SERIAL LIARS

How Lawyers Get the Money and Get the Criminals Off

Why the Lawyer-Run Adversary System Is Immoral,
How it Happened, and the Solution

'Like sharks smell blood, lawyers smell money.'

- Law professor John Banzhaf

'A lawyer with a briefcase can steal more than a thousand men with guns.'

- Don Vito Corleone, *The Godfather*

Evan Whitton

author of *Trial by Voodoo*, *The Cartel: Lawyers,* and *Their Nine Magic Tricks*

'Evan Whitton knows more about the law than most lawyers.'

- Peter Breen, lawyer and MP

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

Praise for Evan Whitton's Work

'Whitton QC not here? What a pity.'

- NSW Premier Neville Wran QC, 1983

"Evan Whitton is exactly the right person to write about any subject that interests him, because of the rare insight that sets him apart from all other Australian journalists."

- Michael English, 1987

Can of Worms (1986)

'No decent person could read it without being possessed of utter rage at the way our public institutions have been corrupted over the past 15 years or so by criminal elements in politics, the police and even the courts.'

- Senator (Australia) John Stone.

Amazing Scenes (1987)

'... combines literary elegance with real sinew.'

- Denis Butler, *The Newcastle Herald*

'Australia's premier journalist …'

- Mike Ryan, *Sunday Press,* Melbourne

The Hillbilly Dictator (1989)

' ... compelling reading, a popular history with a light touch but a serious moral message ... a wealth of anecdotes, humorous, scandalous, shocking, surprising ...'

- Dr Mark Finnane, *The Sydney Morning Herald*

'Evan Whitton is a dazzling writer, incisive and addictive; a master journalist, prodigious in his knowledge and effort.'

- Dr George Miller, film director.

'The Whitton wit is evident … but the tragedy of it all was also evident to him.'

- Christopher Masters, *The Herald*, Melbourne

Trial by Voodoo (1994)

'The only book in the language that critically examines the law as a whole.'

- Law Professor Alex Ziegert, University of Sydney.

'… riveting ... essential reading for those who make the law, those who enforce it, and those who live off it, as well as the rest of us."

- Susan Geason, *The Sun-Herald*, Sydney.

'Whitton is one of those rare creatures in journalism, a writer whose consummate skill and unshakeable integrity earns him universal respect."

- Bruce Stannard, *Australian Business Monthly*

'... the most famous court reporter in the land ... '

- Lenore Nicklin, *The Bulletin,* Sydney

'*Trial by Voodoo' ...* is a book by an experienced and distinguished journalist ... Those who become impatient with the rules which our criminal justice system has established …must be listened to with care, especially if they have the experience in our courts as Mr Whitton does. Outsiders often see error more quickly because they are without preconceptions.'

- Justice Michael Kirby, High Court of Australia.

The Cartel: Lawyers and Their Nine Magic Tricks (1998)

'Evan Whitton is one of that rare, and I fear fast disappearing group of journalists and authors who have a remarkably extensive knowledge of the legal system and the way it works ... *The Cartel* ranges over judicial activity across Europe, the United Kingdom, North America and Australia. It is rich in anecdote ...There is a wealth of historical knowledge and research in every chapter … His insights were always valuable...'

- Justice Ian Callinan, High Court of Australia

'... a trenchant, carefully researched and incisive criticism of our adversarial system ... It has an incredible wealth of reference … very convincingly makes it out to be a court system rather than a system of justice ... Evan Whitton has said, with I think consummate wisdom: "Truth and justice require a moderation of the extreme adversary system and the abolition of rules for concealing evidence". '

- Sir Laurence Street, former Chief Justice NSW

'A very thought-provoking and thoughtful look at some of the defects in the system ... a valuable book in showing the need for change ... I fully agree [about] changing from the more extreme examples of adversarial thinking to the more exploratory thinking of the inquisitorial kind.'

- Dr Edward de Bono.

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Evan Whitton

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

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1. True Crime. 2. Justice. 3. Lawyers' ethics 4. Anglo-American Adversary system. 5. Evidence. 6. Anti-truth devices. 7. Perversions of justice. 8. Judges. 9. Legal History. 10. European investigative system.

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Abbreviations

Butterworths. Butterworths Concise Australian Legal Dictionary (Butterworths 1997)
CDNB. The three-volume Concise Dictionary of National Biography (OUP 1992).
Columbia. The Columbia Encyclopedia (Columbia University Press, fifth edition1993).
Macquarie. The Macquarie Dictionary (Macquarie Library, 1985)
NSW. New South Wales, a state of Australia. The capital, Sydney, has a population of 4.5 million.
OxfordSC. The Oxford Companion to the Supreme Court of the United States ed. Kermit L Hall (OUP 1992).
OxfordLQ. The Oxford Dictionary of American Legal Quotations ed. Fred Shapiro (OUP 1993)
WA Western Australia, a state of Australia.

Preface

Lawyers might accurately be described as serial liars because they repeatedly try to induce others to believe in the truth of propositions, or in the validity of arguments, that they believe to be false.

- Arthur Applbaum, Professor of Ethics, Harvard, 1995

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

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

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

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

Excuse me?

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

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

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

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

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

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

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

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

- Evan Whitton, Sydney 2005.

1. Why the Adversary System Is Immoral

a. What is Justice?

The feather in the cap of Maat, Egyptian goddess of justice from c. 2700 BC, symbolised justice, truth, righteousness (morality). Nearly 5000 years later, Judge Harold Rothwax, of the New York State Supreme Court, wrote in *Guilty: The Collapse of Criminal Justice* (Random House, 1996): 'Without truth there can be no justice.' Russell Fox QC, former Justice of the Australian Federal Court, wrote in *Justice in the 21st Century* (Cavendish 2000):

> … in legal procedure the meaning which approximates most closely to it [justice] is "fairness" … truth can be taken to mean the reality of what happened and is happening. That is what the ordinary person understands by the word, and the undoubted view of the general public is that the findings of a court, human error aside, represent the truth in this sense.

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

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

Lord Chancellor Kilmuir gallantly tried to make the case for process in *The Migration of the Common Law* (Law Quarterly Report, 1960):

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

Forty years later, Justice Fox demolished Viscount Kilmuir thus:

> This statement in fact begs the present question by saying that justice is what the parties [i.e. their lawyers] present in evidence, true or not. On the other hand, there must be a standard, and the public estimate must be correct, that justice marches with the truth. Only in this way does the concept present a moral face, as distinct from one where the winner is the person with the greatest resources and best advocacy.

Justice Fox continued: 'This is the view taken on the continent and in other countries, where the whole system of justice proceeds on the footing that the truth is to be ascertained. Hence the investigational, or inquisitorial, approach of the French, which even provides that, the true facts having been found by a judicial officer, their presentation is not to be polluted by the parties.'

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

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

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

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

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

> I am required by law to do what I must do today, even though I realize that it will strike some, including me, as immoral … Neither can I pretend that the result is just, because I know it is not. Nonetheless, I am bound to apply the law

in this way, which will paradoxically produce both the correct legal result and the wrong moral outcome.

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

b. What is the Adversary System?

The adversary system is an accusatorial (PROVE IT!) system in which trial lawyers, described as serial liars, control the evidence - and hence the process and hence the money - and an untrained judge controls the courtroom. At least one side is lying. Justice Russell Fox wrote in Justice in the 21st Century:

> … there is many a crack in the image of the ideal [of justice]. Mostly these arise from the practice of leaving the practitioner in charge of the collection and presentation of the evidence, which means that the judge may only hear incomplete or inaccurate or unreliable evidence; some of what is relevant may be deliberately withheld. Cross-examination may help the elucidation of the truth, but it may also obscure the truth, and quite often is designed to that end.

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

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

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

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

> The attorney is indeed an officer of the court, and he does participate in a search for the truth [!] … The attorney functions in an adversary system based upon the presupposition that the most effective [!] means of determining truth is to present to a judge and jury a clash between proponents of conflicting views. It is essential to the effective functioning of this system that each adversary have, in the words of Canon 15 [of the 1908 Canon of Ethics], 'entire devotion to the

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

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

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

> The institution of one Court of Appeal may be considered a reasonable precaution; but two suggest panic … the legal profession is the only one in which the chances of error are admitted to be so high that an elaborate machinery has been provided for the correction of error … In other trades to be wrong is regarded as a matter of regret; in the law alone is it regarded as a matter of course.

c. The Adversary Culture: *Cherchez la Monnaie*

Lawyers Weekly reported in May 2002 that a survey for the American Bar Association's Litigation Section found that fewer 'than 20% of Americans have confidence in the legal profession', and that the reason boiled down to 'a single word: character'. The organ continued:

> The American public says lawyers are greedy, manipulative, corrupt and do a poor job of policing themselves … Specifically, respondents said that lawyers: are more interested in winning than seeing that justice is served (74%); spend too much time finding technicalities to get criminals off (73%); are more interested in making money than serving clients (69%) … A respondent said: '[Lawyers] get into a courtroom, and they are like sharks. They want that money.'

1. Herpetoids of the Law

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

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

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

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

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

Lord Chancellor (1938-39) Frederick Maugham said: 'Lawyers are the custodians of civilisation, than which there can be no higher or nobler duty', but business economist James R. Forcier said in *Judicial Excess: The Political Economy of the American Legal System* (University Press of America, 1994):

> A nation's values and problems are mirrored in the ways in which it uses its ablest people. In Japan, a country only half our size, 30 percent more engineers graduate each year then in all the United States. But Japan boasts a total of less than 15,000 lawyers, while American universities graduate 35,000 every year.

Japan uses the European system.

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

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

2. A Feeding Frenzy of Lawyers

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

Lawyer Arthur Train wrote in *The Confessions of Artemus Quibble 77* (1924): 'There are three golden rules in the profession … the first …

thoroughly terrify your client. Second, find out how much money he has and where it is. Third, get it.' Judge John Voelker (*Anatomy of a Murder*, 1958) had lawyer Paul Biegler echo the Mafia motto, 'Get the money, and trust no-one.' Law professor John Banzhaf, of George Washington University, Washington, DC, said in 2002: 'Like sharks smell blood, lawyers smell money.'

Johnnie Cochran knew O.J. Simpson was guilty of murder, but took US$500,000 to pervert justice on his behalf. At Cochran's funeral in April 2005, Simpson said: 'I thought he represented the best of Los Angeles, and certainly the best in what our adversarial legal system was about.' Robert Blake, a US actor found not guilty of murdering his wife, said in March 2005: 'You're innocent until proven broke.' He said he had spent US$10 million on his defence.

Common lawyers do not have a monopoly on greed and cynicism. In April 2005, Reinder Eekhof, a Dutch law school graduate, accidentally sent an e-mail saying he had 'finally finished this stupid education' and was 'now looking for someone crazy enough to dump a suitcase full of money in my lap every month'.

3. Serial Liars

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

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

Harvard ethics professor Arthur Applbaum said (*Professional Detachment: The Executioner of Paris*, Harvard Law Review, 1995):

> Lawyers might accurately be described as serial liars because they repeatedly try to induce others to believe in the truth of propositions, or in the validity of arguments, that they believe to be false.

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

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

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

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

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

> Why not? Every lawyer who practices in the criminal courts knows that police perjury is commonplace. The reason is not hard to find. Policemen see themselves as fighting a two-front war against criminals in the street and against 'liberal' rules of law in court.

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

> [Taking] zealousness to its adversarial limits (all the while promoting the adversarial system as a system of justice) poses a serious moral problem. Basically, we need to admit that there is occasion for shame in our profession. It would be overly dramatic to say that it is a surplus of shame that is driving lawyers from the profession, but something is.

Professor Elkins noted that a 1988 American Bar Association poll showed that '41% of a representative sample of lawyers would choose another profession if they had to make the choice again' and that 'alcoholism among lawyers is almost twice as high as for the general population'. An Australian survey in 2004 for an Australian Young Lawyers' body found almost half of the respondents did not see themselves practising law in five years' time.

Professor Applbaum might also have noted that the Executioner of Paris did not invent the system which sanctioned his ghastly work, but lawyers did invent the adversary system and its ethics which sanctions theirs.

4. Immoral Ethics in an Immoral System

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

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

Lawyers tend to believe that ethics is a county in south-east England, home of the succulent Colchester oyster. Law professor Lester Brickman, of New York's Cardozo School of Law, wrote in 1997: 'When the ethics rules are written by those whose financial interests are at stake, no one can doubt the outcome.'

Ethics and morals are synonymous, but adversarial ethics are client-based rather than morality-based. Law professor Charles Wolfram, of Cornell University, New York, wrote in *Modern Legal Ethics* (West, 1986):

> [The lawyer's role is] institutionally schizophrenic . . . a lawyer's objective within the system is to achieve a result favourable to the lawyer's client, possibly despite justice, the law and the facts

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

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

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

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

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

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

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

Did you suppose from thence that he [Anglesea] would dispose of that £10,000 in any shape to bring about the death of the plaintiff? – I did.

Did you not apprehend that to be a most wicked crime? – I did.

If so, how could you … engage in that project, without making any objection to it? – I may as well ask you, how you came to be engaged for the defendant in this suit?

Giffard was saying it was ethically proper for both lawyers to commit crimes, Giffard by conspiring to murder, the other by seeking to pervert justice in the matter of the title and the estates. Annesley won the

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

Professor Luban said 'the standard conception [of lawyers' ethics] simply amounts to an institutionalised immunity from the requirements of conscience, and that UCLA law professor Murray Schwartz was criticising their ethics when he wrote in *The Professionalism and Accountability of Lawyers* (California Law Review, 1978):

> When acting as an advocate for a client, a lawyer … is neither legally, professionally, nor morally accountable for the means used or the ends achieved.

I mentioned that to Dr Elizabeth O'Brien, a Sydney psychiatrist. She said: 'That sounds like psychopathy.' Psychopaths have no conscience.

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

Professor Luban referred to a statement in which professor Freedman defended two lawyers' dubious behaviour on the ground that they 'had kept faith with their client, and that is essential to the proper working of the adversary system'. Professor Luban commented:

> Everything rides on this argument. Lawyers have to assert legal interests unsupported by moral rights all the time – asserting legal rights is what they do, and everyone can't be in the right on all issues. Unless zealous representation could be justified by relating it to some larger social good, the lawyer's role would be morally impossible. That larger social good is supposed to be the cluster of values – procedural justice and the defense of rights – that are associated with the adversary system.

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

> It might be argued that the law cannot convert an immoral act into a moral one … by simple fiat. Or more fundamentally, the lawyer's non-accountability might be illusory if it depends upon the morality of the adversary system, and if that system is immoral … the justification for the … Principle of Non-accountability … would disappear.

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

Professor Freedman's three hardest questions, with his answers in brackets, were:

Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth? [Yes]

Is it proper to put a witness on the stand when you know he will commit perjury? [Yes]

Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury? [Yes]

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

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

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

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

> Then I put to her something that has haunted me to his day … I suggested that her sexuality might have had something to do with what had occurred with Ivan Milat. Crying and under stress, she ended up agreeing - and in that moment I knew we had won … we had put into their [jurors'] minds that the sex may indeed have been consensual… I am not proud of my conduct that day, but … I had to act according to the ethics of the profession… I had a job to do and I did it.

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

A Sydney barrister, Stuart Littlemore QC, stated client-based ethics accurately when interviewed on television by Andrew Denton in October 1995.

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

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

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

Littlemore: 'Not at all.'

5. Zealous Prosecutors

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

C. Ronald Huff, Ayre Rattner and Edward Sagarin estimated in *Convicted But Innocent, Wrongful Conviction and Public Policy* (Sage 1996), that .5% (approximately 10,000) of all convictions per year in the United States are wrong. *The Chicago Tribune*'s Ken Armstrong and Steve Mills confirmed their estimate in 1999. They said 12 of 285 (4.2%) or prisoners on the Illinois Death Row since 1977 had been found to have been wrongly convicted, and that throughout the US at least 381 homicide convictions had been 'thrown out because prosecutors concealed evidence suggesting innocence or knowingly used false evidence'.

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

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

6. Untrained Judges/The Humpty Option

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

A US judge, Curtis Bok, said in 1941: 'It has been said that a judge is a member of the Bar who once knew a Governor.' The lawyer-judge cartel still exists because judges are not trained separately from lawyers; they are lawyers one day and judges the next. Does that mean they suddenly stop lying and perverting justice? Professor Dershowitz wrote in 1982:

> … lying, distortion, and other forms of intellectual dishonesty are endemic among judges … The courtroom oath – 'to tell the truth, the whole truth and nothing but the truth' – is applicable only to witnesses. Defense attorneys, prosecutors and judges don't take this oath – they couldn't!

Abimbola A. Olowofoyeku, now a law professor at the University of Brunei, pointed out in *Suing Judges: a Study of Judicial Immunity* (Oxford, The Clarendon Press, 1993):

> With all the training given to physicians (college, pre-med, medical school, internship, years of specialist training) no hospital in the world would permit a general practitioner (or a dermatologist) to do surgery. But with no special training, the law permits a real estate lawyer, a banking counsel or a legal scholar to become a judge one day and on the morrow sentence a defendant to thirty years in prison, grant a divorce, adjudicate insanity, render judgment in an accident case, hold a director liable for damages, grant an injunction in a labor dispute, provide for custody of children, reapportion a legislative district, punish for contempt or reduce the tax assessment on an office building. How long does it take a new judge to get a smattering of the learning necessary to do all these things? … Does it not make sense to train the judges before they go on the bench … Should not the judge be trained in his special discipline before being given the awesome responsibility of sitting in judgment on others?

The Humpty Option derives from Lewis Carroll's *Through the Looking Glass, and What Alice Found There* (1871):

'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean -- neither more nor less.'

'The question is,' said Alice, 'whether you *can* make words mean so many different things.'

'The question is,' said Humpty Dumpty, 'which is to be master -- that's all.'

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

> Although we may never know the winner, the loser is perfectly clear. It is the nation's confidence in the judge as an impartial guardian of the rule of law.

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

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

In 1974, it was an iron rule of British justice that accused were presumed innocent until proved Irish. Justice Sir Nigel Cyprian Bridge told the Birmingham Six jury: ' … I am of the opinion, not shared by all my brothers on the bench, that if a judge has formed a clear view it is much better to let the jury see that.' He summed up for a conviction. Mike Mansfield QC noted his technique in *Presumed Guilty*:

> In a careful, almost total demolition of every defence witness and the lauding, sometimes verging on deification, of prosecution witnesses, the jury was corralled into the guilty pen as though driven by a diligent sheep-dog.

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

> We have heard for example from a Mr Bex Bissell [Peter Bessell was the chief prosecution witness], a man who by his own admission is a liar, a humbug, a hypocrite, a vagabond, a loathsome spotted reptile and a self-confessed chicken-strangler. You may choose if you wish to believe the transparent tissue of odious lies which streamed on and on from his disgusting, reedy, slavering lips. That is

entirely a matter for you ... We have been forced to listen to the whinings of Mr Norman St John Scott, a scrounger, a parasite, a pervert, a worm, a self-confessed player of the pink oboe, a man, who by his own admission, chews pillows ... On the evidence of the so-called hitman, Mr Olivia Newton John, I would prefer to draw a discreet veil. He is a piece of slimy refuse, unable to carry out the simplest murder plot ... You are now to retire, as indeed should I, carefully to consider your verdict of Not Guilty.

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

Has she elegance? Has she fragrance? Would she have, without the strain of this trial, radiance? … Has she been able to enjoy rather than endure her husband Jeffrey? Is she right when she says to you – you may think with delicacy – Jeffrey and I lead a full life? … Is he in need of cold, unloving, rubber-insulated sex in a seedy hotel?

The jury gave Archer £500,000, and Caulfied added costs of £700,000. In 2001, Lord Archer got four years for perjury at the trial.

7. The Moral Failure of Law Schools

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

This head in the sand attitude is known as ostrichism, legal positivism, and internalism. *Butterworths* says of positivism: 'Laws are considered in the context of the legal system of which they form a part, without drawing any conclusions about their essential justness or merit.'

Pace Blackstone, legal positivism is plainly a copout/dereliction of duty; medical academics seek a cure for cancer, legal academics should seek a cure for the cancer in the legal system and in law schools. For example, law professor Nancy Lee Firak, of Northern Kentucky University, wrote in '*Ethical Fictions as Ethical Foundations': Justifying Professional Ethics* (Osgoode Hall Law Journal, 1986): 'Lawyers are trained to cast the facts of a single event in several different (even contradictory) forms and are then taught how to argue that each form accurately represents reality.' In short,

how to lie. Law schools thus have no moral centre, and are properly termed trade or technical schools.

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

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

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

Law professor Theodore Plucknett (1897-1965), of Harvard (1921-31) and the London School of Economics (1931-61) is equally damning. In *A Concise History of the Common Law* (first edition Lawyers' Cooperative Publishing Company, 1929; fifth edition Butterworths 1956), he said Blackstone lacked 'excessive learning'; that he regarded 'legal history as an object of "temperate curiosity" rather than exact scholarship'; that his 'equipment in jurisprudence was also somewhat slender'; and that he was led 'to tolerate' the system by a 'romantic fancy' which compared 'it to a picturesque old Gothic castle'. Nonetheless, his *Commentaries on the Laws of England* (4 vols. 1765-69), described by Bentham as 'ignorance on stilts', procured for Blackstone a fortune in sales in Britain and America and appointment as a judge in 1770.

When the American colonies broke with England in 1776, William Jefferson and other lawyers favoured changing to the pro-truth European system, but the *Commentaries* fatally persuaded James Madison to persist with the common law. Madison was not a lawyer but he read law books and in 1791 was largely responsible for the first eight amendments to the Constitution which are generally taken to be the Bill of Rights. Madison locked the common law – but not necessarily the adversary system – into the US system via Amendment VII: ' … no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.' Two centuries later, the malign effects of that amendment are daily visible, not least in the O.J. Simpson debacle.

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