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

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

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

Don Vito would understand.

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

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

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

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

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

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

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

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

**7. Class actions**

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

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

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

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

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

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

Olson concluded:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**8. Defence of civil adversary system**

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

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

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

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

Professor Landsman also wrote:

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

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

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

# E. 24 anti-truth devices

* indicates a rule which conceals evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

***1. Concealing suspects' evidence**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**2. Prove it!**

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

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

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

**3. Legal aid**

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

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

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

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

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

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

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

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

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

**5. Precedent**

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

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

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

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

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

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

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

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

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

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

Professor David Luban wrote in *Lawyers and Justice*:

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

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

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

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

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

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

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

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

**7. The abuse excuse**

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

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

**8. The self-abuse excuse**

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

**9. The lecture**

When the lawyers have decided on the theory of the case, they may coach the accused – subtly or otherwise – in case they decide to let him give evidence. Judge (1957-59) John Voelker (1903-91), of the Michigan Supreme Court, published *Anatomy of Murder* in 1958 under the pen name Robert Traver. It was inspired by a case in which Voelker was the defence lawyer. Fred D. Shapiro quoted from the book in *OxfordLQ*: :

> The Lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching ... 'Who, me? I didn't tell him what to say,' the lawyer can later comfort himself. 'I merely explained the law, see.'

Judge Voelker showed how a lawyer, Paul Biegler, helped his client fabricate a defence to a murder charge:

> 'You mean, that my only possible defense in this case is to find some justification or excuse?'

My lecture was proceeding nicely to schedule. 'You're learning rapidly,' I said, nodding approvingly. 'Merely add legal justification or excuse and I'll mark you an A.'

'And you say that a man is not justified in killing a man who has just raped and beat up his wife?'

'Morally, perhaps, but not legally.'

Biegler told his client a murderer might not be guilty if he was temporarily mad, and advised him to go back to his cell and think about it. The client took the hint, and got off. One remedy is to make lawyers take an oath to tell the truth.

**10. Delay**

Delay helps criminals. Witnesses die or forget; prosecutors tire or calculate the costs. Peter Faris QC, former head of Australia's National Crime Authority (NCA), told the 6th International Criminal Law Congress in Melbourne in 1996:

Excellent books have been written discussing criminal defences. In my view, the major criminal defences, in order of importance, are as follows:

1. Delay.
2. Confusion.
3. Allegations of conspiracy by the police and prosecuting authorities to conceal and tamper with the evidence, thus raising a reasonable doubt.
4. Defences set out in the excellent books.

Mervyn Wood (1917-2006), a corrupt NSW Police Commissioner (1976-79), confirmed Faris's point about delay. He colluded with a corrupt magistrate, Murray Farquhar, to fix a drug case in 1979; was charged in 1986 with attempting to pervert justice; and committed for trial in 1989. In 1991, a Dizzo (District Court) judge, John Sinclair, permanently stayed the perversion charge because of the delay (seven years) in charging Wood.

Lawyers supervised the (Australian) NCA's investigations into suspected organised crime. A case concerning John Dorman Elliott and others (see below: Concealing evidence said to have been improperly gained) began in 1989; charges alleging theft of $66 million were laid in 1993; the case collapsed in 1996 when the judge wrongly concealed the evidence of some 130 witnesses. The NCA lawyers' dismay was recorded by its oversight body, the Parliamentary Joint Committee (PJC), in its *Third Evaluation of the* NCA (1998). The PJC reported that Greg Melick, a barrister member of the NCA, said:

> … a person with enough funds and properly advised could probably delay the Authority's investigative processes by some three to four years before they could actually be forced to answer relevant questions before a hearing … three and a half years of litigation, in which they [Elliott *et al*] did not win one stage but they delayed the matters by a substantial amount of time … anybody who can afford it can probably avoid the consequences because, if you have got the money – and it takes millions of dollars – you can protract the system for as long as you like.

**11. Plea-bargaining**

Professor John Langbein wrote in *The Historical Origins of the Privilege Against Self-Incrimination at Common Law* (Michigan Law Review, March 1994):

> ... when our criminal procedural system crumbled in the twentieth century under caseload pressures, our response was to dispense with trial altogether, transforming the pre-trial process into our no-trial plea-bargaining system.

Caseloads are a factor, but plea-bargaining is an admission that the system's anti-truth devices make it difficult to get convictions. Prosecutors offer suspects a no-risk bargain: accept a large fine or a few years in prison against the possibility of going to prison forever. Plea-bargaining works two ways. It can put the innocent in prison and give the guilty a much lighter sentence and thus deprive victims and the community of justice.

Judges (and jurors) in France and Germany do not accept guilty pleas. They have to find the truth for themselves, and they know a guilty plea can be false because of torture, coercion or to protect others.

**12. Preliminary (committal) hearings**

Preliminary hearings presume that prosecutors are incompetent. A minor judicial officer has to decide whether the prosecution's evidence is sufficient to commit an accused for trial. Apart from making more money for defence lawyers and depleting

prosecution budgets, preliminary hearings are all one way: only the prosecution case has to be revealed. This helps defence lawyers to fabricate a defence, to 'destroy' key witnesses out of the sight of jurors, and to deter them from giving evidence at the trial.

Ottawa lawyer Michael Edelson outlined his approach to sex assault cases at a 1988 seminar for lawyers. Speaking of 'whacking the complainant' at preliminary hearings, Edelson said: 'You've got to attack the complainant hard with all you've got so that he or she will say: "I'm not coming back in front of 12 good citizens to repeat this bullshit story that I've just told the judge".'

Peter Faris QC told an international criminal law congress in 1996: 'There is no justification for the delay and cost of trying issues twice. Committals should be abolished.' The truth-seeking system does not have preliminary hearings.

**13. Separate trials**

Several defendants in the same case may get separate trials if some evidence against one is different from that against others. Also, a person charged with several similar crimes can get a separate trial on each charge because the evidence of all the victims might reveal a devastating pattern (see below Concealing a pattern of criminal behaviour). Natasha Wallace reported in *The Sydney Morning Herald* of 2 July 2004:

Brother John Maguire has faced eight [separate] trials on child sex abuse charges. Eight times, including yesterday, he has been acquitted, with none of the jurors ever told of the other allegations against him … Jurors at each trial, before Judge Megan Latham at the NSW District Court since last November, were therefore unaware of the extensive allegations against Brother Maguire … 'It becomes one person's word against another', one complainant said yesterday.

The children may have wondered what Judge Latham thought as she sat passively through the eight trials.

**14. Only a bit mad: diminished responsibility**

In most crimes, the prosecution has to prove both a wrongful act (*actus reus*) and a wrongful intent (*mens rea*). It is not a crime to think about murder, nor is it a crime to commit murder if you were mad at the time. The latter derives from a House of Lords opinion in *M'Naghten* (1843).

Diminished responsibility is a relatively recent wrinkle on *M'Naghten*. In the 1960s, judges began to accept lawyers' arguments that if the accused was only a little bit mad, he might be only a little bit guilty. Trials tended to become contests between psychiatrists.

The Hon Burton S. Katz, no longer a judge, wrote in *Justice Overruled: Unmasking the Criminal Justice System* (Warner, 1997):

If a man commits a crime, I believe that he is responsible for his crime - not his mommy and daddy, not racism, not an abusive spouse, not recovered memories of childhood abuse, not his potty training. He alone is responsible. He made the decision to murder. Then he murdered. He made the decision to rape. Then he raped. Until we firmly re-establish that principle in our courts, our justice system will cease to have much meaning.

Three cases in point:

**Twinkies.** Dan White was dismissed from the San Francisco public service in 1978. He got a gun; evaded metal detectors by climbing through a City Hall basement window; evaded Mayor George Moscone's bodyguards; killed Moscone with four shots; reloaded; went to the office of another official, Harvey Milk, and killed him with five shots.

White was charged with first degree (premeditated) murder. It was argued on his behalf that his new addiction to junk food, including Twinkies, a confection with a high sugar content, confirmed that losing his job had depressed him, and that depression had prevented premeditation. Dr. Martin Blinder, a psychiatrist, said excessive sugar could have aggravated a chemical imbalance in his brain. The jury found White not guilty of premeditated murder, but guilty of manslaughter. He got six years.

**Bobbitt.** Lorena Bobbitt got a kitchen knife and sliced off half her husband's penis while he was in a drunken slumber in 1993. In 1994, a jury found her not guilty of malicious wounding on the ground that

her temporary insanity gave her an irresistible impulse to wound.

**Anu Singh.** Helen Garner reported in *Joe Cinque's Consolation: A True Story of Death, Grief and the Law* (Picador, 2004) that Anu Singh, 25, a self-obsessed drama queen and final year law student in Canberra, Australia, got advice on how to inject an overdose of heroin in September 1997.

During the night of Saturday, 25 October 1997, Singh put a knockout drug, Rohypnol, in the coffee of her amiable boy friend, Joe Cinque, 26, a civil engineer. At about 3 am on the Sunday, Singh injected heroin into Cinque's body, but he failed to die. She went out, bought more heroin and injected him again at about 10 am. He died about 2 pm. She was charged with murder.

In April 1998, the trial judge, Ken Crispin, sitting without a jury, agreed with psychiatrists who said Singh's responsibility was diminished because she was somewhat mentally disturbed. He found she was not guilty of murder but guilty of manslaughter. He gave her a minimum of four years, backdated to the date of her incarceration, October 26, 1997.

Sing passed her law finals in prison, and was out in October 2001. A glittering career was predicted. Adversarial cross-examination is the Theatre of Cruelty. The cruellest action is robbing a person of his life.

Garner noted 'the ugly divide between morals and the law'. She asked whether 'the moral failure of the law' gives judges an 'icy chill'? The answer is no.

If the system's lack of morality chilled judges, they would do something about it.

***15. Concealing client-lawyer conspiracy**

Raymond Chandler's Philip Marlowe said in *The Long Goodbye* (1953): 'How long do you think the big-shot mobsters would last if the lawyers didn't show them how to operate?'

The privilege of client-lawyer secrecy is a major plank of Professor Benjamin Barton's theory that judges favour lawyers' interests. Judges say the privilege helps the administration of justice. That confirms that common lawyers have a peculiar idea of justice; the privilege protects the guilty and does not protect the innocent.

The privilege resided in the lawyer, not the client when it first appeared in *Berd v Lovelace* (1577). Perhaps indulging a taste for irony, Justice Michael Kirby, said in *The Commissioner, Australian Federal Police and Others* v *Propend Finance Pty Ltd and Others* (Australian High Court, 1997): 'Early cases suggested that [the privilege] belonged to a solicitor and derived from his honour as a "professional man and a gentleman".'

A gentleman presumably would not waive the privilege and disclose details of his criminal conspiracy with a client, but rich criminals got a nasty surprise in 1743 when, as noted in the section on ethics, James Giffard, a lawyer but no gentleman, revealed that he conspired with an organised criminal to procure a judicial killing.

Justice Sir Francis Buller (1746-1800) did the decent thing. In *Wilson v Rastall* (1792) he decided earlier judges were wrong, and that the privilege belongs to the client, not the lawyer. Rich criminals could now conspire with lawyers safe in the knowledge that only criminals could waive the privilege.

In 1827, Jeremy Bentham, whose clothed skeleton still gazes amiably at passers-by in the seat of learning he founded, University College London, formulated an unanswerable argument: if the client is innocent, the lawyer has no guilty secret to betray; if guilty, no injustice flows from its absence. He said the privilege thus had no legitimate purpose, and should be abolished.

Henry Brougham, who had successfully blackmailed George IV in 1820, was Lord Chancellor 1830-33. Lord Brougham ruled that any legal transaction might lead to litigation; all transactions involving lawyers must therefore be secret.

Justice Sir James Knight-Bruce (1791-1866) made an argument for secrecy in *Pearse v Pearse* (1846). He begins with a lie; descends into puerility and finally invokes Othello to claim that truth does not matter. He said:

> The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice, [but] surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser … are too great a price to pay for truth …

Truth, like other good things, may be loved unwisely, may be pursued too keenly, may cost too much.

Professor David Luban says that the privilege cannot exist if lawyers are in business. It is clear that the common law has been a business since it began in the 12th century.

Richard Ackland, proprietor of *Justinian*, noted the reality in *The Sydney Morning Herald* of 2 April 2004:

The truth is that companies of various shapes and sizes have for many years wheeled barrowloads of documents through the portals of the large law firms on the pretext of getting legal advice, but really hoping to achieve an ambit privilege from disclosing all sorts of unattractive details of their day-by-day conduct.

As noted, the courts have been trying to shut the Press up since Defoe invented modern journalism in 1704. The super-injunction – an order to conceal the existence of an injunction to conceal something – is merely the latest wrinkle.

Carter-Ruck, a London law firm, obtained super-injunctions in 2009 on behalf of a shipping company Trafigura, to: 1) Prevent *The Guardian* from publishing details of data covered by client-lawyer secrecy; 2) Prevent disclosure that an injunction had been obtained; 3) Prevent disclosure that a member of Parliament had put a question about the matter on the notice paper. *The Economist* reported the upshot:

This week a national newspaper ran a fascinating story about absolutely nothing. *The Guardian* reported on its front page on October 13th that a question had been tabled by an MP in Parliament, but that the newspaper could not reveal 'who has asked the question, what the question is, which minister might answer it, or where the question is to be found'. The reason, it explained no less cryptically, was that 'legal obstacles, which cannot be identified, involve proceedings, which cannot be mentioned, on behalf of a client who must remain secret'.

The super-injunction implying that judges could also shut members of Parliament up was a step too far; freedom of speech in Parliament has been absolute since 1771. Politicians were furious.

In any event, The *Guardian* article and an equally obscure and/or cunning Twitter by the editor, Alan Rusbridger, had led to discovery of the question on a parliamentary website. The data injuncted via client-lawyer secrecy were also published on Wikileaks and discussed on SideWiki. The horse having bolted, Carter-Ruck withdrew the injunction and super-injunctions.

A message from the Trafigura episode may be that data which judges conceal from jurors, e.g. evidence in criminal and civil actions, could likewise get into the public domain while a case is proceeding

The privilege damns itself doubly: it protects the guilty but not the possibly innocent. A judge sent me the judgment in *Carter v Managing Partner Northmead Hale Davey and Others* (Australian High Court 1995). He said: 'Read this and weep.'

Louis James Carter, a Brisbane accountant was charged with fraud. He said certain documents said to be covered by the privilege would prove his innocence. Should judges opt for justice or law? The voices of infallibility went for law, by the usual narrow margin. Justices Mary Gaudron and John Toohey said Carter should get the documents. Chief Justice Sir Gerard Brennan, Justice Michael McHugh and a rather apologetic Justice Sir Billy Deane said he should not. Carter got four years.

***16. Concealing hearsay**

In the investigative system hearsay evidence is weighed, not concealed. That was also the common law practice until lawyers got control of the criminal process. Professor Julius Stone and former Justice W.A.N. Wells wrote in *Evidence: Its History and Policies* (Butterworths, 1991):

> This need of care in receiving hearsay testimony was recognised by our courts as one of wisdom and policy as long ago as the middle of the 16th century … As a categorical rule of the English law of evidence, however, it was probably only settled at the end of the 18th century … with the remarkable result that the former cases of admission and use of such testimony as a matter of course were transformed in the 19th century into a limited number of exceptions to a rule excluding all hearsay evidence.

The excuse for concealing second-hand evidence is that the original speaker is not available for cross-

examination which might show he was wrong, confused, or simply lying. If that were a valid excuse for concealing evidence, judges would not be bound by precedents made before, say, 1900. Nor would we accept that the US broke from Britain, or that Britain won the Battle of Waterloo.

O.J. Simpson was accused of having cut the throat of his wife, Nicole, on Sunday, 12 June, 1994. In January 1995, Judge Lance Ito used the hearsay rule to conceal evidence of her diary entries in which she said she was afraid Simpson might kill her, and evidence that she rang a refuge five days before her murder and said Simpson was stalking her and that she was afraid. Judge Ito said:

> To the man or woman on the street, the relevance and probative value of such evidence is both obvious and compelling ... it seems only just and right that a crime victim's own words be heard [but precedent] clearly held that it [the hearsay evidence] is reversible error.

Lord Justice Stephen Sedley said (*Howzat? London Review of Books*, 25 September 2003) that the English and US criminal process is still caught up in:

> … the absurdities of the rule against hearsay evidence … which even lawyers have difficulty in understanding and applying. (Is it permissible to testify that when the accused ran off, someone shouted 'Stop thief!' and so on.)

An exception to the rule against hearsay is a statement by someone who knows he is dying. Acting Leading Stoker A.R. Gordon, in company

with Stoker E.J. Elias, stabbed Stoker J.J. Riley 14 times on the battle cruiser HMAS *Australia* in March 1942 to prevent him reporting their homosexual activities. Before he died, Riley told three officers that Gordon had stabbed him, but their evidence was concealed because a doctor did not tell Riley he was going to die. Gordon and Elias were convicted on circumstantial evidence.

***17. Concealing a pattern**

Justice Russell Fox says an understanding of facts depends heavily on context, but as Dr Bob Moles notes in the Foreword to this book: ' … most of what we need to know to place the knowledge in context in trials is ruled to be inadmissible … '

The rule against 'similar facts' specifically hides evidence of a pattern of criminal behaviour. In another lie by omission, prosecutors are obliged to falsely imply that the accused is a first offender. For instance, in 2003 an incompetent Welsh thief's 247 previous convictions were concealed from the jury. He was found not guilty of theft. The rule thus eliminates much context, truncates the chronology – always the first element of deduction – and protects repeat criminals, e.g. serial rapists and organised criminals such as extorting judges and the Mob.

The rule, a relatively recent concoction, derives from a case of systematic murder of babies. Sydney 'baby-farmers' John and Sarah Makin took in unwanted babies for a fee; murdered them; and buried the bodies in their back yards. They were

charged with murdering one baby. The trial judge let in evidence of 12 other dead babies found in the yards of their various previous homes. The guilty verdict was appealed up to the Privy Council in England on the basis that evidence of the other 12 murders was unfair to the Makins.

In *Makin v Attorney-General of NSW*, the Privy Council dismissed the appeal, but Lord Chancellor (1886 and 1892-95) Farrer Herschell (1837-99) used words which have been taken to mean that pattern evidence will almost never be admitted. Herschell said:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely to have committed the offence for which he is being tried.

Dr John Forbes said in *Similar Facts* that, 'despite complaints that *Makin* is vague if not almost vacuous', Herschell's remarks 'still enjoy scriptural status'. Dr Forbes noted a US version in *People v Molineux* (1901): 'The State cannot prove against a defendant any crime not alleged in the indictment … as aiding the proofs that he is guilty of the crime charged.' Oliver Cyriax, a lawyer, wrote in *The Penguin Encyclopedia of Crime* (1996):

> It is generally agreed that the date-rape case against William Kennedy Smith failed on the first day of the trial,

2 December 1991, when the prosecution was barred from calling evidence of similar assaults by Smith. The rules against 'similar evidence' are strict. Nothing is more likely to lead a jury to a finding of guilty – on the 17th occasion – than to hear the suspect committed (or has been acquitted of committing) the same offence 16 times before … evidence of prior acts is only admissible if the crimes show a clear and unique 'signature' or *modus operandi*.

Jason Van Der Baan committed a number of sex crimes in Sydney between 1994 and 1996. In 2001 he was convicted on two sex crimes and sentenced to eight years. He was then charged with the murder of his aunt, Mrs Irene Wilson, 39, at her home in 1995. She was found face down on a bed with her hands tied behind her back and a cord around her neck. In 2002, the trial judge, Greg James, felt that the law obliged him to conceal:

- Van Der Baan's two previous convictions for sexual assault.
- His confession to an undercover police officer in prison.
- Evidence that he tied up other victims in the same way as the murderer of Mrs Wilson.
- Evidence that he was obsessed with her and had stolen her underwear and cut out the crotch.

The defence was of the SOD variety. A friend of Mrs Wilson was cross-examined as if he was a suspect. He was not allowed to sit with the family in court because it would be unfair to the accused if the jury

could see he was still a friend of the family. The jury took only three hours to find Van Der Baan not guilty. Even Dominick Dunne could not have improved on the words of Mrs Wilson's brother:

> This trial was not about the murder of my sister … it wasn't about truth or about justice; it was about points of law. All we hear about are the rights of the accused. What about her rights to have lived and seen her children grow? What about the rights of her children to be cared for by a loving mother?

Van Der Baan hoped to get parole on the other crimes when DNA (deoxyribonucleic acid) evidence tied him to a sex crime in 1995 and another in 1996. He pleaded guilty to the charges in April 2009.

The US has had an exception to the rule against pattern evidence since 1970, but only for organised criminals in the Mafia, in business, and in the judiciary. The exception was the product of an unlikely combination of a Mob hitter, a Senator, a young lawyer, and a complex President. Senator John McClellan (Democrat, Arkansas, 1896-1977), a lawyer, chaired the Sub-committee on Investigations from 1955 to 1973. In 1963, an assassin in the Genovese family, Joe Valachi (1903-71), explained the structure of the Mafia to the sub-committee and, via television, to the public.

Bob Blakey was the principal draftsman of subsequent legislation to deal with organised crime. The legislation was to hand when Richard Nixon ran for President in 1968 partly on law and order, and

was passed in 1970 as the Organized Crime Control Act. The RICO (Racketeer-Influenced and Corrupt Organisations) legislation is Title IX of the Act.

RICO was plainly going to make it harder for lawyers to get rich organised criminals off. I asked Blakey, now a law professor at Notre Dame, in 2001 how he got RICO past the American Bar Association. He replied:

> Only with difficulty. The ABA at first endorsed it. We had an in with the President [Nixon]. It [the ABA] then raised objections. We overcame them with White House support.

RICO's effect on the Mob confirmed that the pattern rule perverts justice on a huge scale. It put away 23 previously untouched Mafia bosses throughout the US between 1981 and 1992 including those of the five New York families: Frank (Funzi) Tieri and Anthony (Fat Tony) Salerno (Genovese family), Anthony (Tony Ducks) Corallo and Vittorio Amuso (Lucchese family), Carmine (The Snake) Persico and Vicorio Orena (Colombo family), and John Gotti (Gambino family). Vincente (Chin) Gigante (Genovese family) was convicted in 1997.

RICO was used to imprison 70 white collar organised criminals in Chicago: 20 judges and their 50 bagmen (lawyers and court officials) between 1984 and 1994

In 1994, US federal rules of evidence were revised to allow the use of prior alleged acts in

federal sex cases. A few states, including California, Indiana, Illinois and Missouri, adopted similar rules.

In 2004, British Home Secretary David Blunkett, announced a plan to give judges a discretion to let jurors hear of an accused's previous convictions. He said: 'These reforms put victims at the heart of the justice system. Trials should be a search for the truth [!] and juries should be trusted with all the relevant evidence to help them to reach proper and fair decisions.'

Blunkett no doubt meant well, but Professor Benjamin Barton would say it is unwise to give judges a discretion in matters which affect lawyers' financial interests. And if the Government really believed that trials should be a search for truth, they would abolish the other 23 anti-truth devices.

Australian police and other experts have requested RICO-type legislation since 1984, but the rule against pattern evidence continues to protect white-collar organised criminals, the Calabrian 'Ndrangheta, and sex criminals.

***18. Concealing improperly gained evidence**

Common law countries vary on concealing evidence said to have been improperly procured.

British judges tend to let the evidence in if it is reliable. Australian judges have been supposed to let the evidence in since *Bunning v Cross* (High Court, 1978), if it is reliable and if the investigators' misbehaviour is less vile than the crime alleged. A similar rule applies in Canada. The US position was

uncertain from 1791 to 1961. The Fourth Amendment stated:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated …

No one knows what 'unreasonable' means. Judge Harold Rothwax says in *Guilty: The Collapse of Criminal Justice* that 'in more than 90 per cent of cases, the police don't know what the law is', i.e. what is reasonable in the particular case. He added. 'A chief judge riding in the back seat of a police car wouldn't know what the law is!'

Justice Benjamin Cardozo (1870-1938, Supreme Court 1932-38) did not like concealing the evidence. He said: ''The criminal is to go free because the constable has blundered'. More criminals have gone free since 1961 because of devious manoeuvres by Tom Clark (1899-1977, Supreme Court 1949-67). It seems more likely than not that Murray (The Camel) Humphreys, a fixer for the Chicago Mob, organised Clark's appointment to the court.

A fix was needed because the Chicago boss, Paul (The Waiter) Ricca (1897-1972, b. Felice De Lucia, Naples), got 10 years in 1943 for extorting from Hollywood film studios. In 1947, possible new charges promised to defeat his chance of parole. The privilege of client-lawyer secrecy made it safe for Ricca to conspire with his lawyers. Carl Sifakis reported:

Printed accounts [in Chicago] had Ricca telling his lawyers to find out who had the final say in granting him a speedy release, saying: 'That man must want something: money, favours, a seat in the Supreme Court. Find out what he wants and get it for him.'

The man who got the job was a thinking man's mobster. Sifakis said Alphonse Capone (1899-1947) said:

Anybody can use a gun. The Hump uses his head. He can shoot if he has to, but he likes to negotiate with cash when he can. I like that in a man.

Gus Russo wrote in *The Outfit: The Role of Chicago's Underworld in the Shaping of Modern America* (Bloomsbury, 2004):

After considering the problem, Humphreys hit upon the solution: He would tap a 68-year-old Missouri attorney named Paul Dillon, a litigator he had employed in 1939 … Humphreys' kinship with the Missouri-based Dillon was a natural result of his role as the Outfit's political liaison to that state. And in the shadowy world of underworld-upperworld collusions, this linkage gave Humphreys leverage over the most powerful politician in the United States … Dillon's gangster associates in Kansas City, Missouri, had sponsored the ascendancy of the 33rd president of the United States, Harry S. Truman. Humphreys knew that by playing the Kansas City card he was subtly threatening to open a Pandora's box that Washington would be forced to address.

Oliver Cyriax said it was claimed that the terms of The Camel's deal were that Truman would get 'a $5 million backhander'; Attorney-General Tom Clark would release Ricca; and Clark would get the next vacant seat on the Supreme Court. Clark released Ricca in 1947. Truman put Clark on the court in 1949.

In 1957, a boxing promoter with electric hair Don King (b. 1931), told Cleveland police of a bomb suspect. Police broke into Dolree Mapp's premises. There was no bomber, but they charged Mapp with possessing obscene materials. She appealed her conviction to the Supreme Court.

Judge Harold Rothwax says *Mapp v Ohio* (1961) was a straightforward First Amendment (free speech) case. The 'search and seizure' Fourth Amendment was not argued at the hearing, nor was it raised when the judges conferred. They voted 9-0 to reverse the conviction on First Amendment grounds, but Clark wrote the opinion on Fourth Amendment grounds. He said all evidence wrongly gained must be concealed. Judge Harold Rothwax observed:

> Clark's opinion stood, but the vote of the justices was quite revealing. Although the majority … agreed that Mapp's conviction should be reversed, only four of the judges (a minority) agreed on Fourth Amendment grounds … What Clark and his allies did was comparable to the Supreme Court overruling *Roe v Wade* [1973], the abortion rights decision, with a case involving free speech.

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

> Did I become a judge for this? Is this the system I am proud to be part of? The *Coolidge* reversal makes me ashamed. Stories like this are an insult to common sense and fair play. There is certainly little feeling for the victim, who was brutally tortured and murdered. There is also little feeling for the truth.

Lawyers supervised the Australian National Crime Authority's investigations into white and blue collar organised crime. In 1993, the NCA charged John Dorman Elliott, Kenneth Biggins, and Peter Scanlon with stealing $66 million from a Melbourne brewery they controlled.

In 1996, without empanelling a jury, Justice Frank Hollis Rivers Vincent heard argument about what evidence he would conceal. That took six months. Robert Richter appeared for Elliott. Vincent then said in effect he would suppress the evidence of some 130 witnesses because NCA lawyers had obtained evidence improperly. He said the lawyers' errors were inadvertent, not deliberate. In a *Bunning v Cross* situation, lawyers' inadvertent errors could hardly be worse than alleged theft of $66 million. The prosecutor offered no other evidence. Vincent declared Elliott, Biggins and Scanlon not guilty.