Garry Livermore, a barrister who had led the NCA investigation from 1989, gave evidence to the Joint Parliamentary Committee on the NCA on Monday, 8 October 1997. He seemed a little peeved, perhaps because the investigation, various legal skirmishes, and the non-trial had cost taxpayers some $20 million, and also by Elliott's self-proclaimed sexual athleticism. *Hansard* recorded Livermore as saying of Elliot, Biggins and Scanlon:

> They were gone. They would have been gone if the evidence had been led before a jury. The evidence against them was overwhelming … Not one of some 130 witnesses ever gave evidence before a jury in this matter. It is a disgrace and blight on the system… Mr Chairman, I attended the Carlton football match at Optus Oval the Saturday after Mr Justice Vincent's ruling throwing out all the evidence in the case. I sat down and listened to Mr Elliott … roar to the crowd [that] he had 'stuck it right up the NCA'. He had not done that at all. What he had done was stick it right up the system and he stuck it up you, Mr Chairman, and every law-abiding member of the Australian community.

That may be, but it was the adversary system which – to continue Mr Elliott's typically delicate metaphor – raped and pillaged the body politic. The Victorian appeal court later found that Vincent was wrong to conceal the evidence [from himself] because the NCA lawyers had got the evidence properly, but the horse had bolted: Elliott, Biggins and Scanlon could not be retried, because the common law said wrong

not guilty verdicts can never be wrong (see Double Jeopardy below).

The obvious remedy is to admit all improperly-gained evidence if it is reliable, and to punish erring detectives at a special tribunal. That has not been tried, perhaps because detectives might insist that lawyers who pervert justice should also be punished.

***19. Concealing any or all evidence (*Christie*)**

The *Christie* discretion is a piece of metaphysical claptrap expounded by British judges in *R v Christie* (Court of Appeal, 1914). They included Lord Reading, who escaped justice for insider trading in the Marconi scandal of 1913. Dr John Forbes said in *Evidence in Queensland* (The Law Book Company, 1992) that the '*Christie* discretion may contain 'a large subjective element' [*R v Sang*, 1980]; that its operation may sometimes be 'whimsical or idiosyncratic' [S*elvey v DPP, 1970*]; and that:

> If there ever was such a thing as judicial corruption, it might well reside in the expanding and almost inscrutable discretions which can alter the whole course of a criminal inquiry.

Professor Julius Stone and former Justice W.A.N. Wells said in *Evidence: Its History and Policies* that evidence concealed by the *Christie* discretion 'must be of comparatively little probative weight, [and] this slight relevance must be accompanied by a great

potentiality for prejudice'. Judges should thus first decide that the evidence points only slightly towards guilt, and only then consider whether it is highly prejudicial. In practice, however, they may first note that the evidence is likely to cause a guilty verdict, and then decide it is only slightly probative.

David Rose (*In the Name of the Law: The Collapse of Criminal Justice*, Jonathan Cape 1996) quotes a detective: ' … as far as I can see, prejudicial means evidence that proves he did it.'

Even if the judge is plainly wrong when he says evidence is only slightly probative, he cannot be reversed because his opinion concerns facts and appeal courts deal only with law. That means judges can never be wrong on facts, but Judge Brian Boulton, of the Queensland District Court, revealed in 1992 that the head of his court, Judge John Helman, had admitted that there might be 'chaos' if different judges applied the discretion to the same evidence.

It was evidence concealed via the *Christie* discretion that first prompted me to look into the West's two systems. In 1987-88, I reported an 18-month inquiry into the truth of corruption in Queensland for *The Sydney Morning Herald* and *The* (Brisbane) *Sun*. The inquiry, chaired by the Hon Gerald Fitzgerald QC, used the investigative system: evidence was not concealed; suspects had to give evidence. That system revealed beyond the slightest doubt that the Police Commissioner, Sir Terence Lewis (b. 1929), was a major organised criminal: he franchised organised crime and extorted bribes from

franchisees, including Sydney yachtsman Jack Rooklyn. Lewis obviously lied in giving evidence.

Lewis was tried for corruption in the District Court under the adversary system in 1991. Judge Anthony Healy presided. The Crown prudently retained the leader of the criminal bar, Bob Mulholland QC, to prosecute. John Jerrard appeared for Lewis.

Jerrard may have achieved what defence lawyers fear above all; asking one question too many. He asked it of Jack Herbert (1924-2004), Lewis's bagman. Herbert was born in London; served in the RAF; joined the Metropolitan Police (Scotland Yard) in 1946; and migrated to Australia in 1947. He was a uniformed cop until he got into plain clothes in the Queensland Licensing Branch in 1959, and was there corrupted. With the mind of a bookkeeper, Herbert became the bagman for the Branch's extortions from illegal liquor sellers (sly-groggers) and bookmakers.

Lewis had been a bagman for a corrupt Commissioner (1957-69), Frank Bischof (1904-79). In 1965, Herbert began to pay Lewis a small share of Licensing Branch bribes. When Herbert apologised for the paltry sums, Lewis graciously said: 'Little fish are sweet.' In 1976, the Premier, Sir Johannes Bjelke-Petersen (1911-2005), also an organised criminal, made Lewis his police chief. In 1980, Herbert, now out of the force, became Lewis's bagman. They used codes to discuss extortees, and meeting places to share the proceeds. Lewis kept the codes in notebooks.

When the Fitzgerald inquiry began in 1987, Herbert, advised by Jack Rooklyn, fled to England, but was sprung by the Met and brought back to Australia in an Air Force plane on a promise of immunity if he told the truth about corruption.

Herbert was the leading witness against Lewis at his corruption trial under the adversary system in 1991. Lewis refused to give evidence. Judge Healy concealed a deal of evidence via the *Christie* discretion. He said: ' … some of the evidence identified by Mr Mulholland as corroborative [of Herbert's evidence] appears to me to be of little probative value but of the kind that would be highly prejudicial to the accused if I admit it.' Some evidence thus concealed:

- Lewis's diary entries, which Mulholland said he could prove were concoctions, purporting to show he was a successful punter in a period, 1979-1987, when it was alleged he was corrupt.
- His false sworn denial in 1980 that he had ever had anything to do with the organised criminal, Jack Rooklyn.
- His transfer to Lady Lewis of his interest in their mansion when he learned that Assistant Commissioner Graeme Parker had 'rolled over' and was confessing to corruption.
- His false sworn claim that he made the transfer to protect the mansion from creditors at a time when he had no credit problems.
- A tape of telephone calls between Herbert and a Barry MacNamara in which they fret that Lewis

stiffed them and an accountant, John Garde, of their share of a $25,000 bribe Herbert arranged for Rooklyn to pay to Lewis.

Of the $25,000, Lewis was to get $15,000. The other three were to split $10,000, but Lewis gave Herbert only $9000. MacNamara says on the tape: 'Oh, I think it is a shitty trick, you know, I really do … And to think, for a f*ckin' sh*tty thousand dollars … I think it's a very bad act.' Later, MacNamara says Garde 'took it badly … he's going to give that bloke [Lewis] a grand light this month'. Herbert cautioned: 'Terry loves this stuff … he might be a bit upset if I did it back to him'. Judge Healy told Jerrard:

I have come to the conclusion that this tape is not capable of corroborating Herbert … I do not think it is part of the *res gestae* [the material facts of a case as opposed to hearsay]. Therefore I exclude it. But if I am wrong about that, the conversation tends to suggest, and this is Herbert's evidence, that your client is a person who is capable of ratting on his friends. That's not part of the indictment either. It would be very prejudicial to him to let it in, so I am excluding it.

That *Christie* ruling meant that the judge took the view that the tape only slightly tended to prove Lewis's guilt.

The jurors heard only a fraction of the material uncovered by Fitzgerald. It is understood that they initially believed that Herbert had vilely traduced an honest cop in order to grain immunity, but that the

following passage concerning the 'little fish' bribes caused them to look at Sir Terence with new eyes:

> Jerrard: What did he promise to do?
>
> Herbert: It's not what he promised. It's what I had in my mind – and other members of the Licensing Branch – what he could do.
>
> What was that? – He was very, very friendly with Mr Bischof. It was well known in circles that Mr Bischof was a grafter, the same as myself, and back in those days – whilst I'm called the bagman now – the accused was well known in police circles as the Commissioner's bagman.
>
> That's a very easy allegation, that one, isn't it? – You asked me. I've told you. I didn't want to mention it, but if I didn't mention it to you, I'm not telling the truth, of which I'm sworn to ….
>
> If you are raised in Queensland, it was practically taught in schools, this allegation? – Yes, it was widely known,

Healy let the Lewis-Herbert codes in. Mulholland told the jury they were the smoking gun, but Healy said Herbert's evidence was worthless, and that 'there is no evidence which is capable of corroborating [it]'. The appeal court later said Healy was wrong, that the codes did corroborate Herbert, but there would have been no appeal if the jury had found Lewis not guilty. Healy concluded: 'You may convict on the uncorroborated evidence of [Herbert], but it would be dangerous to do so.'

Had the jurors heard all the evidence exposed by the investigative system, I imagine they would

have found Lewis guilty without leaving the box. They did find him guilty, but it took five days. Healy promptly gave him the max, 14 years. I took the view that, however inconvenient, it was a good result for Sir Terence: anyone can get a knighthood, but Her Majesty soon admitted him to an exclusive club; he was only the 14th knight to be stripped of his knighthood since the 14th century.

In 1995, the Australian and NSW *Evidence Act*(s) narrowed the probative-prejudicial gap to almost zero. Section 137 of the NSW version states:

> In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

The effect was shown after Rhonda Buckley, 51, a grandmother, was strangled in Newcastle, NSW, on Tuesday, September 25, 2001. Next day, her lover, Lyle Simpson, 47, attempted to kill himself. DNA tests showed that Simpson's semen was on her body. At Simpson's murder trial in March 2005, his legal aid lawyer, Joanne Harris, persuaded Justice Anthony Whealy to conceal his suicide attempt because it might cause him 'unfair prejudice'. DPP Nicholas Cowdery QC decided not to proceed. Simpson walked.

20. Cross-examination

Sir Thomas Smith (1513-77) appears to be the first to mention cross-examination. In his *De Republica Anglorum* (published 1583), he notes a (civil) trial which had 'not only the examination but also the cross-examination of witnesses in the presence of the judge, the parties, their counsel and the jury'.

John Henry Wigmore (1863-1943) was dean of the law school at Northwestern University at Evanston, Illinois, 1901-29. He got his law degree from Harvard in 1887, and thus knew as little about justice as anyone trained by Christopher Columbus Langdell. In *A Treatise on the System of Evidence in Trials at Common* Law (1904), Wigmore said cross-examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of truth'. That is true, but it also false in several respects. It implies that the system seeks the truth, and it omits two things: that the aim of defence lawyers is usually to obscure the truth, and that accused can avoid the truth engine by staying out of the witness box.

Irving Younger (1932-88), prosecutor, defence lawyer, judge, and academic, is revered for his lectures on the law (a snip at US$720 for the DVD). His basic approach is revealed in a question he suggested be put to a hostile witness: 'Is it not true that last night you committed sodomy on a parrot?'

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

> Cross-examination may help the elucidation of the truth, but it may also obscure the truth, and quite often is designed to that end … a clever cross-examiner can make even the most reliable testimony look questionable, and can so confuse the context that an understanding of the answers becomes blurred.

Techniques to create a 'reasonable' doubt include lying to witnesses, asking the same question with slight variations to trick them into answering Yes when they mean No; and verbal thuggery to intimidate and 'destroy' dangerous witnesses.

The oath imposed on witnesses to tell the truth, the whole truth and nothing but the truth is a legal fiction. The whole truth cannot be told in Yes-No answers, e.g. Have you stopped beating your wife? But one of Younger's *10 Commandments of Cross-examination* is: 'Never permit the witness to explain his or her answers.' In France and Germany, witnesses give evidence as a narrative.

Defence lawyers fear the truth because almost all their clients are guilty. Younger commanded: 'Never ask a question to which you don't already know the answer.' Even the sainted Atticus Finch (*To Kill A Mockingbird*, 1960), who put thousands of young idealists into the lying trade, said:

> Never, never, never, on cross-examination ask a witness a question you don't already know the answer to, was a tenet I absorbed with my baby food. Do it, and you'll often get an answer you don't want, an answer that might wreck your case.

OxfordLQ notes a passage in lawyer-novelist Erle Stanley Gardner's *The Case of the Queenly Contestant* (1967):

> [Perry] Mason: 'The purpose of cross-examination is to find out whether a witness is telling the truth.'
>
> Lovett laughed sarcastically. "That's the line they try to teach you in the law books and in the colleges. Actually, when you come right down to it, you know and I know, Mason, that the object of cross-examination is first to find out to your own satisfaction if a witness is telling the truth, then you go on to the next step – which is to try and confuse the witness so that any testimony the witness has given is open to doubt..'

Rape is a crime which incurs a prison sentence of up to 35 years, but malevolent cross-examination is a factor in the fact that the adversary system does not deter serial rapists. A 1993 British Home Office study found that 99% of rapists escape justice. In 2003, the NSW Bureau of Crime Statistics and Research estimated that 12,000 women were victims of a sexual or indecent assault, but only 2707 (22.6%) reported the crime to police. Of those, 858 (31.7%) were charged; and 361 (42%) were found guilty. In terms of the estimates of actual rapes, that is a conviction rate of 3%.

In May 2007, Janet Fife-Yeomans and Lisa Davies reported in *The* (Sydney) *Daily Telegraph* that 70-90% of rapes are not reported; that 80% of reported rapes are not prosecuted; and that of those prosecuted nearly 75% are found not guilty. If, say, 80% of rapes are not reported, the figures mean that

20 in 100 are reported, four are prosecuted, and one results in a guilty verdict.

The rates are low partly because brutal and pornographic cross-examination deters victims from testifying. Dr Caroline Taylor, author of *Court-Licensed Abuse* (Peter Lang, 2004), told *The Sydney Morning Herald*'s Edmund Tadros on 9 December 2004:

…the "sluts and nuts" defence – the complainant either asked for it or is lying – is common … It is typically trial by attrition, where the courts exclude compelling evidence or evidence that is central to fact-finding. The gaps can then be filled in with the legal codswallop about the lying, conniving, slutty, nutty woman.

Tadros quoted Stephen Odgers, chairman of the NSW Bar Association criminal law committee, as saying:

I've had complainants who have vomited in the witness stand in response to questions I've asked them. My reaction as a person who may suspect that they are innocent victims – I can only feel sympathy for them. Then there's me as my job, performing my role, which I believe to be an important role in the system of justice, who believes that I acted ethically. I've cross-examined in what I regard as a perfectly legitimate manner, and it's regrettable, but I don't blame myself for that outcome.

'Belinda', 22, the victim in one of four cases in *Court-Licensed Abuse*, said:

I know it's part of [the lawyer's] tactics but you don't need to keep asking the same question. That's one of the most confusing parts, where they keep asking the same question and they're rewording it to try and slip you up.

Dr Taylor said:

What the defence barrister wants to do is continually shock and confront [the complainant] to affect the quality of her evidence. A standard tactic … is to attack complainants with such ferocity at a committal hearing that they are too afraid to go to trial.

I asked an authority of the French and German systems, Bron McKillop, of Sydney University's law school, in January 2008 if I would be right to assume that courts in those countries convict in 90% of rape cases. He replied:

Your assumption is, I believe, broadly correct. In France the acquittal rate across the three levels of criminal jurisdiction (including the *cour d'assises* which hears rape cases [*viols*] is about 5%. I am not aware of any particular variation for rape as opposed to other offences. In the investigation systems, the compilation of a dossier available at the trial and the criteria for committal result in a similarity of outcomes across the boards. I don't have the figures for Germany but I would think that the systemic civil [European] law similarities would result in similar outcomes, although the lesser role played by the dossier at a German trial and the greater reliance on oral evidence may result in more acquittals.

Common lawyers claim they are ethically obliged to even cross-examine child victims in a brutal and pornographic way. *Four Corners*, a programme on a public broadcaster, the Australian Broadcasting Corporation, aired a television programme on sex crimes against children in 1999. Reporter Peter George noted a case in which a mother heard her five-year-old son crying in a lodger's room. The boy came out with his shorts in his hand and told her what happened. She called police and semen was found in his anal passage. There was a witness, an immediate complaint, and evidence corroborating the boy and his mother. The verdict was not guilty.

Four Corners re-enacted the preliminary hearing of a case in which a Queensland mother said her best friend's husband anally penetrated her son, 7. Russell Clutterbuck cross-examined the boy for five hours, with breaks to stem the sobbing. Clutterbuck asked him questions about oral sex:

Have you ever seen this done before? – No.
Have you ever been in the house when your mother's done this? – No.
Are you sure? – Yes …
You didn't tell the other policewoman the first time, did you? – No.
No. That's because it didn't happen, isn't it, John? - It did happen …
Well why are you crying if the story is true, John? - Cos you said it isn't. …
John, you know what telling lies means, don't you? And that's what you're doing today, isn't it? - I'm not telling lies ...

See, I can stand here all afternoon and ask you all sorts of questions and until you tell me the truth I won't stop.

The trial verdict was not guilty.

Dr Caroline Taylor told Edmund Tadros in 2004: 'If people knew that kids as young as seven have been asked whether they fingered their own vagina, they would ask: "What is going on here?".'

An Australian study found that lawyers and judges whose children had been sexually violated would not subject them to the second trauma of cross-examination.

In 2002, the Auckland (New Zealand) Law Society issued a paper suggesting that in rape cases the right of silence could be removed, and the charges heard according to inquisitorial procedures. In 2009, the Justice Minister, Simon Power, was considering further suggestions that truth-seeking procedures be used in rape cases.

21. Inscrutable jurors

Professor John Langbein quotes a German legal maxim, *Ohne Begrundung kein Urtre,* without a statement of reasons, there can be no valid judgment. If so, no common law jury verdict is valid; jurors have never had to give reasons. The system has been open to confusion and corruption since it was invented in 1166, e.g. O.J. Simpson and a man tried for heifer-rustling at Dubbo, Australia, in the 19th century. Barrister Aubrey Gillespie-Jones

reported the verdict in *The Lawyer Who Laughed* (Century Hutchinson, 1978):

> Judge's associate: Do you find the accused guilty or not guilty of cattle-stealing?
>
> Foreman: Not guilty, if he returns the cows.
>
> Judge: You swore you would try the issue between our Sovereign Lady the Queen and the accused and find a true verdict according to the evidence. Go out and reconsider your verdict …
>
> Associate. Have you decided on your verdict?
>
> Foreman: Yes, we have. We find the accused not guilty, and he doesn't have to return the cows.

Professor Mark Findlay, of Sydney University, did a study of jurors for the Australian Institute of Judicial Administration. In *Jury Management in NSW* (1994), he reported that he had access to a diary kept by a woman juror during a long trial. She noted:

> On the first day, a majority decided that the accused must be guilty because he wore an earring; he looked too glitzy; he was ugly and hence probably bad; and his lawyer looked positively evil. During the trial the majority, led by a handsome banker, 'only listened to evidence or argument which reinforced their conclusion of guilt'.

The woman was bullied and ostracised, described as a 'pinko lezzo', and threatened with being put on a hit list if she went against a guilty verdict. The verdict was eventually decided by a golf appointment. On the last day, the banker, expecting an early result, arranged to play golf, but 'when it

became clear that [the woman and another juror] were not going to go along with a guilty verdict', he 'changed his mind and was followed by the rest'.

22. Reasonable doubt

Along with the right of silence, the formula for the standard of proof, beyond reasonable doubt, is the most effective device for getting criminals off. Anyone can have a doubt; 'reasonable' has as many meanings as there are jurors; in some countries judges are not allowed to tell them that the formula simply means the same as the French formula, *conviction intime*: are we intimately (thoroughly) convinced?

As might be expected, the negative common law formula did not obtain until after lawyers had taken over the criminal process. Professor John Langbein wrote in *The Historical Origins of the Privilege Against Self-Incrimination*:

> … the precise doctrinal formulation of the beyond-a-reasonable-doubt standard of proof in Anglo-American criminal procedure occurred at the end of the 18th century as part of the elaboration of the adversary system of criminal procedure. [Professor John] Beattie points to formulations of the standard of proof used in jury instructions of the 1780s that were still well short of beyond reasonable doubt.

In 1998, the New Zealand Law Reform Commission published a study of 312 jurors who sat on 48 cases ranging from attempted burglary to murder. The

study confirmed that the formula baffles jurors. The Commission reported:

> … many jurors, and the jury as a whole, were uncertain what 'beyond reasonable doubt' meant. They generally thought in terms of percentages, and debated and disagreed with each other about the percentage required for 'beyond reasonable doubt', variously interpreting it as 100 per cent, 95 per cent, 75 per cent, and even 50 per cent. Occasionally this produced profound misunderstandings about the standard of proof.

In the Hannes case mentioned below, the defence was that a Mr X, rather than Hannes, performed a certain action, and that, although Mr X was not produced, the prosecution could not prove beyond reasonable doubt that he did not exist. It might be thought that the jurors' common sense would find such a defence laughable, but they deliberated for five days and then asked Judge Cecily Backhouse to explain reasonable doubt. She told them:

> The Crown must satisfy you of the guilt of the accused by establishing each of the essential ingredients of the charges to that standard, that is, beyond a reasonable doubt ... the accused is entitled to any reasonable doubt in your minds and the accused does not have to prove he is innocent ... the accused is presumed to be innocent until the Crown has established that guilt.

In short, reasonable doubt means reasonable doubt or, as Miss Gertrude Stein (1874-1946) put it, a rose is a rose is a rose. One day, a jury foreman will politely

say: 'I'll put the question again, judge.' Dr John Forbes wrote in *Evidence Law in Queensland* (7th edition, Lawbook Co, 2008):

The beginners' handbook (Bench Book) for Queensland judges – the existence of which is now officially, if somewhat coyly, acknowledged – recommends this circumlocution: 'A reasonable doubt is such a doubt as you … consider to be reasonable … It is therefore for you, and each of you, to say whether you have a doubt which you consider reasonable. If, at the end of your deliberations, you, as reasonable persons, are in doubt about the guilt of the accused, the charge has not been proved beyond reasonable doubt.

Dr Forbes commented:

Mesmeric repetition of the mantra as insurance against an appeal, or by a defender striving for a doubt, reasonable or unreasonable, may be taken by jurors unaccustomed or averse to responsibility, as invitations to acquit. It is then a short step to the comforting thought: 'I have just been described as a reasonable person. I think I have a doubt. Therefore it is reasonable.'

Justice Robin Millhouse, of the South Australian Supreme Court, said in 1999:

Very few people who've come up in the criminal courts when I've been trying them have not been guilty, but a lot of them have got off because jurors' common sense falters in the face of warnings about reasonable doubt. I've often felt my heart sink when I know a bloke's probably guilty,

to have to give all these warnings and I'm afraid the jury will heed them. And they often do.

Justice Christopher Wright, of the Tasmanian Supreme Court, said in 2000:

Too often unsure jurors will shelter behind the standard of proof beyond reasonable doubt, making it the safe option ... I am fully convinced that juries return a wrong verdict in about 25% of all cases.

Angelo Cusumano was murdered during an armed holdup of his Sydney store. Two men pleaded not guilty. A third man, Aaron Robinson, pleaded guilty to murder and told police that one of the others had given him ammunition for the murder weapon. However, Robinson refused to give evidence against the other two, and his statement about the loaded gun was concealed as hearsay. The prosecution thus could not prove that the other two knew the weapon was loaded. When they were found not guilty in 1998, a juror apologised to the victim's widow. Learning of the apology, a radio broadcaster, John Laws, asked the juror on air why she apologised. She said:

To me there was absolutely no doubt. To one other juror there was absolutely no doubt. People confessed on the jury that in their hearts they felt – but that it hadn't been proven ... I said ... please let us bring in an undecided verdict, and they said, absolutely not, it hadn't been proven ... And I fought for three days ... but I was too

weak ... My heart goes out to Mrs Cusumano and those children.

It is not a crime in the US to ask a juror what happened. It is in NSW. Laws was charged, convicted, and given a suspended sentence of 15 months.

A Melbourne lawyer kindly added to the sum of my knowledge on what he called 'the elephant in the room'. In *Justinian* (15 July 2008), I reported that, in a message to the proprietor, the lawyer noted a case in which 'the obviously bloody-minded jury', having been given 'the required but totally unhelpful non-direction on the standard of proof … responded with a question: "Reasonable doubt - 70 to 80%?"' The lawyer said the judge and a majority of counsel:

> … agreed that the judge would repeat the standard direction (with the jury no doubt wondering what on earth did this idiot have for breakfast or lunch depending on when the redirection was given) but on no account mention the 'P' word lest the silly sods get the idea that such a test is permissible in some way.

He added: 'Mr Whitton might be interested to know, if he doesn't already, that our trial directions are now publicly available on the web – see them at the Judicial College of Victoria website …' Thus encouraged, I found that the trial directions (Bench Notes to the Victorian Criminal Charge Book) state:

Although in England the term "beyond reasonable doubt" is seen to be synonymous with the term 'sure' (see e.g., *R v Hepworth and Fearnley* [1955] 2 QB 600; *R v Onufrejczyk* [1955] 1 QB 388), this is not the case in Australia (*Thomas* v *R* [1960] 102 CLR 584; *Dawson v R* [1961] 106 CLR 1; *R v Punj* [2002] QCA 333).'

A little more research caused me to exclaim: Eddie Freaking McTiernan! I noted in *Justinian*:

That means that Britain, home of the common law, now allows judges to tell jurors what the elephant means, but the colony has obstinately persisted in error for 48 years. The date of *Thomas v R*, 1960, means the guilty men were on the High Court run by the fraudulent Sir Owen Dixon. The lead judgment purported to have been written by Justice Sir Eddie McTiernan (1892-1990, Labor MP 1929-30, High Court 1930-76). That raised two questions: Why would any future judge take the slightest notice of that ancient Labor Party hack and world champion judicial limpet? And how many Australian murderers, rapists and organised criminals have escaped justice since 1960, when Eddie shut the door on an explanation of the formula?

23. Double jeopardy

Perhaps the feeblest excuse for the corrupt system is that common lawyers cannot think straight. Double jeopardy said wrong not guilty verdicts are never wrong. This shining example of bottomless stupidity persisted in England for 839 years, and was then abolished by Parliament, not judges.

Double jeopardy is the product of the false notion that being tried twice is the same as being

punished twice. The error, deliberate or otherwise, derives from 1164. Henry II wanted his courts to re-try 'criminous clerks' who had already been found guilty and punished by church courts, but Archbishop Thomas (a) Becket (1118?-70) insisted that persons should not be punished twice for the same offence. Further quarrels between Henry and 'this turbulent priest' led to Becket's murder in Canterbury cathedral.

It seems fair that those found guilty (*autrefois convict*) and punished should not to be retried for the same offence, but judges purported to also believe that those found not guilty (*autrefois acquit*) should not be retried. William Blackstone parroted that ancient confusion in his *Commentaries*: ' … no man is to be brought into jeopardy of his life, more than once, for the same offence', and he was fatally echoed in the US Constitutions' Fifth Amendment in 1791: ' … nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.'

The other 23 anti-truth devices get more than half the guilty criminals off, but justice thus perverted must stay perverted forever, even when the judge wrongly concealed evidence e.g. *Elliot*, and when new and compelling evidence emerges, e.g. DNA evidence.

Britain finally and retrospectively abolished double jeopardy for those acquitted of major crimes as from Monday 4 April, 2005. The National Crime Faculty then calculated that 35 persons acquitted of murder could be re-investigated and new charges

brought. The Bar Council and civil liberties groups opposed the legislation, but a Home Office spokesman stated the obvious:

> It is important that the public should have full confidence in the ability of the criminal justice system to deliver justice. This can be undermined if it is not possible to convict offenders for very serious crimes where there is strong and viable evidence of their guilt.

DNA testing, which became available only in 1986, can deliver justice for innocent prisoners. *The New York Times* reported on 19 June 2009 that since 1992 DNA testing had exonerated 238 people in the US, some on Death Row. However, the Fifth Amendment means that the US is constitutionally unable to abolish double jeopardy and to use DNA to retry criminals, including rapists and murderers.

Truth-seeking systems allow not guilty verdicts to be appealed and, if necessary, retried.

24. Judges second-guessing jurors

Justice Sir Gerard Brennan said in *M v The Queen* (Australian High Court, 1994):

> … an assessment of evidence by an appellate court is a poor substitute for the assessment made by the jury. And that is so for a very basic reason: our belief in the validity of the life experience of juries.

Ordinary citizens also have a better sense of justice than judges, but appellate judges can overturn jurors

because they think they know better. Dr John Forbes wrote in *Evidence Law in Queensland* (7th edition):

> The [judges'] 'unsafe and unsatisfactory' formula, like discretionary exclusion, has returned many a burglar (and other suspects) to their friends and their relations … The 'unsafe verdict' is largely a post-1950 creation that enhances the power of judges to override a jury's verdict of 'guilty' … Despite an official reluctance to admit that the appeal court 'second guesses' the jury, that is what happens.

In 1973, Deidre Kennedy, aged one year and five months, was abducted from her home in Ipswich, Queensland, clothed in stolen women's underwear, bitten on the left thigh, raped, and strangled. Her body was thrown on to the roof of a public lavatory.

Raymond John Carroll was tried for the baby's murder in 1985. The jury heard evidence that he repeatedly bit his own baby daughter on the thigh; that ondontological examination showed the bite marks on the baby's thigh were his; that he stole women's underwear; and that his alibi was false.

The jurors found that Carroll committed the murder, but appellate judges Sir Wally Campbell, Sir George Kneipp and Tom Shepherdson knew better. They said Justice (as he then was) Angelo Vasta was wrong to admit 'prejudicial' evidence that Carroll bit his own baby, and that the jurors should have had a reasonable doubt that he was guilty. They did not order a re-trial; they said Carroll was not guilty.

In 2000, Carroll was charged with perjury on the ground that he had falsely denied his guilt at the murder trial. New evidence confirmed that the teeth marks on Deidre Kennedy were his, and that he had confessed to the murder. Carroll was found guilty and sent down for 2 years, but appellate judges Margaret McMurdo, Catherine Holmes and Glen Williams invoked double jeopardy to overturn the verdict: they said Carroll had effectively been tried twice for the same crime.

In December 2002, High Court judges Murray Gleeson CJ and Mary Gaudron, Michael McHugh, Bill Gummow, and Ken Hayne JJ agreed with McMurdo *et al*. McHugh huffed that the perjury prosecution was a 'vexatious … abuse of process'. Twenty-four jurors had thus been second-guessed by 11 appellate judges.

Jurist Brett Dawson commented: 'How do those judges sleep at night? The *Carroll* case is a model for judicial disintegration of the social fabric.'

It has been reported that Raymond John Carroll has made a point of appearing at the checkout of an Ipswich Woolworths store manned by the mother of the baby bitten, raped and strangled in 1973.

F. Sliding round truth problem

As the non-lawyer public and Judge Fox know, everything turns on the search for truth: justice, fairness, reality, morality but, as the foregoing shows, a system which has six ways of concealing evidence and 18 other mechanisms which obscure or defeat the truth is not trying to find the truth. I asked an academic how lawyers deal with the truth problem. Waggling his hand, he said: 'They slide round it. '

Mostly, they just ignore it. Of those who do confront the problem, some blandly say the system does search for the truth. Others say justice is process, not truth. Some even say that justice is better than truth. A selection:

John Scott, Lord Eldon, (1751-1838) said in *Ex parte Lloyd* (1822): ' … truth is best discovered by powerful statements on both sides of the question'.

Law professor Monroe Freedman echoed Lord Eldon in P*rofessional Responsibility* (1966):

> The attorney … does participate in a search for the truth … The attorney functions in an adversary system based upon the presupposition that the most effective means of determining truth is to present to a judge and jury a clash between proponents of conflicting views.

Law professor David Luban said in *Lawyers and Justice*: 'No trial lawyer seriously believes that the best way to get at the truth is through the clash of opposing points of view.'

Judge Richard Posner noted that adversarial procedures are contests of liars. The addition of a few words demonstrates the reality of Eldon's proposition: 'Truth is best discovered by trained liars making powerful statements on both sides of the question.'

Justice Potter Stewart, speaking for the US Supreme Court, said in *Tehan v Shott* (1966): '…the basic purpose of a trial is the determination of truth.'

Law professor John Strait Applegate, then of the University of Cincinnati College of Law, wrote in *Witness Preparation* (Texas Law Review 1989):

> The public perception of the function of the judicial system and ethical rules support the [public's] view that ascertaining the truth is the paramount goal of the adversarial system and the primary basis of its legitimacy.

That means the public assumes that the system seeks the truth and is thus a legitimate system. The assumptions are natural but wrong. It also means the public will support change to a truth-seeking (and hence legitimate) system.

Chief Justice (NSW) Jim Spigelman said on his appointment in 1998:

> [The legal] profession has an ethical dimension and values justice, truth and fairness … The common law and the adversary system – a manifestation of the power of Socratic dialogue – is [sic] one of the greatest mechanisms for the identification of truth and the maintenance of social stability that has ever been devised.

Law professor Michael Asimow, of the University of California at Los Angeles, summed up his and other lawyers' views that justice is process in *Nova Law Review* (Winter 2000). He wrote: '[The] general public and lawyers differ about whether justice means truth or justice means process.' That means 0.2% per cent of the community believe that justice is process. Justice David Ipp, of the West Australian Supreme Court, said in 2000: 'When the legal system does not reflect community values it loses its legitimacy.'

Professor Michael Asimow noted that the public's belief that justice means truth dooms lawyers to be mistrusted and sadly unloved. He continued:

> Lawyers will always be distrusted, in part because their assigned task is to play whatever role and manipulate whatever law a client's interest demands … lawyers are doomed to be unloved because criminal practice is their most public function As lawyers see it, justice requires that an person have the benefit of appropriate process, such as the reasonable doubt rule or the privilege against self-incrimination. This perspective is not shared by most members of the public, especially when it comes to criminal law. Most people think that justice means finding the truth regardless of the adversarial system, procedural technicalities, statutory loopholes, police or prosecutorial misconduct, or lawyers' tricks.

David Maxwell Fyfe (1900-67) was an exponent of the view that justice is better than truth, but he was naïve about the system's capacity to convict the

innocent. As Home Secretary in 1953, Fyfe refused to stop the hanging of an innocent youth, Derek Bentley, 19 (mental age 11). Fyfe said: 'There is no possibility of an innocent man being hanged in England.' He was thus eminently qualified to become Lord Chancellor (and Viscount Kilmuir) in 1954. He wrote in *The Migration of the Common Law* (Law Quarterly Report, 1960):

> Now the first and most striking feature of the common law is that it puts justice before truth. The issue in a criminal prosecution is not, basically, 'guilty or not guilty?' but 'can the prosecution prove its case according to the rules?' These rules are designed to ensure 'fair play' at the expense of truth. The attitude of the common law to a civil action is essentially the same: the question is 'has the plaintiff established his claim by lawful evidence?' not 'has he really got a good claim?' Again, justice comes before truth.

Justice Russell Fox demolished Kilmuir thus: 'This statement in fact begs the present question by saying that justice is what the parties [i.e. their lawyers] present in evidence, true or not.'

Harold Macmillan (1894-1986, Prime Minister 1957-63) finally dismissed Kilmuir during the Night of the Long Knives in 1962. Kilmuir complained that his cook would have got more notice. Macmillan said it was harder to get a good cook than a Chancellor. Derek Bentley's conviction was quashed in 1998.

G. Conviction rates

The words 'fair trial' are never far from the lips of common lawyers and judges, but former prosecutor William T. Pizzi, now a law professor at the University of Colorado, said in *Trials Without Truth* (New York University Press, 1999):

> The goal of the defense attorney is not to obtain a fair trial for the defendant; a fair trial might spell disaster for the client because it would likely result in a conviction, given the evidence. Instead the goal is to win above all and that means doing almost everything to win. It may require what lawyers refer to as a 'scorched earth' defense in which anyone and everyone is likely to come under attack – including not just prosecution witnesses, but the prosecutor personally as well as the judge.

Sir Lionel Luckhoo QC (1914-97), a Guyanese of Indian descent, was listed in *The Guinness Book of Records* (1990) as the world's most successful lawyer: he procured 245 not guilty murder verdicts in a row. Luckhoo probably knew that perhaps 241 (99%) were guilty. Luckhoo was knighted in 1966, presumably for services to perverting justice. His client, the Rev Jim Jones, presided over the murder/suicides of 913 people at Jonestown, Guyana, in 1978, but saved Luckhoo's record by suiciding himself. In 1980, Luckhoo declared himself 'Ambassador for God'.

Estimates of conviction rates in the adversary system vary, but it is clear that more than half

known serious criminals get off. Law professor Michael Zander said in 1989 that since 1979 approximately 50% of all accused were acquitted in British criminal trials.

In 1997, Dr Lucy Sullivan, of the Sydney Centre for Independent Studies, noted 1993 figures showing that the murder conviction rate in NSW was 26.5%. The rape figure was 11.5%. In 2004, NSW Bureau of Crime Statistics figures showed that the rate in sexual assault cases in NSW was 19%.

The conviction rate in India is 16%. *The Hindu* reported in September 2003 that Mallikarjun Kharge, Home Minister for the state of Karnataka, had urged the Indian Government to change to a truth-seeking system because the conviction rate in Karnataka was 28% and the national average was 16%. India's population in July 2009 was estimated to be 1.17 billion, almost 75% of the total afflicted by the anti-truth system.

The New South Wales Independent Commission Against Corruption (ICAC) uses the investigative system to find the truth about the corrupt in the public sector, but charges are heard in the adversary system. In the period 1989-95, 63 of 208 were found guilty, a conviction rate of 30.3%.

Inquests likewise use the investigative system, but some evidence heard by the coroner will be concealed either by the DPP or the trial judge.

In 1984, Jennifer Tanner died from two bullets from a bolt-action rifle that required reloading. The bullets went through her fingers and into her brain. Police said it was suicide. In 1998, a Victorian

Coroner found that Jennifer Tanner's brother-in-law, Detective-Sergeant Denis Tanner, shot and killed her. The DPP did not charge Tanner.

In 1994, Detective-Sergeant Geoffrey Bowen was murdered by letter bomb. In 1998, a South Australian coroner found that an organised criminal, Dominic Perre, had sent the bomb. The DPP did not charge Perre.

The implied reason for the major cause of low conviction rates – concealing evidence – is that jurors' mental calibre is low. *OxfordLQ* quotes law/economics professor Gordon Tullock, of George Mason University, Virginia, as stating in *The Logic of the Law* (1971):

> When I took courses on Evidence in law school, the explanation given for this giant collection of rules was simply that Juries were stupid.

If that were the case, the remedy would be to use intelligent semi-professional lay judges, as they do in Germany. While noting that no other legal system conceals evidence, Professor Julius Stone QC and former Justice W. A. N. Wells put the stupid theory more delicately in *Evidence*:

> [The] great canons of exclusion of relevant facts [are] unique in the world's evidential systems. [They] sprang from the exigencies of protecting lay jurymen from dangers of confusion and prejudice. They represented the judges' evaluation of the mental calibre of the jury. To some extent this evaluation was excessively low, and

presented unnecessary obstacles for the free exercise of their common sense.

The argument gets sillier: judges sitting alone are bound to conceal the same evidence from themselves. Stone and Wells said 'these rules are today applied to all trials, whether before a jury or before a judge alone'. That must mean that judges are as stupid as they think jurors are. In fact, and bearing in mind that almost all accused are guilty, judges are apparently more stupid. Janet Fife-Yeomans reported in *The Australian* of 27 August 1994:

> Figures from the NSW District Court show that the jury convicted in half the cases while the judge, when hearing a case alone, convicted in only a quarter.

Jurors deliver wrong not guilty verdicts in 50% of cases because of lawyers' tricks and because judges conceal evidence. Judges sitting alone don't have those excuses. They know lawyers' tricks; they hear the evidence before concealing it from themselves; and they know that 99% of accused are guilty. In another example of Orwell's doublethink, they then find as many as 75% of accused not guilty when they know they are guilty.

Some of their not guilty verdicts may be more sinister than mere stupidity. Since there is no appeal against an acquittal, some judges may let criminals off to avoid the shame of being overturned by stupid

appellate judges. And some may merely be doing favours for the defence Bar.

The public is not deceived. *The* [Sydney] *Daily Telegraph* reported in July 2004 that 92% of 7,000 readers believe the judicial system is unfair, and that 78% believe it favours criminals.

A criminal system exists to protect the community, and police are demanding that they be allowed to do their job properly. Ian Blair, Deputy Commissioner of London's Metropolitan Police said in May 2003:

> We need inclusivity of evidence. If the jury is the light by which freedom shines, why don't we tell them the truth and allow them as adults to weigh that truth?

Chief Justice David Malcolm, of Western Australia, said in 1999:

> Historically, the concept of a fair trial has applied [only] to the accused. In my view, that concept needs to be changed - a trial should be fair not only to the accused but also to the victim and the prosecution.

H. Convicting the innocent

The adversary system's win-at-all-costs culture gets the worst of both worlds: criminals get off, and innocent people, particularly the poor, go to prison. Some estimates for the US, Britain and Australia:

The US. C. Ronald Huff, Ayre Rattner and Edward Sagarin estimated (*Convicted But Innocent, Wrongful Conviction and Public Policy*, Sage, 1996) that 5% of convictions per year in the US are wrong. That is approximately 10,000. Their figures suggest that at the start of 2008 perhaps 150,000 of some three million inmates were innocent.

The Chicago Tribune's Ken Armstrong and Steve Mills reported in 1999 that 12 of 285 (4.2%) prisoners on the Illinois Death Row since 1977 were found to have been wrongly convicted, and that throughout the US at least 381 homicide convictions had been 'thrown out because prosecutors concealed evidence suggesting innocence or knowingly used false evidence'.

It is thus too much of a risk to kill those found guilty. The US Bureau of Justice Statistics says 3859 people were executed between 1930 and 1972. If 4% were not guilty, the state wrongly killed 154, including Bruno Hauptmann, who was convicted on fabricated evidence in 1936 for allegedly kidnapping Colonel Lindbergh's baby.

Five US Supreme Court judges – Potter Stewart, Byron White, William Douglas, William Brennan, and Thurgood Marshall – abolished the death

penalty in *Furman v Georgia* (1972) on constitutional grounds, i.e. that it was 'cruel and unusual punishment'. The four in favour of executions were Warren Burger CJ, Harry Blackmun, Lewis Powell and William Hubbs Rehnquist.

Four years later, Douglas had been replaced by John Paul Stevens and Stewart and White switched. In *Gregg v Georgia* (1976), the vote was 7-2 to restore executions. In favour were Burger, Stewart, White, Powell, Blackmun, Rehnquist, and Stevens. Brennan and Marshall were against. They dissented in every death penalty case until they retired, Brennan in 1990 and Marshall in 1991.

From 1976 to 1 April 2008, there were 1099 executions; 44 were probably innocent. Relatives of those killed were no doubt gratified when Harry Blackmun (1908-99, Justice 1970-94) admitted in 1994 that he had been wrong about the death penalty, and when John Paul Stevens (b. 20 April 1920, Supreme Court 1975-) said on 16 April 2008 he now believed the death penalty is unconstitutional

George W. Bush allowed the executions of 152 people – six probably innocent – during his period as Governor of Texas (January 1995-December 2000), many on the cursory advice of his lawyer, Alberto (Seedy) Gonzales. Bush thus presided over an execution every nine days; Britain's Lord Chief Justice (1946-58) Rayner Goddard (1877-1971), who achieved an orgasm when he ordered an execution, would have been an ecstatic Governor of Texas.

After a spate of forced releases from Death Row, *Time* reported in May 2001 that 20 of the 38

States with death penalties were considering moratoriums on executions. On 1 April 2008 there were 3261 on death row; 130 (4%) were probably innocent.

Britain. Mike Mansfield QC noted in *Presumed Guilty* that studies by English probation officers found that '500 or more' (at least 1%) prisoners were wrongly convicted. Timothy Evans was wrongly hanged for murder in 1950 and pardoned in 1966. Uproar followed the hangings of Derek Bentley in 1953 and James Hanratty in 1962. England abolished executions in 1965. That was fortunate for Irish suspected of terror.

In 1974, detectives tortured the Birmingham Six to get false confessions to murder. In 1980, Lord (Alf) Denning (1899-1999, Master of the Rolls 1962-82) heard the Six's civil action alleging assault by police. He said:

> If the six men win it will mean that the police were guilty of perjury, that they were guilty of violence and threats, that the confessions were involuntary and were improperly admitted in evidence and that the convictions were erroneous ... This is such an appalling vista that every sensible person in the land would say it cannot be right that these actions should go any further.

The Six continued to seek justice. Lord Denning, 89, turned Blackstone and Starkie on their heads in 1988. The kindest thing to say about the following statement is that he had sadly succumbed to dementia. He said

It is better that some innocent men remain in gaol than that the integrity of the English judicial system be impugned … Hanging ought to be retained for murder most foul. We shouldn't have all these campaigns to get the Birmingham Six released if they'd been hanged. They'd have been forgotten, and the whole community would be satisfied.

In 1991, after 16 years in prison, the Six were acquitted and freed by appeal court Justices Lloyd, Mustill and Farquharson. The Home Secretary, Kenneth Baker, a lawyer, then set up an inquiry into the criminal system chaired by Viscount (Garry) Runciman, a sociologist. Some saw the inquiry as a damage limitation exercise; others hoped it might result in change to a truth-based system.

Research for the inquiry showed that the innocent are rarely charged in France and Germany, but the Runciman Report (1993) was a throwback to 1219: it said the UK should persist with the Dark Ages system.

The only useful thing to emerge from the inquiry was a recommendation that a body be set up to investigate possible perversions against the innocent. The Criminal Cases Review Commission (CCRC) began work in 1998. It consisted of eight non-lawyers and six lawyers and had a staff of 100.

A Commissioner, Dr James MacKeith, a forensic psychiatrist, told me that the commissioners accept all relevant evidence. The recommendations of the pro-truth CCRC have to be ratified by the Court of

Criminal Appeal (CCA), which adheres to the anti-truth system. In what may be an example of the British spirit of compromise, the CCA has agreed with the CCRC in 70% of cases. To 31 August 2008, the CCRC had received 11,061 applications and had referred 395 cases to the appeal court. The court had quashed the convictions in 260 cases and upheld the convictions in 110 cases. Some results:

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

Derek Bentley. Hanged 1953. Conviction quashed because Lord Chief Justice Rayner Goddard, misdirected the jury. Lord Chief Justice Bingham said Lord Goddard was 'blatantly prejudiced' and denied Bentley 'that fair trial that is the birthright of every British citizen'.

Stephen Downing. Convicted of murder in 1973 and would have been paroled in 1990 if he said he was guilty. He refused and remained in prison for 29 years. His conviction was quashed in 2002 after forensic evidence against him was found to be unreliable.

Patrick Nicholls. Convicted of murder 1975 and sentenced to life. Conviction quashed because new evidence showed the 'victim' died from natural causes.

William Gorman and **Patrick McKinney.** Convicted of terrorism 1980 and given indefinite sentences. Convictions quashed 1999 because Electrostatic Document Analysis (ESDA) of police

interview notes showed significant rewriting of pages.

David Ryan James. Convicted of murder 1995. Conviction quashed because the 'victim's' suicide note was found in 1996.

Australia. If, as in Britain, 1% of Australian prisoners are not guilty, 235 of 23,555 inmates in 2003 were probably innocent. Australia has not risked killing the alleged guilty since 1967. Listed here, courtesy of the New South Wales Council of Civil Liberties' website, are the dates of the last executions in the various states, with, in brackets, the dates when the states formally abolished the death penalty:

> Queensland 1913 (1922)
> NSW 1940 (1955 for murder; 1985 for treason and piracy).
> Tasmania 1946 (1968).
> Commonwealth and Australian Capital Territory no executions (1973).
> Northern Territory 1952 (1973).
> Victoria 1967 (1975).
> South Australia 1964 (1976).
> Western Australia 1964 (1984).

As it happens, I was an official witness, on behalf of Mr Rupert Murdoch's *Truth*, at the last execution in Australia, that of a minor criminal named Ronald Ryan, in Melbourne in 1967. My account, in a book called *Amazing Scenes*: *Adventures of a Reptile of the Press* (Fairfax Library, 1987), begins with a nod – theft if you insist – to Graham Greene's *The Third*

Man: 'One Friday in February 1967 I got a letter from the man I had seen hanged a week before. A week later, the hangman sent a carping letter.'

Ryan's letter, written on 10 feet of lavatory paper the night before he was hanged, said he was not guilty of intent. I tend to believe him, and that life for manslaughter would have been appropriate. The hangman, a Melbourne chemist, took exception to my observation that his movements were hurried and jerky. He wrote: 'I have carried out executions throughout Australia and beyond Australia for the past 38 years, and I have never been told that my work has been jerky.'

A dingo (a wild dog) kidnapped Mrs Lindy Chamberlain's baby daughter, Azaria, from their tent near Uluru, Central Australia, in 1980, but in 1982 Lindy was found guilty of murdering the baby. A later inquiry found the truth, and her conviction was quashed in 1988.

Ian Barker QC prosecuted Mrs Chamberlain. In 1994, as chairman of the NSW Bar Association, he said my book, *Trial by Voodoo*, was the silliest book of the decade. I said he might very well be right, but he was the wrong person to say it: he was the guy who got the dingo off.

I. Contempt: guilt presumed

Contempt by affront is contempt of the judge in court. Contempt by publication allegedly prejudices 'fair' trials. Both are crimes, but outside the US the common law presumes that alleged offenders are guilty, and judges, not jurors, deliver the verdicts.

Affront originated in mediaeval superstition. The deity appointed the king; the king appointed the judge; an affront to a judge was thus an affront to the deity. The offender would suffer eternal damnation, and meanwhile instant retaliation.

Oliver Cyriax reports that in 1631 one Noy threw a brickbat at Judge Richardson – possibly Sir Thomas Richardson (1569-1635), Chief Justice of the King's Bench (criminal cases) 1631 – but missed. Richardson had Noy's hand cut off and displayed on a gibbet, and then had him hanged in the court.

Justice Sir John Eardley Wilmot (1709-1792) prepared an opinion for *R v Almon* (1765), as case of affront against a reporter, John Almon (1737-1805). Wilmot said contempt law was necessary to keep 'a blaze of glory' around the courts, judges alone gave the verdict because that was 'immemorial usage and practice'. His opinion was never delivered, but it is still the leading authority for trial without jury in Australian contempt cases.

Some judges still believe they are enveloped in a blaze of glory. In 1977, Malcolm Turnbull (BCL Oxon), who was then a journalist, referred to judges by surname only. The egregious Harry (a profit is a

loss) Gibbs warned him that 'it was contempt to refer to a judge in any way other than as Mr Justice Bloggs'. Turnbull invited Gibbs to grow up.

Contempt by publication offends against the need for an alleged offender to have a guilty mind, the presumption of innocence, and trial by jury. It punishes media organisations which publish, even inadvertently, material which might be concealed from jurors.

Christopher Murphy, a Sydney lawyer, was not aware that a trial was proceeding when he mentioned the accused's convictions in a newspaper article in 1993. The judge aborted the trial; Murphy and the organ were charged with contempt; three appellate judges found them guilty in 1994.

Unfortunately, the same man was again on trial; his convictions were mentioned at the contempt trial and reported in the Press; his new trial was aborted. The judges and the media were not charged with contempt, but in 1995 the judges confirmed the original guilty verdicts, and ordered the organ to pay the prosecution costs as well as their own. The penalty, some A$120,000, was enough to cripple a small newspaper.

Recent British contempt history shows how judges can subvert the will of Parliament. In *BSC v Granada* (1981), Lord (Cyril) Salmon (1903-91) adopted a formula developed by the Master of the Rolls, Lord Denning. Denning said (presumably before he went ga-ga):

The public has a right of access to information which is of public concern and of which the public ought to know. The newspapers are the agents, so to speak, of the public to collect that information and to tell the public of it. In support of this right of access, the newspapers should not in general be compelled to disclose their sources of information.

The Thatchist regime agreed. Section 10 of the *Contempt of Court Act* 1981 stated:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible unless it is established to the satisfaction of the court that disclosure is necessary in the interests of justice, national security, or for the prevention of disorder or crime.

It took judges only three cases over seven years – *Tisdall* (1983), *Warner* (1987), *Goodwin* (1990) – to destroy the *Contempt of Court Act.* None of the judges was dismissed.

Contempt by publication does not exist in Europe because evidence is not concealed, and barely exists in the US because the First Amendment protects the public's right to information

J. Defence of the criminal system

Defence of the criminal system comes down to assertions that it protects the innocent and the 'rights' of accused, and protects everyone from oppression by the leviathan state.

Professor Stephan Landsman said in *Readings on Adversarial Justice*: 'For centuries adversarial courts have served as a counterbalance to official tyranny and have worked to broaden the scope of individual rights.'

There is something in that, particularly in relation to selfless lawyers who try to help the poor and defenceless, but the argument collapses in the face of the system's own tyranny. Its unfairness oppresses victims of crime. Cruel cross-examination oppresses witnesses in general and women and children in particular. Negligence law oppresses doctors, accountants, teachers, local councils, shareholders in business and manufacturing. Interminable pleadings and discovery oppress litigants. Unfair libel and contempt laws oppress citizens, journalists and media shareholders.

In *Twenty Theses on Adversarial Ethics*, Professor David Luban told a Brisbane conference in 1997:

There are four standard arguments on behalf of the adversary system:

(1) It is the best way to find the truth.

(2) It is the best way to ensure that all parties' rights are protected.

(3) It is part of our tradition and culture.
(4) ... the adversary system is the way clients participate in the litigation process.

Professor Luban said all four arguments fail. He continued:

Only a pragmatic justification of the adversary system succeeds. I don't mean to argue that the adversary system should be abandoned, however. Only if we had strong evidence that real-world alternatives such as the Continental European procedural regime are substantially better would it be worth contemplating a far-reaching change, one that would exile almost every Australian jurist from the only legal regime he or she knows … A common-law country should retain the adversary system because:

(1) It needs some procedural system;
(2) The available alternatives aren't demonstrably better than the adversary system.
(3) The adversary system is the system in place. This is the pragmatic justification for the adversary system. It is logically weak but practically strong.

Professor Luban's argument also fails. An available alternative, the investigative system, which seeks the truth and trained judges control evidence must be better than a system which does not seek the truth and trained liars control the evidence.

I told Professor Luban in April 2007, that he would be the Red Rum of ethicists except that he sails into the last fence. He replied: 'I don't get the

Red Rum allusion, but it sounds like a good thing to be.'

I told him Red Rum was the world's greatest steeplechaser, three times winner of the Grand National. His third win, in 1977, was one of the great moments in British sporting history. He said: 'I'm honored to be included in Red Rum's company!'

In *Professional Detachment*, Harvard ethics professor Arthur Applbaum demolished two of lawyers' traditional claims:

> … at trial, a good lawyer regularly intends to induce beliefs in juries that the lawyer believes to be false, and so deceives the jurors. In trying to evade this simple and obvious fact, much breath is wasted on clever equivocation or bad epistemology [the investigation of human knowledge], such as 'it is the job of the jury, not the lawyer, to render a verdict' (true but beside the point), or 'the lawyer cannot know what is true or false until the jury decides' (false and beside the point).

K. A criminal enterprise?

Debbie Kilroy, 28, got six years in prison in 1989 for drug-trafficking. In 2007, she was admitted to practise as a lawyer in Queensland. She said: 'It's usually the other way round: they become lawyers, then they commit the offences.'

That raises a question: is the adversary system a criminal enterprise? (See Definitions.) Lawyers and judges get money from doing things that would be criminal in anyone else, e.g. perverting justice.

However, it is usually necessary to prove a wrongful intent (*mens rea*) as well as a wrongful act (*actus reus*). Judges and lawyers may lack the necessary guilty mind because law schools have told them for 200 years that the adversary system is the best system and that it requires them to do those things.

Professor (of planning) Bent Flyvbjerg, of Aalborg University, Denmark, wrote in *Rationality and Power: Democracy in Practice* (University of Chicago Press, 1998):

> Power often finds deception, self-deception, lies, and rationalizations more useful for its purposes than truth and rationality, [but that] does not necessarily imply dishonesty. It is not unusual to find individuals, organizations, and whole societies actually believing their own rationalizations. Nietzsche, in fact, claims this self-delusion to be part of the will to power … The greater the power the less the rationality.

Anything can be rationalised. John Bryson, barrister and author of *Evil Angels*, which detailed the Lindy Chamberlain case, told postgraduate law students at Melbourne University (*When the Rule of Law Meets the Real World*, 2001):

> First, we believe as we wish to believe, always, always, always. Second, the passion with which we believe rises in absolute proportion to the importance to us of success in our current enterprise.

Robert French, Chief Justice of the High Court of Australia, undoubtedly believed what he was reported (*The Australian*, 5 September 2009) as saying (in indirect speech):

> Common law in Australia had enshrined rights and freedoms, including freedom of speech and the press, and a range of others, including privilege against self-incrimination, and the right to access a legal counsel when accused of a serious crime.

One assumes that Chief Justice French absorbed that stuff at law school. Unfortunately, as we have seen, freedom of speech and freedom of the Press do not exist in the common law world (except in the US), and the privilege against self-incrimination is based on a lie.