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

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1914. Lord Reading enables judges to conceal all evidence.
1915. *Jennens v Jennens* ends after 117 years; entire estate 'devoured'.
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1936. Lord Atkin biases tax law against pay-as-you-earners.
1957. A lie by Australian judges, 'absolutely' does not mean 'absolutely', benefits tax lawyers, tax evaders.

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

Abbreviations

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

DPP. Director of Public Prosecutions.

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

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

Macquarie. The Macquarie Dictionary (Macquarie Library, 1985)

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

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

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

Foreword

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

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

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

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

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

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

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

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

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

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

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

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

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

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

trial in a number of important respects. There have been numerous legal proceedings in this case over those years, and in none of them has the court actually considered the "merits" of the arguments to be put forward.[1]

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

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

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1 The details of this case and the legal proceedings referred to can be found at the Networked Knowledge web site – netk.net.au

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

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

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

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

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

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

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

Preface

First, some definitions:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Evan Whitton, Sydney, January 2010

A. What is justice?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Origins of the two systems

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Organised criminals start common law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. The legal cartel begins

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

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

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

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

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

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

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

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

3. Origin of the investigative system

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

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

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

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

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

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

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

4. Magna Carta: a tax evasion scheme

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

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

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

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

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

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

5. The Fourth Lateran Council

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

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

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

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

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

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

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

6. The cartel rejects truth

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

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

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

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

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

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

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

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

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

7. Judicial torture in England

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

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

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

8. Judicial torture in Europe

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

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

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

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

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

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

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

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

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

9. British judicial extortion in the Middle Ages

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10. Origin of the adversary system

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

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

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

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

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

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