dunne could not have improved on the words of Mrs Wilson's brother:

This trial was not about the murder of my sister ... it wasn't about truth or about justice; it was about points of law. All we hear about are the rights of the accused. What about her rights to have lived and seen her children grow? What about the rights of her children to be cared for by a loving mother?

Van Der Baan hoped to get parole on the other crimes when DNA (deoxyribonucleic acid) evidence tied him to a sex crime in 1995 and another in 1996. He pleaded guilty to the charges in April 2009.

The US has had an exception to the rule against pattern evidence since 1970, but only for organised criminals in the Mafia, in business, and in the judiciary. The exception was the product of an unlikely combination of a Mob hitter, a Senator, a young lawyer, and a complex President. Senator John McClellan (Democrat, Arkansas, 1896-1977), a lawyer, chaired the Sub-committee on Investigations from 1955 to 1973. In 1963, an assassin in the Genovese family, Joe Valachi (1903-71), explained the structure of the Mafia to the sub-committee and, via television, to the public.

Bob Blakey was the principal draftsman of subsequent legislation to deal with organised crime. The legislation was to hand when Richard Nixon ran for President in 1968 partly on law and order, and

was passed in 1970 as the Organized Crime Control Act. The RICO (Racketeer-Influenced and Corrupt Organisations) legislation is Title IX of the Act.

RICO was plainly going to make it harder for lawyers to get rich organised criminals off. I asked Blakey, now a law professor at Notre Dame, in 2001 how he got RICO past the American Bar Association. He replied:

Only with difficulty. The ABA at first endorsed it. We had an in with the President [Nixon]. It [the ABA] then raised objections. We overcame them with White House support.

RICO's effect on the Mob confirmed that the pattern rule perverts justice on a huge scale. It put away 23 previously untouched Mafia bosses throughout the US between 1981 and 1992 including those of the five New York families: Frank (Funzi) Tieri and Anthony (Fat Tony) Salerno (Genovese family), Anthony (Tony Ducks) Corallo and Vittorio Amuso (Lucchese family), Carmine (The Snake) Persico and Vicorio Orena (Colombo family), and John Gotti (Gambino family). Vincente (Chin) Gigante (Genovese family) was convicted in 1997.

RICO was used to imprison 70 white collar organised criminals in Chicago: 20 judges and their 50 bagmen (lawyers and court officials) between 1984 and 1994

In 1994, US federal rules of evidence were revised to allow the use of prior alleged acts in

federal sex cases. A few states, including California, Indiana, Illinois and Missouri, adopted similar rules.

In 2004, British Home Secretary David Blunkett, announced a plan to give judges a discretion to let jurors hear of an accused's previous convictions. He said: 'These reforms put victims at the heart of the justice system. Trials should be a search for the truth [!] and juries should be trusted with all the relevant evidence to help them to reach proper and fair decisions.'

Blunkett no doubt meant well, but Professor Benjamin Barton would say it is unwise to give judges a discretion in matters which affect lawyers' financial interests. And if the Government really believed that trials should be a search for truth, they would abolish the other 23 anti-truth devices.

Australian police and other experts have requested RICO-type legislation since 1984, but the rule against pattern evidence continues to protect white-collar organised criminals, the Calabrian 'Ndrangheta, and sex criminals.

### **\*18. Concealing improperly gained evidence**

Common law countries vary on concealing evidence said to have been improperly procured.

British judges tend to let the evidence in if it is reliable. Australian judges have been supposed to let the evidence in since *Bunning v Cross* (High Court, 1978), if it is reliable and if the investigators' misbehaviour is less vile than the crime alleged. A similar rule applies in Canada. The US position was

uncertain from 1791 to 1961. The Fourth Amendment stated:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ...

No one knows what 'unreasonable' means. Judge Harold Rothwax says in *Guilty: The Collapse of Criminal Justice* that 'in more than 90 per cent of cases, the police don't know what the law is', i.e. what is reasonable in the particular case. He added. 'A chief judge riding in the back seat of a police car wouldn't know what the law is!'

Justice Benjamin Cardozo (1870-1938, Supreme Court 1932-38) did not like concealing the evidence. He said: "The criminal is to go free because the constable has blundered'. More criminals have gone free since 1961 because of devious manoeuvres by Tom Clark (1899-1977, Supreme Court 1949-67). It seems more likely than not that Murray (The Camel) Humphreys, a fixer for the Chicago Mob, organised Clark's appointment to the court.

A fix was needed because the Chicago boss, Paul (The Waiter) Ricca (1897-1972, b. Felice De Lucia, Naples), got 10 years in 1943 for extorting from Hollywood film studios. In 1947, possible new charges promised to defeat his chance of parole. The privilege of client-lawyer secrecy made it safe for Ricca to conspire with his lawyers. Carl Sifakis reported:



Printed accounts [in Chicago] had Ricca telling his lawyers to find out who had the final say in granting him a speedy release, saying: 'That man must want something: money, favours, a seat in the Supreme Court. Find out what he wants and get it for him.'

The man who got the job was a thinking man's mobster. Sifakis said Alphonse Capone (1899-1947) said:

Anybody can use a gun. The Hump uses his head. He can shoot if he has to, but he likes to negotiate with cash when he can. I like that in a man.

Gus Russo wrote in *The Outfit: The Role of Chicago's Underworld in the Shaping of Modern America* (Bloomsbury, 2004):

After considering the problem, Humphreys hit upon the solution: He would tap a 68-year-old Missouri attorney named Paul Dillon, a litigator he had employed in 1939 ... Humphreys' kinship with the Missouri-based Dillon was a natural result of his role as the Outfit's political liaison to that state. And in the shadowy world of underworld-upperworld collusions, this linkage gave Humphreys leverage over the most powerful politician in the United States ... Dillon's gangster associates in Kansas City, Missouri, had sponsored the ascendancy of the 33rd president of the United States, Harry S. Truman. Humphreys knew that by playing the Kansas City card he was subtly threatening to open a Pandora's box that Washington would be forced to address.

Oliver Cyriax said it was claimed that the terms of The Camel's deal were that Truman would get 'a \$5 million backhander'; Attorney-General Tom Clark would release Ricca; and Clark would get the next vacant seat on the Supreme Court. Clark released Ricca in 1947. Truman put Clark on the court in 1949.

In 1957, a boxing promoter with electric hair Don King (b. 1931), told Cleveland police of a bomb suspect. Police broke into Dolree Mapp's premises. There was no bomber, but they charged Mapp with possessing obscene materials. She appealed her conviction to the Supreme Court.

Judge Harold Rothwax says *Mapp v Ohio* (1961) was a straightforward First Amendment (free speech) case. The 'search and seizure' Fourth Amendment was not argued at the hearing, nor was it raised when the judges conferred. They voted 9-0 to reverse the conviction on First Amendment grounds, but Clark wrote the opinion on Fourth Amendment grounds. He said all evidence wrongly gained must be concealed. Judge Harold Rothwax observed:

Clark's opinion stood, but the vote of the justices was quite revealing. Although the majority ... agreed that Mapp's conviction should be reversed, only four of the judges (a minority) agreed on Fourth Amendment grounds ... What Clark and his allies did was comparable to the Supreme Court overruling *Roe v Wade* [1973], the abortion rights decision, with a case involving free speech.

A jury correctly found that Edward Coolidge had cut the throat of Pamela Mason, 14, but in *Coolidge v New Hampshire* (1971), the Supreme Court overturned the verdict on the ground said the local Attorney General was wrong to issue warrants to search Coolidge's car. Judge Rothwax said:

Did I become a judge for this? Is this the system I am proud to be part of? The *Coolidge* reversal makes me ashamed. Stories like this are an insult to common sense and fair play. There is certainly little feeling for the victim, who was brutally tortured and murdered. There is also little feeling for the truth.

Lawyers supervised the Australian National Crime Authority's investigations into white and blue collar organised crime. In 1993, the NCA charged John Dorman Elliott, Kenneth Biggins, and Peter Scanlon with stealing \$66 million from a Melbourne brewery they controlled.

In 1996, without empanelling a jury, Justice Frank Hollis Rivers Vincent heard argument about what evidence he would conceal. That took six months. Robert Richter appeared for Elliott. Vincent then said in effect he would suppress the evidence of some 130 witnesses because NCA lawyers had obtained evidence improperly. He said the lawyers' errors were inadvertent, not deliberate. In a *Bunning v Cross* situation, lawyers' inadvertent errors could hardly be worse than alleged theft of \$66 million. The prosecutor offered no other evidence. Vincent declared Elliott, Biggins and Scanlon not guilty.

Garry Livermore, a barrister who had led the NCA investigation from 1989, gave evidence to the Joint Parliamentary Committee on the NCA on Monday, 8 October 1997. He seemed a little peeved, perhaps because the investigation, various legal skirmishes, and the non-trial had cost taxpayers some \$20 million, and also by Elliott's self-proclaimed sexual athleticism. *Hansard* recorded Livermore as saying of Elliot, Biggins and Scanlon:

They were gone. They would have been gone if the evidence had been led before a jury. The evidence against them was overwhelming ... Not one of some 130 witnesses ever gave evidence before a jury in this matter. It is a disgrace and blight on the system... Mr Chairman, I attended the Carlton football match at Optus Oval the Saturday after Mr Justice Vincent's ruling throwing out all the evidence in the case. I sat down and listened to Mr Elliott ... roar to the crowd [that] he had 'stuck it right up the NCA'. He had not done that at all. What he had done was stick it right up the system and he stuck it up you, Mr Chairman, and every law-abiding member of the Australian community.

That may be, but it was the adversary system which – to continue Mr Elliott's typically delicate metaphor – raped and pillaged the body politic. The Victorian appeal court later found that Vincent was wrong to conceal the evidence [from himself] because the NCA lawyers had got the evidence properly, but the horse had bolted: Elliott, Biggins and Scanlon could not be retried, because the common law said wrong

not guilty verdicts can never be wrong (see Double Jeopardy below).

The obvious remedy is to admit all improperly-gained evidence if it is reliable, and to punish erring detectives at a special tribunal. That has not been tried, perhaps because detectives might insist that lawyers who pervert justice should also be punished.

### **\*19. Concealing any or all evidence (*Christie*)**

The *Christie* discretion is a piece of metaphysical claptrap expounded by British judges in *R v Christie* (Court of Appeal, 1914). They included Lord Reading, who escaped justice for insider trading in the Marconi scandal of 1913. Dr John Forbes said in *Evidence in Queensland* (The Law Book Company, 1992) that the '*Christie* discretion may contain 'a large subjective element' [*R v Sang*, 1980]; that its operation may sometimes be 'whimsical or idiosyncratic' [*Selvey v DPP*, 1970]; and that:

If there ever was such a thing as judicial corruption, it might well reside in the expanding and almost inscrutable discretions which can alter the whole course of a criminal inquiry.

Professor Julius Stone and former Justice W.A.N. Wells said in *Evidence: Its History and Policies* that evidence concealed by the *Christie* discretion 'must be of comparatively little probative weight, [and] this slight relevance must be accompanied by a great

potentiality for prejudice'. Judges should thus first decide that the evidence points only slightly towards guilt, and only then consider whether it is highly prejudicial. In practice, however, they may first note that the evidence is likely to cause a guilty verdict, and then decide it is only slightly probative.

David Rose (*In the Name of the Law: The Collapse of Criminal Justice*, Jonathan Cape 1996) quotes a detective: '... as far as I can see, prejudicial means evidence that proves he did it.'

Even if the judge is plainly wrong when he says evidence is only slightly probative, he cannot be reversed because his opinion concerns facts and appeal courts deal only with law. That means judges can never be wrong on facts, but Judge Brian Boulton, of the Queensland District Court, revealed in 1992 that the head of his court, Judge John Helman, had admitted that there might be 'chaos' if different judges applied the discretion to the same evidence.

It was evidence concealed via the *Christie* discretion that first prompted me to look into the West's two systems. In 1987-88, I reported an 18-month inquiry into the truth of corruption in Queensland for *The Sydney Morning Herald* and *The (Brisbane) Sun*. The inquiry, chaired by the Hon Gerald Fitzgerald QC, used the investigative system: evidence was not concealed; suspects had to give evidence. That system revealed beyond the slightest doubt that the Police Commissioner, Sir Terence Lewis (b. 1929), was a major organised criminal: he franchised organised crime and extorted bribes from

franchisees, including Sydney yachtsman Jack Rooklyn. Lewis obviously lied in giving evidence.

Lewis was tried for corruption in the District Court under the adversary system in 1991. Judge Anthony Healy presided. The Crown prudently retained the leader of the criminal bar, Bob Mulholland QC, to prosecute. John Jerrard appeared for Lewis.

Jerrard may have achieved what defence lawyers fear above all; asking one question too many. He asked it of Jack Herbert (1924-2004), Lewis's bagman. Herbert was born in London; served in the RAF; joined the Metropolitan Police (Scotland Yard) in 1946; and migrated to Australia in 1947. He was a uniformed cop until he got into plain clothes in the Queensland Licensing Branch in 1959, and was there corrupted. With the mind of a bookkeeper, Herbert became the bagman for the Branch's extortions from illegal liquor sellers (sly-groggers) and bookmakers.

Lewis had been a bagman for a corrupt Commissioner (1957-69), Frank Bischof (1904-79). In 1965, Herbert began to pay Lewis a small share of Licensing Branch bribes. When Herbert apologised for the paltry sums, Lewis graciously said: 'Little fish are sweet.' In 1976, the Premier, Sir Johannes Bjelke-Petersen (1911-2005), also an organised criminal, made Lewis his police chief. In 1980, Herbert, now out of the force, became Lewis's bagman. They used codes to discuss extortees, and meeting places to share the proceeds. Lewis kept the codes in notebooks.

When the Fitzgerald inquiry began in 1987, Herbert, advised by Jack Rooklyn, fled to England, but was sprung by the Met and brought back to Australia in an Air Force plane on a promise of immunity if he told the truth about corruption.

Herbert was the leading witness against Lewis at his corruption trial under the adversary system in 1991. Lewis refused to give evidence. Judge Healy concealed a deal of evidence via the *Christie* discretion. He said: ' ... some of the evidence identified by Mr Mulholland as corroborative [of Herbert's evidence] appears to me to be of little probative value but of the kind that would be highly prejudicial to the accused if I admit it.' Some evidence thus concealed:

- Lewis's diary entries, which Mulholland said he could prove were concoctions, purporting to show he was a successful punter in a period, 1979-1987, when it was alleged he was corrupt.
- His false sworn denial in 1980 that he had ever had anything to do with the organised criminal, Jack Rooklyn.
- His transfer to Lady Lewis of his interest in their mansion when he learned that Assistant Commissioner Graeme Parker had 'rolled over' and was confessing to corruption.
- His false sworn claim that he made the transfer to protect the mansion from creditors at a time when he had no credit problems.
- A tape of telephone calls between Herbert and a Barry MacNamara in which they fret that Lewis



stuffed them and an accountant, John Garde, of their share of a \$25,000 bribe Herbert arranged for Rooklyn to pay to Lewis.

Of the \$25,000, Lewis was to get \$15,000. The other three were to split \$10,000, but Lewis gave Herbert only \$9000. MacNamara says on the tape: 'Oh, I think it is a shitty trick, you know, I really do ... And to think, for a f\*ckin' sh\*tty thousand dollars ... I think it's a very bad act.' Later, MacNamara says Garde 'took it badly ... he's going to give that bloke [Lewis] a grand light this month'. Herbert cautioned: 'Terry loves this stuff ... he might be a bit upset if I did it back to him'. Judge Healy told Jerrard:

I have come to the conclusion that this tape is not capable of corroborating Herbert ... I do not think it is part of the *res gestae* [the material facts of a case as opposed to hearsay]. Therefore I exclude it. But if I am wrong about that, the conversation tends to suggest, and this is Herbert's evidence, that your client is a person who is capable of ratting on his friends. That's not part of the indictment either. It would be very prejudicial to him to let it in, so I am excluding it.

That *Christie* ruling meant that the judge took the view that the tape only slightly tended to prove Lewis's guilt.

The jurors heard only a fraction of the material uncovered by Fitzgerald. It is understood that they initially believed that Herbert had vilely traduced an honest cop in order to gain immunity, but that the

following passage concerning the ‘little fish’ bribes caused them to look at Sir Terence with new eyes:

Jerrard: What did he promise to do?

Herbert: It’s not what he promised. It’s what I had in my mind – and other members of the Licensing Branch – what he could do.

What was that? – He was very, very friendly with Mr Bischof. It was well known in circles that Mr Bischof was a grafter, the same as myself, and back in those days – whilst I’m called the bagman now – the accused was well known in police circles as the Commissioner’s bagman.

That’s a very easy allegation, that one, isn’t it? – You asked me. I’ve told you. I didn’t want to mention it, but if I didn’t mention it to you, I’m not telling the truth, of which I’m sworn to ....

If you are raised in Queensland, it was practically taught in schools, this allegation? – Yes, it was widely known,

Healy let the Lewis-Herbert codes in. Mulholland told the jury they were the smoking gun, but Healy said Herbert’s evidence was worthless, and that ‘there is no evidence which is capable of corroborating [it]’. The appeal court later said Healy was wrong, that the codes did corroborate Herbert, but there would have been no appeal if the jury had found Lewis not guilty. Healy concluded: ‘You may convict on the uncorroborated evidence of [Herbert], but it would be dangerous to do so.’

Had the jurors heard all the evidence exposed by the investigative system, I imagine they would

have found Lewis guilty without leaving the box. They did find him guilty, but it took five days. Healy promptly gave him the max, 14 years. I took the view that, however inconvenient, it was a good result for Sir Terence: anyone can get a knighthood, but Her Majesty soon admitted him to an exclusive club; he was only the 14<sup>th</sup> knight to be stripped of his knighthood since the 14<sup>th</sup> century.

In 1995, the Australian and NSW *Evidence Act(s)* narrowed the probative-prejudicial gap to almost zero. Section 137 of the NSW version states:

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

The effect was shown after Rhonda Buckley, 51, a grandmother, was strangled in Newcastle, NSW, on Tuesday, September 25, 2001. Next day, her lover, Lyle Simpson, 47, attempted to kill himself. DNA tests showed that Simpson's semen was on her body. At Simpson's murder trial in March 2005, his legal aid lawyer, Joanne Harris, persuaded Justice Anthony Whealy to conceal his suicide attempt because it might cause him 'unfair prejudice'. DPP Nicholas Cowdery QC decided not to proceed. Simpson walked.

## 20. Cross-examination

Sir Thomas Smith (1513-77) appears to be the first to mention cross-examination. In his *De Republica Anglorum* (published 1583), he notes a (civil) trial which had 'not only the examination but also the cross-examination of witnesses in the presence of the judge, the parties, their counsel and the jury'.

John Henry Wigmore (1863-1943) was dean of the law school at Northwestern University at Evanston, Illinois, 1901-29. He got his law degree from Harvard in 1887, and thus knew as little about justice as anyone trained by Christopher Columbus Langdell. In *A Treatise on the System of Evidence in Trials at Common Law* (1904), Wigmore said cross-examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of truth'. That is true, but it also false in several respects. It implies that the system seeks the truth, and it omits two things: that the aim of defence lawyers is usually to obscure the truth, and that accused can avoid the truth engine by staying out of the witness box.

Irving Younger (1932-88), prosecutor, defence lawyer, judge, and academic, is revered for his lectures on the law (a snip at US\$720 for the DVD). His basic approach is revealed in a question he suggested be put to a hostile witness: 'Is it not true that last night you committed sodomy on a parrot?'

Yale Professor John Langbein said 'cross-examination ... is often an engine of oppression and obfuscation, deliberately employed to defeat the truth'. Justice Russell Fox wrote:

Cross-examination may help the elucidation of the truth, but it may also obscure the truth, and quite often is designed to that end ... a clever cross-examiner can make even the most reliable testimony look questionable, and can so confuse the context that an understanding of the answers becomes blurred.

Techniques to create a 'reasonable' doubt include lying to witnesses, asking the same question with slight variations to trick them into answering Yes when they mean No; and verbal thuggery to intimidate and 'destroy' dangerous witnesses.

The oath imposed on witnesses to tell the truth, the whole truth and nothing but the truth is a legal fiction. The whole truth cannot be told in Yes-No answers, e.g. Have you stopped beating your wife? But one of Younger's *10 Commandments of Cross-examination* is: 'Never permit the witness to explain his or her answers.' In France and Germany, witnesses give evidence as a narrative.

Defence lawyers fear the truth because almost all their clients are guilty. Younger commanded: 'Never ask a question to which you don't already know the answer.' Even the sainted Atticus Finch (*To Kill A Mockingbird*, 1960), who put thousands of young idealists into the lying trade, said:

Never, never, never, on cross-examination ask a witness a question you don't already know the answer to, was a tenet I absorbed with my baby food. Do it, and you'll often get an answer you don't want, an answer that might wreck your case.

*OxfordLQ* notes a passage in lawyer-novelist Erle Stanley Gardner's *The Case of the Queenly Contestant* (1967):

[Perry] Mason: 'The purpose of cross-examination is to find out whether a witness is telling the truth.'

Lovett laughed sarcastically. "That's the line they try to teach you in the law books and in the colleges. Actually, when you come right down to it, you know and I know, Mason, that the object of cross-examination is first to find out to your own satisfaction if a witness is telling the truth, then you go on to the next step – which is to try and confuse the witness so that any testimony the witness has given is open to doubt..'

Rape is a crime which incurs a prison sentence of up to 35 years, but malevolent cross-examination is a factor in the fact that the adversary system does not deter serial rapists. A 1993 British Home Office study found that 99% of rapists escape justice. In 2003, the NSW Bureau of Crime Statistics and Research estimated that 12,000 women were victims of a sexual or indecent assault, but only 2707 (22.6%) reported the crime to police. Of those, 858 (31.7%) were charged; and 361 (42%) were found guilty. In terms of the estimates of actual rapes, that is a conviction rate of 3%.

In May 2007, Janet Fife-Yeomans and Lisa Davies reported in *The (Sydney) Daily Telegraph* that 70-90% of rapes are not reported; that 80% of reported rapes are not prosecuted; and that of those prosecuted nearly 75% are found not guilty. If, say, 80% of rapes are not reported, the figures mean that

20 in 100 are reported, four are prosecuted, and one results in a guilty verdict.

The rates are low partly because brutal and pornographic cross-examination deters victims from testifying. Dr Caroline Taylor, author of *Court-Licensed Abuse* (Peter Lang, 2004), told *The Sydney Morning Herald's* Edmund Tadros on 9 December 2004:

...the “sluts and nuts” defence – the complainant either asked for it or is lying – is common ... It is typically trial by attrition, where the courts exclude compelling evidence or evidence that is central to fact-finding. The gaps can then be filled in with the legal codswallop about the lying, conniving, slutty, nutty woman.

Tadros quoted Stephen Odgers, chairman of the NSW Bar Association criminal law committee, as saying:

I've had complainants who have vomited in the witness stand in response to questions I've asked them. My reaction as a person who may suspect that they are innocent victims – I can only feel sympathy for them. Then there's me as my job, performing my role, which I believe to be an important role in the system of justice, who believes that I acted ethically. I've cross-examined in what I regard as a perfectly legitimate manner, and it's regrettable, but I don't blame myself for that outcome.

'Belinda', 22, the victim in one of four cases in *Court-Licensed Abuse*, said:

I know it's part of [the lawyer's] tactics but you don't need to keep asking the same question. That's one of the most confusing parts, where they keep asking the same question and they're rewording it to try and slip you up.

Dr Taylor said:

What the defence barrister wants to do is continually shock and confront [the complainant] to affect the quality of her evidence. A standard tactic ... is to attack complainants with such ferocity at a committal hearing that they are too afraid to go to trial.

I asked an authority of the French and German systems, Bron McKillop, of Sydney University's law school, in January 2008 if I would be right to assume that courts in those countries convict in 90% of rape cases. He replied:

Your assumption is, I believe, broadly correct. In France the acquittal rate across the three levels of criminal jurisdiction (including the *cour d'assises* which hears rape cases [*viols*]) is about 5%. I am not aware of any particular variation for rape as opposed to other offences. In the investigation systems, the compilation of a dossier available at the trial and the criteria for committal result in a similarity of outcomes across the boards. I don't have the figures for Germany but I would think that the systemic civil [European] law similarities would result in similar outcomes, although the lesser role played by the dossier at a German trial and the greater reliance on oral evidence may result in more acquittals.



Common lawyers claim they are ethically obliged to even cross-examine child victims in a brutal and pornographic way. *Four Corners*, a programme on a public broadcaster, the Australian Broadcasting Corporation, aired a television programme on sex crimes against children in 1999. Reporter Peter George noted a case in which a mother heard her five-year-old son crying in a lodger's room. The boy came out with his shorts in his hand and told her what happened. She called police and semen was found in his anal passage. There was a witness, an immediate complaint, and evidence corroborating the boy and his mother. The verdict was not guilty.

*Four Corners* re-enacted the preliminary hearing of a case in which a Queensland mother said her best friend's husband anally penetrated her son, 7. Russell Clutterbuck cross-examined the boy for five hours, with breaks to stem the sobbing. Clutterbuck asked him questions about oral sex:

Have you ever seen this done before? – No.

Have you ever been in the house when your mother's done this? – No.

Are you sure? – Yes ...

You didn't tell the other policewoman the first time, did you? – No.

No. That's because it didn't happen, isn't it, John? - It did happen ...

Well why are you crying if the story is true, John? - Cos you said it isn't. ...

John, you know what telling lies means, don't you? And that's what you're doing today, isn't it? - I'm not telling lies ...

See, I can stand here all afternoon and ask you all sorts of questions and until you tell me the truth I won't stop.

The trial verdict was not guilty.

Dr Caroline Taylor told Edmund Tadros in 2004: 'If people knew that kids as young as seven have been asked whether they fingered their own vagina, they would ask: "What is going on here?".'

An Australian study found that lawyers and judges whose children had been sexually violated would not subject them to the second trauma of cross-examination.

In 2002, the Auckland (New Zealand) Law Society issued a paper suggesting that in rape cases the right of silence could be removed, and the charges heard according to inquisitorial procedures. In 2009, the Justice Minister, Simon Power, was considering further suggestions that truth-seeking procedures be used in rape cases.

## 21. Inscrutable jurors

Professor John Langbein quotes a German legal maxim, *Ohne Begründung kein Urtre*, without a statement of reasons, there can be no valid judgment. If so, no common law jury verdict is valid; jurors have never had to give reasons. The system has been open to confusion and corruption since it was invented in 1166, e.g. O.J. Simpson and a man tried for heifer-rustling at Dubbo, Australia, in the 19<sup>th</sup> century. Barrister Aubrey Gillespie-Jones

reported the verdict in *The Lawyer Who Laughed* (Century Hutchinson, 1978):

Judge's associate: Do you find the accused guilty or not guilty of cattle-stealing?

Foreman: Not guilty, if he returns the cows.

Judge: You swore you would try the issue between our Sovereign Lady the Queen and the accused and find a true verdict according to the evidence. Go out and reconsider your verdict ...

Associate. Have you decided on your verdict?

Foreman: Yes, we have. We find the accused not guilty, and he doesn't have to return the cows.

Professor Mark Findlay, of Sydney University, did a study of jurors for the Australian Institute of Judicial Administration. In *Jury Management in NSW* (1994), he reported that he had access to a diary kept by a woman juror during a long trial. She noted:

On the first day, a majority decided that the accused must be guilty because he wore an earring; he looked too glitzy; he was ugly and hence probably bad; and his lawyer looked positively evil. During the trial the majority, led by a handsome banker, 'only listened to evidence or argument which reinforced their conclusion of guilt'.

The woman was bullied and ostracised, described as a 'pinko lezzo', and threatened with being put on a hit list if she went against a guilty verdict. The verdict was eventually decided by a golf appointment. On the last day, the banker, expecting an early result, arranged to play golf, but 'when it

became clear that [the woman and another juror] were not going to go along with a guilty verdict', he 'changed his mind and was followed by the rest'.

## 22. Reasonable doubt

Along with the right of silence, the formula for the standard of proof, beyond reasonable doubt, is the most effective device for getting criminals off. Anyone can have a doubt; 'reasonable' has as many meanings as there are jurors; in some countries judges are not allowed to tell them that the formula simply means the same as the French formula, *conviction intime*: are we intimately (thoroughly) convinced?

As might be expected, the negative common law formula did not obtain until after lawyers had taken over the criminal process. Professor John Langbein wrote in *The Historical Origins of the Privilege Against Self-Incrimination*:

... the precise doctrinal formulation of the beyond-a-reasonable-doubt standard of proof in Anglo-American criminal procedure occurred at the end of the 18<sup>th</sup> century as part of the elaboration of the adversary system of criminal procedure. [Professor John] Beattie points to formulations of the standard of proof used in jury instructions of the 1780s that were still well short of beyond reasonable doubt.

In 1998, the New Zealand Law Reform Commission published a study of 312 jurors who sat on 48 cases ranging from attempted burglary to murder. The

study confirmed that the formula baffles jurors. The Commission reported:

... many jurors, and the jury as a whole, were uncertain what 'beyond reasonable doubt' meant. They generally thought in terms of percentages, and debated and disagreed with each other about the percentage required for 'beyond reasonable doubt', variously interpreting it as 100 per cent, 95 per cent, 75 per cent, and even 50 per cent. Occasionally this produced profound misunderstandings about the standard of proof.

In the Hannes case mentioned below, the defence was that a Mr X, rather than Hannes, performed a certain action, and that, although Mr X was not produced, the prosecution could not prove beyond reasonable doubt that he did not exist. It might be thought that the jurors' common sense would find such a defence laughable, but they deliberated for five days and then asked Judge Cecily Backhouse to explain reasonable doubt. She told them:

The Crown must satisfy you of the guilt of the accused by establishing each of the essential ingredients of the charges to that standard, that is, beyond a reasonable doubt ... the accused is entitled to any reasonable doubt in your minds and the accused does not have to prove he is innocent ... the accused is presumed to be innocent until the Crown has established that guilt.

In short, reasonable doubt means reasonable doubt or, as Miss Gertrude Stein (1874-1946) put it, a rose is a rose is a rose. One day, a jury foreman will politely

say: 'I'll put the question again, judge.' Dr John Forbes wrote in *Evidence Law in Queensland* (7th edition, Lawbook Co, 2008):

The beginners' handbook (Bench Book) for Queensland judges – the existence of which is now officially, if somewhat coyly, acknowledged – recommends this circumlocution: 'A reasonable doubt is such a doubt as you ... consider to be reasonable ... It is therefore for you, and each of you, to say whether you have a doubt which you consider reasonable. If, at the end of your deliberations, you, as reasonable persons, are in doubt about the guilt of the accused, the charge has not been proved beyond reasonable doubt.'

Dr Forbes commented:

Mesmeric repetition of the mantra as insurance against an appeal, or by a defender striving for a doubt, reasonable or unreasonable, may be taken by jurors unaccustomed or averse to responsibility, as invitations to acquit. It is then a short step to the comforting thought: 'I have just been described as a reasonable person. I think I have a doubt. Therefore it is reasonable.'

Justice Robin Millhouse, of the South Australian Supreme Court, said in 1999:

Very few people who've come up in the criminal courts when I've been trying them have not been guilty, but a lot of them have got off because jurors' common sense falters in the face of warnings about reasonable doubt. I've often felt my heart sink when I know a bloke's probably guilty,

to have to give all these warnings and I'm afraid the jury will heed them. And they often do.

Justice Christopher Wright, of the Tasmanian Supreme Court, said in 2000:

Too often unsure jurors will shelter behind the standard of proof beyond reasonable doubt, making it the safe option ... I am fully convinced that juries return a wrong verdict in about 25% of all cases.

Angelo Cusumano was murdered during an armed holdup of his Sydney store. Two men pleaded not guilty. A third man, Aaron Robinson, pleaded guilty to murder and told police that one of the others had given him ammunition for the murder weapon. However, Robinson refused to give evidence against the other two, and his statement about the loaded gun was concealed as hearsay. The prosecution thus could not prove that the other two knew the weapon was loaded. When they were found not guilty in 1998, a juror apologised to the victim's widow. Learning of the apology, a radio broadcaster, John Laws, asked the juror on air why she apologised. She said:

To me there was absolutely no doubt. To one other juror there was absolutely no doubt. People confessed on the jury that in their hearts they felt – but that it hadn't been proven ... I said ... please let us bring in an undecided verdict, and they said, absolutely not, it hadn't been proven ... And I fought for three days ... but I was too

weak ... My heart goes out to Mrs Cusumano and those children.

It is not a crime in the US to ask a juror what happened. It is in NSW. Laws was charged, convicted, and given a suspended sentence of 15 months.

A Melbourne lawyer kindly added to the sum of my knowledge on what he called 'the elephant in the room'. In *Justinian* (15 July 2008), I reported that, in a message to the proprietor, the lawyer noted a case in which 'the obviously bloody-minded jury', having been given 'the required but totally unhelpful non-direction on the standard of proof ... responded with a question: "Reasonable doubt - 70 to 80%?"' The lawyer said the judge and a majority of counsel:

... agreed that the judge would repeat the standard direction (with the jury no doubt wondering what on earth did this idiot have for breakfast or lunch depending on when the redirection was given) but on no account mention the 'P' word lest the silly sods get the idea that such a test is permissible in some way.

He added: 'Mr Whitton might be interested to know, if he doesn't already, that our trial directions are now publicly available on the web – see them at the Judicial College of Victoria website ...' Thus encouraged, I found that the trial directions (Bench Notes to the Victorian Criminal Charge Book) state:



Although in England the term “beyond reasonable doubt” is seen to be synonymous with the term ‘sure’ (see e.g., *R v Hepworth and Fearnley* [1955] 2 QB 600; *R v Onufrejczyk* [1955] 1 QB 388), this is not the case in Australia (*Thomas v R* [1960] 102 CLR 584; *Dawson v R* [1961] 106 CLR 1; *R v Punj* [2002] QCA 333).’

A little more research caused me to exclaim: Eddie Freaking McTiernan! I noted in *Justinian*:

That means that Britain, home of the common law, now allows judges to tell jurors what the elephant means, but the colony has obstinately persisted in error for 48 years. The date of *Thomas v R*, 1960, means the guilty men were on the High Court run by the fraudulent Sir Owen Dixon. The lead judgment purported to have been written by Justice Sir Eddie McTiernan (1892-1990, Labor MP 1929-30, High Court 1930-76). That raised two questions: Why would any future judge take the slightest notice of that ancient Labor Party hack and world champion judicial limpet? And how many Australian murderers, rapists and organised criminals have escaped justice since 1960, when Eddie shut the door on an explanation of the formula?

### 23. Double jeopardy

Perhaps the feeblest excuse for the corrupt system is that common lawyers cannot think straight. Double jeopardy said wrong not guilty verdicts are never wrong. This shining example of bottomless stupidity persisted in England for 839 years, and was then abolished by Parliament, not judges.

Double jeopardy is the product of the false notion that being tried twice is the same as being

punished twice. The error, deliberate or otherwise, derives from 1164. Henry II wanted his courts to retry 'criminous clerks' who had already been found guilty and punished by church courts, but Archbishop Thomas (a) Becket (1118?-70) insisted that persons should not be punished twice for the same offence. Further quarrels between Henry and 'this turbulent priest' led to Becket's murder in Canterbury cathedral.

It seems fair that those found guilty (*autrefois convict*) and punished should not to be retried for the same offence, but judges purported to also believe that those found not guilty (*autrefois acquit*) should not be retried. William Blackstone parroted that ancient confusion in his *Commentaries*: '... no man is to be brought into jeopardy of his life, more than once, for the same offence', and he was fatally echoed in the US Constitutions' Fifth Amendment in 1791: '... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.'

The other 23 anti-truth devices get more than half the guilty criminals off, but justice thus perverted must stay perverted forever, even when the judge wrongly concealed evidence e.g. *Elliot*, and when new and compelling evidence emerges, e.g. DNA evidence.

Britain finally and retrospectively abolished double jeopardy for those acquitted of major crimes as from Monday 4 April, 2005. The National Crime Faculty then calculated that 35 persons acquitted of murder could be re-investigated and new charges

brought. The Bar Council and civil liberties groups opposed the legislation, but a Home Office spokesman stated the obvious:

It is important that the public should have full confidence in the ability of the criminal justice system to deliver justice. This can be undermined if it is not possible to convict offenders for very serious crimes where there is strong and viable evidence of their guilt.

DNA testing, which became available only in 1986, can deliver justice for innocent prisoners. *The New York Times* reported on 19 June 2009 that since 1992 DNA testing had exonerated 238 people in the US, some on Death Row. However, the Fifth Amendment means that the US is constitutionally unable to abolish double jeopardy and to use DNA to retry criminals, including rapists and murderers.

Truth-seeking systems allow not guilty verdicts to be appealed and, if necessary, retried.

## **24. Judges second-guessing jurors**

Justice Sir Gerard Brennan said in *M v The Queen* (Australian High Court, 1994):

... an assessment of evidence by an appellate court is a poor substitute for the assessment made by the jury. And that is so for a very basic reason: our belief in the validity of the life experience of juries.

Ordinary citizens also have a better sense of justice than judges, but appellate judges can overturn jurors

because they think they know better. Dr John Forbes wrote in *Evidence Law in Queensland* (7th edition):

The [judges'] 'unsafe and unsatisfactory' formula, like discretionary exclusion, has returned many a burglar (and other suspects) to their friends and their relations ... The 'unsafe verdict' is largely a post-1950 creation that enhances the power of judges to override a jury's verdict of 'guilty' ... Despite an official reluctance to admit that the appeal court 'second guesses' the jury, that is what happens.

In 1973, Deidre Kennedy, aged one year and five months, was abducted from her home in Ipswich, Queensland, clothed in stolen women's underwear, bitten on the left thigh, raped, and strangled. Her body was thrown on to the roof of a public lavatory.

Raymond John Carroll was tried for the baby's murder in 1985. The jury heard evidence that he repeatedly bit his own baby daughter on the thigh; that odontological examination showed the bite marks on the baby's thigh were his; that he stole women's underwear; and that his alibi was false.

The jurors found that Carroll committed the murder, but appellate judges Sir Wally Campbell, Sir George Kneipp and Tom Shepherdson knew better. They said Justice (as he then was) Angelo Vasta was wrong to admit 'prejudicial' evidence that Carroll bit his own baby, and that the jurors should have had a reasonable doubt that he was guilty. They did not order a re-trial; they said Carroll was not guilty.

In 2000, Carroll was charged with perjury on the ground that he had falsely denied his guilt at the murder trial. New evidence confirmed that the teeth marks on Deidre Kennedy were his, and that he had confessed to the murder. Carroll was found guilty and sent down for 2 years, but appellate judges Margaret McMurdo, Catherine Holmes and Glen Williams invoked double jeopardy to overturn the verdict: they said Carroll had effectively been tried twice for the same crime.

In December 2002, High Court judges Murray Gleeson CJ and Mary Gaudron, Michael McHugh, Bill Gummow, and Ken Hayne JJ agreed with McMurdo *et al.* McHugh huffed that the perjury prosecution was a 'vexatious ... abuse of process'. Twenty-four jurors had thus been second-guessed by 11 appellate judges.

Jurist Brett Dawson commented: 'How do those judges sleep at night? The *Carroll* case is a model for judicial disintegration of the social fabric.'

It has been reported that Raymond John Carroll has made a point of appearing at the checkout of an Ipswich Woolworths store manned by the mother of the baby bitten, raped and strangled in 1973.

## **F. Sliding round truth problem**

As the non-lawyer public and Judge Fox know, everything turns on the search for truth: justice, fairness, reality, morality but, as the foregoing shows, a system which has six ways of concealing evidence and 18 other mechanisms which obscure or defeat the truth is not trying to find the truth. I asked an academic how lawyers deal with the truth problem. Wagging his hand, he said: 'They slide round it.'

Mostly, they just ignore it. Of those who do confront the problem, some blandly say the system does search for the truth. Others say justice is process, not truth. Some even say that justice is better than truth. A selection:

John Scott, Lord Eldon, (1751-1838) said in *Ex parte Lloyd* (1822): '... truth is best discovered by powerful statements on both sides of the question'.

Law professor Monroe Freedman echoed Lord Eldon in *Professional Responsibility* (1966):

The attorney ... does participate in a search for the truth ... The attorney functions in an adversary system based upon the presupposition that the most effective means of determining truth is to present to a judge and jury a clash between proponents of conflicting views.

Law professor David Luban said in *Lawyers and Justice*: 'No trial lawyer seriously believes that the best way to get at the truth is through the clash of opposing points of view.'

Judge Richard Posner noted that adversarial procedures are contests of liars. The addition of a few words demonstrates the reality of Eldon's proposition: 'Truth is best discovered by trained liars making powerful statements on both sides of the question.'

Justice Potter Stewart, speaking for the US Supreme Court, said in *Tehan v Shott* (1966): '...the basic purpose of a trial is the determination of truth.'

Law professor John Strait Applegate, then of the University of Cincinnati College of Law, wrote in *Witness Preparation* (Texas Law Review 1989):

The public perception of the function of the judicial system and ethical rules support the [public's] view that ascertaining the truth is the paramount goal of the adversarial system and the primary basis of its legitimacy.

That means the public assumes that the system seeks the truth and is thus a legitimate system. The assumptions are natural but wrong. It also means the public will support change to a truth-seeking (and hence legitimate) system.

Chief Justice (NSW) Jim Spigelman said on his appointment in 1998:

[The legal] profession has an ethical dimension and values justice, truth and fairness ... The common law and the adversary system – a manifestation of the power of Socratic dialogue – is [sic] one of the greatest mechanisms for the identification of truth and the maintenance of social stability that has ever been devised.

Law professor Michael Asimow, of the University of California at Los Angeles, summed up his and other lawyers' views that justice is process in *Nova Law Review* (Winter 2000). He wrote: '[The] general public and lawyers differ about whether justice means truth or justice means process.' That means 0.2% per cent of the community believe that justice is process. Justice David Ipp, of the West Australian Supreme Court, said in 2000: 'When the legal system does not reflect community values it loses its legitimacy.'

Professor Michael Asimow noted that the public's belief that justice means truth dooms lawyers to be mistrusted and sadly unloved. He continued:

Lawyers will always be distrusted, in part because their assigned task is to play whatever role and manipulate whatever law a client's interest demands ... lawyers are doomed to be unloved because criminal practice is their most public function As lawyers see it, justice requires that an person have the benefit of appropriate process, such as the reasonable doubt rule or the privilege against self-incrimination. This perspective is not shared by most members of the public, especially when it comes to criminal law. Most people think that justice means finding the truth regardless of the adversarial system, procedural technicalities, statutory loopholes, police or prosecutorial misconduct, or lawyers' tricks.

David Maxwell Fyfe (1900-67) was an exponent of the view that justice is better than truth, but he was naïve about the system's capacity to convict the



innocent. As Home Secretary in 1953, Fyfe refused to stop the hanging of an innocent youth, Derek Bentley, 19 (mental age 11). Fyfe said: 'There is no possibility of an innocent man being hanged in England.' He was thus eminently qualified to become Lord Chancellor (and Viscount Kilmuir) in 1954. He wrote in *The Migration of the Common Law* (Law Quarterly Report, 1960):

Now the first and most striking feature of the common law is that it puts justice before truth. The issue in a criminal prosecution is not, basically, 'guilty or not guilty?' but 'can the prosecution prove its case according to the rules?' These rules are designed to ensure 'fair play' at the expense of truth. The attitude of the common law to a civil action is essentially the same: the question is 'has the plaintiff established his claim by lawful evidence?' not 'has he really got a good claim?' Again, justice comes before truth.

Justice Russell Fox demolished Kilmuir thus: 'This statement in fact begs the present question by saying that justice is what the parties [i.e. their lawyers] present in evidence, true or not.'

Harold Macmillan (1894-1986, Prime Minister 1957-63) finally dismissed Kilmuir during the Night of the Long Knives in 1962. Kilmuir complained that his cook would have got more notice. Macmillan said it was harder to get a good cook than a Chancellor. Derek Bentley's conviction was quashed in 1998.

## G. Conviction rates

The words 'fair trial' are never far from the lips of common lawyers and judges, but former prosecutor William T. Pizzi, now a law professor at the University of Colorado, said in *Trials Without Truth* (New York University Press, 1999):

The goal of the defense attorney is not to obtain a fair trial for the defendant; a fair trial might spell disaster for the client because it would likely result in a conviction, given the evidence. Instead the goal is to win above all and that means doing almost everything to win. It may require what lawyers refer to as a 'scorched earth' defense in which anyone and everyone is likely to come under attack – including not just prosecution witnesses, but the prosecutor personally as well as the judge.

Sir Lionel Luckhoo QC (1914-97), a Guyanese of Indian descent, was listed in *The Guinness Book of Records* (1990) as the world's most successful lawyer: he procured 245 not guilty murder verdicts in a row. Luckhoo probably knew that perhaps 241 (99%) were guilty. Luckhoo was knighted in 1966, presumably for services to perverting justice. His client, the Rev Jim Jones, presided over the murder/suicides of 913 people at Jonestown, Guyana, in 1978, but saved Luckhoo's record by suiciding himself. In 1980, Luckhoo declared himself 'Ambassador for God'.

Estimates of conviction rates in the adversary system vary, but it is clear that more than half

known serious criminals get off. Law professor Michael Zander said in 1989 that since 1979 approximately 50% of all accused were acquitted in British criminal trials.

In 1997, Dr Lucy Sullivan, of the Sydney Centre for Independent Studies, noted 1993 figures showing that the murder conviction rate in NSW was 26.5%. The rape figure was 11.5%. In 2004, NSW Bureau of Crime Statistics figures showed that the rate in sexual assault cases in NSW was 19%.

The conviction rate in India is 16%. *The Hindu* reported in September 2003 that Mallikarjun Kharge, Home Minister for the state of Karnataka, had urged the Indian Government to change to a truth-seeking system because the conviction rate in Karnataka was 28% and the national average was 16%. India's population in July 2009 was estimated to be 1.17 billion, almost 75% of the total afflicted by the anti-truth system.

The New South Wales Independent Commission Against Corruption (ICAC) uses the investigative system to find the truth about the corrupt in the public sector, but charges are heard in the adversary system. In the period 1989-95, 63 of 208 were found guilty, a conviction rate of 30.3%.

Inquests likewise use the investigative system, but some evidence heard by the coroner will be concealed either by the DPP or the trial judge.

In 1984, Jennifer Tanner died from two bullets from a bolt-action rifle that required reloading. The bullets went through her fingers and into her brain. Police said it was suicide. In 1998, a Victorian

Coroner found that Jennifer Tanner's brother-in-law, Detective-Sergeant Denis Tanner, shot and killed her. The DPP did not charge Tanner.

In 1994, Detective-Sergeant Geoffrey Bowen was murdered by letter bomb. In 1998, a South Australian coroner found that an organised criminal, Dominic Perre, had sent the bomb. The DPP did not charge Perre.

The implied reason for the major cause of low conviction rates – concealing evidence – is that jurors' mental calibre is low. *OxfordLQ* quotes law/economics professor Gordon Tullock, of George Mason University, Virginia, as stating in *The Logic of the Law* (1971):

When I took courses on Evidence in law school, the explanation given for this giant collection of rules was simply that Juries were stupid.

If that were the case, the remedy would be to use intelligent semi-professional lay judges, as they do in Germany. While noting that no other legal system conceals evidence, Professor Julius Stone QC and former Justice W. A. N. Wells put the stupid theory more delicately in *Evidence*:

[The] great canons of exclusion of relevant facts [are] unique in the world's evidential systems. [They] sprang from the exigencies of protecting lay jurymen from dangers of confusion and prejudice. They represented the judges' evaluation of the mental calibre of the jury. To some extent this evaluation was excessively low, and

presented unnecessary obstacles for the free exercise of their common sense.

The argument gets sillier: judges sitting alone are bound to conceal the same evidence from themselves. Stone and Wells said 'these rules are today applied to all trials, whether before a jury or before a judge alone'. That must mean that judges are as stupid as they think jurors are. In fact, and bearing in mind that almost all accused are guilty, judges are apparently more stupid. Janet Fife-Yeomans reported in *The Australian* of 27 August 1994:

Figures from the NSW District Court show that the jury convicted in half the cases while the judge, when hearing a case alone, convicted in only a quarter.

Jurors deliver wrong not guilty verdicts in 50% of cases because of lawyers' tricks and because judges conceal evidence. Judges sitting alone don't have those excuses. They know lawyers' tricks; they hear the evidence before concealing it from themselves; and they know that 99% of accused are guilty. In another example of Orwell's doublethink, they then find as many as 75% of accused not guilty when they know they are guilty.

Some of their not guilty verdicts may be more sinister than mere stupidity. Since there is no appeal against an acquittal, some judges may let criminals off to avoid the shame of being overturned by stupid

appellate judges. And some may merely be doing favours for the defence Bar.

The public is not deceived. *The [Sydney] Daily Telegraph* reported in July 2004 that 92% of 7,000 readers believe the judicial system is unfair, and that 78% believe it favours criminals.

A criminal system exists to protect the community, and police are demanding that they be allowed to do their job properly. Ian Blair, Deputy Commissioner of London's Metropolitan Police said in May 2003:

We need inclusivity of evidence. If the jury is the light by which freedom shines, why don't we tell them the truth and allow them as adults to weigh that truth?

Chief Justice David Malcolm, of Western Australia, said in 1999:

Historically, the concept of a fair trial has applied [only] to the accused. In my view, that concept needs to be changed - a trial should be fair not only to the accused but also to the victim and the prosecution.

## H. Convicting the innocent

The adversary system's win-at-all-costs culture gets the worst of both worlds: criminals get off, and innocent people, particularly the poor, go to prison. Some estimates for the US, Britain and Australia:

**The US.** C. Ronald Huff, Ayre Rattner and Edward Sagarin estimated (*Convicted But Innocent, Wrongful Conviction and Public Policy*, Sage, 1996) that 5% of convictions per year in the US are wrong. That is approximately 10,000. Their figures suggest that at the start of 2008 perhaps 150,000 of some three million inmates were innocent.

*The Chicago Tribune's* Ken Armstrong and Steve Mills reported in 1999 that 12 of 285 (4.2%) prisoners on the Illinois Death Row since 1977 were found to have been wrongly convicted, and that throughout the US at least 381 homicide convictions had been 'thrown out because prosecutors concealed evidence suggesting innocence or knowingly used false evidence'.

It is thus too much of a risk to kill those found guilty. The US Bureau of Justice Statistics says 3859 people were executed between 1930 and 1972. If 4% were not guilty, the state wrongly killed 154, including Bruno Hauptmann, who was convicted on fabricated evidence in 1936 for allegedly kidnapping Colonel Lindbergh's baby.

Five US Supreme Court judges – Potter Stewart, Byron White, William Douglas, William Brennan, and Thurgood Marshall – abolished the death

penalty in *Furman v Georgia* (1972) on constitutional grounds, i.e. that it was 'cruel and unusual punishment'. The four in favour of executions were Warren Burger CJ, Harry Blackmun, Lewis Powell and William Hubbs Rehnquist.

Four years later, Douglas had been replaced by John Paul Stevens and Stewart and White switched. In *Gregg v Georgia* (1976), the vote was 7-2 to restore executions. In favour were Burger, Stewart, White, Powell, Blackmun, Rehnquist, and Stevens. Brennan and Marshall were against. They dissented in every death penalty case until they retired, Brennan in 1990 and Marshall in 1991.

From 1976 to 1 April 2008, there were 1099 executions; 44 were probably innocent. Relatives of those killed were no doubt gratified when Harry Blackmun (1908-99, Justice 1970-94) admitted in 1994 that he had been wrong about the death penalty, and when John Paul Stevens (b. 20 April 1920, Supreme Court 1975-) said on 16 April 2008 he now believed the death penalty is unconstitutional

George W. Bush allowed the executions of 152 people – six probably innocent – during his period as Governor of Texas (January 1995-December 2000), many on the cursory advice of his lawyer, Alberto (Seedy) Gonzales. Bush thus presided over an execution every nine days; Britain's Lord Chief Justice (1946-58) Rayner Goddard (1877-1971), who achieved an orgasm when he ordered an execution, would have been an ecstatic Governor of Texas.

After a spate of forced releases from Death Row, *Time* reported in May 2001 that 20 of the 38



States with death penalties were considering moratoriums on executions. On 1 April 2008 there were 3261 on death row; 130 (4%) were probably innocent.

**Britain.** Mike Mansfield QC noted in *Presumed Guilty* that studies by English probation officers found that '500 or more' (at least 1%) prisoners were wrongly convicted. Timothy Evans was wrongly hanged for murder in 1950 and pardoned in 1966. Uproar followed the hangings of Derek Bentley in 1953 and James Hanratty in 1962. England abolished executions in 1965. That was fortunate for Irish suspected of terror.

In 1974, detectives tortured the Birmingham Six to get false confessions to murder. In 1980, Lord (Alf) Denning (1899-1999, Master of the Rolls 1962-82) heard the Six's civil action alleging assault by police. He said:

If the six men win it will mean that the police were guilty of perjury, that they were guilty of violence and threats, that the confessions were involuntary and were improperly admitted in evidence and that the convictions were erroneous ... This is such an appalling vista that every sensible person in the land would say it cannot be right that these actions should go any further.

The Six continued to seek justice. Lord Denning, 89, turned Blackstone and Starkie on their heads in 1988. The kindest thing to say about the following statement is that he had sadly succumbed to dementia. He said

It is better that some innocent men remain in gaol than that the integrity of the English judicial system be impugned ... Hanging ought to be retained for murder most foul. We shouldn't have all these campaigns to get the Birmingham Six released if they'd been hanged. They'd have been forgotten, and the whole community would be satisfied.

In 1991, after 16 years in prison, the Six were acquitted and freed by appeal court Justices Lloyd, Mustill and Farquharson. The Home Secretary, Kenneth Baker, a lawyer, then set up an inquiry into the criminal system chaired by Viscount (Garry) Runciman, a sociologist. Some saw the inquiry as a damage limitation exercise; others hoped it might result in change to a truth-based system.

Research for the inquiry showed that the innocent are rarely charged in France and Germany, but the Runciman Report (1993) was a throwback to 1219: it said the UK should persist with the Dark Ages system.

The only useful thing to emerge from the inquiry was a recommendation that a body be set up to investigate possible perversions against the innocent. The Criminal Cases Review Commission (CCRC) began work in 1998. It consisted of eight non-lawyers and six lawyers and had a staff of 100.

A Commissioner, Dr James MacKeith, a forensic psychiatrist, told me that the commissioners accept all relevant evidence. The recommendations of the pro-truth CCRC have to be ratified by the Court of

Criminal Appeal (CCA), which adheres to the anti-truth system. In what may be an example of the British spirit of compromise, the CCA has agreed with the CCRC in 70% of cases. To 31 August 2008, the CCRC had received 11,061 applications and had referred 395 cases to the appeal court. The court had quashed the convictions in 260 cases and upheld the convictions in 110 cases. Some results:

**Mahmood Mattan.** Hanged 1952. Conviction quashed 1998 because evidence of main prosecution witness was unreliable.

**Derek Bentley.** Hanged 1953. Conviction quashed because Lord Chief Justice Rayner Goddard, misdirected the jury. Lord Chief Justice Bingham said Lord Goddard was 'blatantly prejudiced' and denied Bentley 'that fair trial that is the birthright of every British citizen'.

**Stephen Downing.** Convicted of murder in 1973 and would have been paroled in 1990 if he said he was guilty. He refused and remained in prison for 29 years. His conviction was quashed in 2002 after forensic evidence against him was found to be unreliable.

**Patrick Nicholls.** Convicted of murder 1975 and sentenced to life. Conviction quashed because new evidence showed the 'victim' died from natural causes.

**William Gorman and Patrick McKinney.** Convicted of terrorism 1980 and given indefinite sentences. Convictions quashed 1999 because Electrostatic Document Analysis (ESDA) of police

interview notes showed significant rewriting of pages.

**David Ryan James.** Convicted of murder 1995. Conviction quashed because the 'victim's' suicide note was found in 1996.

**Australia.** If, as in Britain, 1% of Australian prisoners are not guilty, 235 of 23,555 inmates in 2003 were probably innocent. Australia has not risked killing the alleged guilty since 1967. Listed here, courtesy of the New South Wales Council of Civil Liberties' website, are the dates of the last executions in the various states, with, in brackets, the dates when the states formally abolished the death penalty:

Queensland 1913 (1922)

NSW 1940 (1955 for murder; 1985 for treason and piracy).

Tasmania 1946 (1968).

Commonwealth and Australian Capital Territory no executions (1973).

Northern Territory 1952 (1973).

Victoria 1967 (1975).

South Australia 1964 (1976).

Western Australia 1964 (1984).

As it happens, I was an official witness, on behalf of Mr Rupert Murdoch's *Truth*, at the last execution in Australia, that of a minor criminal named Ronald Ryan, in Melbourne in 1967. My account, in a book called *Amazing Scenes: Adventures of a Reptile of the Press* (Fairfax Library, 1987), begins with a nod – theft if you insist – to Graham Greene's *The Third*

*Man:* 'One Friday in February 1967 I got a letter from the man I had seen hanged a week before. A week later, the hangman sent a carping letter.'

Ryan's letter, written on 10 feet of lavatory paper the night before he was hanged, said he was not guilty of intent. I tend to believe him, and that life for manslaughter would have been appropriate. The hangman, a Melbourne chemist, took exception to my observation that his movements were hurried and jerky. He wrote: 'I have carried out executions throughout Australia and beyond Australia for the past 38 years, and I have never been told that my work has been jerky.'

A dingo (a wild dog) kidnapped Mrs Lindy Chamberlain's baby daughter, Azaria, from their tent near Uluru, Central Australia, in 1980, but in 1982 Lindy was found guilty of murdering the baby. A later inquiry found the truth, and her conviction was quashed in 1988.

Ian Barker QC prosecuted Mrs Chamberlain. In 1994, as chairman of the NSW Bar Association, he said my book, *Trial by Voodoo*, was the silliest book of the decade. I said he might very well be right, but he was the wrong person to say it: he was the guy who got the dingo off.

## **I. Contempt: guilt presumed**

Contempt by affront is contempt of the judge in court. Contempt by publication allegedly prejudices 'fair' trials. Both are crimes, but outside the US the common law presumes that alleged offenders are guilty, and judges, not jurors, deliver the verdicts.

Affront originated in mediaeval superstition. The deity appointed the king; the king appointed the judge; an affront to a judge was thus an affront to the deity. The offender would suffer eternal damnation, and meanwhile instant retaliation.

Oliver Cyriax reports that in 1631 one Noy threw a brickbat at Judge Richardson – possibly Sir Thomas Richardson (1569-1635), Chief Justice of the King's Bench (criminal cases) 1631 – but missed. Richardson had Noy's hand cut off and displayed on a gibbet, and then had him hanged in the court.

Justice Sir John Eardley Wilmot (1709-1792) prepared an opinion for *R v Almon* (1765), as case of affront against a reporter, John Almon (1737-1805). Wilmot said contempt law was necessary to keep 'a blaze of glory' around the courts, judges alone gave the verdict because that was 'immemorial usage and practice'. His opinion was never delivered, but it is still the leading authority for trial without jury in Australian contempt cases.

Some judges still believe they are enveloped in a blaze of glory. In 1977, Malcolm Turnbull (BCL Oxon), who was then a journalist, referred to judges by surname only. The egregious Harry (a profit is a

loss) Gibbs warned him that 'it was contempt to refer to a judge in any way other than as Mr Justice Bagg'ly'. Turnbull invited Gibbs to grow up.

Contempt by publication offends against the need for an alleged offender to have a guilty mind, the presumption of innocence, and trial by jury. It punishes media organisations which publish, even inadvertently, material which might be concealed from jurors.

Christopher Murphy, a Sydney lawyer, was not aware that a trial was proceeding when he mentioned the accused's convictions in a newspaper article in 1993. The judge aborted the trial; Murphy and the organ were charged with contempt; three appellate judges found them guilty in 1994.

Unfortunately, the same man was again on trial; his convictions were mentioned at the contempt trial and reported in the Press; his new trial was aborted. The judges and the media were not charged with contempt, but in 1995 the judges confirmed the original guilty verdicts, and ordered the organ to pay the prosecution costs as well as their own. The penalty, some A\$120,000, was enough to cripple a small newspaper.

Recent British contempt history shows how judges can subvert the will of Parliament. In *BSC v Granada* (1981), Lord (Cyril) Salmon (1903-91) adopted a formula developed by the Master of the Rolls, Lord Denning. Denning said (presumably before he went ga-ga):

The public has a right of access to information which is of public concern and of which the public ought to know. The newspapers are the agents, so to speak, of the public to collect that information and to tell the public of it. In support of this right of access, the newspapers should not in general be compelled to disclose their sources of information.

The Thatcherist regime agreed. Section 10 of the *Contempt of Court Act* 1981 stated:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible unless it is established to the satisfaction of the court that disclosure is necessary in the interests of justice, national security, or for the prevention of disorder or crime.

It took judges only three cases over seven years – *Tisdall* (1983), *Warner* (1987), *Goodwin* (1990) – to destroy the *Contempt of Court Act*. None of the judges was dismissed.

Contempt by publication does not exist in Europe because evidence is not concealed, and barely exists in the US because the First Amendment protects the public's right to information



## J. Defence of the criminal system

Defence of the criminal system comes down to assertions that it protects the innocent and the 'rights' of accused, and protects everyone from oppression by the leviathan state.

Professor Stephan Landsman said in *Readings on Adversarial Justice*: 'For centuries adversarial courts have served as a counterbalance to official tyranny and have worked to broaden the scope of individual rights.'

There is something in that, particularly in relation to selfless lawyers who try to help the poor and defenceless, but the argument collapses in the face of the system's own tyranny. Its unfairness oppresses victims of crime. Cruel cross-examination oppresses witnesses in general and women and children in particular. Negligence law oppresses doctors, accountants, teachers, local councils, shareholders in business and manufacturing. Interminable pleadings and discovery oppress litigants. Unfair libel and contempt laws oppress citizens, journalists and media shareholders.

In *Twenty Theses on Adversarial Ethics*, Professor David Luban told a Brisbane conference in 1997:

There are four standard arguments on behalf of the adversary system:

- (1) It is the best way to find the truth.
- (2) It is the best way to ensure that all parties' rights are protected.

- (3) It is part of our tradition and culture.
- (4) ... the adversary system is the way clients participate in the litigation process.

Professor Luban said all four arguments fail. He continued:

Only a pragmatic justification of the adversary system succeeds. I don't mean to argue that the adversary system should be abandoned, however. Only if we had strong evidence that real-world alternatives such as the Continental European procedural regime are substantially better would it be worth contemplating a far-reaching change, one that would exile almost every Australian jurist from the only legal regime he or she knows ... A common-law country should retain the adversary system because:

- (1) It needs some procedural system;
- (2) The available alternatives aren't demonstrably better than the adversary system.
- (3) The adversary system is the system in place. This is the pragmatic justification for the adversary system. It is logically weak but practically strong.

Professor Luban's argument also fails. An available alternative, the investigative system, which seeks the truth and trained judges control evidence must be better than a system which does not seek the truth and trained liars control the evidence.

I told Professor Luban in April 2007, that he would be the Red Rum of ethicists except that he sails into the last fence. He replied: 'I don't get the

Red Rum allusion, but it sounds like a good thing to be.'

I told him Red Rum was the world's greatest steeplechaser, three times winner of the Grand National. His third win, in 1977, was one of the great moments in British sporting history. He said: 'I'm honored to be included in Red Rum's company!'

In *Professional Detachment*, Harvard ethics professor Arthur Applbaum demolished two of lawyers' traditional claims:

... at trial, a good lawyer regularly intends to induce beliefs in juries that the lawyer believes to be false, and so deceives the jurors. In trying to evade this simple and obvious fact, much breath is wasted on clever equivocation or bad epistemology [the investigation of human knowledge], such as 'it is the job of the jury, not the lawyer, to render a verdict' (true but beside the point), or 'the lawyer cannot know what is true or false until the jury decides' (false and beside the point).

## **K. A criminal enterprise?**

Debbie Kilroy, 28, got six years in prison in 1989 for drug-trafficking. In 2007, she was admitted to practise as a lawyer in Queensland. She said: 'It's usually the other way round: they become lawyers, then they commit the offences.'

That raises a question: is the adversary system a criminal enterprise? (See Definitions.) Lawyers and judges get money from doing things that would be criminal in anyone else, e.g. perverting justice.

However, it is usually necessary to prove a wrongful intent (*mens rea*) as well as a wrongful act (*actus reus*). Judges and lawyers may lack the necessary guilty mind because law schools have told them for 200 years that the adversary system is the best system and that it requires them to do those things.

Professor (of planning) Bent Flyvbjerg, of Aalborg University, Denmark, wrote in *Rationality and Power: Democracy in Practice* (University of Chicago Press, 1998):

Power often finds deception, self-deception, lies, and rationalizations more useful for its purposes than truth and rationality, [but that] does not necessarily imply dishonesty. It is not unusual to find individuals, organizations, and whole societies actually believing their own rationalizations. Nietzsche, in fact, claims this self-delusion to be part of the will to power ... The greater the power the less the rationality.

Anything can be rationalised. John Bryson, barrister and author of *Evil Angels*, which detailed the Lindy Chamberlain case, told postgraduate law students at Melbourne University (*When the Rule of Law Meets the Real World*, 2001):

First, we believe as we wish to believe, always, always, always. Second, the passion with which we believe rises in absolute proportion to the importance to us of success in our current enterprise.

Robert French, Chief Justice of the High Court of Australia, undoubtedly believed what he was reported (*The Australian*, 5 September 2009) as saying (in indirect speech):

Common law in Australia had enshrined rights and freedoms, including freedom of speech and the press, and a range of others, including privilege against self-incrimination, and the right to access a legal counsel when accused of a serious crime.

One assumes that Chief Justice French absorbed that stuff at law school. Unfortunately, as we have seen, freedom of speech and freedom of the Press do not exist in the common law world (except in the US), and the privilege against self-incrimination is based on a lie.

## **L. Impetus for change**

Justice Geoffrey Davies, of the Queensland appeal court, noted results of rationalisation and self-deception in *The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System* (Australian Institute of Judicial Administration, 2002). His remarks apply equally to the criminal system. He said:

Two related misapprehensions have inhibited change to our civil justice system. The first of these is a belief that our traditional civil justice system has, over time, developed the best means of ascertaining the truth and of achieving fairness between the parties. And the second ... is a perception that the civil systems of Europe are so different from ours and so inferior to ours in each of those important respects that nothing can be gained by borrowing from them.

Nonetheless, impetus for change has been growing in recent decades. Warren Burger, later US Chief Justice 1969-86) said in 1967:

I assume that no one will take issue with me when I say that these North European countries are as enlightened as the United States in the value they place on the individual and on human dignity. [Those countries] do not consider it necessary to use a device like our Fifth Amendment, under which an accused person may not be required to testify. They go swiftly, efficiently and directly to the question of whether the accused is guilty.

Harry Whitmore, Professor of Law at the University of NSW, wrote in *The Sydney Morning Herald* (6 April 1981):

Some distinguished lawyers are indeed ashamed of the system in which they are working ... it is a process which is as likely to suppress or distort the truth as to reveal it. The technique is often a charade ... It would be quite easy to develop a better system partially based on the European 'inquisitorial' system of justice ... a judge ... should be concerned to find the truth.

In 1984, Chief Justice Burger gave the American Bar Association a glimpse of the future:

Trials by the adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.'

Former judge Burton Katz wrote in *Justice Overruled* (1997):

A system that exalts a criminal's rights over the victim's, procedure over substance, and adversarial supremacy over the quest for truth and justice is on the verge of moral bankruptcy. It will not survive, because the people will not support it.

Thomas Babington Macaulay (1800-59), a Whig barrister and historian, said a lawyer 'with a wig on his head and a band round his neck will do for a guinea what he would otherwise think it wicked and

infamous to do for an empire'. In 1837, as legal adviser to the Supreme Council of India, Macaulay drew up a Penal Code based on the lawyer-run adversary system, minus some grosser technicalities. The code, revised by Sir Barnes Peacock (1810-90, Chief Justice of Calcutta 1859-70), became law in 1860.

India today has three-quarters of the 1.6 billion who suffer the injustice of the adversary system. As noted above, India's conviction rate is 16%. Lord Macaulay's system thus puts away one-sixth of guilty accused.

A blue ribbon committee recommended in April 2003 that India change to a truth-seeking criminal system. The chairman was Justice V.S. Malimath, former Chief Justice of the Karnataka and Kerala High Courts. Committee members included D.V. Subba Rao, Chairman of the Bar Council of India, Amitabh Gupta, former Director-General of Police, and Durgadas Gupta, Joint Secretary in the Ministry of Home Affairs.

Justice Malimath said that at the core of the report was the 'duty of the court to search for truth', and that the criminal system was weighted in favour of the accused. The report recommended that judges be given the power to summon and examine anyone they consider appropriate; to examine and cross-examine accused at trial; and to draw adverse inferences from a refusal to answer. At least in India, victims of crime would no longer have to suffer from Blackstone's lie.



By late 2009, however, the Malimath recommendations were still to be passed into law. That may be due to rearguard actions by lawyers and by organisations who wrongly believe that the adversary system protects the innocent, e.g. Amnesty International and civil liberties groups. Or it may be nothing more sinister than that reform in India proceeds at a measured pace. It took 23 years for Lord Macaulay's 'reforms' to be put in place.

In 2004, the Australian Family court began to experiment with a largely lawyer-free investigative system for custody cases.

*The Australian* (21 March 2005) reported that Mick Keelty, the Federal Police Commissioner, and other experts said a 'system such as the one used in France' would more effectively deal with terror suspects. Commissioner Keelty had stated the obvious, but it was not obvious to Australia's first law officer Philip Ruddock. He told *The Australian* he 'was not currently in favour of a French-style system', because 'that involves a whole lot of principles that if introduced here would create a great deal of problems'.

The United Nations set up the International Association of Prosecutors (IAP) following a sharp increase in transnational organised crime after the collapse of the Soviet Empire in 1991. The IAP now represents 128 countries in both systems. The NSW DPP, Nick Cowdery QC, who is on the IAP's Executive Committee, said on 10 October 2008: 'I've had some discussions about moving towards some aspects of the inquisitorial system too in the context

of the [IAP]. I'm sure these discussions are being held all over the place very often.'

*The Australian* (31 October 2008) reported the Victorian DPP, Jeremy Rapke QC, as saying 'something very serious is amiss with the manner in which criminal trials are conducted', and that Rob Hulls, the Victorian first law officer, had said that lawyers need to abandon many of their adversarial traditions and join him in a cultural revolution based on an active, problem-solving judiciary.

Also on 31 October, 2008 Emeritus Professor (law) David Flint wrote in *The Australian* that Australia needs a Royal Commission to examine critically the criminal justice system. That is certainly true, but the chairman of any such inquiry should be book-ended by non-lawyers.

## M. Convergence fails

Bob Askin, a famously corrupt NSW politician, told colleagues when his party won the 1965 election: 'We're in the tart shop now, boys.' The adversary tart shop provides endless confections for the few who run it. Some lawyers in the investigative system probably gaze wistfully at the tart shop.

Under pressure of change, common lawyers' fallback position is 'convergence' between the two systems, but with lawyers still controlling the evidence (and the money). Convergence is touted as a happy compromise, but a system run by trained judges who search for the truth cannot possibly converge successfully with an anti-truth system run by trained liars, who search for the money.

In 1993, the United Nations foolishly let common lawyers and judges have a slice of the action in dealing with crimes committed in what was Yugoslavia. The International Criminal Tribunal for former Yugoslavia (ICTY) boasts on its website:

It [ICTY] has created an independent system of law, comprising of elements from adversarial and inquisitory criminal procedure traditions ... It has established a unique legal aid system, and groomed a group of defence attorneys highly qualified to represent accused in war crimes proceedings.

The folly of 'convergence' was amply demonstrated at the Milošević farce. Slobodan Milošević (1941-

2006), a Serb, was President of Yugoslavia from 1997 to 2000. He was arrested in March 2001 and eventually sent to The Hague to stand trial at the ICTY on charges of crimes against humanity, violating the laws or customs of war, grave breaches of the Geneva Conventions and genocide in Croatia, Bosnia, and Kosovo.

The farce began on 12 February 2002. Two judges were from the adversary system, Presiding Judge Patrick Robinson, of Jamaica, and Judge Iain Bonomy, of Scotland. One was from the pro-truth system, Judge O-Gon Kwon, of South Korea. Milošević appeared for himself.

It took two years to present no more than the case concerning genocide in Croatia, Bosnia and Kosovo. Milošević, who suffered from a heart condition, asked to be treated in a heart surgery centre in Moscow, but the ICTY refused on the ground that he might escape. He was shortly found dead in his cell of a heart attack on 11 March 2006. The ICTY denied any responsibility. His death was sad news for the ‘convergent’ lawyers. In more than four years, they had called 300 witnesses and were probably looking forward to many more years of gainful employ, and nice Dutch food.

Dr Radovan Karadzic (b. 1945), a Montenegrin poet, psychiatrist and (Serb) politician, was arrested in Belgrade, Yugoslavia, on 21 July 2008, and sent to The Hague on ICTY charges of genocide and war crimes against Bosnian Muslims and Bosnian Croats.

Amid reports that Karadzic’s trial was expected to take 10 years, Geoffrey Robertson QC said (*The*

*Independent*, 1 August 2008): '... it may be necessary to abandon the Anglo-American model of adversarial trial and shift instead to the European inquisitorial process'. In that process, judges present only enough evidence to manifest the truth.

The ICTY did not take Robertson's advice, but Reed Stevenson, of Reuters, reported on Tuesday, 9 September 2009, that Judge O-Gon Kwon had urged prosecutors to 'streamline their case'. Stevenson said 'prosecutors said last week they would reduce the number of locations to be mentioned in evidence and cut their witness list by more than a quarter. But Kwon on Monday detailed several more areas for prosecutors to cut'.

Representing himself, Dr Karadzic asked for another 10 months to prepare. Judge Kwon said he had had enough time already. Kwon hoped the trial would start in October 2009 and be over in 2 ½ to three years, in 2012. In what may have been a useful piece of greymail, Dr Karadzic asked for documents from the administration of President Bill Clinton. If they were not forthcoming, the tribunal might find it difficult to convict.

The European Union has 25 members. Only three, the UK, Ireland and Malta, are in the anti-truth tradition. The Milošević and Karadzic trials should remind the other 22 countries that 'convergence' between the two systems would be inimical to justice, and would merely divert huge sums of money to lawyers.

## N. The remedy

Professor David Luban said: 'The O. J. Simpson trial has persuaded most Americans that the adversary system is at best grotesque.' This book has sought to identify causes and consequences of the grotesquerie.

**Causes.** A cartel of lawyers and judges runs the system as a business; the system does not seek the truth; trial lawyers, i.e. trained liars, are in charge of evidence; judges are untrained former trial lawyers.

**Consequences.** Too many innocent people go to prison; too many criminals get off; civil hearings take too long.

The investigative system is better in every respect. There is no cartel; judges trained separately from lawyers control evidence and search for the truth; lawyers' role is minimal. That is not to say the system is perfect. In France, for instance, the *juge d'instruction* (investigating judge) can detain suspects for lengthy periods, ostensibly for suspects to be available for further questioning as new evidence comes in, but detention can be seen as a softening-up hangover from the old torture days.

Nor would it be helpful to borrow from the new Italian system. That system has tilted towards the adversary system to help members of the Sicilian Mafia escape justice. Alexander Stille explained how it happened in *Excellent Cadavers: The Mafia and the Death of the First Italian Republic* (Pantheon, 1995).

The Sicilian Mafia was virtually the criminal wing of Giulio Andreotti's Christian Democrat party. In February 1986, Giovanni Falcone, an investigating judge, put 475 Mafiosi on trial in Palermo. At national elections in June 1987, the Mafia voted for parties other than Andreotti's on two conditions: investigating judges were to be emasculated and the law changed. This punished Andreotti's party for failing to stop the investigation and the maxi-trial and gained more protection for the Mob.

In December 1987, 344 (72%) of the Mafiosi were found guilty. In 1988, the pool of Mafia-investigating judges was dismantled, and the Parliament passed changes to the criminal code which limited the powers of remaining investigating judges. On 20 September 1988, a tap on a telephone in the Cafe Giardano in Brooklyn recorded a conversation between a heroin-dealer, Joe Gambino, and an anonymous hood just back from Palermo. The dialogue, in Sicilian, indicates that the Mafia sees the function of the US adversary system as being to anally penetrate police:

Hood: Now they've approved the new law, now they can't prosecute as they did in the past ... They can't arrest people when they want. Before they do, they have to have solid proof, they have to convict first and arrest later.

Gambino: Oh, so it's like here, in America.

Hood: No, it's better, much better. Now these bastards, the magistrates and cops, can't even dream of arresting anyone the way they do now.

Gambino: The cops will take it up the ass. And [Falcone] won't be able to do anything either? ... They'll all take it up the ass.

Hood: Yeah, they'll take it in the ass.

Falcone and Judge Paolo Borsellino knew that seriously investigating the Mafia would result in their murders, and they were assassinated in 1992. Their heroism is a reproach to common law academics, prosecutors and judges who are silent in the face of their system's protection of criminals. Procedures in Germany and France at least provide the basis for a truth-seeking system

## **1. German and French civil procedure**

Modern German civil procedure is similar to that used in Britain before lawyers began to get control of the process in the 15<sup>th</sup> century. The following relies largely on Professor John Langbein's *The German Advantage in Civil Procedure* (1985).

Litigation in Germany begins with a lawyer making a complaint which lays out the key facts, a legal theory, and asks for a remedy. Supporting documents are attached or indicated, and witnesses identified. The defendant does the same. Discovery is virtually non-existent; the judge examines the material and sends for public records and any other documents he needs. He now has the beginning of a



dossier. All subsequent evidence-gathering and submissions go into the dossier. It is continuously open to inspection by the lawyers.

US trial lawyers coach witnesses relentlessly. German lawyers rarely speak to witnesses outside the court. To do so is a serious ethical breach and self-defeating: judges doubt the reliability of witnesses who have discussed the case with lawyers or have been seen consorting with them.

There are no adversary system 'saxophones', i.e. 'expert' witnesses on whom lawyers who hire them play tunes. If there is a technical problem, the judge, in consultation with the lawyers, selects an expert or experts and defines their role.

The judge sits without a jury and does not conceal evidence from himself. He, rather than lawyers, mainly gathers and evaluates evidence over a series of hearings. There is no distinction between pre-trial and trial, between discovering evidence and presenting it. The German approach is called the 'conference method'; the tone is that of a routine business meeting. This lessens tension and theatrics and encourages compromise and settlement. The fact that the loser pays encourages settlement before judgment.

The judge may be able to suggest compromise and resolution in discussions with the lawyers and their clients. If the parties persist, the judge acts as examiner-in-chief of the witnesses. Lawyers for either party can then ask additional questions, but Professor Langbein says that in Germany 'counsel are not prominent as examiners'. He says the judge

ranges over the entire case, 'constantly looking for the jugular - for the issue of law or fact that might dispose of the case'.

Professor Langbein notes that in the adversary system, lawyers are paid by the hour and court reporters by the page. The German incentive is the opposite: evidence is rarely recorded verbatim. The judge periodically pauses to dictate a summary into the dossier; lawyers can suggest improvements. The summaries are useful for refreshers at later hearings, and for the written judgment and the appeal court.

The lawyers can comment orally or in writing when the judge has heard witnesses or procured other evidence, and can suggest further proofs or advance legal theories. Professor Langbein says:

Thus, non-adversarial proof-taking alternates with adversarial dialogue across as many hearings as necessary. The process merges the investigatory function of our pre-trial discovery and evidence-presenting function of our trial.

Justice Russell Fox wrote in *Justice in the 21<sup>st</sup> Century*:

In a civil action [in the adversary system] a large part of the cost is incurred in the pre-trial phase. This comprises pleadings, court directions, compulsory conferences, discovery and interrogatories, and other matters as the case requires ... The whole operation is costly to the parties and to the government as well.

He contrasted that with a civil matter in France, where, he said:

... evidence is customarily assembled in written form by one of a court of three judges, and he or she reports to the court on it. The practice is for the reporting judge to accept the evidence presented by the parties and to do little, if any, separate investigation himself. When a witness is called, he is first examined by the President, and counsel for the parties may examine later ('cross-examination' is not a term known to continental jurisprudence.) Few witnesses are called to give oral evidence. Hearings (the correct term, there being no 'trials') are without juries and are not concentrated, continuous affairs. The first hearing may occupy no more than one hour, whereupon there can be an adjournment, so that one party or the other may produce further evidence, or for a related purpose. The next hearing may be the final one, and commonly does not last longer than an hour or so. The point for present purposes is that the whole case may be disposed of in less than a day overall; relatively few occupy much more. In other continental countries, and in Japan, the position is much the same. This result is greatly helped by the fact that France, in common with other civil law countries, does not have any exclusionary rules of evidence.

After the lawyers and the reporting judge have done the preliminary work, the French system can then dispose of a civil case in a few hours. *Three Rivers District Council v Bank of England* took 10 years. The action, brought by liquidators of the Bank of Credit and Commerce International (BCCI), reminded some of *Jarndyce v Jarndyce*. BCCI, founded in Pakistan in 1973, was involved in bribing, money laundering, supporting terrorism, arms trafficking, selling nuclear technology, tax evasion, smuggling, illegally

buying banks and land, and illegal immigration. When it was closed in 1991, at least US\$13 billion of assets had disappeared.

In 1995, the liquidators of BCCI claimed £850 million in compensation from the Bank of England for alleged errors and omissions as a regulatory body. The trial was delayed for nine years by arguments over discovery in the Court of Appeal (twice) and in the House of Lords (once). The trial began in January 2004. The opening speech by Gordon Pollock QC, for Three Rivers, took 80 sitting days; the opening speech by Nicholas Stadlen QC, for the Bank of England, took 119 sitting days. Stadlen's speech, which ended in May 2005, was thought to be the longest in British legal history, but *Jennens* was safe; the liquidators dropped the action in November 2005.

The time and money wasted on pleadings and discovery tends to exclude from civil justice most except wealthy corporations and the rich. The rapidity of European civil litigation gives the poor and middling at least some access.

## **2. Criminal procedure in France**

French pre-trial filters (see below, Two systems compared) show how the innocent can be protected without concealing evidence. Moreover, police are less likely to fabricate because they know evidence will not be hidden, and because, in serious cases, they are supervised by a trained investigating judge (*juge d'instruction*).

Law professor Gordon van Kessel, of UC Hastings College of the Law, San Francisco, observed in *Adversary Excesses in the American Criminal Trial* (Notre Dame Law Review, 1992):

It is arguable that by allowing the defendants full discovery of the state's case, an opportunity to give unsworn narrative testimony, and a right to written reasons supporting the fact-finder's decision, the non-adversary system shows greater respect for the accused.

At the pre-trial stage, an overworked *juge d'instruction* reconstructs the crime, stages a confrontation between suspect and victim or relatives, and builds up a dossier of all relevant evidence for and against the suspect. Despite a right of silence, the suspect generally accepts that he is a proper source of information.

The dossier is made available to the suspect's lawyer in case he can show the truth lies elsewhere. If the lawyer can show there is considerable doubt, that is the end of it.

At the trial, the jurors, if any, sit on the bench with the judge or judges. Guilty pleas are not accepted; judge and jurors are obliged to find the truth for themselves. The accused is not on oath. His life, character and previous convictions are presented. He has a right of silence, but adverse inferences can be drawn if he refuses to give evidence.

The presiding judge uses the dossier to question as many witnesses as necessary for 'the

manifestation of the truth'. Witnesses can tell the whole truth by giving their evidence as a narrative rather than by Yes-No answers. Lawyers for prosecution and defence can question witnesses but in some jurisdictions they are not allowed to cross-examine directly lest they pollute the truth; they can ask questions only through the judge.

Common law jurors find the formula, beyond reasonable doubt, negative and confusing; French jurors understand their formula. Bron McKillop, an Australian authority on the investigative system, says there is probably no real difference between 'beyond reasonable doubt' and the European 'conviction of guilt', what the French call *conviction intime* and Germans call *freie uberzeugung*.

A doubt must be resolved in favour of the accused. Judge(s) and jurors reach the verdict and penalty together and give their reasons. The results automatically go to appeal courts for review. Prosecution as well as defence can formally appeal against not guilty verdicts; there is no double-jeopardy rule.

The dossier helps the appellate court to scrutinise the lower court's reasoning, application of the law and findings of fact. A flaw is that witnesses' trial evidence is not reviewed because it is not recorded in the dossier.

Bron McKillop notes (*Review of Convictions after Jury Trials: The New French Jury Court of Appeal, The Sydney Law Review*, Lawbook Co., June 2006) that since 2001 a jury verdict of guilty in France can be appealed to a court of appeal consisting of three

judges and 12 lay jurors. He wrote of this logical development:

This may seem strange to anglophones but it shows a faith in the jury court as the ultimate arbiter of guilt in serious criminal cases, without the control of judicial review.

### **3. The two systems compared**

Professor David Luban was plainly correct in saying that every argument for the adversary system fails, but he was not correct in saying that change is not worthwhile because 'the available alternatives are not demonstrably better'. A pro-truth and hence moral system in which trained judges gather and present facts must be superior to an anti-truth and hence immoral system in which trained liars gather and present 'facts'.

The adversary system is inaccurate for innocent and guilty alike, but Justice James Burchett, of the Australian Federal Court, said in 1996:

My reading suggests that even those comparative lawyers who are critical of the French criminal law do accept that French courts are fair, and that the verdict reached is generally accurate.

The superiority of the investigative system can be demonstrated mathematically in terms of accuracy and cost.

First, accuracy for the innocent. David Rose noted in *In the Name of the Law: The Collapse of Criminal Justice* that one of the first acts of the 1991-

93 Runciman inquiry into the British criminal system 'was to order research into two nearby jurisdictions which broadly follow inquisitorial principles, France and Germany.' That research resulted in *A Report on the Administration of Criminal Justice in the Pre-Trial phase in France and Germany*, by Professor Leonard Leigh and Lucia Zedner (Her Majesty's Stationery Office, 1992). Rose reported: '[They] reached several immediately striking conclusions':

First, they found that in neither country was it likely that miscarriages of justice such as the Guildford or Birmingham cases would occur. Second, in contrast to the stratified and often vexed relationship between the different actors in the criminal process in England, on the continent this relationship was marked by 'a high degree of confidence, and of co-operation and mutual trust'. Finally, public confidence in both systems remained high in their respective countries.

Further, Professor Leigh and Lucia Zedner said:

The low acquittal rates in France and Germany and the apparent paucity of cases of unjust convictions are the product of the care taken in the initial stages of the criminal process. A series of pre-trial filters also ensures that the innocent are rarely charged, let alone convicted ... At the end of the *instruction* [investigation] the accused's lawyer will be given an opportunity to examine the dossier and to make representations before the prosecutor decides whether or not the matter should proceed further. If the prosecutor, on receipt of the dossier from the examining magistrate, believes that the case should proceed, he will transfer the file to the *chambre*



*d'accusation*. This court then assesses the correctness of the decision and thus serves as a further filter in the system. It may order that the case proceed, that it be dropped, that the charges be re-assessed ... This court also sits in appeal on refusals of pre-trial liberty and on refusals by the examining magistrate to order investigations into matters suggested by the defence.

Doubtful cases have thus been filtered out at the pre-trial stage, but French and German courts err on the side of caution. They give a further benefit of the doubt to 5% of those who face court. Japanese and Indonesian courts may seem not cautious enough; they give the benefit of the doubt to only 1% of those who get to court.

Second, accuracy for victims. As Professor Alan Dershowitz suggests, 99% of accused are guilty. French and German systems convict 95%. Our system convicts fewer than 50% - 16% in India - because of the 24 anti-truth mechanisms, including evidence concealed first by prosecutors and then by judges.

Third, cost. Justice Russell Fox says trials in the adversary system are two to 10 times longer than hearings in the investigative system. In 1994, an International Bar Association conference in Melbourne heard a report which said a French trial costs about a third to a half that of a common law trial. The investigative system thus convicts at least twice as many serious criminals for at least half the cost, and protects the innocent better.

The Hannes case offers a useful contrast between the length and cost of criminal trials in the two systems. Simon Gautier Hannes was an executive director of Macquarie Bank, a Sydney investment bank. He earned about A\$2 million a year in salary and bonuses. In 1996, Macquarie Bank was advising Thomas Nationwide Transport (TNT) in connection with a takeover bid by a Dutch company, KPN.

Australian banks must report cash transactions of \$10,000 or more. Hannes went to 15 banks on Monday, 9 September 1996. At some banks, he got bank cheques of about \$9000. At others he withdrew cash from his own accounts. He then put \$90,000 into a new account at stockbrokers Ord Minnett in the name of M. Booth.

On Tuesday, 17 September, 1996, an Ord Minnett broker was instructed by telephone to invest M. Booth's \$90,000 in options over shares in TNT. When KPN's takeover bid became public on Wednesday, 2 October, M. Booth made a profit of \$2 million.

Hannes was charged with insider trading early in 1997. His defence was that he and a Mr X had set up an investment syndicate, and that Mr X had bought the TNT options without telling him. Hannes did not give evidence and did not produce Mr X, but his lawyers argued that the prosecution could not prove beyond reasonable doubt that Mr X did not exist.

Hannes endured a committal hearing, a 55-day trial over 10 months (guilty), a successful appeal,

and a 75-day re-trial over 11 months (guilty). He was fined \$100,000 and sent to prison for 2 ½ years. Elisabeth Sexton reported in *The Sydney Morning Herald* (20 November 2002) that Hannes had spent \$3.1 million on legal costs which sometimes reached \$13,000 a day. His various court outings cost taxpayers at least \$2 million.

Bron McKillop, author of *Anatomy of a French Murder Case* (Hawkins, 1997), lectures each year in France and Germany. Given that Hannes' trials took 130 days, I asked him how the French system would have dealt with Hannes. He replied:

The investigator (judge, prosecutor or police) would have interrogated Hannes and required 'X' and M. Booth to present themselves for interrogation, failing which the appropriate adverse inference would have been drawn by the investigator, and by the trial court. All the financial transactions would have been established in detail in the dossier. These matters would have been taken on board through the dossier at the trial, confirmed by oral evidence of the material witnesses and probably also through the interrogation of Hannes by the presiding judge. The trial would probably have lasted a day or so, a week tops, with Hanne almost certainly convicted.

The case for change to some improved version of the truth-seeking system is unanswerable.

#### **4. How to get justice**

Justice Russell Fox said: 'The public estimate must be correct, that justice marches with the truth.' Once

it is accepted that the public knows best, it is a matter of working out how best to direct everything to finding the truth.

It is not impossible. Common lawyers already use an investigative system – usually quite badly of course – in various inquiries, including inquests.

A system in which trained judges search for the truth will require more judges and fewer lawyers. In 1992, France (pop. 60 million) had 20,000 lawyers while Washington DC (pop. 500,000) had 45,000 lawyers.

In 1983, West Germany had 17,000 judges in a population of 61 million; roughly one judge for 3600 people. In 1997, Australia had 863 judicial officers (including magistrates) in a population of 18,500,000: one judge for every 21,436.

Investigative systems thus need roughly six times as many judges as an adversary system. Common law countries which change to a truth-seeking system would thus need roughly the following numbers of trained judges: India: 280,000, US: 77,000, United Kingdom: 17,000, South Africa: 13,000, Canada: 8900, Australia: 5000, New Zealand: 1100, Ireland: 1100.

Trial lawyers may hope governments would not ask taxpayers to pay for the training and upkeep of the extra judges, but reducing the number of lawyers reduces hidden costs. Justice Russell Fox quotes a 1989 report to the US Congress:

Excessive litigation has an adverse effect on economic growth, not only in direct costs but in the way the tort

system alters individuals' behaviour. One of the primary factors determining economic growth is technological innovation. To the degree that technological innovation is inhibited by the tort system ... economic growth suffers. Stephen Magee, professor of finance at the University of Texas at Austin, estimates that the excess supply of lawyers in the USA reduces economic output by [US]\$300 billion to [US]\$600 billion.

Also, higher costs will be more than offset by a reduction in public legal bills and tax evasion. In the end, a truth-seeking system will deliver more justice at less cost.

As an interim step, lawyers can be made judges and, along with existing judges, given control of evidence. Both can then try to put rules for concealing evidence out of their heads. It will be a novel experience, and they may get to like it.

Academics will have to be retrained to teach techniques of searching for the truth, but they should be happy to be able to burn all those impenetrable tomes on how to hide evidence.

The cartel can then be abolished by training new judges separately from lawyers. Professor Benjamin Barton ended his paper, *Do Judges Systematically Favor the Interests of the Legal Profession?* (December 2007), with a suggestion that would effectively abolish the cartel:

Given the general public distrust and dislike of lawyers, there may be many other objections to their dominant role in the judiciary aside from any bias towards lawyers in general. I do not think it is obvious that all judges should

be lawyers. To the contrary, it may be right that no lawyers should be judges. In many civil law countries [those which use the investigative system] judges are trained and educated separately from lawyers. Perhaps it is a better model.

It is encouraging to learn that Professor Barton has not been run out of the cartel on a rail. I asked him in March 2008 how his paper was received by judges, trial lawyers and fellow academics. He replied:

So far I have received a very favorable response. I received a lovely note from the Honorable Dennis Jacobs, a Federal Appeals Judge here ... Interestingly, for a law review article it's drawn some non-lawyer attention, and I've gotten multiple emails, letters, and calls from folks who have their own stories to tell about the phenomenon I noted.

Professor Barton expanded his hypothesis to a book called *The Lawyer-Judge Bias*. It was being peer-reviewed for Cambridge University Press as this was written.

The public knows that justice means truth. Politicians with the courage to determine to change to a truth-seeking system will find that, for the first and last time in their careers, they have the support of more than 90% of the voters.

If there is resistance, reforming politicians might be tempted to hint at a reference to the local anti-cartel authority but, thanks to law schools, lawyers appear to lack the necessary guilty mind, and the parrot-house can be safely ignored: lawyers

are still only 0.2% of the voters, and the public are still 99.8%.

## Definitions

**Abuse of process.** *Butterworths*: 'The misuse or unjust or unfair use of court process and procedure ... generally any process that gives rise to unfairness ... Criminal contempt of court through abuse of the court's process ... includes serious misconduct such as ... intentionally deceiving the court ...' The definitions imply that the adversary system itself is an abuse of process.

**Accusatorial system.** A accuses B; B says: 'Prove it'. It was used in Europe and England from the Dark Ages until early in the 13<sup>th</sup> century. Since then, it has been used only in England and its colonies.

**Adversary system.** An accusatorial system in which lawyers control the evidence, the process, and the money, and untrained judges control the court. English judges began to let lawyers take control of the civil process in the 15<sup>th</sup> century and of the criminal process in the 18<sup>th</sup> century.

**Bagman.** A collector/distributor of bribes/extortions.

**Blackmail.** Theft by extortion.

**Cartel, The.** A syndicate of common lawyers and judges first formed about 1180 to maximize their profits.

**Civil Law.** (The law of the people). Codified criminal and civil law deriving from Roman law. Used in European countries, their former colonies, and other countries.



**Common law.** Judge-made law used in England and its former colonies, including the USA, Canada, India, New Zealand and Australia.

**Conversion rate.** Historian Roy Porter said that multiplying 18<sup>th</sup> century English pounds by 100 gives a rough equivalent of their value today.

**Criminal enterprise.** The vehicle through which organised crimes are committed.

**Dickens Principle.** ‘The one great principle of the English law is to make business for itself’, i.e. trial lawyers.

**Ethics.** ‘A system of moral principles, by which human actions and proposals may be judged good or bad or right or wrong.’ – Macquarie Dictionary. In the adversary system, legal ethics are client-based rather than morality-based.

**Investigative System.** A truth-seeking system in which trained judges control the court and the process. Used by civil law countries since early in the 13<sup>th</sup> century.

**Justice.** This book accepts former Justice Russell Fox’s definition: justice means fairness, fairness means truth, truth means reality, and the search for truth gives a justice system its moral face.

**Kleptocracy.** Rule by thieves.

**Law Lords.** Lords of Appeal in Ordinary; life peers who were members of England’s highest appeal court, the Judicial Committee of the House of Lords.

**Legal Fiction.** A convenient lie. Australia was deemed to be uninhabited when British took control in 1788.

**Legal positivism.** Laws are considered in the context of the legal system of which they form a part, without drawing any conclusions about their essential justness or merit.

**Lord Chancellor.** A politician who was head of the UK judiciary until 2003.

**Magnates.** The 'great men of the realm'; originally 300 mercenaries who received a large part of England from William the Conqueror after 1066.

**Manuel Test.** 'A fair go all round'. From a 1971 statement by NSW Conciliation Commissioner Gilbert Manuel.

**Master of the Rolls.** Head of England's second-highest court, the Court of Appeal.

**Organised crime.** Systematic criminal activity for money or power.

**Organised Criminals.** People who engage in systematic criminal activity for money or power. RICO defines an organised criminal as one who exhibits a pattern (over 10 years) of two or more chargeable offences (not necessarily convictions) which carry penalties of at least a year in prison.

**Parties.** Clients in civil litigation. It is a legal fiction that clients control the process.

**Probative.** Tending to prove guilt.

**RICO.** An exception to the rule against evidence of a pattern of criminal behaviour. Racketeer-Influenced and Corrupt Organizations is Title IX of the US Organized Crime Control Act of 1970. RICO applies to all organised criminals, including businessmen, judges and lawyers, and members of the Mafia.

**Rule of Law.** A legal fiction. It holds that all persons and organisations, including governments, are subject to the same laws.

**Saxophones.** Expert witnesses on whom lawyers play tunes.

**Trial/Litigation/Plaintiff Lawyers.** Lawyers who do court work, some 40% of the total, i.e. most barristers and about 30% of solicitors. In this book 'lawyers' usually refers to trial lawyers.

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Errors are mine alone.

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