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

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

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

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

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

11. British corruption from 1455

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12. Origin of criminal adversary system

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

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

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

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

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

13. A glorious lawyer-driven revolution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14. Origin of law schools

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

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

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

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

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

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

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

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

15. US fatally persists with common law

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

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

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

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

16. Jennens v Jennens (Jarndyce v Jarndyce)

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

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

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

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

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

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

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

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

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

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

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

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

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

17. Bonaparte reforms investigative system

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Bonaparte himself said:

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

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

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

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

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

The Napoleon codification successfully achieved a number of goals. The law was to be accessible to all, uniform throughout France and based on democratic principles and economic liberalism. The code is still considered a masterpiece of French prose, and has been called the greatest book of French literature by the poet Paul 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.

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

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

18. The moral failure of law schools

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Has any judge said something like that?

19. Judicial corruption in common law world

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. What Common Lawyers Do

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

1. Down the ages

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Serial lying

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

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

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

[Taking] zealousness to its adversarial limits (all the while promoting the adversarial system as a system of justice) poses a serious moral problem. Basically, we need to

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

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

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

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

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

3. Ethics

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

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

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

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

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

It's a lie though, isn't it? – It is.

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

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

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

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

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

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

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

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

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

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

> Did you suppose from thence that he [the Earl] would dispose of that £10,000 in any shape to bring about the death of the plaintiff? – I did.
>
> Did you not apprehend that to be a most wicked crime? – I did.
>
> If so, how could you … engage in that project, without making any objection to it? – I may as well ask you, how you came to be engaged for the defendant in this suit?

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

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

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

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

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

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

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

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

> Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth? [Yes]
>
> Is it proper to put a witness on the stand when you know he will commit perjury? [Yes]
>
> Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury? [Yes]

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

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

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

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

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

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

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

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

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

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

Littlemore: Not at all.

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

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

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