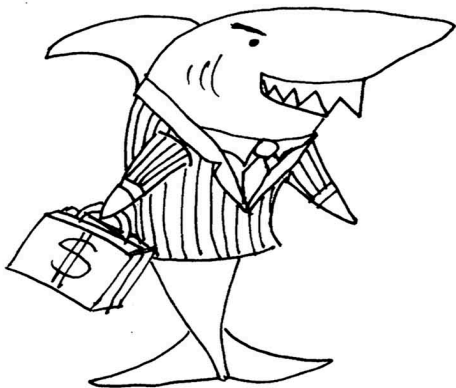


# SERIAL LIARS

How Lawyers Get the Money



**Evan Whitton**

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Evan Whitton received the Walkley Award for National Journalism five times and was Journalist of the Year 1983 for ‘courage and innovation’ in reporting a corruption inquiry. He was editor of *The National Times*, Chief Reporter and European Correspondent for *The Sydney Morning Herald*, and Reader in Journalism at the University of Queensland. He is now a columnist on the online legal journal, *Justinian*. [www.justinian.com.au](http://www.justinian.com.au)

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- Sir Laurence Street, former Chief Justice NSW

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- Dr Edward de Bono.

# **Serial Liars**

**How Lawyers Get the Money  
And Get the Criminals Off**

**Evan Whitton**

**Lulu  
2005**

# **For dearest Noela, without whom not a word of this would have been written**

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Queries to

Evan Whitton  
14/26 Cook Street  
Glebe  
NSW 2037  
Australia  
61 2 9566 4121  
[ewhitton@bigpond.net.au](mailto:ewhitton@bigpond.net.au)

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# Abbreviations

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

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

**Columbia.** The Columbia Encyclopedia (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)

**WA** Western Australia, a state of Australia.

# Preface

*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.*

- Arthur Applbaum, Professor of Ethics, Harvard, 1995

Everything turns on truth. Justice Russell Fox says justice means fairness; fairness means truth; truth means what the public think it means, reality, and the search for truth gives a justice system its necessary moral dimension, otherwise the winner is merely the one with the most resources.

The lawyer-run Anglo-American adversary system does not search for the truth; 99% of accused are guilty, but in serious cases more than half get off. Legal academics are partly to blame; they teach what the law is, not what it should be, or where it came from. A few do say it is a bad system. Thane Rosenbaum says it is immoral; David Luban says it is grotesque; James Elkins says its philosophy of cruelty makes lawyers malevolent; John Langbein says it is inferior to the judge-run European investigative system.

Intellectual torpor is reinforced by habituation through film and television. I periodically slept in those windowless rooms for 27 years before it occurred to me to ask the obvious question: where did this madness come from? And then only because of a rare opportunity to observe at first hand how the west's two systems dealt with the same organised criminal, Sir (as he then was) Terence Lewis, Police Commissioner of Queensland.

In 1988, Gerald Fitzgerald QC used the European investigative system to show beyond the slightest doubt that Sir Terence had achieved Level Five (the highest) on Professor Alfred McCoy's Corruption Scale: he franchised organised crime and extorted bribes from the franchisees. But at his 1991 trial under the adversary system, Judge Tony Healy felt obliged to conceal so much evidence that he had to tell the jurors there was no reliable evidence [left], and that it would be dangerous to find him guilty.

Excuse me?

As it happened, the jurors had more sense than the system; they found Sir Terence guilty on all 14 counts of corruption, but it took them five days. Judge Healy promptly gave him the maximum, 14 years, and Her Majesty admitted him to an ancient and exclusive club: he became only the 14<sup>th</sup> knight since the 14<sup>th</sup> century to be stripped of the accolade.

What I have learned can be summarised shortly. The European process is controlled by trained judges and is largely about truth; the Anglo-American process is controlled by trained lawyers and is largely about money.

Dickens said: ‘The one great principle of the English law is to make business for itself.’ The common law has been a business since paid lawyers and judges first appeared late in the 12<sup>th</sup> century in a culture of trickle-down extortion in the public sector, and formed a cartel to maximise profits and protect their interests.

European countries which, along with England, had used an anti-truth accusatorial (Prove it!) system from the Dark Ages, changed to a pro-truth investigative (What happened?) system early in the 13<sup>th</sup> century, but the cartel persisted with the anti-truth system, either through bottomless stupidity or because corruption is easier if truth is not required.

The adversary system is a variation of the Prove it! system. Possibly for reasons no more sinister than sloth, judges began to allow lawyers to take control of the evidence - and hence of the process, and hence of the money - about 1460. The model for Dickens’ *Jarndyce v Jarndyce* began in the perennially corrupt Chancery Court in the 18<sup>th</sup> century and did not end until lawyers had ‘devoured’ the entire estate in the 20<sup>th</sup>. A civil case in France takes a total of about a day.

There was no money in criminal work; lawyers did not get control of the criminal process until early in the 19<sup>th</sup> century. The cartel then progressively invented some 26 anti-truth devices which make it fairly easy to get rich criminals off. The devices are said to make trials fair and protect the innocent, but the result of the system’s emphasis on winning is that as many as 50 prisoners in every 1000 are innocent.

The solution is plainly some improved version of the What happened? system. It has no anti-truth devices; puts away 90% of accused, and protects the innocent better than the adversary system. It is already used in common law countries when it is necessary to find the truth. In the circumstances, this book may be a tiny bit critical of common lawyers, including judges and academics, but it is mostly out of their own mouths. The aim is not to exhaust the subject or the reader, but to help the baffled to understand why the system daily defies truth, fairness, justice, and morality, and to encourage change to a moral system. That will happen when lawyers in legislatures learn to fear outraged voters.

**Notes.** Some of the material originally appeared in Richard Ackland’s online legal journal, *Justinian* ([www.justinian.com.au](http://www.justinian.com.au)). The book is a template for a documentary on the two systems, *Serial Liars: The Musical*, e.g. *O the shark has pretty teeth, dear* (Weill), *And now I’m a judge/And a good judge too* (Gilbert & Sullivan), *Judges of the Secret Court* (Berlioz), *Anything Goes* (Porter), *Smoke Gets in Your Eyes* (Harbach/Kern), *All We Are Saying/Is Give Truth a Chance* (not quite Lennon.)

- Evan Whitton, Sydney 2005.

# 1. Why the Adversary System Is Immoral

## a. What is Justice?

The feather in the cap of Maat, Egyptian goddess of justice from c. 2700 BC, symbolised justice, truth, righteousness (morality). Nearly 5000 years later, 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.’ Russell Fox QC, former Justice of the Australian Federal Court, wrote in *Justice in the 21<sup>st</sup> Century* (Cavendish 2000):

... in legal procedure the meaning which approximates most closely to it [justice] is “fairness” ... truth can be taken to mean the reality of what happened and is happening. That 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.

Law professor Michael Asimow, of the University of California at Los Angeles (UCLA), wrote in *Nova Law Review* (Winter 2000): ‘[The] general public and lawyers differ about whether justice means truth or justice means process.’ That means a robust 0.2% believe justice is adversarial process and a minuscule 99.8% believe it is truth. Harvard law professor and criminal lawyer Alan Dershowitz wrote in *The Best Defense* (Vintage, 1982):

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 emphases.)

Lord Chancellor Kilmuir gallantly tried to make the case for process 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.

Forty years later, Justice Fox demolished Viscount 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. On the other hand, there must be a standard, and 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.

Justice Fox continued: ‘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.’

Everything – justice, fairness, morality - thus turns on a search for truth, but Judge Rothwax wrote: ‘Our system is a carefully crafted maze, constructed of elaborate and impenetrable barriers to the truth.’ The barriers include four major rules for concealing relevant evidence and at least 22 other anti-truth devices.

Amazingly, some lawyers and judges claim that the system DOES search for the truth. Justice (1958-81) Potter Stewart said in *Tehan v Shott* (Wednesday 19 January 1966) that ‘the basic purpose of a trial is the determination of truth’. He was speaking, presumably with a straight face, for the US Supreme Court. Such assertions are seriously misinformed at best, and deliberately false at worst.

Professor Thane Rosenbaum is a novelist and former corporate lawyer who teaches law at Fordham, the Jesuit university in New York. He agrees with Justice Fox and the Europeans that a justice system must have a moral centre and that it comes from the search for truth. He also agrees that the adversary system is not a moral system because it does not search for the truth. He wrote in *The Myth of Moral Justice: Why Our Legal System Fails to Do What's Right* (HarperCollins, 2005):

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.

Judges and lawyers are morally reviled in part because the adversary system obliges them to say things they know are not true. Professor Rosenbaum suggests a formula that will at least relieve judges of the hypocrisy required by the system. He said there is nothing to stop them saying, for example:

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.

As a tiny step in the direction of a moral system, I offered (*Justinian* 28 June 2005) a small cash prize for the first judge to utter Professor Rosenbaum's formula. At this writing (October 2005) there had been no takers. What this says about common law judges hardly bears contemplation

## **b. What is the Adversary System?**

The adversary system is an accusatorial (PROVE IT!) system in which trial lawyers, described as serial liars, control the evidence - and hence the process and hence the money - and an untrained judge controls the courtroom. At least one side is lying. 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. Cross-examination may help the elucidation of the truth, but it may also obscure the truth, and quite often is designed to that end.

Chief Judge Richard Posner, of Chicago, put it more bluntly in *Overcoming Law* (Harvard UP, 1995). He described 'adversarial procedure' as 'contests of liars'. However, lawyers attempt to justify the adversary process by quoting Lord Chancellor Eldon. He said in *ex parte Lloyd* (1822):

Truth is best discovered by powerful statements on both sides of the question.

That is a double lie. Eldon falsely implies that the system seeks the truth, and law professor David Luban, of Georgetown University, Washington, says in *Lawyers and Justice: An Ethical Study* (Princeton UP 1988): 'No trial lawyer seriously believes that the best way to get at the truth is through the clash of opposing points of view.'

There is an echo of Lord Eldon in a statement by Professor Monroe Freedman, now of Hofstra University, New York, in *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions* (Michigan Law Review, 1966):

The attorney is indeed an officer of the court, and he 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. It is essential to the effective functioning of this system that each adversary have, in the words of Canon 15 [of the 1908 Canon of Ethics], 'entire devotion to the

interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability'. (Exclamation marks added.)

Professor Freedman's argument for the adversary system is thus based on error: lawyers do not participate in a search for the truth, and the best way of finding truth is not through a clash of conflicting views.

A. P. Herbert (1890-1971) was called to the Bar in the Inner Temple in 1918, but never practised, possibly because he feared he could not keep a straight face. In *Why Is the House of Lords?* (Punch 1933), his Master of the Rolls admits (*Board of Inland Revenue v Haddock*) that error and injustice are built in to the adversary system:

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.

## **c. The Adversary Culture: *Cherchez la Monnaie***

*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.'

### **1. Herpetoids of the Law**

Billy Flynn, the 'greasy Mick lawyer' in *Chicago*, reminded film critic Joel Siegel of an old joke: 'It's only the 99 percent of lawyers who give the rest a bad name.'

In fact, the dubious reputation comes largely from the 40 percent who are trial lawyers, i.e. (in some jurisdiction) most barristers and some 30 percent of solicitors. The type has had a bad name since the Sophists showed how to 'make the worst appear the better reason' 2500 years ago, and were denounced by Socrates for moral bankruptcy.

Billy Flynn called lying tap-dancing. The reptiles of the press, as journalists are known in England, are also seen to be economical with the

truth. By analogy, trial lawyers - present company of course excepted - may be termed the herpetoids of the law. The other 60 percent can presumably be really nice people who never lie, but why they stoically endure opprobrium by association is curious.

The adversary anti-truth culture is unique among justice systems. Lawyers collect and present 'facts', some probably true, and they decide who will give evidence, what they will say, and how long the process will last, with the meter running. Untrained former lawyers called judges control the courtroom, and try to stay awake.

Lord Chancellor (1938-39) Frederick Maugham said: 'Lawyers are the custodians of civilisation, than which there can be no higher or nobler duty', but business economist James R. Forcier said 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 the European system.

The custodians of civilisation can resist change to a moral system because they have all bases covered: bench, bar, parliament, legal education. Lawyers have been heavily over-represented since about 1350. They are 0.2% of the population, but in Australia's 1998 Cabinet, 63% were lawyers, including a master of the slippery utterance, Prime Minister John (Jackie the Lackey) Howard. Forcier noted lawyers' power in the US:

As a nation, we have allowed attorneys as a group to evolve ... to a huge technocratic class, specialized along profit-making lines and dedicated to preserving and promoting its own interests ... the legal industry has imposed itself into all spheres of American economic life. through the vehicles of legislation, litigation, and regulation ... Lawyers comprise Congress' largest occupational group: 239 members are attorneys.

## 2. A Feeding Frenzy of Lawyers

The avarice exhibited by Larsen E. Pettifogger (*The Kingdom of Id*) has a long history. Henry Brinkelow (d. 1546) said: 'The lawyer can not vnderstand the matter tyl he fele his mony.' *The Sporting Magazine* reported in 1794: 'A water lawyer, or in plainer terms a shark, was caught last month near Workington.'

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.' Judge John Voelker (*Anatomy of a Murder*, 1958) had lawyer Paul Biegler echo the Mafia motto, 'Get the money, and trust no-one.' Law professor John Banzhaf, of George Washington University, Washington, DC, said in 2002: 'Like sharks smell blood, lawyers smell money.'

Johnnie Cochran knew 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 of Los Angeles, and certainly 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.

Common lawyers do not have a monopoly on greed and cynicism. 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'.

### 3. Serial Liars

A public relations agent is said to be a paid liar. Edward von Kloberg III, who lied on behalf of Saddam Hussein, Nicolae Ceausescu, the Burmese junta, and General Mobutu of Zaire, said the PR man's role is no different from a lawyer's.

Evelin Sullivan said 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 said 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.'

Harvard ethics professor Arthur Applbaum said (*Professional Detachment: The Executioner of Paris*, 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 replied that what they do is zealous advocacy sanctioned by the system. Professor Applbaum said in *Ethics for Adversaries* (Princeton University Press, 2000), that Charles-Henri Sanson, the Executioner of Paris, was sanctioned by the system, but he was still a serial killer. At the height of the terror in 1793 he cut the heads off 300 men and women in three days. His

son, Gabriel, an apprentice serial killer, slipped in the blood, fell off the guillotine, and was himself killed. That seems fair.

Professor Applbaum also demolished two of lawyers' favourite assertions. He said:

... 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, 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).

Lawyers lie to keep criminals out of prison, but express outrage when police lie to put them in. Irving Younger, inventor of the sodomised parrot defence, complained (*The Perjury Routine*, *The Nation*, 3 May 1967) that judges do not assume that 'the arresting officers are committing perjury'. He asked:

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.

Not all lawyers lie without shame. Law professor James R Elkins, of West Virginia University, author of *The Moral Labyrinth of Zealous Advocacy* (21 Cap. U. L. Rev. 735 (1992)) and *Can Zealous Advocacy Be a Moral Enterprise?* has written:

[Taking] zealotry 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 that a 1988 American Bar Association poll 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 in 2004 for an Australian Young Lawyers' body found almost half of the respondents did not see themselves practising law in five years' time.

Professor Applbaum might also have noted that the 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.

## 4. Immoral Ethics in an Immoral System

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

‘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.

Lawyers tend to believe that ethics is a county in south-east England, home of the succulent Colchester oyster. Law professor Lester Brickman, of New York’s Cardozo School of Law, wrote 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, but adversarial ethics are client-based rather than morality-based. 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 favourable to the lawyer’s client, possibly despite justice, the law and the facts

Lawyers’ ethics are thus hopelessly self-contradictory. They are not supposed to mislead the court, but claim a ‘sacred duty’ to do whatever it takes to get the best possible result for the client. If the client 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 mislead the court and pervert justice.

Their ethics permit other activities which would be criminal as well as immoral in people other than lawyers. For example, Henry Brougham (1778-1868) in effect claimed that lawyers can have a ‘sacred duty’ to resort to blackmail, which is the crime of theft by extortion. Brougham, whose hugely fertile brain invented *The Edinburgh Review* (1802), London University (1828), a single-steed, four-wheel conveyance (1829), and Cannes (1834), informed their lordships: in 1820:

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 mentions it approvingly in *The Best Defense*, but law professor Franklin Strier, of California State University, indicates in *Reconstructing Justice: An Agenda for Trial Reform* (University of Chicago Press, 1994) that Lord Brougham - as he became when appointed Lord Chancellor in 1830 - later admitted it was blackmail.

The words were a threat, in code, to George IV that unless he dropped his action to divorce Queen Caroline, he would reveal that the king had secretly married a Catholic, Mrs Maria Fitzherbert. Since the *Act of Settlement* (1701) said a king who married a Catholic must be treated 'as if he were naturally dead', the disclosure would inevitably rob His Most Sacred Majesty of the crown, the palaces, and the money. That was an offer George could not refuse. Today, unscrupulous lawyers routinely use blackmail in negligence and libel cases.

Whatever it takes also includes conspiracy to murder, according to a Dublin lawyer, James Giffard, in 1743. In *Lawyers and Justice*, Professor David Luban relates The Case of the Wicked Uncle. The uncle, the Earl of Anglesea, was an organised criminal; in 1727, he used bribery to steal vast estates in Ireland and the title of Lord Latham from his nephew, James Annesley, 12, and had the boy kidnapped and sent into slavery in America. When Annesley escaped and returned to Dublin in 1741, the earl offered Giffard, £10,000 (c. £1 million today) to get him hanged, otherwise, he said, he would have 'to quit this kingdom ... and let Jemmy have his right'. Giffard accepted and prosecuted Annesley for murder, but an Old Bailey jury found him not guilty, and the conspiracy emerged when Giffard sued Anglesea for his unpaid bill of £800 (c. £80,000 today).

Armed with that information, Annesley sued to be declared the rightful Lord Latham, and hence the rightful owner of the estates. The trial began in the Dublin Court of Exchequer on 11 November 1743 and ran for a then record 15 days. When Annesley called Giffard as a witness, Anglesea's new lawyers adopted a strategy that could only hope to work in a system to which reality is a stranger. They argued on the one hand that the attempt to kill Annesley was a perfectly proper legal proceeding, and on the other that it was so wicked that no one could believe the Earl would be party to it. One of Anglesea's lawyers put the second argument to Giffard:

Did you suppose from thence that he [Anglesea] 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 saying it was ethically proper for both lawyers to commit crimes, Giffard by conspiring to murder, the other by seeking to pervert justice in the matter of the title and the estates. Annesley won the

verdict but the earl's lawyers procured a writ of error to set it aside, and Annesley had no money to pursue his claim in the House of Lords. Anglesea continued in possession of the title and estates until he died in 1761, a year after Annesley. As Justice Sir James Mathew (1830-1908) observed: 'Justice is open to all, like the Ritz Hotel.'

Professor Luban said 'the standard conception [of lawyers' ethics] simply amounts to an institutionalised immunity from the requirements of conscience, and that UCLA law professor Murray Schwartz was criticising their 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 Dr Elizabeth O'Brien, a Sydney psychiatrist. She said: 'That sounds like psychopathy.' Psychopaths have no conscience.

How do lawyers, sane or psychopathic, justify being unaccountable for what amounts to criminal activity? Their argument essentially is that the adversary system is the best system of justice and it demands advocacy even as zealous as that. Or, the end justifies the means, the end being the best result for the client. The argument collapses in the face of the fact that an anti-truth (and hence immoral) process run by serial liars cannot possibly be a good system of justice, let alone the best.

Professor Luban referred to a statement in which professor 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 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.

Again, the argument essentially is that the adversary system is a good thing in itself and requires that sort of advocacy. Professor Luban quoted professor Schwartz's response to that kind of 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.

But on the analyses of Justice Russell Fox and professor Thane Rosenbaum, the system IS immoral because it does not seek the truth. It follows that the justification for lawyers' claim of non-accountability disappears.

Professor Freedman's three hardest 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 Luban noted that professor Freedman 'later reversed himself [in *Lawyers' Ethics in an Adversary System, Bobbs-Merrill, 1975*] on the third issue – though a recent study of white-collar defense lawyers indicates that it is Freedman's original advice that is typically followed.' (See below, *Concocting a Defence: The Lecture.*) Professor Luban continued:

But he 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 privately admits he is guilty of rape, his lawyer is still ethically obliged to let him go in the box and falsely deny it on oath, and to back up that lie by cross-examining the girl about her sex life to falsely suggest she consented. The technique, at once brutal and pornographic, confirms professor James Elkins reference to lawyers' 'professional malevolence'.

Sydney lawyer John Marsden said in *I Am What I Am* (Viking, 2004) that he was ethically obliged to use the consent defence to get Ivan Milat off rape charges in 1974.

Then I put to her something that has haunted me to his 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.

In 1996, Milat was found guilty of murdering seven backpackers in circumstances similar to the cases of alleged rape in 1974.

A Sydney barrister, Stuart Littlemore QC, stated client-based ethics accurately when interviewed on television by Andrew Denton 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.'

## 5. Zealous Prosecutors

If it is ethically proper for defence lawyers to lie to keep criminals out of prison, it should be ethically proper for detectives and prosecutors to lie to put them in. But not all are guilty; Mike Mansfield QC noted in *Presumed Guilty: The British Legal System Exposed* (Heinemann, 1993) that studies by English probation officers found that '500 or more' prisoners had been wrongly convicted, i.e. a minimum of 1% in a prison population which was then 50,000.

C. Ronald Huff, Ayre Rattner and Edward Sagarin estimated in *Convicted But Innocent, Wrongful Conviction and Public Policy* (Sage 1996), that .5% (approximately 10,000) of all convictions per year in the United States are wrong. *The Chicago Tribune's* Ken Armstrong and Steve Mills confirmed their estimate in 1999. They said 12 of 285 (4.2%) or prisoners on the Illinois Death Row since 1977 had been 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'.

In February 2004, Claire Cooper, of California's *The Sacramento Bee*, noted cases in which prosecutors behaved like defence lawyers, but appellate judges did not know what to do about it.

She said prosecutors in Solano County, California, 'in two trials identified both Jonathan Shaw and Mango Watts as the single robber who held a gun to a restaurant manager's head'. Three judges said the prosecutions were 'something between stunningly dishonorable and outright deplorable', but 'said they were powerless to reopen the case because the US Supreme Court has "never directly addressed the issue of whether due process permits two persons to be convicted for a crime that only one committed".'

## 6. Untrained Judges/The Humpty Option

Non-judges who persistently make mistakes are sacked, but it is difficult to get rid of judges who are persistently wrong. The public knows that justice is often a stranger to the system; Australia probably reflects the common law world in that only 15% have great confidence in judges, according to a 2003 report by the Sydney *Sun-Herald* of market researcher Quantum's annual Australia Scan survey. The survey questioned 2000 people on institutions in which they had great confidence. Nonetheless, senior judges call themselves 'Justice', and the convention is followed in this book although it would be more realistic to use a neutral prefix, e.g. Benchperson.

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.' The lawyer-judge cartel still exists because judges are not trained separately from lawyers; they are lawyers one day and judges the next. Does that mean they suddenly stop lying and perverting justice? Professor Dershowitz wrote in 1982:

... 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!

Abimbola A. Olowofoyeku, now a law professor at the University of Brunei, 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?

The Humpty Option derives from Lewis Carroll's *Through the Looking Glass, and What Alice Found There* (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.’

Chief Justice (1969-86) Warren Burger knew that Supreme Court judges are Humpties. Bob Woodward and Scott Armstrong reported in *The Brethren: Inside the Supreme Court* (Coronet, 1979) that Burger advised his colleague, Justice (1955-71) John Marshall Harlan II: ‘We are the Supreme Court, and we can do what we want.’ In *Bush v Gore* (Monday, December 13, 2000), five Humpties on the court - William Hubbs Rehnquist, Antonin Scalia, Clarrie Thomas, Sandra Day O’Connor, and Anthony Kennedy - effectively claimed that democracy means you don’t count all the votes. A dissenter, Justice John Paul Stevens 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.

Scalia himself in effect accused some colleagues of exercising the Humpty option in *McCreary County, Kentucky et al v ACLU* (2005). He said: ‘Nothing stands behind the court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the court’s own say-so.’

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

In 1974, it was an iron rule of British justice that accused were presumed innocent until proved Irish. Justice Sir Nigel Cyprian Bridge told the Birmingham Six 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.’ He summed up for a conviction. Mike Mansfield QC noted his technique in *Presumed Guilty*:

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.

In June 1979, Justice Sir Joseph Cantley presided at a case in which a barrister/politician, the Rt Hon Jeremy Thorpe, was accused of conspiring to have Andrew Gino Newton murder Thorpe’s former lover, Norman Scott. A few days later, at the Secret Policeman’s Ball for Amnesty International, Peter Cook, who had said: ‘I could have been a judge, but I never had the Latin’, detonated a parody of the summing-up he called *Entirely a Matter for You*, which is judgespeak for ‘entirely a matter for yours truly’:

We have heard for example from a Mr Bex Bissell [Peter Bessell was the chief prosecution witness], 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.

In a 1987 libel case, Lord (as he later became) Jeffrey Archer, falsely denied resorting to a dwarfish prostitute, Monica Coghlan. Justice Sir Bernard Caulfield seemed entranced by the icy charm of Mrs Mary Archer, who had stood by her man. He said in his charge to 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. In 2001, Lord Archer got four years for perjury at the trial.

## **7. The Moral Failure of Law Schools**

Intellectual torpor (IT) is good; it avoids straining the brain's muscles, if any. As noted in the Preface, I pursued a policy of masterly torpidity on the law for 27 years. Judges and working lawyers are also entitled to a spot in the IT Hall of Fame, but they have an excuse, however feeble: they were taught by legal academics who in turn have an excuse for the IT they acquired from the founder of their trade, a mountebank named Blackstone, the notion that the law is so nearly perfect that there is no point in examining it for possible flaws or even where it came from.

This head in the sand attitude is known as ostrichism, legal positivism, and internalism. *Butterworths* says of 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.'

*Pace* Blackstone, legal positivism is plainly a copout/dereliction of duty; medical academics seek a cure for cancer, legal academics should seek a cure for the cancer in the legal system and in law schools. For example, 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. Law schools thus have no moral centre, and are properly termed trade or technical schools.

Common law trade schools are relatively recent; barristers controlled legal education from the 13<sup>th</sup> century to the 18<sup>th</sup>. What they taught can be seen from Sir Thomas Erskine May's assessment of the system at the start of the 19<sup>th</sup> century in *Constitutional History of England 1760-1860* (1861-63):

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.

William Blackstone (1723-80) was the first and most influential academic. A fat, near-sighted former barrister - by definition a serial liar – with a grating voice, he began lecturing on the common law at Oxford in 1753. Jeremy Bentham discerned the intellectual sloth in his ‘spirit of obsequious quietism’ which ‘scarce ever let him recognise a difference’ between what the law is and what it should be.

Law professor Theodore Plucknett (1897-1965), of Harvard (1921-31) and the London School of Economics (1931-61) is equally damning. In *A Concise History of the Common Law* (first edition Lawyers' Cooperative Publishing Company, 1929; fifth edition Butterworths 1956), he 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’. Nonetheless, his *Commentaries on the Laws of England* (4 vols. 1765-69), described by Bentham as ‘ignorance on stilts’, procured for Blackstone a fortune in sales in Britain and America and appointment as a judge in 1770.

When the American colonies broke with England in 1776, William Jefferson and other lawyers favoured changing to the pro-truth European system, but the *Commentaries* fatally persuaded James Madison to persist with the common law. Madison was not a lawyer but he read law books and in 1791 was largely responsible for the first eight amendments to the Constitution which are generally taken to be the Bill of Rights. Madison locked the common law – but not necessarily the adversary system – into the US system via Amendment VII: ‘... 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.’ Two centuries later, the malign effects of that amendment are daily visible, not least in the O.J. Simpson debacle.

Law professor James Elkins, of the University of West Virginia, blames a couple of Harvard types, Christopher Columbus Langdell and

Oliver Wendell Holmes Jr for making legal immorality respectable. Harvard is a seat of learning founded in 1737 by descendants of deranged English Puritans who believed an inscrutable deity was the supreme civil ruler. Today, Harvard's legal trade school, founded 1817, stands foursquare for artifice, chicanery and greed, as does its business school.

Langdell, dean of the law school 1875-95, invented the case, or Socratic, method of teaching law. In *The Moral Failure of Law Schools (Troika)*, November-December 1996), Professor Alan Hirsch, visiting professor of Constitutional Law at Williams College, Massachusetts, in 2005, explained how the method corrupts young law students and destroys their idealism. He wrote:

... 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.'

The thug Harvard professor, Charles Kingsfield, 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.' I think he meant learning how to get the money by arguing either side with precision.

Holmes (1841-1935) became a Humpty on the Supreme Court at 61, and stuck like a limpet until his colleagues persuaded him to go at 90. 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.' The gain is to the profits of morally unaccountable trial lawyers.

## **8. The Law As a Game**

The view that justice is a game recurs in the literature. 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 the

anti-moral 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 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.’

Justice may be a game, but the playing field is not level; later sections note that the game is rigged in ways which get money for lawyers: aspects of civil law are unfairly biased in favour of plaintiffs; criminal law is unfairly biased in favour of defendants.

## 9. The Law As a Business

Some lawyers claim the law is a profession, but it has been a business since lawyers and judges formed a cartel to maximise their profits more than 800 years ago. Edward Jacob KC (d. 1841), editor of *Chancery Reports*, certainly saw it as a business. Nicholas Mullany, a Perth barrister, noted in *Pleadings – Sacrificing the Sacrosanct* (West Australian Law Reform Commission, 1998) that Lord Justice Sir William James said 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.

Charles Dickens, who had worked in a law firm, wrote in Chapter XXXIX of *Bleak House* (1852-53):

The one great principle of the English law is to make business for itself [i.e. lawyers]. There is no other principle distinctly, certainly and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.

Max Weber (1864-1920), the German polymath who taught law, political economy, economics, and sociology, noted in 1915 the ferocity with which the lawyer-judge cartel used its power to maintain the Dickens Principle:

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.

Lawyers are beginning to admit that the law is a business. 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, reported:

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.

Professor David Luban has noted dire consequences:

[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.

## **10. Self-Deception/Rationalisation**

In the face of a Niagara of evidence to the contrary, some common lawyers and judges actually believe the adversary system is the best possible system of justice. The explanation for this phenomenon may lie in observations by John Bryson and Bent Flyvbjerg. In 2001, Bryson, a barrister and author of *Evil Angels*, which concerned perversion of justice in the Lindy Chamberlain case, told Melbourne University's Postgraduate Law Students' Association in an address called *When the Rule of Law Meets the Real World*:

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.

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, rationalisations and lies 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.

Power invents its own reality and imposes it by constant repetition. In November 2002, *Time* essayists Nancy Gibbs and Michael Duffy quoted a former Clinton official as saying of people in the Bush-Cheney regime:

They just assert a reality and stick with it. They do it with tremendous discipline. They keep it simple and use the bully pulpit, and they say it again and again and again until people believe it.

Kurt Campbell, head of security studies at the Centre for Strategic and International Studies in Washington was quoted in *The Sydney Morning Herald* of 6 November 2004 as saying: ‘A lot of people who support the President are really not interested in the facts on the ground. There really is a faith-based belief in the President as a person and in his ability to remake reality.’

## **d. Getting the Money: The Civil Process**

### **1. The Law As a Casino**

Lord Justice Sir Frank McKinnon (1871-1946) said (*Salisbury v Gilmore*, 1942) that the law lords are ‘the voices of infallibility, by a narrow majority’. A London tax lawyer, David Goldberg QC, 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.

Lawyers can thus urge clients to pay for another roll of the dice; they might win, however dubious their case. 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.’ Harold Clough, a Perth contracting 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 fair as any court case.

## **2. Spinning the Process Out**

Litigation is like a cancer; it grows exponentially. Judge Learned Hand said in 1921: ‘I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.’

### **i. Lawyer/Judge Procrastination**

The record spin-out, *Jennens v Jennens*, began in the anciently corrupt Chancery Court in 1798, four years after the water lawyer was caught near Workington. *Jennens* concerned the estate of a loan shark named William Jennens, whose grandfather, Robert, had married twice and called boys from each marriage Robert. William Jennens plied his trade in London’s gambling dens. He was the richest commoner in England, worth £5 million, about £500 million today. Jennens, 98, unmarried, went to a solicitor to make a will, but forgot to take his spectacles, and the solicitor’s did not fit. He died a few days later, on Tuesday, June 19, 1798, the unsigned will still in his pocket, and £20,000 (about \$A6 million today) in cash in the house. Lawyers for alleged relatives flooded into the Chancery Court.

*Jennens v Jennens* was still going when Dickens was born in 1812, when he worked as a law clerk at Ellis & Blackmore in 1827-28, when he used it as the model for *Jarndyce v Jarndyce* in *Bleak House* in 1852-53, and when he died in 1870. It ended in 1915, 117 years after it began, but only because generations of water lawyers had ‘devoured’ the entire estate. *Jennens* had thus been on foot for 55 years when Dickens observed that the law exists to make business for lawyers.

It is noted in Part 3 that Justice Russell Fox said that in France – where trained judges control the litigation process – ‘the whole [civil] case may be disposed of in less than a day overall’.



## ii. Pleadings

Pleadings are supposed to narrow the issues, but are largely useless because in five centuries judges have never found a way to stop lawyers lying in paper pleadings. Speaking for the West Australian Law Reform Commission, Nicholas Mullany, said in *Pleadings – Sacrificing the Sacrosanct*:

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.

Nonetheless, lawyers can exchange pleadings interminably in see-saw fashion: statement of claim, defence, reply, rejoinder, surrejoinder, rebutter, surrebutter, counter-claim, defence to counter claim, reply, etc.

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 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, Professor (now Justice) Ralph Simmonds, and Crown Counsel (now DPP) Robert Cock QC – said:

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.

They effectively recommended a return to pre-adversarial oral pleading, i.e. a procedure which ‘resembles most closely that prevailing in Germany’. They said the change could generally be made ‘without the assistance of the legislature’, but it still had not happened in 2005.

## iii. Discovery

Discovery is moving documents from one law office to another. A courier will do it for \$10. 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 grounds of privilege, e.g. client-lawyer secrecy. Justice Peter Heerey, of the Australian Federal Court, described the process in *Trade Practices Commission v Santos Limited and Sagasco Holdings Limited* (1993):

... a burgeoning army of lawyers were recruited into ... discovering, inspecting, filing, listing, copying, storing, carrying about and otherwise dealing with 100,000 documents ... [Junior lawyers] ensnared in the discovery process [said]: 'I have been Santossed.'

Discovery, originally a monopoly of equity lawyers, i.e. those who worked in the corrupt Chancery Court, was extended to common lawyers by the Common Law Procedure Act of 1854. A few words by Lord Justice (of appeal) William Baliol Brett (1815-99) in the so-called birdshit case, *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company* (1882) has made billions for lawyers. He 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.)

The *Guano* precedent made discovery open-ended, but only a very few documents are relevant. Lord (as he now is) 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 *Reforms to the Adversarial Process in Civil Litigation*, Part II (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.' Or millions. *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.'

That indicates that nearly 50% of lawyers habitually use discovery to extort from their own clients.

### 3. Unfair Bias in Favour of Plaintiffs

Jurist Brett Dawson says aspects of civil law, notably in negligence and libel (outside the US), are unfairly biased in favour of plaintiffs' lawyers; 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 to plaintiffs in the belief that they are redistributing wealth and punishing rich companies. In reality, they enrich lawyers and punish shareholders.

#### i. Negligence/Product Liability

*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.*

- Justice Russell Fox, *Justice in the 21<sup>st</sup> Century*

Lord (James Richard) Atkin (1867-1944) had a dome as bald and conical as Humpty Dumpty's or M. Hercule Poirot's, and he was as capable of high octane drive as either. His definition of the undefinable in *Donoghue v Stevenson* (1932), a House of Lords appeal concerning an alleged (but unproved) snail in a bottle of Scottish ginger beer, contained three variations of the word 'reasonable' in a few lines. Lawyers rub their hands when they hear that word: it has as many meanings as there are human beings; they can argue that almost any act or omission is unreasonable. Lord Atkin thus made negligence law totally unpredictable and billions for lawyers. 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 .... (Emphasis added.)

Lord 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 Fox said Lord 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; it allows lawyers to charge a contingency fee of up to 40% of the payout; and it allows jurors to make punitive awards. The annual Stella Awards for outrageous negligence verdicts honour 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, but 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 Robert Montgomery, a West Palm Beach lawyer, complained: 'It's going to put us out of business', according to a report by Jane Musgrave in *The Palm Beach Post* of July 24, 2005. But, she noted: '... 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 him US\$3000 million, of which his lawyers presumably expected to get at least \$US1000 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. Australian 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, who had moved to 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'. He said:

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.

That presumably also means that trial lawyers who do not take personal responsibility for doing what it takes to get the best result for the client 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 on negligence law was ‘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.’

No-fault 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 individuals of basic common law rights. There is more money in rights than fairness.

## ii. Libel

Except in the US, libel law offends fairness and justice. 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 also claims the title. A US researcher, 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.

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) because it is unfairly biased in favour of plaintiffs by a string of false presumptions: appearance (reputation) is always to be preferred to reality (character); the private right to reputation is always to be 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 and always causes damage.

The bias encourages ‘libel terrorism’ as practised by Robert Maxwell (1923-91), an organised criminal, asset stripper, newspaper proprietor, and megalomaniac. He won one libel action only, but London 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.

Another effect of the bias is that liars and their lawyers get money from honest soldiers for truth. A short list:

Politician Jack Profumo, who falsely denied that he and Christine Keeler jumped into Lord Astor’s swimming pool and engaged in carnal congress therein. Pianist Wladziu Valentino Liberace, who falsely swore he was heterosexual. 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. Juni Morosi, a secretary, who falsely denied she had sex with the Deputy Prime Minister of Australia, Dr Jim Cairns. NSW Police Commissioner Fred Hanson, who falsely denied he was corrupt. Sir Les Thiess, an industrialist, who falsely denied he bribed Sir Johannes Bjelke-Petersen, Premier of Queensland.

Sir Robin Askin, Premier of NSW, falsely denied he was an organised criminal, and would probably have got money from a politician, John Hatton, but sadly died before the case got on.

In 2005, Australia’s first law officer, P. Ruddock, 61, had a plan to allow people to sue from the grave. In *Justinian*, I reminded him that Voltaire observed in 1785: ‘We owe respect to the living; to the dead we owe only

truth’, and said that any such legislation would inevitably be dubbed the Askin/Murphy clause in honour of Askin and High Court Justice Lionel Murphy, who was also a criminal.

Libel law has protected powerful and respectable organised criminals for seven centuries. It began with Edward I’s Statute of Westminster (1275), which invented the crime of *Scandalum Magnatum*, slandering the magnates, most of whom were robber barons, but truth, at least nominally, was a defence. The legislation was re-enacted in 1378 to include judges, prelates, and certain named officials, many of whom were corrupt.

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. The *Scandalum Magnatum* was re-enacted in 1554 and again in 1559 with new clauses on ‘seditious words’ which might cause disaffection against authority; 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 it was abolished in 1641, ‘it was settled that truth was not a defence’, and that this ‘was a break with Roman authority’, but the entire common law was a break with Roman authority.

A ‘glorious’ revolution in 1688 was followed by a century of rule by a corrupt Whig oligarchy, but the Whigs were tricked into allowing the Licensing Act to lapse in 1695, and modern journalism dates from the first appearance of Daniel Defoe’s *The Review* on 19 February 1704.

Judges and politicians perceived that the Press would become a rival for power and a threat to corruption. Professor Plucknett noted that in 1704 Chief Justice Sir John Holt said ‘it is very necessary for all governments that people should have a good opinion of it’, and ‘from this it seemed to follow that any publication which reflected upon the Government was criminal’.

To silence proprietors, the oligarchs resorted to secrecy – always the bottom line on corruption - taxation, libel law, and bribery. It became a crime to report parliamentary debates, and in 1712 *The Review* and other journals, including Addison and Steele’s *The Spectator*, were taxed out of existence. But libel law has proved the most effective. Professor Plucknett said:

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.’

It was thus a crime to write the truth about corrupt politicians and judges, laws, and institutions such as Parliament and the courts which were run as criminal enterprises. To ensure conviction, judges gave the verdict; jurors’ only role was to decide whether the accused had published the slur.

The Zenger case helped to make the US the only English-speaking country in which freedom of information is not a legal fiction. John Peter Zenger, proprietor of *The New York Weekly Journal*, criticised the New York colonial Governor, William Cosby, and was tried on a charge of seditious libel on 4 August 1735. His Philadelphia lawyer, Andrew Hamilton, admitted that Zenger 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 helped to establish the notions that truth should be an absolute defence, and that jurors should give the verdict.

Lord Mansfield was a Whig politician who was ineffably obtuse on policy towards American colonists. In his other role, Lord Chief Justice (1757-88), he invented a lie: the greater the truth the greater the libel, i.e. the more corrupt a judge was, the greater the penalty for exposing him. Public outrage resulted in Charles James Fox's Libel Act (1792), which gave libel verdicts to jurors. Professor Plucknett said Fox's Act 'was passed in spite of the unanimous opinion given by the judges at the demand of the House of Lords', which suggests that judges greatly feared exposure.

James Madison's Amendment I (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 it was not until *New York Times v Sullivan* (1964) that the Supreme Court ruled, by a 9-0 vote, that the First Amendment implied freedom of information. For the court, Justice William Brennan 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'.

In US libel law, the burden of proof is on the plaintiff, but in the rest of the English-speaking world it is on the defendant, and US judges have taken the view that US libel defendants cannot get justice in England. US courts usually enforce orders made by overseas courts except when based on laws 'repugnant' to US law. A Maryland court refused to enforce an English libel verdict in 1997 because, on fundamental issues of free speech and a free Press, England's law 'is totally different' from First Amendment principles 'in virtually every significant respect'.

#### **4. Blackmail - Theft by Extortion**

In negligence and libel cases, unscrupulous clients and lawyers get money by pitching worthless claims at a sum lower than the cost of litigation. They calculate that the target company will make a commercial decision to submit



to the extortion. Perth barrister Paul Mendelow noted in *Discovery: Should the Whistleblowers 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.'

SLAPP (Strategic Lawsuits Against Public Participation) suits can amount to legal 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 SLAPP 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'. Robert Maxwell used a SLAPP variation, libel terrorism, to rob the public of their right to information for 30 years before he jumped or fell off his boat and drowned in 1991.

Jurist 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. Workplace disputes

The Manuel Test, 'a fair go all round', was enunciated by NSW Conciliation Commissioner Gilbert Manuel in a 1971 wrongful dismissal case. Jurist Walter K. Olson says workplace disputes take up roughly half the business of US civil courts, but juries do not as a rule adhere to the test.

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 and Mackenzie was dismissed. Under the Manuel Test, he might have got six months' wages, perhaps \$US20,000, or been reinstated on condition that he apologise to the lady, and that she stop making a nuisance of herself. In *Mackenzie v Miller Brewing* (1997), Milwaukee jurors gave him US\$26.6 million. His San Francisco lawyers, Littler, Mendelson, presumably got at least US\$8 million.

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

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

What, if anything, is the difference between tax avoidance, tax evasion, and larceny by trick? The brightest lawyers tend to specialise in advising rich clients how to avoid paying tax. In London, they can make £2 million a year; in Australia they can be elevated to the High Court.

Justice Russell Fox said the English legal system was originally designed to benefit landowners, and was ‘later adjusted to the requirements of the wealthy and the powerful’ In the 20<sup>th</sup> century, the House of Lords said the better people have a right not to pay tax, notably in a case involving the 2<sup>nd</sup> Duke of Westminster, Hugh Richard Grosvenor (1879-1953). He loved Hitler and hated Jews but had the saving grace of owning much of Mayfair and Belgravia. Lord Atkin said in *Inland Revenue Commissioners v Duke of Westminster* (1936):

“... 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.”

Lord Jim did not disclose how the poor and humble might evade tax. Also in 1936, the Australian Parliament took the view that fairness requires all to pay their share of tax, and that evasion is larceny by trick, the victims being the Treasury and the pay-as-you-earners who must make up the difference. Section 260 of the Income Tax Assessment Act 1936 said every “arrangement” which has the effect, directly or indirectly, of “defeating, evading, or avoiding any duty or liability imposed on any person by this Act [shall] be absolutely void”.

The justice ‘game’ thus required tax lawyers to persuade appellate Humpties that ‘absolutely’ does not mean ‘absolutely’; there could be an exception that would open the floodgates. In *Keighery* (1957), the deeply sinister Sir Garfield Barwick QC so persuaded High Court Chief Justice Sir Owen Dixon and Justices Sir Dudley Williams, Sir Eddie McTiernan, Sir Frank Kitto, and Sir Alan Taylor. Only Justice Sir William Webb adhered to the Parliament’s instructions.

Barwick went into politics in 1958, but failed as Attorney-General and Foreign Minister, and in 1964 Prime Minister Robert Menzies QC, who contrived to get people killed in four wars which were of no concern to Australia – Europe, Korea, Malaya and Vietnam - gave Barwick a soft landing as Chief Justice of the High Court.

Don Vito Corleone presumably knew whereof he spoke when he said (*The Godfather*, 1969): ‘A lawyer with a briefcase can steal more than a thousand men with guns.’ But he failed to tell us how many thousand men

with guns could equal a judge with a gavel. Nor do we know how many trillions were pilfered as a result of such judgments as those by Justice Brett (discovery, 1882), Lord Atkin (negligence, 1932, tax evasion 1936), and Sir Garfield Barwick (tax evasion 1957-81). But we can quantify the amount of tax money ‘liberated’ from the Australian Treasury in the eight years after Barwick, Sir Victor Windeyer, Sir Harry Gibbs, and Sir William Owen finished off Section 260 in *Casuarina P/L v the Federal Commissioner of Taxation* (1970): it was \$A800 million, some A\$3 billion at 2005 rates.

David Marr noted in *Barwick* (Allen & Unwin, 1980) that *Casuarina* concerned “a wholly artificial scheme ... to avoid tax ... The *Casuarina* Case became the cornerstone of the tax avoidance industry ...” And in *Curran* (1974), Barwick, Sir Harry Gibbs, and Sir Douglas Menzies said a profit of \$2782 was a loss, for tax purposes, of \$186,046. The self-employed rushed into tax schemes based on *Curran*. Some tax scheme promoters who entered into the spirit of the Barwick court went to prison, but Barwick, Gibbs and Menzies were not charged.

John Ahern, a Brisbane accountant who went to prison, explained how *Curran* worked in *A Taxing Time* (A & B Management, 1990). A company has shares worth \$100. It 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, Menzies and Gibbs would say it is a loss of \$99,900.

In 1978, Treasurer John Howard resorted to retrospective legislation to get back some of the \$A800 million lost through *Curran* and similar schemes, and in 1981 he introduced Part IVA to the 1936 Act. The section again purported to bar ‘blatant, artificial or contrived arrangements’, but lawyers and Humpties can always defeat the English language. Professor Russell Mathews, an economist, said in 1980 that Australian wage/salary earners paid 81.2% of all income tax, and in 1985 he 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 90s found that ‘a significant segment of the *BRW* magazine’s Rich List claimed to have a taxable income below the minimum wage’. In 1999, Tax Commissioner Michael Carmody said 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 ....”

Lord Atkin lives. *The 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 solution is simpler: legislation saying that minimisation, avoidance, evasion, or larceny by trick is forbidden, and that judges who find an exception to the rule will be instantly dismissed.

## 7. Class Actions

Thomas Pelham-Holles, first Duke of Newcastle upon Tyne, was the bagman for a corrupt Whig oligarchy for 38 years (1724-62). He found the work debilitating; he had to find ‘pasture enough for the beasts that they must feed’. Likewise the law. As more young beasts are beguiled by the prospect of huge emolument, new ways of satisfying their greed must be found.

In 1960, there were 213,000 lawyers in the US; in 1991 there were 772,000. As numbers grew, judges were asked to find more pasture. Walter K. Olson notes in *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* (Truman Talley Books St Martin's Press, 2003) that in the mid-1970s, proposals ‘that judges create some new right to sue’ were ‘all but ubiquitous’. One was deployed in *Class Actions: Let the People In*, by Beverly C. Moore and Fred Harris, in *Verdict on Lawyers* (Eds. Ralph Nader and Mark Green, Crowell 1976). 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 ... 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 ...

In class actions against companies, those involved are its executives, its shareholders, the alleged victims, and the lawyers. If the executives had guilty knowledge of harmful practice and/or products, they should be dealt with in the criminal courts. The Manuel Test, a fair go all round, should apply to the others.

Justice Russell Fox noted in *Justice in the 21<sup>st</sup> Century* how class actions relating to asbestos, tobacco, intra-uterine devices, breast implants, and the like should be handled and at minimum cost. He said:

... 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 largely about money. It can be considered in terms of the Manuel Test, a rule which - at least nominally - 'bars a lawyer from charging or collecting a clearly excessive fee', and the practice known as 'pay to play'. Olson said in pay-to-play elected officials farm out public legal work to law firms which have donated to their campaigns.' The practice is deplored - if no more - by the American Bar Association.

Most tobacco suits failed on the ground of personal responsibility because the Surgeon-General had warned in 1964 that smoking is a risk, but in 1993 a Mississippi lawyer, Mike Lewis, gave Mike Moore, the Mississippi (Democrat) Attorney-General, the idea of shifting the goalposts from individual sufferers to taxpayers who paid the Medicaid funds which cared for them. A private lawyer, Dickie Scruggs - surely a Dickens invention - had contributed to Moore's election campaign, but Moore invited him to research and develop a case.

In May 1994, Moore sought from tobacco companies \$940 million said to have been spent by Mississippi on people with tobacco-related illnesses. Moore and Scruggs, known as Mo and Scro, traversed the country in Scruggs's Lear Jet to persuade state attorneys-general to join the action. Most of those who joined gave the business to private lawyers 'who', Olson said, 'were often among their most important campaign donors' He said 'a pay-to-play scandal [was] waiting to happen'.

In at least one case, pay to play seems to have meant trickle-down extortion. Catherine Crier, a former Texas judge who became host of *Catherine Crier Live* on Court TV, wrote in *The Case Against Lawyers* (Broadway, 2002) that it was alleged in 1998 that Texas Attorney-General Dan Morales '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.'

The success of the Mo and Scro tour increased the pressure on tobacco companies to cave in. In November 1998, they agreed to a Master Settlement Agreement (MSA) of US\$246 billion over several decades. Cigarette prices

shortly jumped by 45 cents a pack. In view of the millions they stood to gain, lawyers handsomely waived their usual contingency fee of 40% of the payout. Olson said the fees ranged from 3% to 25%. In 2003, Dan Morales was imprisoned for four years for fraudulently trying to get US\$520 million from the settlement for a lawyer friend, Marc Murr, who had done little or no work on the tobacco action.

Lawyer Robert A. Levy, author of *Shakedown: How Corporations, Government and Trial Lawyers Abuse the Judicial Process* (Cato Institute, 2004), noted 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.

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? In 2002, a judge obliged a tobacco company to pay a Melbourne cancer victim, Rolah McCabe, \$700,000, but the Victorian Court of Appeal reversed the decision, and the children of the now-dead Mrs McCabe became liable for fees estimated 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.

## **e. Keeping the Money: Lawyers' Immunity from Suit**

*O, the moon shines tonight  
On Mrs Porter,  
And on her D'Orta*

- Cartel carousing shong (hic)

Lawyers' immunity from suit was invented by judges in the Court of Exchequer in 1860. Courtesy of jurist Brett Dawson, we can name the guilty men: chief exchequer baron Sir Jonathan Pollock (1783-1870) and barons Sir

William Watson (1796-1860) and Sir George Bramwell (1808-92). In *Swinfen v Lord Chelmsford* (1860), they were put to the exigency of protecting the money of a once – and, as it turned out, future – head of the judiciary who had clearly stiffed his client, Ms Patricia Swinfen.

Born Fred Thesiger, Lord Chelmsford (1794-1878) had a glittering career. He was a plucky little midshipmite, 13, at the Battle of Copenhagen, but, perhaps tiring, for the moment, of rum, sodomy and the lash, he got out at 17 and took to the bar and Tory politics. He rose to Solicitor General, Attorney General and, in 1858, to Lord Chancellor, but went out in 1859 with the 14th Earl of Derby's government. 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. Finding himself double-booked, he took the time-honoured course of settling the action which promised the smaller fee, although Ms Swinfen had instructed him by telegram not to settle. A June 2004 editorial in FLAC (For Legally Abused Citizens) Australia noted how the Exchequer barons saved the noble lord's bacon:

The 'reasoning' of the court was: we can't find any case where a barrister has been successfully sued for negligence, so the law must be that one cannot sue barristers for negligence.

Such impeccable reasoning cannot possibly be controverted, and the notion that lawyers cannot be sued for court work still obtains in Australia, if in few other common law jurisdictions. Its most recent assertion – largely on the ground that there must be some finality in legal actions - was *D'Orta-Ekenaike v Victoria Legal Aid* (High Court, March 10, 2005). Those for were Chief Justice Murray Gleeson and Justices Michael McHugh, Bill Gummow, Ken Hayne, Dyson Hayden, and Ian Callinan. When the lone dissenter, Justice Michael Kirby, shortly had an emergency heart by-pass operation, the legal journal, *Justinian*, commented: 'It's sad to see that the only judge on the court with a heart is now having trouble with it.'

## f. Defence of the Civil Adversary System

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

On the other hand, 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 said: ‘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 is the objective, Confucius (551-479BC) invented a lawyer-free method at about the same time that the Sophists showed lawyers how to become serial liars. In the Confucian system, mediators decide cases pragmatically 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. In a population of 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.

## **g. Getting the Guilty Off: The Criminal Process**

A legal system exists to protect the community from criminals, but crime increases as the risk of incarceration decreases. Brett Dawson advises:

Criminal law is a get-the-guilty-off game. The bias in favour of the accused encourages rich criminals to pay lawyers. If they did not have a good chance of getting off, they might plead guilty, get the discount, and save the money for when they get out.’

The richest are usually organised criminals, some powerful and respectable, some not. Dawson says getting an acquittal requires little skill; all you need to learn at law school is how to say ‘I object’. The heavy lifting is done by 26 (and counting) anti-truth devices most of which were concocted by the lawyer-judge cartel after judges allowed lawyers to take control of the criminal process early in the 19<sup>th</sup> century.

Some say the adversary system produces ‘procedural truth’, i.e. truth according to the procedure. But truth is what the public believes it is, reality,



and procedural truth is not reality, e.g. O.J. Moreover, Judge Richard Posner's observation that the procedure is a contest of liars indicates that the spiritual home of procedural truth is George Orwell's 'lies are truth' in 1984.

### **i. Conviction Rates**

In *The Best Defense*, Professor Alan Dershowitz said the first two rules of what he called 'the justice game' are:

Rule I: Almost all criminal defendants are, in fact, guilty. (Brett Dawson says 'almost all' means 99%.)

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

French and German courts convict 90% of accused, i.e. they properly give 10% the benefit of the doubt. But common law judges sitting without a jury conceal damning evidence from themselves and then acquit as many as 75% of accused they know are guilty. In *The Australian* of 27 August 1994, Janet Fife-Yeomans reported an extraordinary statistic:

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.

Does this mean jurors are twice as intelligent as judges? Or that some judges acquit in order to avoid the embarrassment of being overturned by a higher court? Estimates of conviction rates in the adversary system vary, but it is clear that at least 50% of 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 conviction rate for murder in NSW was 26.5% and 11.5% for rape. In 2004, NSW Bureau of Crime Statistics figures showed that the conviction rate in sexual assault cases in NSW was 19%.

*The Hindu* reported in September 2003 that Mallikarjun Kharge, Home Minister for the state of Karnataka, had urged the Indian Government to change to the European investigative system on the ground that the conviction rate in Karnataka was 28% and the national average was 16%.

The effectiveness of the two systems can be compared through the NSW Independent Commission Against Corruption (ICAC), which uses the European system to investigate public sector organised crime. In the period 1989-95, ICAC recommended that the Director of Public Prosecutions (DPP) charge 208 persons with corruption. At trials under the adversary system, 63 were found guilty, a conviction rate of 30.3%.

Inquests also use the European system, but much of the evidence they find will not be admitted at a later trial because of the adversary system's rules for concealing relevant evidence. The Victorian Coroner,

Graeme Johnstone, found that a detective, Denis Tanner, murdered his sister-in-law, but the DPP did not charge Tanner. Nor did the South Australian DPP charge an organised criminal, Dominic Perre, although a coroner found that Perre had murdered a detective by letter bomb.

*The Guinness Book of Records* listed Lionel Luckhoo (1914-97), of Guyana, as the world's most successful [defence] barrister; he won 245 murder cases in a row. If 99% of his clients were guilty, Luckhoo got 241 murderers off. He was knighted in 1966, presumably for services to perverting justice, and in 1980 declared himself 'Ambassador for God'.

## ii. Unfair Bias in Favour of Defence Lawyers/Criminals

Members of the lawyer-judge cartel often speak of the vital importance of a fair trial, but former prosecutor William T. Pizzi, now a law professor at the University of Colorado, says in *Trials Without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure, and What We Need to Do to Rebuild It* (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 like to come under attack – including not just prosecution witnesses, but the prosecutor personally as well as the judge.

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. As Justice Fox observed, the public believes that fairness means truth. So far from seeking the truth, the adversary system has some 26 anti-truth devices, including rules for concealing relevant evidence. The devices unfairly bias the law in favour of lawyers and their criminal clients, and against victims, detectives, prosecutors, witnesses, jurors, and the public.

Nonetheless, the cartel persists in claiming that concealing the truth makes trials fair because it protects accused from jurors. *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.' Professor Julius Stone QC and former Justice W.A.N. Wells put it more delicately in *Evidence: Its History and Policies* (Butterworths, 1991):

[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.

But Stone and Wells said 'these rules are today applied to all trials, whether before a jury or before a judge alone'. That either means that judges are as unintelligent as they believe jurors to be, or there is some other reason, e.g. to make it relatively easy for lawyers to get rich criminals off. In 1794, Edmund Burke, who trained as a lawyer, said the rules of evidence were of 'so small a compass that a parrot he had known might get them by rote in one half-hour and repeat them in five minutes'. The cartel invented most of the rules and other anti-truth devices, including a discretion to conceal ALL evidence, after judges gave lawyers control of the criminal process soon after 1800. Two hundred years later, police are beginning to demand that they be allowed to protect the community properly. Ian Blair, Deputy Commissioner of London's Metropolitan Police (Scotland Yard), 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?

Even judges are beginning to say trials should be fair. 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.' But fairness requires a search for truth, and that requires the abolition of the adversary system and its anti-truth devices.

### **iii. 26 Anti-truth Devices**

#### **1. Precedent**

Precedent is hearsay, which is usually not admitted at trial because the original speaker is not available for cross-examination which might show he was wrong, confused or had a hidden agenda. Nonetheless, *stare decisis* (the decision stands) means abiding by precedent, i.e. judges are bound by the assertions of untrained and possibly corrupt judges. Precedent thus locks all manner of injustice into the system. Significantly, it is only since the lawyer-judge cartel invented the criminal adversary system that judges have been bound by precedent Professor Plucknett wrote:

... 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.

The cartel claims that abiding by precedent provides certainty and predictability, but in reality it enables members to riffle through precedents until they find one that suits their agenda.

## 2. The Accusatorial (PROVE IT!) System

Part 2 of this book, *How It Happened*, notes that the accusatorial system still used in Britain and its former colonies is a relic of the Dark Ages, which technically began in 476 AD. In that system, one side made an accusation and the other said: Prove it! It was never an investigation into the truth: the 'proof' involved such mumbo jumbo as throwing a suspect witch into a river, and a hidden and inscrutable 'judge', the deity, supplied the verdict on the basis of whether she sank or floated.

In the modern version, the adversary system, prosecutors are required to prove the case after much relevant and compelling evidence is concealed. This reaches its logical conclusion when a judge conceals ALL the evidence and then invites a bemused prosecutor to prove it.

That happened in a Melbourne case in which the Australian National Crime Authority (NCA), which investigated white and blue collar organised crime, accused John Dorman Elliott, Kenneth Biggins, and Peter Scanlon were accused of stealing \$66 million from a brewery they controlled. Robert Richter QC appeared for Elliott. After six months of argument (without a jury being empanelled) about what evidence would be concealed, Justice Frank Hollis Rivers Vincent said in effect he was going to suppress the evidence of 130-odd witnesses, and declared the accused not guilty when the prosecutor offered no other evidence.

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 non-trial had cost taxpayers some \$20 million, or perhaps because of Elliott's self-proclaimed sexual athleticism. *Hansard* recorded Livermore as saying:

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 a Dark Ages system which - to continue Mr Elliott's typically delicate metaphor - raped and pillaged the body politic. The Victorian appeal court later said Vincent was wrong to conceal the evidence, but the horse had bolted: Elliott, Biggins and Scanlon could never be retried, because the common law says wrong not guilty verdicts can never be wrong (see Double Jeopardy below).

### 3. Client-Lawyer Secrecy

*How long do you think the big-shot mobsters would last if the lawyers didn't show them how to operate?*

- Philip Marlowe, *The Long Goodbye*, 1953

The privilege of client-lawyer secrecy protects rich criminals but not the possibly innocent. The argument for secrecy made by Sir James Knight-Bruce, chief judge in bankruptcy, in *Pearse v Pearse* (1846) begins with a lie and does not improve. 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.

The privilege first appeared in *Berd v Lovelace* (1577), a century after judges began to give lawyers control of the civil process. Perhaps indulging a taste for irony, Justice Michael Kirby, of the Australian High Court, said in *Propend* (1997): 'Early cases suggested that it [the privilege] belonged to a solicitor and derived from his honour as a "professional man and a gentleman".'

Rich criminals got a nasty surprise in 1743 when, as noted in the section on ethics, James Giffard, a Dublin solicitor but no gentleman, revealed that he had conspired with an organised criminal, the Earl of Anglesea, to procure a judicial murder. Fortunately, Justice Sir Francis Buller suddenly discovered in *Wilson v Rastall* (1792) that the privilege actually belongs to the client, not the lawyer. Rich criminals could continue to conspire with lawyers safe in the knowledge that their crimes were safe from meanly prying eyes.

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 against the privilege in 1827: if the client is innocent, the lawyer has no guilty secret to betray; if he is guilty, the absence of the privilege causes no injustice. It thus has no legitimate purpose, and should be abolished.

As for the possibly innocent, a judge sent me the Australian High Court judgment in *Carter* (1995) with an instruction: 'Read this and weep.' Louis James Carter, a Brisbane accountant charged with fraud, said certain documents 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 have the documents. Chief Justice Sir Gerry Brennan, Justice Michael McHugh and a rather apologetic Justice Sir Billy Deane said he should not. Carter got four years.

#### **4. Concocting a Defence: The Lecture**

Judge (1957-59) John D. Voelker (1903-91), of the Michigan Supreme Court, published *Anatomy of Murder* (1958) under the pen name Robert Traver. It was inspired by a case in which Voelker defended the accused. Fred D. Shapiro has a quote 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 to go back to his cell and think about it. The client took the hint, and got off.

In 1993, Lorena Bobbitt successfully pleaded temporary insanity to a charge of slicing off her husband's penis while he was asleep.

#### **5. Concocting a Defence: The Theory of the Case**

The theory of the case is a device by which lawyers say it wasn't our client, therefore it must be some other person or thing. 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.

The theory of the case may have the merit of spinning the case out and creating a 'reasonable' doubt. A Sydney lawyer, John Dobies, derided what he called the polar bear defence, which sounds like the sodomised parrot defence. He said that if the body of a murdered man had scratches on it, the theory of the case might be that a polar bear did it. The lawyers would then have to hire witnesses expert on the incidence of polar bears in Sydney, and witnesses who would say they saw a polar bear that day.

## 6. Delay

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.

Benefits of delay include: witnesses forget evidence or die; prosecutors tire; the cost of prosecution becomes prohibitive. Lawyers supervised the NCA's investigations into suspected organised crime, as in the Elliott case noted above. It began in 1989; charges alleging theft of \$66 million were laid in 1993; the case collapsed when the judge wrongly concealed the evidence of some 130 witnesses in 1996. The NCA lawyers' dismay at the experience 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.

## 7. Separate trials

Lawyers for several defendants can get separate trials because some evidence against one is different from that against others. And a lawyer for a person charged with several similar crimes can get a separate trial on each because all the evidence might reveal a devastating pattern. 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 ... The 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.

One can only wonder what Judge Latham thought of presiding at the eight trials.

## 8. Shifting the Goalposts

Defence lawyers naturally try to shift the goalposts from their client to the victim, police, prosecutors, or the media. Lawyer/reporter Jeffrey Toobin gives a stark example in what is generally thought to be the best account of the Simpson case, *The Run of His Life: The People v. O.J.. Simpson Touchstone* 1997).

Toobin said: '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.' He continued:

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.

## 9. 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 and



not do it, 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, lawyers began to persuade judges that if the accused was a little bit mad, he might only be a little bit guilty; trials tended to become contests between paid psychiatrists.

Judge Burton Katz is not impressed. He 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.

Judge Katz may be getting dangerously close to common sense. The Katz Test may be applied to two cases. In 1978, Dan White, who had been sacked from the San Francisco public service, procured a gun; climbed through a basement window in the City Hall to evade metal detectors; 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 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 his depression had prevented premeditation. Dr. Martin Blinder, a psychiatrist, also said excessive sugar could have aggravated a chemical imbalance in his brain. The jury found White not guilty of murder, but guilty of manslaughter. He got six years.

Helen Garner reported in *Joe Cinque's Consolation: A True Story of Death, Grief and the Law* (Picador, 2004) that in September 1997, 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. During the night of Saturday, 25 October 1997, she 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, she injected heroin into his comatose 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, Justice 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 and gave her a minimum of four years, backdated to the date of her incarceration, October 26, 1997. Anu Singh passed her law finals in prison, and was out in October 2001. A glittering

career was predicted: robbing a human being of his life is the cruellest action; adversarial cross-examination is the Theatre of Cruelty.

Noting 'the ugly divide between morals and the law', Garner asked whether 'the moral failure of the law' gives judges an 'icy chill'? As noted, the law has no moral compass because it does not seek the truth, but moral failure does not appear to chill judges; if it did, they would, like Judge Katz, try to do something about it.

## 10. The Abuse/Self Abuse Excuse

Lyle and Erik Menendez, of Hollywood, planned their parents' murders and claimed that years of verbal, physical, and sexual abuse made them fear they were going to be killed. A psychiatric witness offered research on snails to support her claim that fear had 're-wired' Erik's brain. In 1993, jurors were divided; some felt they were guilty only of manslaughter. At the second trial in 1996, much of the abuse evidence was ruled irrelevant, but a claim that Erik suffered from Post Traumatic Stress Disorder (PTSD) was admitted. It was asserted that PTSD prevented him from formulating thoughts necessary for premeditated murder, but both were found guilty of murder.

Noa Nadruku, of Canberra, was charged with assault on three women. 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 in 1997.

## 11. Privilege Against Self-Incrimination/Right of Silence

Sir Harry Gibbs, Chief Justice of the Australian High Court, defined the privilege against self-incrimination - of which the right of silence is a part - in *Sorby v The Commonwealth* (1983). Quoting *Lamb v Munster* (1882), he 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 provides confirmation, if such were needed, of the thesis that the 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 (or his law clerk - it is believed that clerks write Supreme Court opinions) 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'.

The correct formulation of suspects' duty is attributed to St. John Chrysostom (c. 347-407), a Syrian lawyer and Archbishop of Constantinople.

He said no one has to volunteer guilt, but if accused, he must show his innocence, if he can. That became canon law. Justice Ken Marks, of the Victorian Supreme Court, quoted the canon law in *'Thinking up' about the right of silence and unsworn statements (Victorian Law Institute Journal, 1984)*. In Latin, it reads: *Licet nemo tenetur seipsum prodere, tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare*, i.e. 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.

The modern privilege is based on a 16<sup>th</sup> perversion of canon law which was exhumed by Blackstone, entombed in the US Constitution, and imposed on the system after lawyers got control of the process. Thus:

Chief Justice Sir James Dyer, president of the Court of Common Pleas, turned canon law on its head in 1568; he extracted *nemo tenetur seipsum prodere* - no one is compelled to accuse himself - and used it to free a suspect. Judges ignored Dyer for 200 years; but Blackstone wrote in 1765: *'At the common law, nemo tenebatur prodere seipsum.'* (No-one was compelled to accuse himself.). That was not the common law at all, Yale professor John Langbein's research 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'*.

Jeremy Bentham observed (in 1827) that the privilege was irrational and was perpetuated only by those *'duped and corrupted by English lawyers'*, i.e. Blackstone. One dupe was James Madison; his Fifth Amendment (1791) to the US Constitution states: *'... nor shall be compelled in any criminal case to be a witness against himself.'*

The privilege certainly gets the guilty off. Law lecturer David Dixon, of the University of NSW, said in 1997 that about half those who stayed silent were convicted. Since 99% of accused are guilty, it appears that the privilege alone gets 50% of serious criminals off. Alun Jones QC said: *'I am told that over half of all defendants in America decline to give evidence.'*

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, but got a retrial on a technicality, refused to give evidence, and got off in 1986. O.J. Simpson got off two murder charges largely because of race, but staying silent was useful; he had to speak at his civil trial in 1996, was seen to be shifty, evasive and contradictory, and was found responsible for the murders.

As a matter of human dignity, suspects can remain silent if they choose, but (except in the UK since 1994) guilt cannot be inferred from their silence Justice Geoffrey Davies, of the Queensland Court of Appeal, pointed out 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? [But] it suits the view of many, including most defence lawyers, that nothing should change.

Immunity from adverse inference from silence became a rule of law in the second half of the 20th century. The Australian High Court edged towards removing the immunity in *Weissensteiner v Her Majesty* (1993), and England abolished it in 1994, but it was largely restored by 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.

## **12. Extension of Presumption of Innocence.**

The presumption of innocence is a 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. Stone and Wells note in *Evidence*: 'The presumption of innocence is entirely flexible. If the omission to do an act would be illegal, the law presumes that it was done; if the doing of it would be illegal, the law presumes that it was not done.' There are also presumptions of guilt in libel and contempt and, in some jurisdictions, goods in custody. If, for instance, police find 10 kilos of heroin in the trunk of a man's car, he is presumed guilty unless he can prove it is not his.

Where it applies, 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 privilege against self-incrimination, and the rule against pattern evidence.

The latter has spawned another legal fiction: repeat offenders, e.g. rapists, are presumed to be first offenders even if they have been found guilty of several previous rapes. The House of Lords birched Lord Chief Justice Rayner Goddard for saying of pattern evidence (*R v Sims*, 1946): 'If one starts with the general proposition that all evidence that is logically probative is admissible unless excluded [by a specific rule], then evidence of this kind does not have to seek a justification.' Their lordships said (*R v Hall*, 1952) he was wrong because his proposition tended to subvert the presumption of innocence. Lord Goddard might have replied that probative evidence tends to subvert the presumption of innocence, but had to toe their line.

## **13. Preliminary (Committal) Hearings**

In theory, preliminary hearings exist to allow a minor judicial officer to decide whether the evidence is sufficient to commit an accused for trial. This

presumes that all District Attorneys and Directors of Prosecutions are incompetent. The reality is that preliminary hearings enable lawyers to increase their business, to concoct a false defence; to ‘destroy’ prosecution witnesses out of the sight of jurors, and hence to encourage them not to subject themselves to cross-examination at trial.

Ottawa lawyer Michael Edelson referred to ‘whacking the complainant’ at preliminary hearings in outlining his approach to sex assault cases at a 1988 seminar for lawyers. He 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 investigative system does not have preliminary hearings.

#### **14. Cross-Examination - General**

*Is it not true that last night you committed sodomy on a parrot?*

- Irving Younger

Younger’s technique goes back to the Sophists, but the modern format of cross-examination is a product of lawyers’ takeover of the civil process beginning about 1460. Sir Thomas Smith (1513-77) noted in *De Republica Anglorum* (published 1583) a jury 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), dean of the law school at Northwestern University, Evanston, Illinois, said in *A Treatise on the System of Evidence in Trials at Common Law* (1904) that cross-examination is ‘beyond any doubt the greatest legal engine ever invented for the discovery of truth’. That is true, but it has little meaning; defence lawyers do not seek the truth, and their clients can avoid cross-examination by remaining silent.

Professor John Langbein said ‘cross-examination ... is often an engine of oppression and obfuscation, deliberately employed to defeat the truth’. Justice Russell Fox said: ‘... 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.’

Defence cross-examiners aim to create a ‘reasonable’ doubt in the mind of at least one juror. Techniques include shifting the blame, lying to witnesses, interminably asking the same question with slight variations to

trick them into answering Yes when they mean No; and use of verbal thuggery to intimidate and ‘destroy’ them.

Because 99% of clients are guilty, defence lawyers fear the truth. Irving Younger’s 10 Commandments of Cross-Examination include: ‘Never ask a question to which you don’t already know the answer.’ Even Atticus Finch (*To Kill A Mockingbird*, 1960), who put thousands of young idealists into the wrong 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 lawbooks 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”.’

Defence cross-examination is inevitably anti-truth, anti-fairness, anti-justice, and anti-morality. By contrast, in the pro-truth investigative system, a trained judge questions witnesses in a neutral way and does not allow lawyers to confuse the issue.

## **15. Cross-Examination: Sex Crimes Against Girls and Women**

A 1993 British Home Office study showed that 99% of rapists escape justice. The NSW Bureau of Crime Statistics and Research estimated that 12,000 NSW women were victims of a sexual or indecent assault in 2003, but only 2707 reported the crime to police; 858 were charged; and 361 were found guilty. The conviction rate is 3% in terms of estimated victims, partly because brutal and pornographic cross-examination deters victims from testifying. Dr S. 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.

'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.' 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.

## **16. Cross-examination: Sex Crimes Against Children**

In a 1999 report by the Australian Broadcasting Corporation's *Four Corners* on sex crimes against children, 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 thus a witness, an immediate complaint, and evidence corroborating the boy and his mother, but 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 John, 7. Defence barrister Russell Clutterbuck cross-examined the boy for five hours, with breaks to stem the sobbing. He asked him detailed 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 Taylor told Tadros: ‘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?”’ Not surprisingly, an Australian study found that lawyers and judges whose children had been sexually violated would not allow them to suffer the second trauma of cross-examination.

### **17. Cross-examination: Yes-No Answers**

The oath imposed on witnesses is a legal fiction; the whole truth cannot be told through Yes-No answers, e.g. Have you stopped beating your wife? But Irving Younger said: ‘Never permit the witness to explain his or her answers.’ Insistence on yes-no answers allows lawyers to cross-examine to oblige witnesses to agree with things they do not believe.

### **18. Cross-examination: Theft by Extortion**

Fear of barbaric cross-examination induces women not to report rape, or, having reported it, not to proceed from preliminary hearing to trial. Cross-examination of that sort is thus a form of blackmail, i.e. theft by extortion: it robs victims of justice.

### **19. Rule Against Secondhand Evidence (Hearsay)**

If the rule against hearsay is valid, no history prior to say, 1900, would be accepted; the law says such evidence is inadmissible because the original speaker is not available for cross-examination. O.J. Simpson (who did not make himself so available) was alleged to have cut the throat of his former wife, Nicole. At his trial in January 1996, Judge Lance Ito concealed hearsay evidence of diary entries in which she said she was afraid Simpson might kill her. He also concealed evidence that she rang a refuge five days before her death and said she was afraid because Simpson was stalking her. 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

In *Howzat?* (*London Review of Books*, 25 September 2003), Lord Justice Stephen Sedley said 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.)’

In the investigative system, hearsay evidence is weighed, not concealed. That was also the common law rule until lawyers got control of



the process. Professor Julius Stone and former Justice W.A.N. Wells said in *Evidence: Its History and Policies*:

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.

One exception to the rule is for statements made by people who know they are dying. A sailor named Riley was stabbed on an Australian navy vessel in March 1942. Before he died, he told a doctor that Acting Leading Stoker A.R. Gordon and Stoker E.J. Elias did it, but that was held to be inadmissible hearsay, because the doctor did not tell Riley he was about to die.

## **20. Rule to Conceal Evidence of a Pattern of Criminal Behaviour**

The rule against evidence of a pattern of criminal behaviour, aka the rule against similar facts, obliges prosecutors to falsely imply to jurors that the accused is a first offender. In a 2003 theft case, an incompetent Welsh thief was found not guilty after his 247 previous convictions for theft were concealed from the jury. The rule is thus unfairly biased in favour of lawyers for repeat criminals, e.g. sexual predators and organised criminals, pin-striped and otherwise. Oliver Cyriax, a lawyer, wrote in *The Penguin Encyclopedia of Crime* (Penguin 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.

The rule is a relatively recent concoction. Prosecutors could produce evidence of other crimes which might show 'that the accused is a person likely to have committed the offence for which he is being tried' until Lord Chancellor Farrer Herschell (1837-99) ruled otherwise in *Makin v Attorney-General of NSW* (1894). *Makin* established that judges must conceal pattern evidence unless to do so would be 'an affront to common sense', but common sense is a stranger to the system. 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.

The US has an exception to the rule for organised criminals in the Mafia, the courts, and Wall Street. After Joe Valachi, a hitter in the Genovese family, explained the structure of the Mafia to a Senate committee in 1963, Senator John McClellan's legislation aimed at organised criminals was in hand in 1968 when Richard Nixon became President with a policy against organised crime. It was passed in 1970 as the Organized Crime Control Act, Title IX of which is called Racketeer-Influenced and Corrupt Organisations, or RICO for short. Since RICO made it harder for lawyers to get rich criminals off, I asked its architect, law professor Bob Blakey, now of Notre Dame, in 2001 how he got it 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 rule against pattern evidence perverts justice on a huge scale. From 1981 to 1992, RICO put away 23 previously untouched Mafia bosses throughout the US, including heads of the five New York families: Frank (Funzi) Tieri and Anthony (Fat Tony) Salerno (Genovese family), Anthony (Tony Ducks) Corallo and Vittorio Amuso (Lucchese), Carmine (The Snake) Persico and Vicorio Orena (Colombo), John Gotti (Gambino). Vincente (Chin) Gigante (Genovese family) was convicted in 1997. RICO was also used from 1984 to 1994 to goad 20 Chicago judges for extorting bribes and 50 lawyers for paying them.

In 1994, US federal rules of evidence were revised to allow the use of prior alleged acts in federal sex cases, and 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.' If the British Government really believed that, they would abolish the other anti-truth devices. In any event, it is unwise to give judges a discretion; as lawyers, they believed that fairness means concealing evidence.

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.

## 21. Rule to Conceal Evidence Said to Have Been Improperly Gained

Common law countries vary on concealing evidence said to have been gained improperly. England tends to let the evidence in if it is reliable, and Canadian and Australian judges are supposed to admit it if it is reliable and the alleged offence is worse than the investigators' alleged improper behaviour. In the US, where it is called the exclusionary rule – as if it is the only rule for concealing evidence - *Mapp v Ohio* (Supreme Court 1961) obliges judges to conceal ALL such evidence. Circumstantial evidence suggests that the Chicago Mob effectively appointed *Mapp's* architect, Justice Tom Clark.

In *Coolidge v New Hampshire* (1971) a jury correctly found that Edward Coolidge had cut the throat of Pamela Mason, 14, but the Supreme Court said the local Attorney General was wrong to issue warrants to search Coolidge's car, and overturned the verdict. Judge Harold 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.

## 22. The *Christie* Discretion to Conceal ALL Evidence.

The *Christie* discretion is a piece of metaphysical claptrap expounded by Lord Reading and other law lords in *Rex v Christie* (House of Lords, 1914). It expanded a general discretion to conceal some evidence on the ground of 'fairness' to a discretion to conceal ALL evidence, however damning. Stone and Wells said in *Evidence* that the evidence so concealed 'must be of comparatively little probative weight [and] this slight relevance must be accompanied by a great potentiality for prejudice'.

The judge could thus not consider the prejudicial effect unless he had first decided that the evidence only slightly (?) tended to prove guilt. Perhaps the required ratio was 10% probative and 90% likely to convict. In practice, however, it seems likely that some judges, subconsciously or otherwise, first note that the evidence is likely to cause a guilty verdict, and then decide it is only slightly probative. Even if he is plainly wrong, the prosecutor cannot get a second opinion from a higher court: the judge's opinion concerns facts and appeal courts deal only with law.

The authority on the discretion, Dr John Forbes, of the University of Queensland, noted in *Evidence in Queensland* (The Law Book Company, 1992):

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.

Dr Forbes said the ‘*Christie* discretion may contain “a large subjective element’ [R v Sang, 1980], and its operation may sometimes be ‘whimsical or idiosyncratic’ [Selvey v DPP, 1970]. Judge Brian Boulton revealed in 1992 that Judge John Helman, head of the Queensland District Court, had admitted that if different judges applied the discretion to the same evidence the result might be ‘chaos’.

The District Court, popularly known as the Dizzo, was the scene of the trial, mentioned in the Preface, of Sir (as he then was) Terence Lewis, who contrived to be at once a major organised criminal and Queensland Police Commissioner. The prosecutor, Bob Mulholland QC, said some of the evidence excluded under the discretion was ‘incapable of being categorised as of slight or trifling weight’. Among that evidence was a tape of a phone calls between Sir Terence’s bagman, Jack Herbert, and another accomplice, Barry MacNamara, in which they fret that Sir Terence had stiffed them and a John Garde of \$1,000 – \$333.33 each – from the proceeds of a \$25,000 bribe extorted from Jack Rooklyn, a Sydney yachtsman and organised criminal.

MacNamara said: ‘Oh, I think it is a shitty trick, you know, I really do ... And to think, for a fuckin’ shitty thousand dollars ... I think it’s a very bad act.’ Later, he said John [Garde] ‘took it badly ... he’s going to give that bloke [Lewis] a grand light this month’, but Herbert cautioned: ‘Terry loves this stuff’; he might be a bit upset if I did it back to him’. Judge Tony Healy told John Jerrard, for Sir Terence, that ‘the conversation tends to suggest ... that your client is a person who is capable of ratting on his friends ... It would be very prejudicial to him to let it in, so I am excluding it’.

The probative/prejudicial ratio in the *Christie* discretion was changed dramatically by the Australian and NSW *Evidence Act* 1995. 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.’ On a scale of 100, the ratio thus went from, say, 5/95 to 49/51; the gap was reduced from 90 to virtually zero.

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 his 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.

## **23. Reasonable Doubt (for a Reasonable Price)**

After the right of silence, the formula for the standard of proof, beyond reasonable doubt, is the single most effective device for getting rich criminals off: because jurors do not know what the formula means, and,

because of the curse of precedent, judges are not allowed to tell them it simply means what the French formula says: are you intimately (thoroughly) convinced?

The Anglo-American formula, and judges' refusal to explain it, is thus a major player in the get-the-guilty-off game which followed the handover of the criminal process to lawyers. Yale law professor John Langbein wrote in *The Historical Origins of the Privilege Against Self-Incrimination at Common Law* (Michigan Law Review, March 1994):

... 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:

... 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.

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.'

Unlike the US, it is a crime in NSW to seek information from jurors. John Laws, a Sydney broadcaster, was given a suspended sentence of 15 months for asking a juror why she apologised to the widow of Angelo Cusumano for the not guilty verdict of a man charged with murdering her husband. The juror had 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.

In a case of alleged insider trading noted in Section 3, the defence was that the accused, Hannes, did not buy certain shares; a Mr X did. Hannes did not produce Mr X, but his lawyers argued that the prosecution could not prove beyond reasonable doubt that Mr X did not exist.

## 24. Inscrutable Jurors

Professor John Langbein quotes a German legal maxim, *Ohne Begründung kein Urtheil*, without a statement of reasons, there can be no valid judgment. Since common law jurors have never had to give reasons, the system has thus been open to corruption since it was invented in 1166, e.g. Rodney King, O.J. Simpson, Michael Jackson, and a man tried for heifer-rustling at Dubbo, NSW. Melbourne barrister Aubrey Gillespie-Jones reported the Dubbo 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. 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'.

## 25. Rule Against Double Jeopardy for Those Found Not Guilty

In the adversary system, double jeopardy means no acquitted person can be tried twice for the same crime, although more than 50% of acquittals are wrong. Some are obviously perverse, e.g. O.J. Simpson, and in some the judge wrongly concealed evidence e.g. Elliott, Biggins and Scanlon noted above. Nor can acquitted criminals be retried when new and compelling evidence, e.g. DNA (deoxyribonucleic acid), emerges. Justice perverted in favour of criminals must stay perverted forever. On the other hand, 1% of guilty verdicts are wrong and can properly be appealed and the case retried.

Double jeopardy goes back to ancient Greece, but the Anglo-American version derives from confusion or worse over an event at the very beginning of the common law. In 1164, Henry II wanted his courts to re-try ‘criminous clerks’ who had already been found guilty and punished by church courts, but Archbishop Thomas a Becket insisted that no man should be punished twice for the same offence.

That those previously found **guilty** (*autrefois convict*) and punished should not be tried twice for the same offence seems fair. However, judges who, at best, could not think straight, later purported to believe it also meant that those found **not guilty** (*autrefois acquit*).should not be tried twice.

Needless to say, Blackstone parroted that ancient nonsense in 1765. He said ‘no man is to be brought into jeopardy of his life, more than once, for the same offence’, and that was fatally echoed in the fifth amendment to the US Constitution in 1791: ‘ ... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.’

When Britain finally and retrospectively abolished double jeopardy for those acquitted of major crimes from Monday April 4, 2005, the National Crime Faculty calculated that 35 persons acquitted of murder could be re-investigated and new charges brought. The Bar Council and so-called civil liberties groups opposed the legislation, but a Home Office spokesman stated the obvious:

It is important 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.

The truth-based investigative system naturally allows not guilty as well as guilty verdicts to be appealed and, if necessary, retried.

## 26. Plea-Bargaining: A Step Towards Abolishing Trials Altogether

Professor John Langbein wrote in *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*: ‘ ... 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 notarial plea bargaining system.’

Caseloads may be a factor, but plea-bargaining, notably the US, is an admission that the anti-truth devices make it difficult to get convictions. Prosecutors thus offer major criminals a no-risk bargain: accept a large fine or a few years in prison against the possibility of going to prison forever.

#### **iv. Legal Aid**

If the anti-truth devices make the adversary system a fraud on the community, the fraud is compounded by obliging the community to pay lawyers to obscure the truth, get criminals off, and generally pervert justice. Legal aid should only be paid to lawyer to help the system find the truth.

### **h. Perversions of Justice Against the Innocent**

*Under our system of justice, it is better that 10 guilty men go free than that one innocent man be convicted.*

- W. Blackstone 1765

The reality is that at least one innocent person is found guilty, and more than 50 criminals go free, but lawyers endlessly regurgitate Blackstone. He said those words when lawyers were at last finding money in criminal work. When judges gave them final control of the criminal process some 40 years later, Blackstone’s words gave the cartel an excuse to start inventing the get-the-rich-off devices noted above, and the bar was shortly raised tenfold; law professor Thomas Starkie KC, of Cambridge, said in 1824:

The maxim of the law ... is that it is better that 99 ... offenders shall escape than that one innocent man be condemned.

The adversary system’s win-at-all-costs culture gets the worst of both worlds; many criminals get off, and some innocent, particularly the unrich, suffer perversions of justice. It is estimated that at least 1% of British prison inmates are innocent, i.e. 700 of 70,000 in 2002. In Australia, at least 235 of 23,555 inmates in 2003 were probably innocent. In the US it is estimated that upwards of 5% are innocent, i.e. perhaps 105,000 of 2.1 million in 2004.



## 1. The US

The number of innocent inmates clearly make it too risky for guilty verdict to proceed to execution. As noted above, 12 of 285 (4.2%) on Death Row in Illinois were found to have been wrongly convicted. If the same percentage applied in Texas, six of the 152 executed during the term of Governor George Bush on the advice of Alberto Gonzales were probably innocent.

The US Bureau of Justice Statistics (BJS) 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 in 1936 on fabricated evidence for allegedly kidnapping Colonel Lindbergh's baby.

The Supreme Court voted 5-4 to abolish the death penalty in *Furman v Georgia* (1972). Justices Potter Stewart, Byron White, William Douglas, William Brennan, and Thurgood Marshall outvoted Chief Justice Warren Burger and Justices Harry Blackmun, Lewis Powell and William Hubbs Rehnquist. But four years later, Stewart and White switched sides and Douglas had been replaced by John Paul Stevens. In *Gregg v Georgia* (1976), Burger, Stewart, White, Powell, Blackmun, Rehnquist, and Stevens outvoted Brennan and Marshall to restore executions. Marshall dissented in every such case until he retired in 1991. Relatives of those wrongly killed from 1976 were no doubt gratified when Blackmun (1908-99, Justice 1970-94) admitted in 1994 that he had been wrong about the death penalty.

From 1976 to 2004, there were 944 executions; 37 may have been innocent. In May 2001, after a spate of forced releases from Death Row, *Time* reported that 20 of the 38 States with death penalties were considering moratoriums on executions. At the end of 2003, there were 3374 on Death Row in 37 States and the federal system; 134 may have been innocent.

## 2. Britain

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. It was fortunate for Irish suspected of terror that England abolished executions in 1965. 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. In 1988, Lord Denning turned Blackstone and Starkie on their heads. 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, Appeal Court Justices Lloyd, Mustill and Farquharson acquitted and freed the Six, after 16 years in prison. Viscount Runciman was then asked to investigate the possibility of change to a pro-truth system. Research for the inquiry showed that perversions suffered by the Birmingham Six and the Guildford Four were unlikely to occur in France and Germany, but most involved in the inquiry were lawyers, and its report recommended persisting with the anti-truth system.

The inquiry did recommend that a body be set up to investigate possible perversions against the innocent (but not those in favour of the guilty). The Criminal Cases Review Commission (CCRC) began work in 1998 with eight non-lawyers and six lawyers as Commissioners. It has a staff of 100 and they use the European system to investigate the truth; a Commissioner, Dr James MacKeith, a forensic psychiatrist, told me they accept all available evidence.

The CCRC sends its recommendations to a non-truth body, the Court of Criminal Appeal, for final decision. The court has agreed with the CCRC in 70% of cases. To 31 March 2005, the CCRC had received 7602 applications and had referred 271 cases to the appeal court. The court had heard 216 cases and had quashed 151 convictions and upheld 65 convictions. Some results:

Mahmood Mattan. Hanged 1952. Conviction quashed 1998 because evidence of main prosecution witness was unreliable.

Derek Bentley. Hanged 1953. Conviction quashed because the trial judge, 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 a total of 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.

### **3. Australia.**

Ronald Ryan was the last man hanged in Australia. I happened to be an official witness at the execution in Melbourne in 1967, and received his letter from the grave. He said he was not guilty of intent, and I am inclined to believe him; manslaughter and a prison term would have been appropriate.

A dingo (a wild dog) killed Mrs Lindy Chamberlain’s baby daughter, Azaria, but the mother was found guilty of murder in Darwin in 1982. An inquiry found the truth and the conviction was quashed in 1988.

## **i. Presumption of Guilt: Unfair Bias Against Accused**

### **a. Contempt by publication.**

A law of contempt by publication does not exist in the European system because it does not conceal evidence, and barely exists in the US because the First Amendment protects the right to know. It only exists in other common law countries because the cartel concealed evidence after lawyers got control of the criminal process early in the 19<sup>th</sup> century. Prior to that, judges admitted most relevant evidence and informally advised jurors on weight. That was no longer possible after the adversary process isolated judges from jurors.

The alleged crime concerns publication of evidence which may be concealed from jurors, e.g. the accused’s pattern of crime, at a trial which is imminent or proceeding, and so may prevent a ‘fair’ trial. It is offensive to staples of the common law: the necessity for the alleged offender to have a guilty mind, the presumption of innocence, and trial by jury. It presumes accused are guilty even though their action was inadvertent, and accused are not allowed trial by jury, possibly because jurors might refuse to convict.

A Sydney case illustrates how unfair and unjust the law can be. A lawyer, Christopher Murphy, unaware that a trial was proceeding, 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. However, the judges were unaware that the same man was again on trial, and his convictions were mentioned at the contempt trial and reported in the Press. A judge then aborted his second trial. The judges and the media were not charged with contempt, but in February 1995 the judges confirmed the original guilty verdicts on Murphy and the organ, and ordered the organ to pay the prosecution costs as well as

their own. This effective penalty, estimated to be A\$120,000, was enough to cripple a small newspaper.

## **b. Contempt by Affront**

The law of contempt by affront originated in mediaeval superstition: an inscrutable deity appointed the monarch; the monarch appointed the judge; an affront to the beak was thus an affront to the deity and the monarch.

Justice Sir John Eardley Wilmot (1709-1792) said (*R v Almon*, 1765) contempt law was necessary to keep ‘a blaze of glory’ around the courts. Translation: it deterred pamphleteers from reporting that most judges were corrupt. Wilmot said it was ‘immemorial usage and practice’ for judges to give contempt verdicts. His opinion was never delivered, but it is still the leading authority for trial without jury in Australian affront cases.

The first US Chief Justice (1789-95), John Jay, told jurors in *Georgia v Brailsford* (1794) they “have ... a right ... to judge the law as well as the fact in controversy”. Judges don’t give them a chance to judge the law of affront.

Recent British contempt history shows how Humpties can effortlessly 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, presumably before he succumbed to dementia:

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.”

However, over three cases, *Tisdall* (1983), *Warner* (1987) and *Goodwin* (1990), law reinstated the common law rule that the private right of revenge takes precedence over the public right to information.

Although judicial work is the most error-riddled industry there is, some judges insist on being treated as if enveloped in a Christ-like blaze of glory. When Malcolm Turnbull (BCL Oxon) referred to judges by surname only in 1977, ‘Justice’ Harry (a profit is a loss)

Gibbs warned him that he ‘felt it was a contempt of court to refer to a judge other than as “Mr Justice Bloggs’.” Turnbull in effect told him to grow up.

## **j. Defence of the Criminal Adversary System**

Defences of the criminal adversary system come down to assertions that it protects citizens’ ‘rights’ and protects them from oppression by the leviathan state. Professor Stephan Landsman said in *Readings on Adversarial Justice: The American Approach to Adjudication*: ‘For centuries adversarial courts have served as a counterbalance to official tyranny and have worked to broaden the scope of individual rights.’

The oppression argument tends to collapse in the face of oppression on a vast scale by the adversary system itself. Its unfairness oppresses victims of crime; cruelty in cross-examination oppresses witnesses in general and women and children in particular; negligence law oppresses doctors, accountants, teachers, local councils, and business and manufacturing shareholders; 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 1997 Brisbane conference:

There are four standard arguments on behalf of the adversary system. These are (1) that it is the best way to find the truth; (2) that it is the best way to ensure that all parties’ rights are protected; (3) that it is part of our tradition and culture; and (4) ... the adversary system is the way clients participate in the litigation process.

He said all those arguments fail, and that: ‘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.’ He concluded:

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; and (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.

That argument also fails. An available alternative, the European investigative system, which seeks the truth and is controlled by trained judges is

necessarily better than a system which does not seek the truth and is controlled by trained liars.

## k. Conclusion

The foregoing leads to hard questions which all affected by the adversary system, including judges, lawyers (academic and practising), litigants, police, and those obliged to fund it, would do well to consider.

What exactly did Don Vito mean when he said a lawyer can steal more than a thousand men with guns? Did he mean they steal money from clients by spun-out pleadings and discovery, and steal justice from victims and the community?

The *Macquarie* says 'corrupt' comes from the Latin *corruptus*, broken in pieces. Definitions include: destroyed, dishonest, without integrity, debased in character, perverted, tainted, made bad by errors. If Justice Fox is right in saying that justice is fairness, fairness is truth, and morality comes from a search for truth, is the adversary system effectively a corrupt form of justice?

Is it effectively a criminal enterprise? Organised crime is systematic criminal activity for money or power; a criminal enterprise is the vehicle through which the activity is conducted. Lawyers habitually engage in practices normally regarded as criminal, e.g. perverting justice, and get money for it.

However, they would say they are compelled by the system, a good thing in itself, to do what they do, and hence cannot have the necessary *mens rea* (guilty mind). Further, 'enterprise' suggests active participation. Perhaps a passive usage would be more appropriate, e.g. the system can IN EFFECT amount to a criminal enterprise, but participants are not necessarily guilty.

It may not be relevant to that particular point, but the adversary system does get the accolade from an organisation which IS a criminal enterprise, the Sicilian Mafia. It is noted in Section 3 that the Mafia's response to 475 members being put on trial by investigating magistrates in 1986 was to 'persuade' the Italian parliament to change to a more adversarial system in 1988.

A tap on a Brooklyn telephone recorded US gangsters' joy on behalf of their Sicilian colleagues. A heroin dealer, Joe Gambino, said: 'Oh, so it's like here, in America?'

The other man, just back from Sicily, said: 'No, it's better, much better.'

Material in Part 2 shows that the common law had a long tradition of trickle down extortion, and that it still has pockets of judicial extortion; in the last 20 years, 70 Chicago judges and lawyers went to prison for that sort of criminal enterprise.

# 2. How It Happened

## a. What Law Schools Don't Teach

Justice Russell Fox said understanding facts depends heavily on context. Justice Ron Sackville, of the Australian Federal Court, said 'great care must be taken to understand the social and historical context in which a legal system has developed'. In 1993, the Runciman inquiry gave this as the reason for rejecting truth for the second time in eight centuries.

Every system is the product of a distinctive 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.

The common law's history, culture and context can be stated briefly. For 700 years from the Dark Ages, England and Europe used the same anti-truth accusatorial (PROVE IT!) system. They diverged at a time when the master of Europe happened to be an upright churchman, and England was run by organised criminals. After 1215, Europe changed to a pro-truth investigative (WHAT HAPPENED?) system, but England rejected that system and persisted with the accusatorial system. The adversary system is a lawyer-run variant of the PROVE IT! system.

Europe has thus had a pro-truth culture for 800 years; England – and its colonies – has had an anti-truth culture for some 1500 years. Viscount Runciman was right; changing to a pro-truth system would be difficult for lawyers: it would deprive them money.

### 1. Trial by Ordeal; Verdict by Inscrutable Deity

Historian Michael Woodiwiss has made much history and journalism obsolete. In *Organized Crime and American Power: A History* (University of Toronto Press, 2001), he defined organised crime as 'systematic criminal activity for money or power'. He says we should look beyond the Mafia to the 'powerful and respectable' because 'organised criminal enterprise was deeply embedded in the machinery of law and government from at least the time of the Roman empire'.

The West Roman Empire collapsed under the weight of its corruption in 476. In the Dark Ages (c.476 – c.750) and for much of the Middle Ages (c.750-1453), the legal system in western Europe and England regressed from truth-based roman law to an anti-truth accusatorial system

called the Judgment of God (*judicium dei*). A accused B; B said: ‘Prove it.’ The verdict was supposed to be revealed by an inscrutable deity.

Trials took several forms. The wager of law was the equivalent of modern self-regulation. The accused swore he was innocent, and was presumed to be telling the truth if the deity did not strike him with lightning. Trial by ordeal included walking on hot ploughshares, carrying a hot iron for nine feet, and taking a stone out of boiling water. An ‘expert’ inspected the damage three days later and interpreted the deity’s verdict. Accused clerics had to swallow the ‘cursed morsel’, a feather concealed in piece of food. If he choked, it was presumed that the deity had judged him to be guilty.

In ‘swimming a witch’ (trial by cold water) the suspect was trussed and thrown in to a stretch of water blessed by a priest. If she sank, she was not a witch because the blessed water had received her. If she floated, she was a witch because the water had rejected her. She was fished out and hanged or burned at the stake. Alleged witches were swum and hanged in England in 1647, and 20 were hanged in Salem, Massachusetts, in 1692.

The Church opposed the Judgment of God from the time of Agobard, Bishop of Lyons (d. 840), on the ground that it was improper to tempt the deity. Pope Stephen VI tried to stop the practice in 877, but the spectacle was too exciting to be successfully proscribed. After 1066, the Normans introduced to England another spectacle, trial by combat, also known as the judicial duel, wager of battle, and trial by battle. Accuser and accused swore before a judicial officer they were telling the truth and then fought a duel. The winner got the verdict; the loser, if still alive, was hanged. Trial by battle was last demanded by a murderer, Abraham Thornton, in 1817. He got the verdict when his accuser declined to take part in the duel.

## **2. Origin of the Common Law in a Culture of Trickle-Down Extortion**

England was always as corrupt as any country in Europe, if not more so, and incomparably the best at calling it something else: bribes and/or extortions become gifts, presents, favours, patronage, *doucens*, commissions, gratuities, honoraria, unofficial taxes. In a former colony, the US, bribes are referred to as juice in California, ice in Florida, grease in New York. Corruption and racket are likewise euphemisms for organised crime.

Michael Woodiwiss notes that in 1930 Raymond Moley said Europe’s medieval 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’. He says ‘William of Normandy did most to establish such a system in early Britain’.

Richard Condon said modern man thinks money brings power, but medieval man knew power brought money. William I (1027-87) and his son, William II (c.1056-1100), had the standard medieval mind. After William I’s 6500 mercenaries defeated King Harold’s 7000 troops at Hastings in 1066,



William franchised 90% of the country to 300 of his 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; they extorted from merchants travelling through their land; and they 'sometimes led or employed bands of brigands to plunder towns and villages'. Freemen in turn franchised land to its original owners and extorted from them.

The British Empire was to a degree a criminal enterprise based on theft of land and, later, human beings. The empire dates from 1072, when William 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. The empire then developed a triangular trade in goods and slaves between Africa, America and England

London's population was between 14,000 and 18,000 when King (1087-1100) William II institutionalised trickle-down extortion in the trade of authority. Professor John Gillingham, a mediaevalist at the London School of Economics, said in *The Oxford History of Britain vol II The Middle Ages* (OUP1992) that William put every public office, from Chancellor down, on sale. The buyer in turn extorted bribes from those who had to deal with the office. As head of the royal secretariat, the Chancery, the Chancellor was a sort of mediaeval Prime Minister. It was in the context of this culture of systemic corruption that the common law is generally understood to have begun in the reign of King Henry II (1154-89).

The jury system was invented in 1166. When a crime was reported, 12 neighbours had to use their local knowledge to suggest a suspect (possibly including an enemy). The suspect was still tried by ordeal, and the verdict was still believed to come from an inscrutable deity.

Professor Theodore Plucknett said professional, i.e. paid, lawyers first appeared in a new court (later called the Court of Common Pleas) set up by Henry II in 1178 to deal with civil litigation. Law professor J.H. Baker, of Cambridge, says in *An Introduction to English Legal History* (Butterworths, third edition 1990) that professional judges had appeared by 1200. London's population was then 20,000-25,000. The courts sat in Westminster Hall of Westminster Palace; lawyers had their own pillars at which they met clients.

### **3. The Lawyer-Judge Cartel**

*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.*

- Adam Smith, *The Wealth of Nations*, 1776

Professor J. H. Baker said: ‘England possessed from an early date a bench and bar united by their membership of a common profession.’ The Chicago economist and appellate judge, Richard Posner, wrote in *Overcoming Law*:

The legal profession in its traditional form is a cartel of providers of services related to society’s laws ... Should we be surprised to find that self-interest has played as big a role in legal thought as in medical thought? ... 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 and the judiciary, to secure a lustrous place in the financial and social-status sun.

Leaving on one side the fact that the common law professoriat did not begin until Blackstone procured Oxford’s first Vinerian chair in 1758, Judge Posner’s observation suggests that the common law has always been a business. He said the US cartel began to implode about 1960 through pressure of competition.

#### **4. A 13<sup>th</sup> Century Tax Evasion Scheme: *Magna Carta***

*Magna Carta* is invoked to support all manner of legal claims, but it was essentially an attempt by magnates to evade taxation and to dilute the power of the monarch. Scutage was a tax in lieu of military service. When King (1199-1216) John insisted that the tax be paid by magnates who had refused service in France, they gathered in force outside London (pop. c 25,000) in June 1215 to demand, at sword-point, that John 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 each other 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’. Freemen owned freehold land and were one level below the magnates.

Section 40: ‘To no one will we sell, to no one will we refuse or delay, right or justice’. That seems to confirm that justice could be bought.

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

#### **5. England Rejects Truth**

A church conference in Rome in November 1215 agreed to end clerical participation in trial by ordeal and to use a truth-based system based on the old roman law to investigate alleged clerical misbehaviour. European courts

then changed from the accusatorial system to an investigative (inquisitorial) system, but England hesitated. When King John died in October 1216, his successor, Henry III, was nine; the decision on the system was left to the judges, which effectively meant the cartel, then consisting of a dozen or so lawyers and judges. In 1219, they accepted that trial by ordeal had to end, but rejected the investigative system, and persisted with an accusatorial system.

One reason was ethnocentrism, defined as ‘the belief in the inherent superiority of one’s own group and culture accompanied by a feeling of contempt for other groups and cultures’. Law professor Richard Jackson, of Cambridge, said in *The Machinery of Justice in England* (Cambridge University Press, seventh edition 1977) that a cause of the rejection was ‘an insular dislike of things foreign’.

Another reason was the defective jury system. Professor Theodore Plucknett said it was ‘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 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.’

A result of the rejection of truth was that the British Empire – then consisting of England, Scotland, Wales and Ireland - had a system which preferred procedure to truth, form to substance, ‘rights’ to justice, and appearance and legal fictions to reality. In the Middle Ages, for example, if a man paid a debt but did not make sure the bond was cancelled, it was no defence to prove he had repaid; the bond was held to be incontrovertible evidence that he still owed the money.

The rejection of truth also facilitated corruption; it is easier to pervert justice for money if the system does not require truth. In the following centuries, British judges tended to extort to get the money, while European judges tended to torture to get the truth.

## **6. Judicial Extortion in the Late 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; lawyers, who like to hear their voices and to protect the system which get them money, migrated to the Commons. Simon de Montfort invented the Commons in 1265 during the Barons’ War of 1264-68, another failed attempt by magnates to usurp the monarch’s power; it took lawyers another four centuries to achieve that.

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 some 35,000. Lawyers could thus

still buy the office of judge, and those who did had an incentive to convict; they got a share of the fines they imposed.

Judges were accused of murder, sorcery and corruption in 1289. The Chief Justice of Common Pleas fled the country, and seven judges were dismissed, including Ralph de Hengham, Chief Justice of the King's Bench (criminal trials). In 1301 de Hengham was appointed Chief Justice of Common Pleas, presumably by paying 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.

By 1300, the lawyer-judge cartel had been formalised as the Order of Serjeants-at-Law, aka the Order of the Coif. It was originally an order of ecclesiastic lawyers; the coif, a piece of silk worn on the head, represented the clerical tonsure. Professor Theodore Plucknett said that by 1300 the Serjeants were 'a close guild in complete control of the legal profession'. Fewer than 1000 were appointed Serjeants over the next 550 years. Some US law schools still award an Order of the Coif to bright students. Professor J. H. Baker says 'ministers sold the coif for bribes' in the 17<sup>th</sup> century', but it was worth buying three centuries earlier. Professor Plucknett says Serjeants' wealth in the 14<sup>th</sup> century 'must have been enormous'; on appointment, they had to hold feasts 'comparable to a king's coronation, and to distribute liveries and gold rings in profusion'. By 1340, with London's population at 40,000-50,000, Serjeants had acquired a monopoly of work in the common law courts, a monopoly of appointment as judges, and a monopoly of legal education. Professor 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.

English-speaking citizens are thus said to have enjoyed government of, by and for serial liars for 650 years. In the 1380s, Richard II made the royal secretariat, the Chancery, a court. 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 Chancellor was its judge and jury; and the Chancery Court inevitably became as corrupt as the other courts. Professor Baker says 'already by 1393 there were complaints of its abuse'.

Professor Plucknett says that in the Middle Ages Serjeants, i.e. the inner cartel, 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'. He says that by 1400 the 'judges and Serjeants together' were deciding difficult cases in the Exchequer Chamber, and, presumably, dividing 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. Dissatisfaction with the legal system was a reason for Jack Cade's revolt in 1450. He briefly had control of 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 was himself killed.

## 7. Judges Give Lawyers Control of the Civil Process

We know a lot about the Wars of the Roses (1455-87). They were skirmishes between gangs of organised criminals in the houses of Lancaster (red rose) and York (white rose) for power and money, i.e. control of the monarchy. Actual fighting totalled only three months and did not unduly trouble citizens, but there were 17 melees, and the crown changed hands five times: Henry VI, Edward IV, Henry VI, Edward IV, Richard III, Henry VII.

The civil adversary system began in the same period as the Wars of the Roses, but we don't know much about it, possibly because members of the cartel was at pains to cover their tracks. Yale professor John Langbein wrote in *The Origins of Adversary Criminal Trial* (Oxford, 2004):

... 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.

The few academics who are interested in the origin of the adversary system usually date it from the 18<sup>th</sup> century, when lawyers began to get control of criminal evidence, but lawyers actually began to get control of civil evidence in the 15<sup>th</sup> century. It can safely be assumed that the motive, as well as the effect, was to get control of the money. Professor Stephan Landsman wrote in *Readings on Adversarial Justice*:

... adversarial process was in the interest of lawyers as a group. It created ever more work for attorneys, as increasing numbers of potential clients sought legal advice.

But why did judges give up their power to control the process? Jurist Brett Dawson believes it may have been for reasons no more sinister than sloth; 'they went on the bench to retire'. On the other hand, it may be that, like the Pontiff, the Mafia and corrupt detectives, the cartel thought in centuries: with control of the process, lawyers could sharply increase their profits and retire more comfortably to the bench. At all events, the vehicle for the civil handover was the method of pleading. Much of the following data comes

from Nicholas Mullany's 1998 paper, *Pleadings – Sacrificing the Sacrosanct*, for the WA Law Reform Commission.

Written pleadings are now the first step in the civil process. In the 15<sup>th</sup> century, when barristers pled orally before a judge, pleadings were the second last step. Cambridge law professor Frederick Maitland said the barristers and the judge 'licked the plea into shape', presumably in an hour or so. Oxford law professor Sir William Holdsworth described the process:

... 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.

Professor Holdsworth said the first record of a paper (written) pleading was in 1460. Sir John Prisot, Chief Justice (1449-60) of the Common Pleas saw 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 J.H. Baker said it was more than a century before judges accepted written pleadings only, but '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 [lawyers] 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 means that lawyers have been able to lie in pleadings for five centuries, and judges have never found a way to stop them.

## **8. Judicial Extortion 1485-1810**

When the Wars of the Roses ended in 1485, the last man standing was the Lancastrian Henry Tudor, who became Henry VII. The CDNB says he 'practised much extortion', but that was the point of the wars. In *Judicial Ethics in Australia* (Law Book Company, second edition 1997), Justice

James Thomas, of the Queensland appeal court, said of the Tudor period (1485-1603):

With few exceptions, all officials (including judges) were ... corrupt. [Cardinal] Wolsey [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.

Justice Thomas noted that in 1554 the Count of Egmont bribed Britain's entire Royal Council and reported to Philip of Spain that 'more could be done with money in England than anywhere in the world'. Britain invaded America in 1607 and added theft of human beings from West Africa to theft of land. British justice also continued to be effectively a criminal enterprise, at least for some. Sir John Evelyn, the diarist, recorded admissions by four senior members of the cartel, including Lord Chancellor (1685-89) George Jeffreys, on 26 November 1686:

I din'd at my L. Chancelors, where being 3 other Serjants 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.

Two years later, lawyers got control of the political process by overthrowing King James II and installing their own Dutch king. Professor Plucknett said: 'It was the common lawyers who were mainly instrumental in making parliamentary supremacy [over the monarch] a fact'. John Locke (1632-1704), a Whig conspirator, justified the lawyers' treason in *Two Treatises of Government* (1690). The second, which continues to have a profound effect in the US, 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, he supplied a pretext for any usurpation.

The 1688 revolution was called 'glorious', presumably because organised criminals in the Whig oligarchy rightly anticipated making glorious sums over the next century. In *English Society in the Eighteenth Century* (Penguin, 1982), historian Roy Porter noted how they operated:

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.

The Duke of Newcastle, the oligarchy's bagman 1724-62, was himself Prime Minister 1754-56 and 1757-62. Walpole, Prime Minister 1721-42, said of parliamentarians: 'All these men have their price.' 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.

The head of the corrupt Chancery Court, Lord Chancellor (1718-25) Macclesfield, a former Whig politician, continued England's 600-year-old tradition of trickle-down extortion. He usually extorted £5000 [c. £500,000 today] from barristers who sought appointment as Masters in Chancery in order to extort more directly from litigants. A barrister, Francis Elde, had to use a clothesbasket to convey the bribe to Lord Macclesfield and his bagman, Master Peter Cottingham.

Justice 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'. In 1756, Murray became a Serjeant and Lord Chief Justice and continued to sit in corrupt Cabinets, where he favoured coercing American colonists, until 1774, and he remained an active politician until 1784. Judges were still extorting bribes from barristers in return for legal office in 1810.

## **9. Judges Give Lawyers Control of the Criminal Process**

Lawyers did not appear in the criminal courts until the 18<sup>th</sup> century; there was no money in it: wealthy and respectable organised criminals were not normally accused. 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.' Prosecutions were private; those in court were judge, jurors, accuser, accused and their witnesses; trials were nasty, brutish and short.

England's trade in goods and slaves in the 17<sup>th</sup> century sharply increased its wealth and population. London's population almost tripled, from some 200,000 in 1600, to 350,000-400,000 in 1650, to 575,000-600,000 in 1700. Unrespectable organised crime followed; after 600 years, lawyers began to discover a tender care for the 'rights' of accused. Lawyers began to appear in criminal courts after a 1692 Act and the Treason Act of 1696.



The 1692 Act offered a reward of £40 (c. £4000 today) for information leading to the conviction of highway robbers and other thieves. An organised criminal from the lower orders, Jonathan Wild (1682?-1725), had a gang of thieves, took his share of the proceeds, and informed on them for the reward. Wild was hanged in 1725, but lives on in representations of Prime Minister Sir Robert 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 in 1928.

Defence lawyers found that the truth engine easily exposed lying informants like Wild, but did not appear in great numbers until much later in the 18<sup>th</sup> century. Research on Old Bailey trials by Professor John M. Beattie, of the University of Toronto, showed that defence lawyers appeared in 2.1% of trials in the 1770s, 20.2% in 1786, and 36.6% in 1795. By the first decade of the 19<sup>th</sup> century, judges had given lawyers control of the process, and could indulge their taste for sloth in the criminal courts, but had to stay awake long enough to agree to the anti-truth devices which make it quite easy for their former colleagues to get rich criminals off.

## 10. Judicial Extortion in the US and Other Former Colonies

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.' Those largely responsible were John Locke, Blackstone, James Madison, Alexander Hamilton, and John Marshall.

US law professor Darien McWhirter's *The Legal 100: A Ranking of the Individuals Who Have Most Influenced the Law* (Citadel, 1998) says: 'Locke ... laid the philosophical foundation for the legal and governmental system that developed in the United States.' In 1692, Locke said people have certain natural rights, including a sacred right to property. 'People' was not interpreted to mean Indians, Negroes, or women. In 1791, Blackstone persuaded Madison to incorporate English common law, and what that entailed, in the Bill of Rights. *The Legal 100* says Alexander Hamilton 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 thus believed that the business of America is business. He also believed that government by an oligarchy of rich businessmen was the best way to enable business to build a great and powerful country. Perhaps inspired by Britain's shamelessly 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.

Oligarchy, was institutionalised by Article II Section 2 of the Constitution ratified in 1789. It says the President, ‘with the advice and consent of the Senate, shall appoint ... public ministers’, including members of the Cabinet. clever businessmen can thus shuffle round a revolving door of business and government for decades. In 2005, Donald Rumsfeld, 73, had been on the shuffle for 48 years, former President G.H.W. Bush, 81, for 39, and Richard (Dick) Cheney, 64, for 36. For example, when President Gerald Ford gave Thojib Soeharto the all clear to unlawfully use US weapons in his invasion of East Timor in 1975, Rumsfeld was Secretary for Defense, as he was in 2005, and Cheney was Ford’s chief of staff, i. e. gatekeeper. *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 property sales from it. Investors procured an advisory opinion from Alexander Hamilton. He told them what they wanted to hear: the cancellation was unconstitutional. A collusive test case, *Fletcher v Peck*, ground through the courts.

President John Adams appointed Hamilton’s protégé, John Marshall (1755-1835), a former land speculator, Chief Justice in stacking the courts at “midnight” of the day he was to retire, 20 January 1801. In Marshall’s period (1801-35), the cartel was akin to the Serjeants in the 14<sup>th</sup> century. In a case of judicial extortion, *US v Murphy* (1985), Judge Frank Easterbrook noted:

When John Marshall was the Chief Justice, the Justices and many of the lawyers who practiced in the Supreme Court lived in the same boarding house and took their meals together.

*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.’ Marshall thus made untrained and unelected Humpties supreme over Congress.

Hamilton, lawyer and gentleman, aimed high in a duel in 1804; Aaron Burr, lawyer, aimed at his stomach. Hamilton died but his Yazoo opinion lived. Article II Section 4 of the Constitution says bribery is sufficiently heinous to warrant removal of the President, and *OxfordSC* says that in *Fletcher v Peck* (1810) the Contracts Clause of the Constitution appeared to be on Georgia's side. But Marshall dutifully parroted Hamilton's line that the Yazoo cancellation was unconstitutional. He upheld the corrupt grants, voided the legislation which cured them, and even 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.' Marshall thus effectively defined the business of America as a business in which fraud, bribery, extortion, force etc. are acceptable, even necessary, tools.

*Fletcher v Peck* was a useful precedent for pin-striped organised criminals. Historian Gustavus Myers said it 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 Marshall, the New York culture barely distinguished between organised crime in the judiciary, politics and on the streets. In *Damon Runyon* (Ticknor and Fields, 1991), Jimmy Breslin said 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 so they could extort in turn from bootleggers and other organised criminals.

A lawyer named Macrery paid the \$10,000 and Hines procured a five-year appointment. Later, Judge Macrery told Hines: 'I only pay once', but shortly died of alcoholic poisoning. When a Tammany lawyer put it about that Macrery had been beaten to death and sought an investigation, 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.

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 the county's court system since Cook County was created in 1831. Carl Sifakis notes the Guzik Scale of buying judges in *The Mafia Encyclopedia* (Checkmark, second edition 1999). It was devised by Jake (Greasy Thumb) Guzik (1887-1956), a fixer for the Chicago Mob. (His figures should be multiplied by perhaps 20). He said:

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 fixer for the Chicago Mob, Murray (The Camel) Humphreys (1899-1965): '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 1980, the Justice Department and the FBI began an investigation into the system. From 1984 to 1994, the FBI's Operation *Greylord* and the following Operation *Gambat* used the RICO legislation to put away 20 judges, 50 lawyers, and sundry police and court officials for extortion and bribery. Judge Thomas J. Maloney was even convicted of taking bribes in three murder cases.

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. In return they coached him on how to run his cases, pressured opposing lawyers to settle, and assigned 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 England, where William II instituted a culture of public sector organised crime in the 11<sup>th</sup> century, it was idle to suppose that it stopped in the 20<sup>th</sup>. In *Cockburn Sums Up* (Quartet, 1981), Claud Cockburn recalled the naïveté of Kingsley Martin, editor of *The New Statesman* in the 1930s. He wrote:

I would mention ... that, obviously, the explanation for this or that turn of events was that this or that official, this or that political leader, had been richly bribed by this or that interested party. Kingsley would look at me with his kindly indulgent smile which held at the same time a touch of pity for my continental-type ignorance of what is done and what is not done in England.

Cockburn said of the 1960s and 1970s:

There was nothing astonishing in the extent and blatancy of the corruption which are no greater in Britain than in France or the United States. What truly astonished me was the extent to which the British Establishment, including the corrupters and the corrupted, have, despite all, managed to keep alive for public circulation the legend that that sort of thing does not happen in England: or that when it happens it is an unusual phenomenon, swiftly dealt with and eliminated the moment there is any evidence of its existence.

Geoffrey Robertson QC wrote in *The Justice Game* in 1998: '[Britain] clings to the illusion that it has the least corrupt Parliament in the world. '

Alarminglly, the Chief Justice of India, Sam Bharucha, said in 2001:

... 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.

In Australia, Chief Justice Sir Garfield Barwick was accused in 1980 of not disclosing his interest in companies before the court, an offence carrying 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.

Justice Lionel Murphy, also of the High Court, was charged in 1985 with attempting to pervert justice on behalf of a lawyer, Morgan Ryan. Justice Murphy was found guilty, got a re-trial, and was acquitted. An inquiry by three retired judges found 14 instances of his possible criminal behaviour, but he died in 1986 and the inquiry papers were sealed until 2016.

FBI boss J. Edgar Hoover accepted Mafia bribes in the form of tips on fixed horse races through a cut-out, reporter Walter Winchell, but a corrupt NSW Chief Magistrate, Murray Farquhar, regularly got similar tips directly from an organised criminal, George Freeman. Farquhar was imprisoned in 1985 for fixing a case of theft of \$55,000.

## **b. Conclusion**

Corruption among judges and lawyers does not necessarily mean a legal system is wrong, but the history of the common law and the adversary system does not inspire confidence.

English common law began in the 12<sup>th</sup> century in a culture of universal extortion. A cartel of lawyers and judges rejected truth early in the 13<sup>th</sup> century. That error was compounded when judges, many of them corrupt, began to let lawyers (described as serial liars who believe ethics is an English county) take control of the civil process in the 15<sup>th</sup> century, and of the criminal process in the 18<sup>th</sup>.

The cartel has since invented some 26 anti-truth devices which encourage rich criminals to pay lawyers. Extortion from litigants, clients and opponents still exists

### 3. The Solution

The adversary system's perverts justice every day because of three basic reasons: it does not seek the truth; lawyers control the process; and a cartel of lawyers-and untrained judges has overall control.

All three can be corrected by: training judges separately from lawyers in techniques of searching for the truth. The anti-truth devices can then be abolished by putting jurors on the bench with the judge, and having the judges advise them on the weight to be given evidence, e.g. hearsay. In other pro-truth procedures, the judge will question witnesses in a neutral way, and allow them to tell the whole truth by giving evidence as a narrative; lawyers will not be allowed to use cross-examination to obscure the truth; and judge and jurors will give reasons for their verdict and penalty.

The solutions are more or less the way the investigative system works for 1,600,000,000 people in European countries, their former colonies and Japan and South Korea. It protects the innocent better than the adversary system, and puts away 90% of the 99% of accused who are guilty in serious criminal cases, against the adversary system's fewer than 50%.

Implementation would not be difficult; some common law countries already use the European system – not very well - to investigate the truth at inquests and commissions of inquiry.

The European system has a presumption of innocence for suspects, but one of the most effective lies put out by common lawyers in law schools and elsewhere is that it has a presumption of guilt

#### a. Origin of the Investigative (Inquisitorial) System

Roman law at least nominally sought the truth and was controlled by judges, but it was not codified and the *Columbia* says much of it was 'confused, contradictory or redundant'. And corrupt. Justinian (482-565), Emperor of the East Roman (Byzantine) empire from 527, had Tribonian and a committee of legal academics and advocates codify roman law. Their *Corpus Juris Civilis* was completed by 535 and remained in use in the Byzantine Empire until Constantinople (formerly Byzantium) fell to the (Turkish) Ottoman Empire in 1453. As noted above, law in West Europe and Britain regressed into superstition after the fall of West Roman Empire in 476, but a

digest of Justinian's Code was discovered in Italy about 1070, and scholars at the University of Bologna began to study the Code.

Lotario de' Conte di Segni, son of Count Trasimund of Segni and nephew of Pope Clement III, was born in 1160 or 1161. After early education in Rome, he studied theology at the University of Paris and jurisprudence at the University of Bologna. Pope Gregory VIII ordained him sub-deacon in 1187, Pope Clement III created him Cardinal in 1190, and after the death of Pope Celestine III, the cardinals elected him Pope on 8 January 1198. Justice Ken Marks wrote in *'Thinking up' about the right of silence* (1984) that he had 'devised inquisitorial techniques [for investigating alleged clerical misbehaviour].in a series of decrees beginning in 1189-90'. Professor Richard Jackson 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.

As Pope, Innocent was zealous in repressing simony, i.e. selling ecclesiastical office, the clerical equivalent of systemic trickle-down extortion in England's trade of authority. His term (1198-1216) was the high point of the papacy's temporal power: he had authority over Sicily, was virtual lord of Christian Spain, Scandinavia, Hungary, and the Latin East. He was in a position to order the election of Frederick II as German king, and became 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, a lead-time that ensured maximum attendance. Justice Ken Marks said the 'glittering' event was attended by ambassadors from King John of England, Frederick II, king of the Holy Roman Empire, the Latin Emperor of Constantinople, King Philip II of France, and the kings of Aragon, Hungary, Cyprus, and Jerusalem, along with 71 archbishops, 412 bishops, and 900 abbots and priors.

The council is called the Fourth Lateran Council because it was the fourth held at the Lateran Basilica. It began on 11 November 1215, and Innocent's 70 canons (decrees) were approved by the end of the month. In terms of the future of European law, Canons 8 and 18 were the key decrees.

Canon 8 confirmed Innocent's system of investigating 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 effectively ended trial by ordeal; it banned ‘any blessing’ by clerics to ‘judicial tests or ordeals by hot or cold water or hot iron’.

Temporal courts in Europe shortly adopted Innocent’s investigative system but the English lawyer-judge cartel persisted with the accusatorial system. Professor George Dargo, of the New England School of Law, said in OxfordSC that the civil law, i.e. the European investigative system, ‘is the most widespread and important legal tradition in the modern world’. The man who invented the system, Innocent, is not in *The Legal 100*, but novelists Erle Stanley Gardner and John Mortimer are.

## **b. Judicial Torture in Europe**

European trials had a number of odious features. Some were secret; some suspects had to defend themselves without knowing the allegations; truth-seeking judges soon fell into anti-truth error. There were no jurors, and it was recognised that judicial power carried the risk of oppression. The result was an impossibly high standard of proof: judges could convict only on the basis of two eyewitnesses or a confession. That eliminated circumstantial evidence; two eyewitnesses were rare; criminals might not dutifully confess.

Judges wrongly believed torture might produce truth, but suspects were given a modicum of protection. Torture could only be used where there was one reputable eyewitness or compelling circumstantial evidence’ it was permitted only to elicit facts, not a confession; and the judge was not to suggest the answer he wanted. In practice, however, the torture rules were as futile as ethics rules later promulgated by Anglo-American bar associations. As a method of finding the truth, torture is notoriously unreliable: the tortured are likely to confess to anything, e.g. the Birmingham Six. Professor Langbein noted in *The Origins of Adversary Criminal Trial*:

... efforts at surrounding coercion with safeguard 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.

Judicial torture in Europe enabled common lawyers to claim that their corrupt Dark Ages system was better. Hypocrisy, ethnocentrism and self-deception induced a contempt for the European system which persists to this day; they still slyly hint that it is akin to the Spanish Inquisition. Professor Langbein said that from the time of the Henry VIII’s Reformation (1534):

... 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 Blackstone [1723-80] extolled the superiority of England's torture-free procedure.

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

### c. Bonaparte Reforms the Investigative System

Revolutionary France proposed a fair society and new laws based on rational principles in 1789. Jean Jacques Cambacères spent the next decade grappling with a code of laws but all drafts were rejected. The issue was decided by another accident of history, this time in north Italy.

On Saturday 12 June 1800, an Austrian General, Michael von Melas, defeated First Consul Bonaparte at the Battle of Marengo. Rumours shortly reached Paris that Bonaparte was probably dead and certainly finished, but he had sent a message to General Louis Desaix, whom he had unwisely sent to block Melas's presumed retreat to Genoa: 'For God's sake, come back, if still you can.' On his arrival, Desaix breezily advised Bonaparte: 'This battle is completely lost, but it is only two o'clock; there is time to win another.' Desaix led the charge and was killed, but the day was won by his infantry, François Kellerman's cavalry, and Auguste Marmont's artillery. To distinguish it from the earlier battle, this is known as the Battle of Chicken Marengo from the recipe invented by Bonaparte's cook, Dunand, from the materials to hand, a chicken, tomatoes, mushrooms, eggs, and prawns.

Bonaparte hastily showed himself in Paris, falsely claimed credit for the victory, and 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 their duty. He 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, in August. 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 prepared by reading law books, and chaired more than half the meetings. A member of the Council, Antoine Clair 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 Tribunal on 24 November 1801, but it was rejected it 65-13. Napoleon withdrew the draft on 3 January 1802 and had obstructive Tribunes removed. The 36 sections of the Civil Code 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), Code Penal (1810). Along with the Civil Code, they are regarded as the Napoleonic Code. The Criminal Code invented the *juge d'instruction* (examining 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 Valery. 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.

## d. Flaws in the Investigative System

The European system is by no means perfect. In France, investigating magistrates have the power to keep suspects to hand for weeks or months for further questioning as more evidence comes in. This can be seen as a 'softening-up' process.

Nor would it be helpful to borrow much from the current Italian system. Italy has moved to a more adversarial system in order to help organised criminals escape justice. Alexander Stille explained how it happened in *Excellent Cadavers: The Mafia and the Death of the First Italian Republic* (Pantheon, 1995). Judge Giovanni Falcone put 475 Mafiosi on trial in Palermo in February 1986. It was still proceeding when national elections were held in June 1987. The Mafia, virtually the criminal wing of Giulio Andreotti's Christian Democrat party, punished the party for failing to stop the investigations: votes were transferred to other parties on condition that the judges were emasculated and the law changed.

In December 1987, 344 Mafiosi were found guilty. In 1988, the pool of judges investigating the Mafia was dismantled, and the Italian Parliament passed changes to the criminal code which limited the power of investigating judges. On 20 September 1988, a tap on a telephone in the Cafe Giardino in Brooklyn recorded a conversation between a heroin-dealer, Joe Gambino, and an anonymous hood just back from Palermo. The dialogue, in Sicilian, suggests that in their view the function of the adversary system is to anally penetrate judges and 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.

Judge Falcone and his colleague, Judge Paolo Borsellino, knew they would be killed for seriously investigating the Mafia, and they were assassinated in 1992. Their heroism is a reproach to the poltroonery of common law judges who remain silent in the face of the adversary system's manifest lack of justice, fairness, truth, and morality.

## e. The Two Systems Compared

Professor David Luban, of Georgetown University, would be the Red Rum of common law ethicists except that he sails into the last fence. As noted above, he says all arguments in favour of the adversary system fail, but change is not worth the trouble because ‘the available alternatives aren't demonstrably better than the adversary system’. Leaving on one side the fact that a pro-truth and hence moral system in which trained judges gather and present facts is likely to be better than an anti-truth and hence immoral system in which serial liars gather and present ‘facts’, the superiority of the investigative system can be demonstrated mathematically in terms of accuracy of verdict and cost. First, accuracy. 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.

France and Germany convict 90% of the 99% of accused who are guilty - the 99% rate in Japan and Indonesia is too high – while the adversary process convicts fewer than 50%, but up to 50 in every thousand prisoners are innocent. David Rose noted in his book, *In the Name of the Law: The Collapse of Criminal Justice* (Jonathan Cape, 1996), that one of the first acts of the 1991-93 Runciman inquiry into the criminal system ‘was to order research into two nearby jurisdictions which broadly follow inquisitorial principles, France and Germany.’ The 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.

Leigh and 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. Leigh and Zedner wrote:

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.

Second, cost. Justice Fox says trials in the adversary system are two to 10 times longer than hearings in the investigative system. An International Bar Association conference in Melbourne in 1994 heard a report that 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 at half the cost and protects the innocent better.

The Hannes case offers a comparison of the length and cost of criminal trials in the two systems. Simon Gautier Hannes was an executive director of the Macquarie Bank, a Sydney investment bank. He earned about A\$2 million a year in salary and bonuses. In 1996 his bank was advising Thomas Nationwide Transport(TNT) in connection with a takeover bid by a Dutch company, KPN. On 9 September 1996. Hannes went to 15 banks. The reporting threshold for cash transactions in Australia is \$10,000. At some banks, Hannes 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 17 September, an Ord Minnett broker received instructions by telephone to invest the \$90,000 in options over shares in TNT. When KPN's takeover bid became public on 2 October 1996, M. Booth made a profit of \$2 million.

Early in 1997, Hannes was charged with insider trading. 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.

Bron McKillop, of the law school at Sydney University, is an authority on the investigative system. He wrote *Anatomy of a French Murder Case* (Hawkins, 1997), and lectures each year in France and Germany. I asked him how Hannes would have been dealt with in France. He said:

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 Hannes almost certainly convicted.

In the adversary system Hannes had 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 got 2 ½ years and a fine of \$100,000. Elisabeth Sexton reported in *The Sydney Morning Herald* of 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 the public at least \$2 million.

Justice Fox compared civil litigation in the two systems. He wrote: ‘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.’ But, he wrote:

In a civil matter in France, 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.

If the French system can dispose of a civil case in a day or two, what can be said of *BCCI v Bank of England*, which recalled *Jarndyce v Jarndyce*, and perhaps even its original, *Jennens v Jennens* (1798-1915)? Creditors of BCCI were claiming £850 million in compensation from the bank for claimed errors and omissions by its officials, and the bank was reported to have allowed £20 million a year for legal fees. That seems wise; before the case even began, arguments over discovery were referred twice to the Court to Appeal and once to the House of Lords, and the opening remarks by Gordon Pollock QC, for BCCI, took 80 sitting days, and those by Nicholas Stadlen QC, for the Old Lady, took 119.

The rapidity of European civil litigation gives the poor and middling some access to justice, while in Anglo-American litigation the time and money wasted on pleadings and discovery prevents access to most except the rich and wealthy corporations.

Since judges do most of the work, investigative systems require roughly six times as many (trained) judges as adversary systems. West Germany had one judge for every 3606 people in 1983 (17,000 in a population of 61,306,700).

Pro-rata, common law countries changing to a WHAT HAPPENED? system would need roughly the following numbers of judges: India: 280,000, USA: 77,000, United Kingdom: 17,000, South Africa: 13,000, Canada: 8900, Australia: 5000, New Zealand: 1100, Ireland: 1100. It would cost US\$15.4 billion to pay 77,000 US judges US\$200,000 a year.

On the other hand, investigative systems require fewer lawyers. In 1992, Washington (pop. 500,000) had 45,000 lawyers; France (pop. 60 million) had 20,000 lawyers. Reducing the number of lawyers reduces hidden costs. In *Justice in the 21<sup>st</sup> Century*, Justice Fox quotes a 1989 report to the US Congress which stated:

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.

## **f. Manifesting the Truth**

### **1. Civil Litigation in Germany**

Interestingly, German civil litigation is akin to that in England before lawyers began to get control of the process in the 15<sup>th</sup> century. Discovery is virtually non-existent; the judge sends for any documents he needs. The approach has been called the 'conference method' of adjudication. The tone, a routine business meeting, lessens tension and theatrics and encourages compromise and settlement. The loser pays system also encourages settlement before judgment.

Professor John Langbein has an overview of the system in *The German Advantage in Civil Procedure* (1985). He noted two fundamental differences between German and Anglo-American civil procedures. First, it is the judge rather than lawyers who mainly gathers and sifts evidence. Second, the judge 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 proceedings start with a lawyer making a complaint. The complaint 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. German lawyers rarely have contact with witnesses outside the court. This is both a serious ethical breach and self-defeating: German judges explicitly express doubts about the reliability of witnesses who have discussed the case with counsel or who have been seen consorting with the client.

The judge examines the material and sends for public records. He now has the beginning of a dossier; all subsequent evidence-gathering and submissions go into the dossier, and it is continuously open to inspection by the lawyers. The judge calls a hearing and possibly some of the witnesses. He may be able to resolve the case by discussing it with the lawyers and their clients and suggesting avenues of compromise. If the parties persist, he will act as examiner-in-chief of the witnesses. Counsel for either party may then pose additional questions, but in Germany ‘counsel are not prominent as examiners’.

In the adversarial process, lawyers choose what aspects of their cases they will put before a passive judge who is ignorant of the facts. Professor Langbein says that in Germany 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’.

In the adversary system, lawyers are paid by the hour and court reporters by the page. The German incentive is the other way: evidence is rarely recorded verbatim. The judge periodically pauses to dictate a summary into the dossier and the lawyers can suggest improvements. The summaries are useful for quick refreshers at later hearings, and for the written judgment and the appeal court.

Judges sit without a jury and they function without the common law rules of evidence (such as hearsay) that exclude probative evidence. There are no ‘saxophones’;(Professor Langbein’s term for expert witnesses on whom the lawyers who hire them play tunes). If there is a technical problem, the judge, in consultation with the lawyers, selects the expert or experts and defines their role. 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.

‘Thus,’ says Professor Langbein, ‘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.’



## 2. Criminal Pre-Trial in France

In serious cases, overworked investigating magistrates do much of the work. They supervise detectives (and hence reduce fabrication), reconstruct the crime, stage a confrontation between suspect and victim or relatives, and build up a dossier of all relevant evidence for and against the suspect.

The suspect is seen as a valuable source of information and he generally accepts this, despite the right of silence. The dossier is made available to the suspect's lawyer in case he can show the truth lies elsewhere. If he can show there is considerable doubt, that is the end of it.

## 3. Criminal Trial in France

At trial, the jurors, if any, sit on the bench with the judge or judges. Guilty pleas are not accepted; it is the task of judge and jurors to find out for themselves the truth of the matter. 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.

The accused is not on oath. His life, character and previous convictions are presented. He has a right to remain silent, but adverse inferences can be drawn if he refuses to give evidence.

Lawyers for prosecution and defence can question witnesses but in some jurisdictions only through the judge; they are not allowed to cross-examine directly lest they pollute the truth.

On the standard of proof, Bron McKillop says there is probably no real difference between beyond reasonable doubt and the European 'conviction of guilt', the French *conviction intime* and the German *freie uberzeugung*. A doubt must be resolved in favour of the accused. While the English formula is negative and confusing; French jurors understand what 'intimately [thoroughly] convinced' means.

Judge(s) and jurors reach the verdict and penalty together and give their reasons. There is no double-jeopardy rule; the prosecution can appeal against not guilty verdicts.

Trial results automatically go to appeal courts for review. The dossier helps the appellate judges to scrutinise the lower court's reasoning, application of the law and findings of fact. A drawback is that the evidence of witnesses at the trial is not reviewed because it is not recorded in the dossier.

The investigative system thus generally destroys any claim that the adversary system is fairer to accused. Professor Gordon van Kessel said 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.

## **g. Tide Turns against the Adversary System**

US Chief Justice (1969-86) Warren Burger told the American Bar Association in 1984:

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.

Judge Burton Katz said in *Justice Overruled*:

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.

A Queensland appellate judge, Geoffrey Davies, wrote in *The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System* (Australian Institute of Judicial Administration, 2002):

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.

In 2004, the Australian Family court was experimenting with a largely lawyer-free investigative system for custody cases.

In India, which has two-thirds of the 1.6 billion people affected by the adversary system, a committee recommended change to an investigative criminal system in April 2003. The committee consisted of the chairman, Justice V.S. Malimath, former Chief Justice of the Karnataka and Kerala High Courts, and D.V. Subba Rao, Chairman of the Bar Council of India, N.R. Madhava Menon, Vice-Chancellor of the West Bengal National University of Juridical Sciences, Amitabh Gupta, former Director-General of Police, Rajasthan, S. Varadachary, former Adviser to the Planning Commission of India, 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'. The report recommended that judges be

empowered to summon and examine any person they consider appropriate. It said the system had to be amended to give judges the power to examine and cross-examine the accused at trial, and to draw adverse inferences if he refuses to answer.

Presenting the report, Justice Malimath said the criminal justice system was weighted in favour of the accused and did not adequately focus on justice for victims of crime. The committee had therefore recommended that the victim should be given the right to take part in serious criminal cases with a penalty of seven years or more.

India's Malimath inquiry into the criminal justice system was thus profoundly better than Britain's Runciman inquiry, but as of October 2005 Indian lawyers and misguided allies were still fighting a rearguard action to stop changing to a moral system.

## **h. Convergence?**

In April 2005, the British Labor Government, headed by barrister Tony Blair, was reported to be demanding the right to veto European Union decisions affecting taxation, defence, social security, justice, and foreign affairs. However, there is talk in Europe and England of 'convergence' between the two systems. It might seem impossible for a pro-truth system run by trained judges to converge with an anti-truth system run by serial liars, but a small compromise on cross-examination might allow the English legal establishment to claim the inquisitorial system has become more adversarial.

The suggested compromise is the method adopted by the Hon Gerald Fitzgerald QC and Justice James Wood when they ran major commissions of inquiry in Australia. The commissioner allowed lawyers for suspects to cross-examine for as long as he believed they were helping him find the truth, and sat them down abruptly when they started to use their old tricks to obscure it.

## **i. Conclusion**

Fairness, justice and morality require a search for truth. The adversary version of the Dark Ages PROVE IT! system does not seek the truth; the process is controlled by lawyers who claim ethical obligations to lie and pervert justice; untrained former lawyers prone to the Humpty Option control courtrooms; civil law is in part unfair to business, industry, the professions, the media, and the public; criminal law is unfair to victims, relatives, detectives, prosecutors, witnesses, jurors, and to a public totalling 1,600,000,000.

The European system is not perfect, but it is everything the adversary system is not. It seeks the truth; judges are trained, and trained separately

from lawyers, and they control the pre-trial and trial process; the system is generally fair to both sides, accused and public; it does not conceal relevant evidence; it does not allow barristers to pollute the truth in cross-examination; jurors and judges sit together on the bench and give reasons for their verdict and penalty. It puts away 90% of criminals against the adversary system's fewer than 50%.

In the English-speaking world, the case for change to a moral system is unanswerable. It will happen when common lawyers in legislatures learn to fear outraged voters more than they love a corrupt system.

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## 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 (PROVE IT!) 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, the Dark Ages system has been used only in England and its colonies.

**Adversary System.** An anti-truth 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, e.g. the Duke of Newcastle, Chicago lawyers who collected judges' extortions.

**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 and used in European countries, their former colonies, and Japan and South Korea with a total population of c.1.6 billion.

**Common law.** Cartel-made law used in England and its former colonies, including the USA, Canada, India, New Zealand and Australia, with a total population of c.1.6 billion, of whom some three million are lawyers.

**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.

**Corruption.** A euphemism for organised crime, usually in the public sector.

**Criminal Enterprise, A.** The vehicle through which organised crimes are committed, e.g. a court system in the case of judicial extortion; the Roman, British and US empires; and the Gambino Mafia family.

**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.

**Humpty Option, The.** Judges’ power to assert that words have meanings different from their real meanings, e.g. ‘absolutely’ does not mean ‘absolutely’. The option derives from *Through the Looking Glass, and What Alice Found There*.

**Investigative (Inquisitorial/WHAT HAPPENED?) System.** A pro-truth 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, and the search for truth gives a justice system its necessary moral dimension.

**Kleptocracy.** Literally, rule by thieves; a euphemism for rule by organised criminals.

**Law Lords.** Lords of Appeal in Ordinary; life peers who are members of England’s highest appeal court, the Judicial Committee of the House of Lords.

**Legal Fiction.** A lie, e.g. Australia was ‘deemed’ to be uninhabited when a British criminal enterprise invaded the country and stole the land.

**Lord Chancellor.** A politician who was head of the UK judiciary until 2003.

**Magnates.** The ‘great men of the realm’; originally 300 organised criminals to whom William the Conqueror gave a large part of England after he took control in 1066.

**Manuel Test, The.** ‘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 Criminal.** Title IX of the US Organized Crime Control Act (1970) 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. A legal fiction says the parties rather than their lawyers control the process.

**Probative.** Tending to prove guilt.

**RICO.** Racketeer-Influenced and Corrupt Organizations (Title IX of the US Organized Crime Control Act of 1970). RICO is an exception to the rule against evidence of a pattern of criminal behaviour. It applies to all organised criminals, including businessmen, judges and lawyers, and members of the Mafia.

**Rule of Law, The.** A legal fiction. It holds that all persons and organisations, including governments, are subject to the same laws.

**Saxophones.** Expert witnesses. Law professor John Langbein says trial lawyers play tunes on expert witnesses they hire.

**Trial (Litigation) 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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# The West's Two Legal Systems

The Anglo-American adversary system daily subverts truth, fairness, justice, and morality, but self-interest and intellectual torpor inhibit inquiry into what precisely is wrong, how it happened, and the solution.

What's wrong is simple enough. The system does not search for the truth, and trial lawyers, described as serial liars by a Harvard ethicist, control the evidence, and hence the process, and hence the money.

How it happened is also quite simple. Untrained British judges allowed trial lawyers to take control of the civil process in the 17th century, and of the criminal process early in the 19th. Since then, lawyers and judges have invented a series of anti-truth devices which make it relatively easy for trial lawyers to get rich criminals off.

As for the solution, an Australian judge says justice is fairness, fairness is truth, truth is reality, and the search for truth gives a justice system its necessary moral dimension. The European investigative system searches for the truth and trained judges control the process.

In short, the Anglo-American system is largely about money; the European system is largely about truth.

Evan Whitton has been exploring the two systems since 1991, when the adversary system concealed compelling evidence the European system had found against an organised criminal, Sir Terence Lewis.

Cover illustration by Rose Lennon.

