Oliver Wendell Holmes Jnr for making legal immorality respectable. Harvard is a seat of learning founded in 1737 by descendants of deranged English Puritans who believed an inscrutable deity was the supreme civil ruler. Today, Harvard's legal trade school, founded 1817, stands foursquare for artifice, chicanery and greed, as does its business school.

Langdell, dean of the law school 1875-95, invented the case, or Socratic, method of teaching law. In *The Moral Failure of Law Schools* (*Troika*, November-December 1996), Professor Alan Hirsch, visiting professor of Constitutional Law at Williams College, Massachusetts, in 2005, explained how the method corrupts young law students and destroys their idealism. He wrote:

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

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

Holmes (1841-1935) became a Humpty on the Supreme Court at 61, and stuck like a limpet until his colleagues persuaded him to go at 90. He wrote in *The Path of the Law* (1897): 'For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether.' The gain is to the profits of morally unaccountable trial lawyers.

8. The Law As a Game

The view that justice is a game recurs in the literature. Geoffrey Robertson QC, author of *The Justice Game* (Random House, 1998), was asked in 1998: 'Should justice be a game?'

He replied: 'Should it? No. Is it? Yes. We can't avoid the fact that the adversary system … does make justice a game.'

US jurist John Henry Wigmore (1863-1943) referred to 'the game of litigation'. Judge Learned Hand (1872-1961) recalled that he once said to the

anti-moral Justice Oliver Wendell Holmes Jnr: 'Well, sir, goodbye. Do justice!'

'That is not my job,' Holmes replied. 'My job is to play the game according to the rules.'

In *We, the Jury* (Basic Books 1994), Jeffrey Abramson, a lawyer and Professor of Politics at Brandeis University, Massachusetts, quoted Stephen Adler, of *The Wall Street Journal*, as reporting that jury consultants openly admit that:

> … if a client needs prejudiced jurors, the firm will help find them … they defend the ethics of their profession by pointing out that they obey the same imperatives lawyers do in our adversary system: they seek their clients' advantage within the rules of the game … Media accounts strongly reinforce the notion that jury selection is the only game in town and the game is crooked.

Justice Geoffrey Davies, of the Queensland appeal court, and J.S. Leiboff wrote in *Reforming the Civil Litigation System: Streamlining the Adversarial Framework* (Queensland Law Society Journal, 1995): ' … the adversarial imperative encourages, each party to ... even deny specifically facts known to be true … By such tactics the parties [lawyers] are playing a very expensive game …'

Norman Mailer told me in 2000: 'I've always looked upon our legal system as a high-stakes game played at the top by very skilful men, and once in a while even justice is served.'

Justice may be a game, but the playing field is not level; later sections note that the game is rigged in ways which get money for lawyers: aspects of civil law are unfairly biased in favour of plaintiffs; criminal law is unfairly biased in favour of defendants.

9. The Law As a Business

Some lawyers claim the law is a profession, but it has been a business since lawyers and judges formed a cartel to maximise their profits more than 800 years ago. Edward Jacob KC (d. 1841), editor of *Chancery Reports*, certainly saw it as a business. Nicholas Mullany, a Perth barrister, noted in *Pleadings – Sacrificing the Sacrosanct* (West Australian Law Reform Commission, 1998) that Lord Justice Sir William James said in *Hall v Eve* (1877):

> This case reminds me of a saying of the late Mr Jacob, that the importance of questions was in this ratio: first, costs, second, pleadings, and third, very far behind, the merits of the case.

Charles Dickens, who had worked in a law firm, wrote in Chapter XXXIX of *Bleak House* (1852-53):

> The one great principle of the English law is to make business for itself [i.e. lawyers]. There is no other principle distinctly, certainly and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.

Max Weber (1864-1920), the German polymath who taught law, political economy, economics, and sociology, noted in 1915 the ferocity with which the lawyer-judge cartel used its power to maintain the Dickens Principle:

> In England, the reason for the failure of all efforts at a rational codification of law were due to the successful resistance against such rationalisation offered by the great and centrally organised lawyers' guilds, a monopolistic stratum of notables from whose midst the judges of the High Court are recruited ... they successfully fought all moves towards rational law which threatened their material position.

Lawyers are beginning to admit that the law is a business. In *Greed on Trial* (*The Atlantic Monthly*, June 2004), Alex Beam quoted Robert Popeo, a plaintiff's lawyer who was seeking an EXTRA US$1.3 billion for starving tobacco lawyers, as saying: '... the law is an industry now, not a learned profession'. An editorial in *The Financial Times* of 16 June 2005, reported:

> A looming shake-up of legal regulation is prompting British law firms to rethink their business models. A recent survey shows two-thirds of the top 100 firms plan to admit non-lawyers as partners, one in five intends to seek outside investors and one in 10 aims to list on the stock market … As for the supposedly dangerous profit motive, law firms have been ruthlessly pursuing profit for years.

Professor David Luban has noted dire consequences:

> [If a] lawyer is really just another businessman, [lawyers] lose whatever claim they have to the perquisites and immunities of the legal profession [including] such invaluable goodies as the attorney-client privilege.

10. Self-Deception/Rationalisation

In the face of a Niagara of evidence to the contrary, some common lawyers and judges actually believe the adversary system is the best possible system of justice. The explanation for this phenomenon may lie in observations by John Bryson and Bent Flyvbjerg. In 2001, Bryson, a barrister and author of *Evil Angels*, which concerned perversion of justice in the Lindy Chamberlain case, told Melbourne University's Postgraduate Law Students' Association in an address called *When the Rule of Law Meets the Real World*:

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.

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, rationalisations and lies 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.

Power invents its own reality and imposes it by constant repetition. In November 2002, *Time* essayists Nancy Gibbs and Michael Duffy quoted a former Clinton official as saying of people in the Bush-Cheney regime:

> They just assert a reality and stick with it. They do it with tremendous discipline. They keep it simple and use the bully pulpit, and they say it again and again and again until people believe it.

Kurt Campbell, head of security studies at the Centre for Strategic and International Studies in Washington was quoted in *The Sydney Morning Herald* of 6 November 2004 as saying: 'A lot of people who support the President are really not interested in the facts on the ground. There really is a faith-based belief in the President as a person and in his ability to remake reality.'

d. Getting the Money: The Civil Process

1. The Law As a Casino

Lord Justice Sir Frank McKinnon (1871-1946) said (*Salisbury v Gilmore*, 1942) that the law lords are 'the voices of infallibility, by a narrow majority'. A London tax lawyer, David Goldberg QC, said in 1997:

> … it is, I think, generally accepted that every case or virtually every case which goes to the House of Lords could be decided either way. At any rate Lord Reid is reported by Alan Patterson in his book *The Law Lords* as saying that at least 90% of the cases which came before him [1948-75] could have been decided either way.

Lawyers can thus urge clients to pay for another roll of the dice; they might win, however dubious their case. Oxford law professor Patrick Atiyah wrote

in *Justice and predictability in the common law* (NSW Law Journal 1992): ' … less predictability in the law means more litigation.' Harold Clough, a Perth contracting engineer and former President of the Australian Chamber of Commerce, said in 1998:

> We avoid litigation like the plague. When we have differences of opinion with our clients and we are stalemated in positions from which neither can move, rather than bring in the lawyers I suggest we toss for it. Tossing a coin has great advantages. It is quick, it is cheap, it is decisive and in my view equally fair as any court case.

2. Spinning the Process Out

Litigation is like a cancer; it grows exponentially. Judge Learned Hand said in 1921: 'I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.'

i. Lawyer/Judge Procrastination

The record spin-out, *Jennens v Jennens,* began in the anciently corrupt Chancery Court in 1798, four years after the water lawyer was caught near Workington. *Jennens* concerned the estate of a loan shark named William Jennens, whose grandfather, Robert, had married twice and called boys from each marriage Robert. William Jennens plied his trade in London's gambling dens. He was the richest commoner in England, worth £5 million, about £500 million today. Jennens, 98, unmarried, went to a solicitor to make a will, but forgot to take his spectacles, and the solicitor's did not fit. He died a few days later, on Tuesday, June 19, 1798, the unsigned will still in his pocket, and £20,000 (about $A6 million today) in cash in the house. Lawyers for alleged relatives flooded into the Chancery Court.

Jennens v Jennens was still going when Dickens was born in 1812, when he worked as a law clerk at Ellis & Blackmore in 1827-28, when he used it as the model for *Jarndyce v Jarndyce* in *Bleak House* in 1852-53, and when he died in 1870. It ended in 1915, 117 years after it began, but only because generations of water lawyers had 'devoured' the entire estate. *Jennens* had thus been on foot for 55 years when Dickens observed that the law exists to make business for lawyers.

It is noted in Part 3 that Justice Russell Fox said that in France – where trained judges control the litigation process - 'the whole [civil] case may be disposed of in less than a day overall'.

ii. Pleadings

Pleadings are supposed to narrow the issues, but are largely useless because in five centuries judges have never found a way to stop lawyers lying in paper pleadings. Speaking for the West Australian Law Reform Commission, Nicholas Mullany, said in *Pleadings – Sacrificing the Sacrosanct*:

> The pleading rules 'stop short' of requiring the parties [and their lawyers] to be frank about what they allege. There is a tendency of parties to make allegations which they do not believe to be true … and to deny allegations which they know to be true … There is, in other words, a lack of 'truth' in pleadings.

Nonetheless, lawyers can exchange pleadings interminably in see-saw fashion: statement of claim, defence, reply, rejoinder, surrejoinder, rebutter, surrebutter, counter-claim, defence to counter claim, reply, etc.

Judicature Acts introduced by Lord Chancellor Selborne in 1873 and by Lord Chancellor Cairns in 1875 purported to reform pleadings, but Mullany said 'they did not introduce a system which operated to define the issues in dispute between the parties' A committee chaired by Lord Chief Justice Coleridge in 1881 'supposed' from the statistics for more than 20,000 cases in 1879 that 'pleadings were of little use', but all attempts at reform have been sabotaged. Mullany quoted Peter Hayes QC, of Melbourne, as stating in a 1998 paper for the Law Institute of Victoria:

> I think that pleadings are a big heap of crap, essentially … the rules - call it anal retentiveness - … are nonsense, are all an impediment these days to justice.

In 1998, the WA law reform commissioners – WA Bar Association President Wayne Martin QC, Professor (now Justice) Ralph Simmonds, and Crown Counsel (now DPP) Robert Cock QC – said:

> It is our opinion that for so long as the Australian litigation system is based on the adversarial tradition … attempts to bring about *substantial* reform of the current system of written pleadings with a view to facilitating the more efficient administration of justice will fail.

They effectively recommended a return to pre-adversarial oral pleading, i.e. a procedure which 'resembles most closely that prevailing in Germany'. They said the change could generally be made 'without the assistance of the legislature', but it still had not happened in 2005.

iii. Discovery

Discovery is moving documents from one law office to another. A courier will do it for $10. Lawyers for one client ask lawyers for the other to 'discover' and hand over documents which might help their side or hinder

the other's. The other side responds with lists of the documents they are prepared to reveal, those no longer available and why, and those they want to conceal grounds of privilege, e.g. client-lawyer secrecy. Justice Peter Heerey, of the Australian Federal Court, described the process in *Trade Practices Commission v Santos Limited and Sagasco Holdings Limited* (1993):

> … a burgeoning army of lawyers were recruited into ... discovering, inspecting, filing, listing, copying, storing, carrying about and otherwise dealing with 100,000 documents ... [Junior lawyers] ensnared in the discovery process [said]: 'I have been Santossed.'

Discovery, originally a monopoly of equity lawyers, i.e. those who worked in the corrupt Chancery Court, was extended to common lawyers by the Common Law Procedure Act of 1854. A few words by Lord Justice (of appeal) William Baliol Brett (1815-99) in the so-called birdshit case, *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company* (1882) has made billions for lawyers. He said any document is discoverable if it **might**, directly or **indirectly**, lead to a 'train of inquiry' which **might** help the lawyer's case or damage his adversary's. (Emphasis added.)

The G*uano* precedent made discovery open-ended, but only a very few documents are relevant. Lord (as he now is) Steyn said in 1992:

> [Discovery] contributes to the tyranny of modern litigation … It is the experience of Commercial judges that usually 95% of the documents contained in the trial bundle are wholly irrelevant and never mentioned by either side.

Justice David Ipp, then of the WA Supreme Court, said in *Reforms to the Adversarial Process in Civil Litigation*, Part II (Australian Law Journal, 1995): ' … the usual result is that the number of those documents that are critical to the result of the trial are substantially less than 50 [but] sometimes hundreds of thousands [are] discovered.' Or millions. *The Economist* reported in 1992 that discovery accounts for 60% of the time and money spent on US lawsuits, and that in 1988 a Louis Harris survey showed:

> … a big majority of litigators for both plaintiffs and defendants said that discovery is used as a weapon to increase a trial's cost and delay to the other side (nearly half said lawyers use it to drive up their own charges) … In an IBM antitrust [monopoly] suit, discovery took five years and produced 64 million pages of documents … A partner at a big [US] law firm bragged to law school students about a long anti-trust case: 'My firm's meter was running all the time – every month for 14 years.'

That indicates that nearly 50% of lawyers habitually use discovery to extort from their own clients.

3. Unfair Bias in Favour of Plaintiffs

Jurist Brett Dawson says aspects of civil law, notably in negligence and libel (outside the US), are unfairly biased in favour of plaintiffs' lawyers; the bias encourages people to sue, and the sued have to pay lawyers to defend them. The bias is compounded by the fact that in eight centuries jurors have never had to give reasons. They can thus award unjust sums to plaintiffs in the belief that they are redistributing wealth and punishing rich companies. In reality, they enrich lawyers and punish shareholders.

i. Negligence/Product Liability

The simple fact is that no one can define negligence, nor in most cases is it possible to form an accurate view of the facts.

- Justice Russell Fox, *Justice in the 21st Century*

Lord (James Richard) Atkin (1867-1944) had a dome as bald and conical as Humpty Dumpty's or M. Hercule Poirot's, and he was as capable of high octane drivel as either. His definition of the undefinable in *Donoghue v Stevenson* (1932), a House of Lords appeal concerning an alleged (but unproved) snail in a bottle of Scottish ginger beer, contained three variations of the word 'reasonable' in a few lines. Lawyers rub their hands when they hear that word: it has as many meanings as there are human beings; they can argue that almost any act or omission is unreasonable. Lord Atkin thus made negligence law totally unpredictable and billions for lawyers. He said:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour … You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my acts that I ought reasonably to have them in contemplation …. (Emphasis added.)

Lord Atkin did not say the 'neighbour' should exercise common sense and personal responsibility, e.g. in avoiding tobacco or a hole in the road. Justice Fox said Lord Atkin's 'principle'

> sounded good and proved very durable … in theory, one can talk in terms of "proximity" and "reasonable foreseeability", and "what a reasonable person would have done". In practice, these are but shibboleths which offer no obstacle to the inclination of judges and juries to provide compensation for the injured (or damaged) plaintiff … Many are not worried by this phenomenon, recognising it as a convenient form of injury (and damage) insurance, and governments are saved the necessity of introducing a scheme to achieve a similar result. It is however a very expensive pseudo-scheme because to each claim are added legal

costs and these can be 30, 40 or 50% of the amount recovered, sometimes more. Eventually, the community at large, or a large percentage of it, bears the burden, and insurance companies (if they are cautious) and lawyers profit.

The US system does not always oblige losing litigants to pay the winner's costs; it allows lawyers to charge a contingency fee of up to 40% of the payout; and it allows jurors to make punitive awards. The annual Stella Awards for outrageous negligence verdicts honour Stella Liebeck, 79, who spilled coffee on her lap at McDonald's in 1992, and was initially awarded US$2.86 million by the New Mexico District Court.

Florida plaintiff lawyers traditionally took 40% of the first $1 million in medical liability payouts, 30% of the second $1 million, and 20% of any higher amount, but in November 2004, 63% of Florida voters approved a legislative amendment which capped lawyers' fees at 30% of awards up to $250,000 and 10% of amounts over $250,000. The lawyers would thus get $500,000 of a $5 million payout, but Robert Montgomery, a West Palm Beach lawyer, complained: 'It's going to put us out of business', according to a report by Jane Musgrave in *The Palm Beach Post* of July 24, 2005. But, she noted: ' … personal injury lawyers quickly found a way around the new limits: They simply ask clients to waive their constitutional right to larger shares of any malpractice award they might get.'

The US Surgeon-General warned against smoking in 1964. Richard Boeken, 57, smoked 40 Marlboro cigarettes a day and got cancer, but swore he did not know smoking was dangerous until 1994. In 2000, Los Angeles jurors ordered Philip Morris shareholders to pay him US$3000 million, of which his lawyers presumably expected to get at least $US1000 million. On appeal, the payout was reduced to US$50 million.

Brett Dawson says that even in a small country like Australia, lawyers get $1200 million a year from personal injury litigation, largely from lump sum payouts. A boy got eight cuts at a Sydney school in 1984. In 2002, a jury gave him $2.5 million, or $312,500 per cut. Australian obstetricians, i.e. their patients, pay A$140,000 a year for negligence insurance. Swedish obstetricians pay the equivalent of A$500 a year.

Justice David Ipp, who had moved to the NSW Supreme Court, told a conference of anaesthetists in Perth in May 2004 (*Personal Responsibility in Australian Society and Law: Striving for Balance*) that, particularly since the 1970s, 'courts throughout the common law world have awarded damages to plaintiffs without paying any regard to the concept of personal responsibility'. He said:

Since ancient times, taking personal responsibility for one's own behaviour has been regarded as fundamental to what it means to be fully human, to lead an ethical life and, therefore, to participate in a just society. Without a fully realised concept of personal responsibility, society cannot be ordered in a fair way.

That presumably also means that trial lawyers who do not take personal responsibility for doing what it takes to get the best result for the client are not fully human; do not lead an ethical life, do not participate in a just society; and prevent society from being ordered in a fair way.

Justice Russell Fox said his concern on negligence law was 'the waste in cost involved, and court time, and damage to court integrity'. He noted that Justice Rae Else-Mitchell, of the NSW Supreme Court, said in 1972: ' … the case for all claims arising out of motor vehicle and industrial accidents being decided on a no-fault basis by an administrative tribunal is unanswerable … more people would be able to go to court and the taxpayer would be better off in the end.'

No-fault eliminates lawyers because there is nothing to argue about, and thus eliminates blackmail and increases the money available to care for victims. It also eliminates Santa Claus judges and jurors, but lawyers say it deprives individuals of basic common law rights. There is more money in rights than fairness.

ii. Libel

Except in the US, libel law offends fairness and justice. Geoffrey Robertson QC wrote in *The Justice Game*:

> London is the libel capital of the world because English law heavily favours plaintiffs … So there have been celebrated cases where newspapers have published the truth, yet lost.

Sydney also claims the title. A US researcher, John Wicklein, reported in the *Columbia Journalism Review* (November/December 1991):

> By a recent count, 142 defamation actions against newspapers, most of them filed by politicians and businessmen, were pending in Sydney, which has been called the libel capital of the world. This is nearly twice the libel suits filed in the entire United States in any one year.

Law professor Ray Watterson, of the University of Newcastle (Australia), noted in *Media Law in Australia* (Oxford, second edition, 1988) that Lord Atkin 'conceded in *Sim v Stretch* (1936) that judges and textbook writers alike have found difficulty in defining with precision the word "defamatory".' Professor Watterson explained how libel law works:

> The mere publication of words defamatory of the plaintiff gives rise to a *prima facie* cause of action … a plaintiff has the benefit of the presumptions of falsity and of damage. He is not required to prove that the words are false; the law presumes in his favour that they are. The law also presumes that defamatory words cause harm. Thus it is not necessary for the plaintiff to … to prove that he

suffered material or financial loss … Furthermore, a plaintiff is not required to establish that the defendant intended to harm his reputation …

Libel law thus oppresses defendants (and the community) because it is unfairly biased in favour of plaintiffs by a string of false presumptions: appearance (reputation) is always to be preferred to reality (character); the private right to reputation is always to be preferred to the public right to information; a slur is always false; the author of a slur is always guilty; the subject of a slur is always innocent; a slur is always intentional and always causes damage.

The bias encourages 'libel terrorism' as practised by Robert Maxwell (1923-91), an organised criminal, asset stripper, newspaper proprietor, and megalomaniac. He won one libel action only, but London libel lawyer David Hooper wrote in *Reputations Under Fire: Winners and Losers in the Libel Business* (Little, Brown, 2000):

Robert Maxwell learned early in his career that English libel law was an extremely useful device for concealing the truth about his reputation and his business methods. Defendants had to prove the truth of what he had striven successfully to cover up, and that was both costly and difficult … Over a period of 30 years Maxwell developed a policy of using the law of libel to terrorise his opponents. His libel actions covered every aspect of his career: publishing, politics, newspapers and football. As his business empire collapsed, so his fired out his last bevy of writs to muzzle the press.

Another effect of the bias is that liars and their lawyers get money from honest soldiers for truth. A short list:

Politician Jack Profumo, who falsely denied that he and Christine Keeler jumped into Lord Astor's swimming pool and engaged in carnal congress therein. Pianist Wladziu Valentino Liberace, who falsely swore he was heterosexual. Politicians Aneurin Bevan, Dick Crossman and Morgan Phillips, who falsely denied they were 'pissed as newts' at a conference of Italian Socialists in Venice. Lord (Bob) Boothby, who falsely denied he had a sexual relationship with an organised criminal, Ronnie Kray. Dr John Bodkin Adams, who falsely denied he was a serial killer of Eastbourne widows. Juni Morosi, a secretary, who falsely denied she had sex with the Deputy Prime Minister of Australia, Dr Jim Cairns. NSW Police Commissioner Fred Hanson, who falsely denied he was corrupt. Sir Les Thiess, an industrialist, who falsely denied he bribed Sir Johannes Bjelke-Petersen, Premier of Queensland.

Sir Robin Askin, Premier of NSW, falsely denied he was an organised criminal, and would probably have got money from a politician, John Hatton, but sadly died before the case got on.

In 2005, Australia's first law officer, P. Ruddock, 61, had a plan to allow people to sue from the grave. In *Justinian,* I reminded him that Voltaire observed in 1785: 'We owe respect to the living; to the dead we owe only

truth', and said that any such legislation would inevitably be dubbed the Askin/Murphy clause in honour of Askin and High Court Justice Lionel Murphy, who was also a criminal.

Libel law has protected powerful and respectable organised criminals for seven centuries. It began with Edward I's Statute of Westminster (1275), which invented the crime of *Scandalum Magnatum*, slandering the magnates, most of whom were robber barons, but truth, at least nominally, was a defence. The legislation was re-enacted in 1378 to include judges, prelates, and certain named officials, many of whom were corrupt.

The printing press, introduced to England by William Caxton in 1477, threatened the reputations of the powerful. The Licensing Act of 1538 forbade books to be printed without a licence, thus enforcing pre-publication censorship. The *Scandalum Magnatum* was re-enacted in 1554 and again in 1559 with new clauses on 'seditious words' which might cause disaffection against authority; ears were cut off for a spoken slur; the right hand for a written slur.

The Star Chamber dealt with some libel cases. Professor Theodore Plucknett said in *A Concise History of the Common Law* that by the time it was abolished in 1641, 'it was settled that truth was not a defence', and that this 'was a break with Roman authority', but the entire common law was a break with Roman authority.

A 'glorious' revolution in 1688 was followed by a century of rule by a corrupt Whig oligarchy, but the Whigs were tricked into allowing the Licensing Act to lapse in 1695, and modern journalism dates from the first appearance of Daniel Defoe's *The Review* on 19 February 1704.

Judges and politicians perceived that the Press would become a rival for power and a threat to corruption. Professor Plucknett noted that in 1704 Chief Justice Sir John Holt said 'it is very necessary for all governments that people should have a good opinion of it', and 'from this it seemed to follow that any publication which reflected upon the Government was criminal'.

To silence proprietors, the oligarchs resorted to secrecy – always the bottom line on corruption - taxation, libel law, and bribery. It became a crime to report parliamentary debates, and in 1712 *The Review* and other journals, including Addison and Steele's *The Spectator*, were taxed out of existence. But libel law has proved the most effective. Professor Plucknett said:

> Until 1792 the strict legal theory has been accurately summed up in these words: 'a seditious libel means written censure upon any public man whatever for any conduct whatever, or upon any law or institution whatever.'

It was thus a crime to write the truth about corrupt politicians and judges, laws, and institutions such as Parliament and the courts which were run as criminal enterprises. To ensure conviction, judges gave the verdict; jurors' only role was to decide whether the accused had published the slur.

The Zenger case helped to make the US the only English-speaking country in which freedom of information is not a legal fiction. John Peter Zenger, proprietor of *The New York Weekly Journal*, criticised the New York colonial Governor, William Cosby, and was tried on a charge of seditious libel on 4 August 1735. His Philadelphia lawyer, Andrew Hamilton, admitted that Zenger had published the slurs, but argued that citizens should have a right to tell the truth about public officials, and offered to prove the slurs were true.. The jurors insisted on finding Zenger not guilty. The verdict did not change the law, but it did diminish prosecutions for seditious libel, and helped to establish the notions that truth should be an absolute defence, and that jurors should give the verdict.

Lord Mansfield was a Whig politician who was ineffably obtuse on policy towards American colonists. In his other role, Lord Chief Justice (1757-88), he invented a lie: the greater the truth the greater the libel, i.e. the more corrupt a judge was, the greater the penalty for exposing him. Public outrage resulted in Charles James Fox's Libel Act (1792), which gave libel verdicts to jurors. Professor Plucknett said Fox's Act 'was passed in spite of the unanimous opinion given by the judges at the demand of the House of Lords', which suggests that judges greatly feared exposure.

James Madison's Amendment I (1791) to the US Constitution stated: 'Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.' But it was not until *New York Times v Sullivan* (1964) that the Supreme Court ruled, by a 9-0 vote, that the First Amendment implied freedom of information. For the court, Justice William Brennan said public officials could only win a libel case if they could show that the slur derived from 'actual malice', i.e. 'knowledge that the [material] was false', or from a 'reckless disregard of whether it was false or not'. Actual malice was later extended to cover public 'figures'.

In US libel law, the burden of proof is on the plaintiff, but in the rest of the English-speaking world it is on the defendant, and US judges have taken the view that US libel defendants cannot get justice in England. US courts usually enforce orders made by overseas courts except when based on laws 'repugnant' to US law. A Maryland court refused to enforce an English libel verdict in 1997 because, on fundamental issues of free speech and a free Press, England's law 'is totally different' from First Amendment principles 'in virtually every significant respect'.

4. Blackmail - Theft by Extortion

In negligence and libel cases, unscrupulous clients and lawyers get money by pitching worthless claims at a sum lower than the cost of litigation. They calculate that the target company will make a commercial decision to submit

to the extortion. Perth barrister Paul Mendelow noted in *Discovery: Should the Whistleblowers Stop the Train of Inquiry?* (WA Law Reform Commission, 1998): 'Parties may attempt to force favourable settlement by driving up costs [of discovery] beyond the value of the case.'

SLAPP (Strategic Lawsuits Against Public Participation) suits can amount to legal terrorism. Julian Petley noted in *Free Press* 108 (Jan/Feb 1999) that professors Penelope Canan and George Pring, of the University of Denver, invented the SLAPP acronym when they noticed 'that corporations were increasingly threatening individuals in the environment movement with actions for defamation, conspiracy, invasion of privacy, interference with business, etc'. Robert Maxwell used a SLAPP variation, libel terrorism, to rob the public of their right to information for 30 years before he jumped or fell off his boat and drowned in 1991.

Jurist Brett Dawson says a woman who asked a married man to pay her to keep quiet about their adultery could be charged with extortion, but if she went through a lawyer, it would be regarded as a legal settlement.

5. Workplace disputes

The Manuel Test, 'a fair go all round', was enunciated by NSW Conciliation Commissioner Gilbert Manuel in a 1971 wrongful dismissal case. Jurist Walter K. Olson says workplace disputes take up roughly half the business of US civil courts, but juries do not as a rule adhere to the test.

Jerold Mackenzie, who worked at the Miller brewery in Milwaukee, related an incident from *Seinfeld*, a television comedy of manners, in 1993. The 'office scold' complained and Mackenzie was dismissed. Under the Manuel Test, he might have got six months' wages, perhaps $US20,000, or been reinstated on condition that he apologise to the lady, and that she stop making a nuisance of herself. In *Mackenzie v Miller Brewing* (1997), Milwaukee jurors gave him US$26.6 million. His San Francisco lawyers, Littler, Mendelson, presumably got at least US$8 million.

In *The Trial Lawyers: The Nation's Top Litigators Tell How They Win* (St Martins Press, 1990), Emily Couric reported the case of a New York man dismissed for engaging in auto-eroticism in his office. A jury gave him $2.1 million because the employer had failed to protect him from sexually harassing himself.

Other verdicts: an American Airlines manager got $US7 million for 'discrimination' when she was not promoted; a Texaco female employee got $US20 million when she was not promoted; a sacked employee got $US1.4 million for 'emotional pain and trauma' resulting from an unfavourable reference.

6. Larceny by Trick – Tax Evasion

What, if anything, is the difference between tax avoidance, tax evasion, and larceny by trick? The brightest lawyers tend to specialise in advising rich clients how to avoid paying tax. In London, they can make £2 million a year; in Australia they can be elevated to the High Court.

Justice Russell Fox said the English legal system was originally designed to benefit landowners, and was 'later adjusted to the requirements of the wealthy and the powerful' In the 20th century, the House of Lords said the better people have a right not to pay tax, notably in a case involving the 2nd Duke of Westminster, Hugh Richard Grosvenor (1879-1953). He loved Hitler and hated Jews but had the saving grace of owning much of Mayfair and Belgravia. Lord Atkin said in *Inland Revenue Commissioners v Duke of Westminster* (1936):

> "… the deeds were … a device by which [the Duke] might avoid some of the burden of sur-tax. I do not use the word device in any sinister sense; for it has to be recognized that the subject, whether poor and humble, or wealthy and noble, has the legal right to so dispose of his capital and income as to attract upon himself the least amount of tax."

Lord Jim did not disclose how the poor and humble might evade tax. Also in 1936, the Australian Parliament took the view that fairness requires all to pay their share of tax, and that evasion is larceny by trick, the victims being the Treasury and the pay-as-you-earners who must make up the difference. Section 260 of the Income Tax Assessment Act 1936 said every "arrangement" which has the effect, directly or indirectly, of "defeating, evading, or avoiding any duty or liability imposed on any person by this Act [shall] be absolutely void".

The justice 'game' thus required tax lawyers to persuade appellate Humpties that 'absolutely' does not mean 'absolutely'; there could be an exception that would open the floodgates. In *Keighery* (1957), the deeply sinister Sir Garfield Barwick QC so persuaded High Court Chief Justice Sir Owen Dixon and Justices Sir Dudley Williams, Sir Eddie McTiernan, Sir Frank Kitto, and Sir Alan Taylor. Only Justice Sir William Webb adhered to the Parliament's instructions.

Barwick went into politics in 1958, but failed as Attorney-General and Foreign Minister, and in 1964 Prime Minister Robert Menzies QC, who contrived to get people killed in four wars which were of no concern to Australia – Europe, Korea, Malaya and Vietnam - gave Barwick a soft landing as Chief Justice of the High Court.

Don Vito Corleone presumably knew whereof he spoke when he said (*The Godfather*, 1969): 'A lawyer with a briefcase can steal more than a thousand men with guns.' But he failed to tell us how many thousand men

with guns could equal a judge with a gavel. Nor do we know how many trillions were pilfered as a result of such judgments as those by Justice Brett (discovery, 1882), Lord Atkin (negligence, 1932, tax evasion 1936), and Sir Garfield Barwick (tax evasion 1957-81). But we can quantify the amount of tax money 'liberated' from the Australian Treasury in the eight years after Barwick, Sir Victor Windeyer, Sir Harry Gibbs, and Sir William Owen finished off Section 260 in *Casuarina P/L v the Federal Commissioner of Taxation* (1970): it was $A800 million, some A$3 billion at 2005 rates.

David Marr noted in *Barwick* (Allen & Unwin, 1980) that *Casuarina* concerned "a wholly artificial scheme … to avoid tax … The Casuarina Case became the cornerstone of the tax avoidance industry …" And in *Curran* (1974), Barwick, Sir Harry Gibbs, and Sir Douglas Menzies said a profit of $2782 was a loss, for tax purposes, of $186,046. The self-employed rushed into tax schemes based on *Curran*. Some tax scheme promoters who entered into the spirit of the Barwick court went to prison, but Barwick, Gibbs and Menzies were not charged.

John Ahern, a Brisbane accountant who went to prison, explained how *Curran* worked in *A Taxing Time* (A & B Management, 1990). A company has shares worth $100. It issues 100,000 bonus shares at $1 a share. The shares are now deemed to be worth $100,100 but are actually worth about $100. The shares are sold for, say, $200, a profit of $100, but Barwick, Menzies and Gibbs would say it is a loss of $99,900.

In 1978, Treasurer John Howard resorted to retrospective legislation to get back some of the $A800 million lost through *Curran* and similar schemes, and in 1981 he introduced Part IVA to the1936 Act. The section again purported to bar 'blatant, artificial or contrived arrangements', but lawyers and Humpties can always defeat the English language. Professor Russell Mathews, an economist, said in 1980 that Australian wage/salary earners paid 81.2% of all income tax, and in 1985 he said:

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

Don Vito would understand. An Australian tax office survey in the early 90s found that 'a significant segment of the *BRW* magazine's Rich List claimed to have a taxable income below the minimum wage'. In 1999, Tax Commissioner Michael Carmody said tax schemes had caused '$3.5 billion in claims and rising'. Brian Toohey reported in *The Australian Financial Review* of July 2-3, 2005:

> When the Howard government was elected in 1996, the Income Tax Act was about 3000 pages. It is now estimated to be more than 10,000 pages, not counting the innumerable interpretative guidelines and rulings issued by the ATO …."

Lord Atkin lives. *The Financial Times* reported in April 2004: 'An international task force to combat tax avoidance is to be set up by the US, Australia, the UK and Canada. The task force, which is expected to be based in New York, will focus on tax avoidance schemes employed by business and take joint action against such schemes.'

The solution is simpler: legislation saying that minimisation, avoidance, evasion, or larceny by trick is forbidden, and that judges who find an exception to the rule will be instantly dismissed.

7. Class Actions

Thomas Pelham-Holles, first Duke of Newcastle upon Tyne, was the bagman for a corrupt Whig oligarchy for 38 years (1724-62). He found the work debilitating; he had to find 'pasture enough for the beasts that they must feed'. Likewise the law. As more young beasts are beguiled by the prospect of huge emolument, new ways of satisfying their greed must be found.

In 1960, there were 213,000 lawyers in the US; in 1991 there were 772,000. As numbers grew, judges were asked to find more pasture. Walter K. Olson notes in *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* (Truman Talley Books St Martin's Press, 2003) that in the mid-1970s, proposals 'that judges create some new right to sue' were 'all but ubiquitous'. One was deployed in *Class Actions: Let the People In*, by Beverly C. Moore and Fred Harris, in *Verdict on Lawyers* (Eds. Ralph Nader and Mark Green, Crowell 1976). Olson wrote:

> Moore and Harris argued that courts should act to make it much easier for lawyers to file class-action suits against American business. [They had] a long list of the injuries, ailments, frustrations, and indignities of everyday life over which, in their opinion, the courts should permit class-action lawsuits. The list enumerated some 24 varieties of harm, paired in each case with the various businesses that could be sued over them. 'Tooth decay … Sugar industry (food manufacturers)' was no. 15 … By even a conservative reckoning, the items on the list would have led to the redistribution of well over $1 trillion a year back in 1976, at a time when the gross national product (GNP) of the United States stood at $1.8 trillion … More than half the nation's GNP, in other words, would be routed through lawyers' offices. A lot of it would stay there ...

In class actions against companies, those involved are its executives, its shareholders, the alleged victims, and the lawyers. If the executives had guilty knowledge of harmful practice and/or products, they should be dealt with in the criminal courts. The Manuel Test, a fair go all round, should apply to the others.

Justice Russell Fox noted in *Justice in the 21st Century* how class actions relating to asbestos, tobacco, intra-uterine devices, breast implants, and the like should be handled and at minimum cost. He said:

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

The great Tobacco-Medicaid wheeze of the 1990s should dispel any doubt that the adversary system is largely about money. It can be considered in terms of the Manuel Test, a rule which - at least nominally - 'bars a lawyer from charging or collecting a clearly excessive fee', and the practice known as 'pay to play'. Olson said in pay-to-play elected officials farm out public legal work to law firms which have donated to their campaigns.' The practice is deplored – if no more – by the American Bar Association.

Most tobacco suits failed on the ground of personal responsibility because the Surgeon-General had warned in 1964 that smoking is a risk, but in 1993 a Mississippi lawyer, Mike Lewis, gave Mike Moore, the Mississippi (Democrat) Attorney-General, the idea of shifting the goalposts from individual sufferers to taxpayers who paid the Medicaid funds which cared for them. A private lawyer, Dickie Scruggs – surely a Dickens invention - had contributed to Moore's election campaign, but Moore invited him to research and develop a case.

In May 1994, Moore sought from tobacco companies $940 million said to have been spent by Mississippi on people with tobacco-related illnesses. Moore and Scruggs, known as Mo and Scro, traversed the country in Scruggs's Lear Jet to persuade state attorneys-general to join the action. Most of those who joined gave the business to private lawyers 'who', Olson said, 'were often among their most important campaign donors' He said 'a pay-to-play scandal [was] waiting to happen'.

In at least one case, pay to play seems to have meant trickle-down extortion. Catherine Crier, a former Texas judge who became host of *Catherine Crier Live* on Court TV, wrote in *The Case Against Lawyers* (Broadway, 2002) that it was alleged in 1998 that Texas Attorney-General Dan Morales 'had solicited large sums' from five law firms he hired to do the tobacco work, and that lawyer Joe Jamail was quoted in *The Houston Chronicle* as saying: 'Morales solicited $1 million from each of several lawyers he considered hiring.'

The success of the Mo and Scro tour increased the pressure on tobacco companies to cave in. In November 1998, they agreed to a Master Settlement Agreement (MSA) of US$246 billion over several decades. Cigarette prices

shortly jumped by 45 cents a pack. In view of the millions they stood to gain, lawyers handsomely waived their usual contingency fee of 40% of the payout. Olson said the fees ranged from 3% to 25%. In 2003, Dan Morales was imprisoned for four years for fraudulently trying to get US$520 million from the settlement for a lawyer friend, Marc Murr, who had done little or no work on the tobacco action.

Lawyer Robert A. Levy, author of *Shakedown: How Corporations, Government and Trial Lawyers Abuse the Judicial Process* (Cato Institute, 2004), noted in 1999: 'In Florida, judge Harold J. Cohen … denounced the state's 25 percent contingency contract, observing that the fee, $233 million per lawyer, 'shocks the conscience of the Court.' The average contingency fee worked out at about 8.8%. Levy told me in May 2005:

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

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

No win no fee sounds good, but what if you lose? In 2002, a judge obliged a tobacco company to pay a Melbourne cancer victim, Rolah McCabe, $700,000, but the Victorian Court of Appeal reversed the decision, and the children of the now-dead Mrs McCabe became liable for fees estimated to be at least A$4 million. And what if you win? A Queensland law firm, Baker and Johnson, whose logo is a charging two-horned rhinoceros, got $5000 compensation for a woman's back injury. They kept the $5000 and asked her for another $7000.

e. Keeping the Money: Lawyers' Immunity from Suit

O, the moon shines tonight
On Mrs Porter,
And on her D'Orta

- Cartel carousing shong (hic)

Lawyers' immunity from suit was invented by judges in the Court of Exchequer in 1860. Courtesy of jurist Brett Dawson, we can name the guilty men: chief exchequer baron Sir Jonathan Pollock (1783-1870) and barons Sir

William Watson (1796-1860) and Sir George Bramwell (1808-92). In *Swinfen v Lord Chelmsford* (1860), they were put to the exigency of protecting the money of a once – and, as it turned out, future – head of the judiciary who had clearly stiffed his client, Ms Patricia Swinfen.

Born Fred Thesiger, Lord Chelmsford (1794-1878) had a glittering career. He was a plucky little midshipmite, 13, at the Battle of Copenhagen, but, perhaps tiring, for the moment, of rum, sodomy and the lash, he got out at 17 and took to the bar and Tory politics. He rose to Solicitor General, Attorney General and, in 1858, to Lord Chancellor, but went out in 1859 with the 14th Earl of Derby's government. Down on his luck and with mouths to feed – his son, Alf, a future appellate judge, was still at Oxford – Lord Chelmsford had to resort to the bar. Finding himself double-booked, he took the time-honoured course of settling the action which promised the smaller fee, although Ms Swinfen had instructed him by telegram not to settle. A June 2004 editorial in FLAC (For Legally Abused Citizens) Australia noted how the Exchequer barons saved the noble lord's bacon:

> The 'reasoning' of the court was: we can't find any case where a barrister has been successfully sued for negligence, so the law must be that one cannot sue barristers for negligence.

Such impeccable reasoning cannot possibly be controverted, and the notion that lawyers cannot be sued for court work still obtains in Australia, if in few other common law jurisdictions. Its most recent assertion – largely on the ground that there must be some finality in legal actions - was *D'Orta-Ekenaike v Victoria Legal Aid* (High Court, March 10, 2005). Those for were Chief Justice Murray Gleeson and Justices Michael McHugh, Bill Gummow, Ken Hayne, Dyson Hayden, and Ian Callinan. When the lone dissenter, Justice Michael Kirby, shortly had an emergency heart by-pass operation, the legal journal, *Justinian,* commented: 'It's sad to see that the only judge on the court with a heart is now having trouble with it.'

f. Defence of the Civil Adversary System

Defenders of the civil system say its virtues include client control and neutral and passive judges. Professor Stephan Landsman wrote in a section called *Defense of the Adversarial Process* in his *Readings on Adversarial Justice: The American Approach to Adjudication* (West, 1988, sponsored by the American Bar Association):

> The adversary process provides litigants with the means to control their lawsuits. The parties are pre-eminent in choosing the forum, designating the proofs, and running the process.

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

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

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

If resolving disputes is the objective, Confucius (551-479BC) invented a lawyer-free method at about the same time that the Sophists showed lawyers how to become serial liars. In the Confucian system, mediators decide cases pragmatically on the circumstances rather than by reference to an abstract system. Despite Mao Zedong, China's system is still vaguely based on Confucian benevolence and reciprocity. In a population of 1200 million, there are said to be 800 qualified lawyers and 10 million mediators, not all, one trusts, members of the secret police.

Pro-rata, the US would have 180 lawyers, England 40 and Australia 12. London would have five lawyers, Washington two-fifths of a lawyer, and Canberra one-fifth of a lawyer. That sounds about right.

g. Getting the Guilty Off: The Criminal Process

A legal system exists to protect the community from criminals, but crime increases as the risk of incarceration decreases. Brett Dawson advises:

> Criminal law is a get-the-guilty-off game. The bias in favour of the accused encourages rich criminals to pay lawyers. If they did not have a good chance of getting off, they might plead guilty, get the discount, and save the money for when they get out.'

The richest are usually organised criminals, some powerful and respectable, some not. Dawson says getting an acquittal requires little skill; all you need to learn at law school is how to say 'I object'. The heavy lifting is done by 26 (and counting) anti-truth devices most of which were concocted by the lawyer-judge cartel after judges allowed lawyers to take control of the criminal process early in the 19th century.

Some say the adversary system produces 'procedural truth', i.e. truth according to the procedure. But truth is what the public believes it is, reality,

and procedural truth is not reality, e.g. O.J. Moreover, Judge Richard Posner's observation that the procedure is a contest of liars indicates that the spiritual home of procedural truth is George Orwell's 'lies are truth' in *1984.*

i. Conviction Rates

In *The Best Defense*, Professor Alan Dershowitz said the first two rules of what he called 'the justice game' are:

Rule I: Almost all criminal defendants are, in fact, guilty. (Brett Dawson says 'almost all' means 99%.)

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

French and German courts convict 90% of accused, i.e. they properly give 10% the benefit of the doubt. But common law judges sitting without a jury conceal damning evidence from themselves and then acquit as many as 75% of accused they know are guilty. In *The Australian* of 27 August 1994, Janet Fife-Yeomans reported an extraordinary statistic:

> 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.

Does this mean jurors are twice as intelligent as judges? Or that some judges acquit in order to avoid the embarrassment of being overturned by a higher court? Estimates of conviction rates in the adversary system vary, but it is clear that at least 50% of 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 conviction rate for murder in NSW was 26.5% and 11.5% for rape. In 2004, NSW Bureau of Crime Statistics figures showed that the conviction rate in sexual assault cases in NSW was 19%.

The Hindu reported in September 2003 that Mallikarjun Kharge, Home Minister for the state of Karnataka, had urged the Indian Government to change to the European investigative system on the ground that the conviction rate in Karnataka was 28% and the national average was 16%.

The effectiveness of the two systems can be compared through the NSW Independent Commission Against Corruption (ICAC), which uses the European system to investigate public sector organised crime. In the period 1989-95, ICAC recommended that the Director of Public Prosecutions (DPP) charge 208 persons with corruption. At trials under the adversary system, 63 were found guilty, a conviction rate of 30.3%.

Inquests also use the European system, but much of the evidence they find will not be admitted at a later trial because of the adversary system's rules for concealing relevant evidence. The Victorian Coroner,

Graeme Johnstone, found that a detective, Denis Tanner, murdered his sister-in-law, but the DPP did not charge Tanner. Nor did the South Australian DPP charge an organised criminal, Dominic Perre, although a coroner found that Perre had murdered a detective by letter bomb.

The Guinness Book of Records listed Lionel Luckhoo (1914-97), of Guyana, as the world's most successful [defence] barrister; he won 245 murder cases in a row. If 99% of his clients were guilty, Luckhoo got 241 murderers off. He was knighted in 1966, presumably for services to perverting justice, and in 1980 declared himself 'Ambassador for God'.

ii. Unfair Bias in Favour of Defence Lawyers/Criminals

Members of the lawyer-judge cartel often speak of the vital importance of a fair trial, but former prosecutor William T. Pizzi, now a law professor at the University of Colorado, says in *Trials Without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure, and What We Need to Do to Rebuild It* (New York University Press, 1999):

> … the goal of the defense attorney is not to obtain a fair trial for the defendant; a fair trail 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 like to come under attack – including not just prosecution witnesses, but the prosecutor personally as well as the judge.

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. As Justice Fox observed, the public believes that fairness means truth. So far from seeking the truth, the adversary system has some 26 anti-truth devices, including rules for concealing relevant evidence. The devices unfairly bias the law in favour of lawyers and their criminal clients, and against victims, detectives, prosecutors, witnesses, jurors, and the public.

Nonetheless, the cartel persists in claiming that concealing the truth makes trials fair because it protects accused from jurors. *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.' Professor Julius Stone QC and former Justice W.A.N. Wells put it more delicately in *Evidence: Its History and Policies* (Butterworths, 1991):

> [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.

But Stone and Wells said 'these rules are today applied to all trials, whether before a jury or before a judge alone'. That either means that judges are as unintelligent as they believe jurors to be, or there is some other reason, e.g. to make it relatively easy for lawyers to get rich criminals off. In 1794, Edmund Burke, who trained as a lawyer, said the rules of evidence were of 'so small a compass that a parrot he had known might get them by rote in one half-hour and repeat them in five minutes'. The cartel invented most of the rules and other anti-truth devices, including a discretion to conceal ALL evidence, after judges gave lawyers control of the criminal process soon after 1800. Two hundred years later, police are beginning to demand that they be allowed to protect the community properly. Ian Blair, Deputy Commissioner of London's Metropolitan Police (Scotland Yard), 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?

Even judges are beginning to say trials should be fair. 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.' But fairness requires a search for truth, and that requires the abolition of the adversary system and its anti-truth devices.

iii. 26 Anti-truth Devices

1. Precedent

Precedent is hearsay, which is usually not admitted at trial because the original speaker is not available for cross-examination which might show he was wrong, confused or had a hidden agenda. Nonetheless, *stare decisis* (the decision stands) means abiding by precedent, i.e. judges are bound by the assertions of untrained and possibly corrupt judges. Precedent thus locks all manner of injustice into the system. Significantly, it is only since the lawyer-judge cartel invented the criminal adversary system that judges have been bound by precedent Professor Plucknett wrote:

… even as late as the days of Baron Parke [1782-1868; Court of Exchequer 1834, created baron 1856] … it was possible for that very learned judge to ignore decisions of the House of Lords … The 19th century produced the

changes which were necessary for the establishment of the rigid … theory as it exists today.

The cartel claims that abiding by precedent provides certainty and predictability, but in reality it enables members to riffle through precedents until they find one that suits their agenda.

2. The Accusatorial (PROVE IT!) System

Part 2 of this book, How It Happened, notes that the accusatorial system still used in Britain and its former colonies is a relic of the Dark Ages, which technically began in 476 AD. In that system, one side made an accusation and the other said: Prove it! It was never an investigation into the truth: the 'proof' involved such mumbo jumbo as throwing a suspect witch into a river, and a hidden and inscrutable 'judge', the deity, supplied the verdict on the basis of whether she sank or floated.

In the modern version, the adversary system, prosecutors are required to prove the case after much relevant and compelling evidence is concealed. This reaches its logical conclusion when a judge conceals ALL the evidence and then invites a bemused prosecutor to prove it.

That happened in a Melbourne case in which the Australian National Crime Authority (NCA), which investigated white and blue collar organised crime, accused John Dorman Elliott, Kenneth Biggins, and Peter Scanlon were accused of stealing $66 million from a brewery they controlled. Robert Richter QC appeared for Elliott. After six months of argument (without a jury being empanelled) about what evidence would be concealed, Justice Frank Hollis Rivers Vincent said in effect he was going to suppress the evidence of 130-odd witnesses, and declared the accused not guilty when the prosecutor offered no other evidence.

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 non-trial had cost taxpayers some $20 million, or perhaps because of Elliott's self-proclaimed sexual athleticism. *Hansard* recorded Livermore as saying:

> 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 a Dark Ages system which - to continue Mr Elliott's typically delicate metaphor - raped and pillaged the body politic. The Victorian appeal court later said Vincent was wrong to conceal the evidence, but the horse had bolted: Elliott, Biggins and Scanlon could never be retried, because the common law says wrong not guilty verdicts can never be wrong (see Double Jeopardy below).

3. Client-Lawyer Secrecy

How long do you think the big-shot mobsters would last if the lawyers didn't show them how to operate?

- Philip Marlowe, *The Long Goodbye*, 1953

The privilege of client-lawyer secrecy protects rich criminals but not the possibly innocent. The argument for secrecy made by Sir James Knight-Bruce, chief judge in bankruptcy, in *Pearse v Pearse* (1846) begins with a lie and does not improve. He said:

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

The privilege first appeared in *Berd v Lovelace* (1577), a century after judges began to give lawyers control of the civil process. Perhaps indulging a taste for irony, Justice Michael Kirby, of the Australian High Court, said in *Propend* (1997): 'Early cases suggested that it [the privilege] belonged to a solicitor and derived from his honour as a "professional man and a gentleman".'

Rich criminals got a nasty surprise in 1743 when, as noted in the section on ethics, James Giffard, a Dublin solicitor but no gentleman, revealed that he had conspired with an organised criminal, the Earl of Anglesea, to procure a judicial murder. Fortunately, Justice Sir Francis Buller suddenly discovered in *Wilson v Rastall* (1792) that the privilege actually belongs to the client, not the lawyer. Rich criminals could continue to conspire with lawyers safe in the knowledge that their crimes were safe from meanly prying eyes.

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

As for the possibly innocent, a judge sent me the Australian High Court judgment in *Carter* (1995) with an instruction: 'Read this and weep.' Louis James Carter, a Brisbane accountant charged with fraud, said certain documents covered by the privilege would prove his innocence. Should judges opt for justice or law? The voices of infallibility went for law, by the usual narrow margin. Justices Mary Gaudron and John Toohey said Carter should have the documents. Chief Justice Sir Gerry Brennan, Justice Michael McHugh and a rather apologetic Justice Sir Billy Deane said he should not. Carter got four years.

4. Concocting a Defence: The Lecture

Judge (1957-59) John D. Voelker (1903-91), of the Michigan Supreme Court, published *Anatomy of Murder* (1958) under the pen name Robert Traver. It was inspired by a case in which Voelker defended the accused. Fred D. Shapiro has a quote from the book in *OxfordLQ*:

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

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

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

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

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

'Morally, perhaps, but not legally.'

Biegler told his client a murderer might not be guilty if he was temporarily mad, and to go back to his cell and think about it. The client took the hint, and got off.

In 1993, Lorena Bobbitt successfully pleaded temporary insanity to a charge of slicing off her husband's penis while he was asleep.

5. Concocting a Defence: The Theory of the Case

The theory of the case is a device by which lawyers say it wasn't our client, therefore it must be some other person or thing. Professor David Luban wrote in *Lawyers and Justice*:

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

The theory of the case may have the merit of spinning the case out and creating a 'reasonable' doubt. A Sydney lawyer, John Dobies, derided what he called the polar bear defence, which sounds like the sodomised parrot defence. He said that if the body of a murdered man had scratches on it, the theory of the case might be that a polar bear did it. The lawyers would then have to hire witnesses expert on the incidence of polar bears in Sydney, and witnesses who would say they saw a polar bear that day.

6. Delay

Peter Faris QC, former head of Australia's National Crime Authority (NCA), told the 6th International Criminal Law Congress in Melbourne in 1996:

> Excellent books have been written discussing criminal defences. In my view, the major criminal defences, in order of importance, are as follows: 1. Delay. 2.Confusion. 3. Allegations of conspiracy by the police and prosecuting authorities to conceal and tamper with the evidence, thus raising a reasonable doubt. 4. Defences set out in the excellent books.

Benefits of delay include: witnesses forget evidence or die; prosecutors tire; the cost of prosecution becomes prohibitive. Lawyers supervised the NCA's investigations into suspected organised crime, as in the Elliott case noted above. It began in 1989; charges alleging theft of $66 million were laid in 1993; the case collapsed when the judge wrongly concealed the evidence of some 130 witnesses in 1996.The NCA lawyers' dismay at the experience was recorded by its oversight body, the Parliamentary Joint Committee (PJC), in its *Third Evaluation of the* NCA (1998). The PJC reported that Greg Melick, a barrister member of the NCA, said:

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

7. Separate trials

Lawyers for several defendants can get separate trials because some evidence against one is different from that against others. And a lawyer for a person charged with several similar crimes can get a separate trial on each because all the evidence might reveal a devastating pattern. Natasha Wallace reported in *The Sydney Morning Herald* of 2 July 2004:

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

One can only wonder what Judge Latham thought of presiding at the eight trials.

8. Shifting the Goalposts

Defence lawyers naturally try to shift the goalposts from their client to the victim, police, prosecutors, or the media. Lawyer/reporter Jeffrey Toobin gives a stark example in what is generally thought to be the best account of the Simpson case, *The Run of His Life: The People v. O.J.. Simpson* Touchstone 1997).

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

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

9. Diminished Responsibility

In most crimes, the prosecution has to prove both a wrongful act (*actus reus*) and a wrongful intent (*mens rea*). It is not a crime to think about murder and

not do it, nor is it a crime to commit murder if you were mad at the time. The latter derives from a House of Lords opinion in *M'Naghten* (1843). Diminished responsibility is a relatively recent wrinkle on *M'Naghten*. In the 1960s, lawyers began to persuade judges that if the accused was a little bit mad, he might only be a little bit guilty; trials tended to become contests between paid psychiatrists.

Judge Burton Katz is not impressed. He wrote in *Justice Overruled: Unmasking the Criminal Justice System* (Warner, 1997):

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

Judge Katz may be getting dangerously close to common sense. The Katz Test may be applied to two cases. In 1978, Dan White, who had been sacked from the San Francisco public service, procured a gun; climbed through a basement window in the City Hall to evade metal detectors; evaded Mayor George Moscone's bodyguards; killed Moscone with four shots; reloaded; went to the office of another official, Harvey Milk, and killed him with five shots. White was charged with first degree (premeditated), murder.

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

Helen Garner reported in *Joe Cinque's Consolation: A True Story of Death, Grief and the Law* (Picador, 2004) that in September 1997, Anu Singh, 25, a self-obsessed drama queen and final year law student in Canberra, Australia, got advice on how to inject an overdose of heroin. During the night of Saturday, 25 October 1997, she put a knockout drug, Rohypnol, in the coffee of her amiable boy friend, Joe Cinque, 26, a civil engineer. At about 3 am on the Sunday, she injected heroin into his comatose body but he failed to die. She went out, bought more heroin and injected him again at about 10 am. He died about 2 pm. She was charged with murder.

In April 1998, Justice Ken Crispin, sitting without a jury, agreed with psychiatrists who said Singh's responsibility was diminished because she was somewhat mentally disturbed. He found she was not guilty of murder but guilty of manslaughter and gave her a minimum of four years, backdated to the date of her incarceration, October 26, 1997. Anu Singh passed her law finals in prison, and was out in October 2001. A glittering

career was predicted: robbing a human being of his life is the cruellest action; adversarial cross-examination is the Theatre of Cruelty.

Noting 'the ugly divide between morals and the law', Garner asked whether 'the moral failure of the law' gives judges an 'icy chill'? As noted, the law has no moral compass because it does not seek the truth, but moral failure does not appear to chill judges; if it did, they would, like Judge Katz, try to do something about it.

10. The Abuse/Self Abuse Excuse

Lyle and Erik Menendez, of Hollywood, planned their parents' murders and claimed that years of verbal, physical, and sexual abuse made them fear they were going to be killed. A psychiatric witness offered research on snails to support her claim that fear had 're-wired' Erik's brain. In 1993, jurors were divided; some felt they were guilty only of manslaughter. At the second trial in 1996, much of the abuse evidence was ruled irrelevant, but a claim that Erik suffered from Post Traumatic Stress Disorder (PTSD) was admitted. It was asserted that PTSD prevented him from formulating thoughts necessary for premeditated murder, but both were found guilty of murder.

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

11. Privilege Against Self-Incrimination/Right of Silence

Sir Harry Gibbs, Chief Justice of the Australian High Court, defined the privilege against self-incrimination - of which the right of silence is a part - in *Sorby v The Commonwealth* (1983). Quoting *Lamb v Munster* (1882), he said a suspect cannot be compelled 'to answer any question, or to produce any document or thing, if to do so "may tend to bring him into the peril and possibility of being convicted as a criminal".'

The privilege provides confirmation, is such were needed, of the thesis that the law is a get-the-guilty-off game. Cambridge law professor Glanville Williams said in *The Proof of Guilt: A Study of the English Criminal Trial* (Stevens, 1963): ' … immunity from being questioned is a rule which by its nature can protect the guilty only. It is not a rule that may operate to acquit some guilty for fear of convicting some innocent.' US Chief Justice (1953-69) Earl Warren (or his law clerk – it is believed that clerks write Supreme Court opinions) thus spoke truer than he knew when he said in *Miranda v Arizona* (1966) that the privilege is 'the essential mainstay of our adversary system'.

The correct formulation of suspects' duty is attributed to St. John Chrysostom (c. 347-407), a Syrian lawyer and Archbishop of Constantinople.

He said no one has to volunteer guilt, but if accused, he must show his innocence, if he can. That became canon law. Justice Ken Marks, of the Victorian Supreme Court, quoted the canon law in '*Thinking up' about the right of silence and unsworn statements* (*Victorian Law Institute Journal*, 1984). In Latin, it reads: *Licet nemo tenetur seipsum prodere, tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare*, i.e. Although no one is compelled to accuse himself, yet one accused by rumour is compelled to present himself to show his innocence if he can and to clear himself.

The modern privilege is based on a 16th perversion of canon law which was exhumed by Blackstone, entombed in the US Constitution, and imposed on the system after lawyers got control of the process. Thus:

Chief Justice Sir James Dyer, president of the Court of Common Pleas, turned canon law on its head in 1568; he extracted *nemo tenetur seipsum prodere* - no one is compelled to accuse himself - and used it to free a suspect. Judges ignored Dyer for 200 years; but Blackstone wrote in 1765: 'At the common law, *nemo tenebatur prodere seipsum*.' (No-one was compelled to accuse himself.). That was not the common law at all, Yale professor John Langbein's research on the period 1660-1800 showed there was not 'a single case in which an accused refused to speak on asserted grounds of privilege, or in which he makes the least allusion to a privilege against self-incrimination'.

Jeremy Bentham observed (in 1827) that the privilege was irrational and was perpetuated only by those 'duped and corrupted by English lawyers', i.e. Blackstone. One dupe was James Madison; his Fifth Amendment (1791) to the US Constitution states: ' … nor shall be compelled in any criminal case to be a witness against himself.'

The privilege certainly gets the guilty off. Law lecturer David Dixon, of the University of NSW, said in 1997 that about half those who stayed silent were convicted. Since 99% of accused are guilty, it appears that the privilege alone gets 50% of serious criminals off. Alun Jones QC said: 'I am told that over half of all defendants in America decline to give evidence.'

Justice Lionel Murphy, of the Australian High Court, was charged with perverting justice. He gave evidence, was seen to be shifty and evasive and was found guilty, but got a retrial on a technicality, refused to give evidence, and got off in 1986. O.J. Simpson got off two murder charges largely because of race, but staying silent was useful; he had to speak at his civil trial in 1996, was seen to be shifty, evasive and contradictory, and was found responsible for the murders.

As a matter of human dignity, suspects can remain silent if they choose, but (except in the UK since 1994) guilt cannot be inferred from their silence Justice Geoffrey Davies, of the Queensland Court of Appeal, pointed out in "*The Prohibition Against Adverse Inferences from Silence: A Rule without a Reason?*" (Part 1, *Australian Law Journal*, 2000):

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

Immunity from adverse inference from silence became a rule of law in the second half of the 20th century. The Australian High Court edged towards removing the immunity in *Weissensteiner v Her Majesty* (1993), and England abolished it in 1994, but it was largely restored by the Commonwealth and NSW *Evidence Acts* of 1995. Section 20 (2) of the NSW Act says judges - but not prosecutors - can comment on an accused's refusal to speak, but cannot suggest it was because he was guilty.

12. Extension of Presumption of Innocence.

The presumption of innocence is a legal fiction; if taken literally, no criminal would be charged. The reality is a presumption of agnosticism: the suspect/accused may be innocent, or he may not. Stone and Wells note in *Evidence*: 'The presumption of innocence is entirely flexible. If the omission to do an act would be illegal, the law presumes that it was done; if the doing of it would be illegal, the law presumes that it was not done.' There are also presumptions of guilt in libel and contempt and, in some jurisdictions, goods in custody. If, for instance, police find 10 kilos of heroin in the trunk of a man's car, he is presumed guilty unless he can prove it is not his.

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

The latter has spawned another legal fiction: repeat offenders, e.g. rapists, are presumed to be first offenders even if they have been found guilty of several previous rapes. The House of Lords birched Lord Chief Justice Rayner Goddard for saying of pattern evidence (*R v Sims*, 1946): 'If one starts with the general proposition that all evidence that is logically probative is admissible unless excluded [by a specific rule], then evidence of this kind does not have to seek a justification.' Their lordships said (*R v Hall*, 1952) he was wrong because his proposition tended to subvert the presumption of innocence. Lord Goddard might have replied that probative evidence tends to subvert the presumption of innocence, but had to toe their line.

13. Preliminary (Committal) Hearings

In theory, preliminary hearings exist to allow a minor judicial officer to decide whether the evidence is sufficient to commit an accused for trial. This

presumes that all District Attorneys and Directors of Prosecutions are incompetent. The reality is that preliminary hearings enable lawyers to increase their business, to concoct a false defence; to 'destroy' prosecution witnesses out of the sight of jurors, and hence to encourage them not to subject themselves to cross-examination at trial.

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

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

14. Cross-Examination - General

Is it not true that last night you committed sodomy on a parrot?

- Irving Younger

Younger's technique goes back to the Sophists, but the modern format of cross-examination is a product of lawyers' takeover of the civil process beginning about 1460. Sir Thomas Smith (1513-77) noted in *De Republica Anglorum* (published 1583) a jury 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), dean of the law school at Northwestern University, Evanston, Illinois, said in *A Treatise on the System of Evidence in Trials at Common* Law (1904) that cross-examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of truth'. That is true, but it has little meaning; defence lawyers do not seek the truth, and their clients can avoid cross-examination by remaining silent.

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

Defence cross-examiners aim to create a 'reasonable' doubt in the mind of at least one juror. Techniques include shifting the blame, lying to witnesses, interminably asking the same question with slight variations to

trick them into answering Yes when they mean No; and use of verbal thuggery to intimidate and 'destroy' them.

Because 99% of clients are guilty, defence lawyers fear the truth. Irving Younger's 10 Commandments of Cross-Examination include: 'Never ask a question to which you don't already know the answer.' Even Atticus Finch (*To Kill A Mockingbird*, 1960), who put thousands of young idealists into the wrong 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 lawbooks 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".'

Defence cross-examination is inevitably anti-truth, anti-fairness, anti-justice, and anti-morality. By contrast, in the pro-truth investigative system, a trained judge questions witnesses in a neutral way and does not allow lawyers to confuse the issue.

15. Cross-Examination: Sex Crimes Against Girls and Women

A 1993 British Home Office study showed that 99% of rapists escape justice. The NSW Bureau of Crime Statistics and Research estimated that 12,000 NSW women were victims of a sexual or indecent assault in 2003, but only 2707 reported the crime to police; 858 were charged; and 361 were found guilty. The conviction rate is 3% in terms of estimated victims, partly because brutal and pornographic cross-examination deters victims from testifying. Dr S. 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.

'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.' 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.

16. Cross-examination: Sex Crimes Against Children

In a 1999 report by the Australian Broadcasting Corporation's *Four Corners* on sex crimes against children, 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 thus a witness, an immediate complaint, and evidence corroborating the boy and his mother, but 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 John, 7. Defence barrister Russell Clutterbuck cross-examined the boy for five hours, with breaks to stem the sobbing. He asked him detailed 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 Taylor told Tadros: '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"?' Not surprisingly, an Australian study found that lawyers and judges whose children had been sexually violated would not allow them to suffer the second trauma of cross-examination.

17. Cross-examination: Yes-No Answers

The oath imposed on witnesses is a legal fiction; the whole truth cannot be told through Yes-No answers, e.g. Have you stopped beating your wife? But Irving Younger said: 'Never permit the witness to explain his or her answers.' Insistence on yes-no answers allows lawyers to cross-examine to oblige witnesses to agree with things they do not believe.

18. Cross-examination: Theft by Extortion

Fear of barbaric cross-examination induces women not to report rape, or, having reported it, not to proceed from preliminary hearing to trial. Cross-examination of that sort is thus a form of blackmail, i.e. theft by extortion: it robs victims of justice.

19. Rule Against Secondhand Evidence (Hearsay)

If the rule against hearsay is valid, no history prior to say, 1900, would be accepted; the law says such evidence is inadmissible because the original speaker is not available for cross-examination. O.J. Simpson (who did not make himself so available) was alleged to have cut the throat of his former wife, Nicole. At his trial in January 1996, Judge Lance Ito concealed hearsay evidence of diary entries in which she said she was afraid Simpson might kill her. He also concealed evidence that she rang a refuge five days before her death and said she was afraid because Simpson was stalking her. Ito said:

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

In *Howzat?* (*London Review of Books*, 25 September 2003), Lord Justice Stephen Sedley said the English and US criminal process is still caught up 'in the absurdities of the rule against hearsay evidence … which even lawyers have difficulty in understanding and applying. (Is it permissible to testify that when the accused ran off, someone shouted "Stop thief!" and so on.)'

In the investigative system, hearsay evidence is weighed, not concealed. That was also the common law rule until lawyers got control of

the process. Professor Julius Stone and former Justice W.A.N. Wells said in *Evidence: Its History and Policies*:

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

One exception to the rule is for statements made by people who know they are dying. A sailor named Riley was stabbed on an Australian navy vessel in March 1942. Before he died, he told a doctor that Acting Leading Stoker A.R. Gordon and Stoker E.J. Elias did it, but that was held to be inadmissible hearsay, because the doctor did not tell Riley he was about to die.

20. Rule to Conceal Evidence of a Pattern of Criminal Behaviour

The rule against evidence of a pattern of criminal behaviour, aka the rule against similar facts, obliges prosecutors to falsely imply to jurors that the accused is a first offender. In a 2003 theft case, an incompetent Welsh thief was found not guilty after his 247 previous convictions for theft were concealed from the jury. The rule is thus unfairly biased in favour of lawyers for repeat criminals, e.g. sexual predators and organised criminals, pin-striped and otherwise. Oliver Cyriax, a lawyer, wrote in *The Penguin Encyclopedia of Crime* (Penguin 1996):

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

The rule is a relatively recent concoction. Prosecutors could produce evidence of other crimes which might show 'that the accused is a person likely to have committed the offence for which he is being tried' until Lord Chancellor Farrer Herschell (1837-99) ruled otherwise in *Makin v Attorney-General of NSW* (1894). *Makin* established that judges must conceal pattern evidence unless to do so would be 'an affront to common sense', but common sense is a stranger to the system. Dr John Forbes, of the University of Queensland, noted in *Similar Facts* (Law Book Company, 1987) that New Zealand appellate judges said in *R v Hall* (1887):

> Viewed in the light of science or common sense … the common law must often result in what the public may regard as a failure of justice. That is really not our concern.

The US has an exception to the rule for organised criminals in the Mafia, the courts, and Wall Street. After Joe Valachi, a hitter in the Genovese family, explained the structure of the Mafia to a Senate committee in 1963, Senator John McClellan's legislation aimed at organised criminals was in hand in 1968 when Richard Nixon became President with a policy against organised crime. It was passed in 1970 as the Organized Crime Control Act, Title IX of which is called Racketeer-Influenced and Corrupt Organisations, or RICO for short. Since RICO made it harder for lawyers to get rich criminals off, I asked its architect, law professor Bob Blakey, now of Notre Dame, in 2001 how he got it past the American Bar Association. He replied:

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

RICO's effect on the Mob confirmed that the rule against pattern evidence perverts justice on a huge scale. From 1981 to 1992, RICO put away 23 previously untouched Mafia bosses throughout the US, including heads of the five New York families: Frank (Funzi) Tieri and Anthony (Fat Tony) Salerno (Genovese family), Anthony (Tony Ducks) Corallo and Vittorio Amuso (Lucchese), Carmine (The Snake) Persico and Vicorio Orena (Colombo), John Gotti (Gambino). Vincente (Chin) Gigante (Genovese family) was convicted in 1997. RICO was also used from 1984 to 1994 to gaol 20 Chicago judges for extorting bribes and 50 lawyers for paying them.

In 1994, US federal rules of evidence were revised to allow the use of prior alleged acts in federal sex cases, and a few states, including California, Indiana, Illinois and Missouri adopted similar rules.

In 2004, British Home Secretary David Blunkett, announced a plan to give judges a discretion to let jurors hear of an accused's previous convictions. He said: 'These reforms put victims at the heart of the justice system. Trials should be a search for the truth [!] and juries should be trusted with all the relevant evidence to help them to reach proper and fair decisions.' If the British Government really believed that, they would abolish the other anti-truth devices. In any event, it is unwise to give judges a discretion; as lawyers, they believed that farness means concealing evidence.

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

21. Rule to Conceal Evidence Said to Have Been Improperly Gained

Common law countries vary on concealing evidence said to have been gained improperly. England tends to let the evidence in if it is reliable, and Canadian and Australian judges are supposed to admit it if it is reliable and the alleged offence is worse than the investigators' alleged improper behaviour. In the US, where it is called the exclusionary rule – as if it is the only rule for concealing evidence - *Mapp v Ohio* (Supreme Court 1961) obliges judges to conceal ALL such evidence. Circumstantial evidence suggests that the Chicago Mob effectively appointed *Mapp*'s architect, Justice Tom Clark.

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

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

22. The *Christie* Discretion to Conceal ALL Evidence.

The *Christie* discretion is a piece of metaphysical claptrap expounded by Lord Reading and other law lords in *Rex v Christie* (House of Lords, 1914). It expanded a general discretion to conceal some evidence on the ground of 'fairness' to a discretion to conceal ALL evidence, however damning. Stone and Wells said in *Evidence* that the evidence so concealed 'must be of comparatively little probative weight [and] this slight relevance must be accompanied by a great potentiality for prejudice'.

The judge could thus not consider the prejudicial effect unless he had first decided that the evidence only slightly (?) tended to prove guilt. Perhaps the required ratio was 10% probative and 90% likely to convict. In practice, however, it seems likely that some judges, subconsciously or otherwise, first note that the evidence is likely to cause a guilty verdict, and then decide it is only slightly probative. Even if he is plainly wrong, the prosecutor cannot get a second opinion from a higher court: the judge's opinion concerns facts and appeal courts deal only with law.

The authority on the discretion, Dr John Forbes, of the University of Queensland, noted in *Evidence in Queensland* (The Law Book Company, 1992):

> 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.

Dr Forbes said the '*Christie* discretion may contain "a large subjective element' [*R v Sang*, 1980], and its operation may sometimes be 'whimsical or idiosyncratic' [S*elvey v DPP, 1970*]. Judge Brian Boulton revealed in 1992 that Judge John Helman, head of the Queensland District Court, had admitted that if different judges applied the discretion to the same evidence the result might be 'chaos'.

The District Court, popularly known as the Dizzo, was the scene of the trial, mentioned in the Preface, of Sir (as he then was) Terence Lewis, who contrived to be at once a major organised criminal and Queensland Police Commissioner. The prosecutor, Bob Mulholland QC, said some of the evidence excluded under the discretion was 'incapable of being categorised as of slight or trifling weight'. Among that evidence was a tape of a phone calls between Sir Terence's bagman, Jack Herbert, and another accomplice, Barry MacNamara, in which they fret that Sir Terence had stiffed them and a John Garde of $1,000 – $333.33 each – from the proceeds of a $25,000 bribe extorted from Jack Rooklyn, a Sydney yachtsman and organised criminal.

MacNamara said: 'Oh, I think it is a shitty trick, you know, I really do … And to think, for a fuckin' shitty thousand dollars … I think it's a very bad act.' Later, he said John [Garde] 'took it badly … he's going to give that bloke [Lewis] a grand light this month', but Herbert cautioned: 'Terry loves this stuff'; he might be a bit upset if I did it back to him'. Judge Tony Healy told John Jerrard, for Sir Terence, that 'the conversation tends to suggest … that your client is a person who is capable of ratting on his friends … It would be very prejudicial to him to let it in, so I am excluding it'.

The probative/prejudicial ratio in the *Christie* discretion was changed dramatically by the Australian and NSW *Evidence Act* 1995. 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.' On a scale of 100, the ratio thus went from, say, 5/95 to 49/51; the gap was reduced from 90 to virtually zero.

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 his 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.

23. Reasonable Doubt (for a Reasonable Price)

After the right of silence, the formula for the standard of proof, beyond reasonable doubt, is the single most effective device for getting rich criminals off: because jurors do not know what the formula means, and,

because of the curse of precedent, judges are not allowed to tell them it simply means what the French formula says: are you intimately (thoroughly) convinced?

The Anglo-American formula, and judges' refusal to explain it, is thus a major player in the get-the-guilty-off game which followed the handover of the criminal process to lawyers. Yale law professor John Langbein wrote in *The Historical Origins of the Privilege Against Self-Incrimination at Common Law* (Michigan Law Review, March 1994):

> … 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:

> … 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.

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.'

Unlike the US, it is a crime in NSW to seek information from jurors. John Laws, a Sydney broadcaster, was given a suspended sentence of 15 months for asking a juror why she apologised to the widow of Angelo Cusumano for the not guilty verdict of a man charged with murdering her husband. The juror had 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.

In a case of alleged insider trading noted in Section 3, the defence was that the accused, Hannes, did not buy certain shares; a Mr X did. Hannes did not produce Mr X, but his lawyers argued that the prosecution could not prove beyond reasonable doubt that Mr X did not exist.

24. 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. Since common law jurors have never had to give reasons, the system has thus been open to corruption since it was invented in 1166, e.g. Rodney King, O.J. Simpson, Michael Jackson, and a man tried for heifer-rustling at Dubbo, NSW. Melbourne barrister Aubrey Gillespie-Jones reported the Dubbo 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. 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'.

25. Rule Against Double Jeopardy for Those Found Not Guilty

In the adversary system, double jeopardy means no acquitted person can be tried twice for the same crime, although more than 50% of acquittals are wrong, Some are obviously perverse, e.g. O.J. Simpson, and in some the judge wrongly concealed evidence e.g. Elliott, Biggins and Scanlon noted above. Nor can acquitted criminals be retried when new and compelling evidence, e.g. DNA (deoxyribonucleic acid), emerges. Justice perverted in favour of criminals must stay perverted forever. On the other hand, 1% of guilty verdicts are wrong and can properly be appealed and the case retried.

Double jeopardy goes back to ancient Greece, but the Anglo-American version derives from confusion or worse over an event at the very beginning of the common law. In 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 insisted that no man should be punished twice for the same offence.

That those previously found **guilty** (*autrefois convict*) and punished should not be tried twice for the same offence seems fair. However, judges who, at best, could not think straight, later purported to believe it also meant that those found **not guilty** (*autrefois acquit*).should not be tried twice.

Needless to say, Blackstone parroted that ancient nonsense in 1765. He said 'no man is to be brought into jeopardy of his life, more than once, for the same offence', and that was fatally echoed in the fifth amendment to the US Constitution in 1791: ' … nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.'

When Britain finally and retrospectively abolished double jeopardy for those acquitted of major crimes from Monday April 4, 2005, the National Crime Faculty calculated that 35 persons acquitted of murder could be re-investigated and new charges brought. The Bar Council and so-called civil liberties groups opposed the legislation, but a Home Office spokesman stated the obvious:

> It is important 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.

The truth-based investigative system naturally allows not guilty as well as guilty verdicts to be appealed and, if necessary, retried.

26. Plea-Bargaining: A Step Towards Abolishing Trials Altogether

Professor John Langbein wrote in *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*: ' ... when our criminal

procedural system crumbled in the twentieth century under caseload pressures, our response was to dispense with trial altogether, transforming the pre-trial process into our notarial plea bargaining system.'

Caseloads may be a factor, but plea-bargaining, notably the US, is an admission that the anti-truth devices make it difficult to get convictions. Prosecutors thus offer major criminals a no-risk bargain: accept a large fine or a few years in prison against the possibility of going to prison forever.

iv. Legal Aid

If the anti-truth devices make the adversary system a fraud on the community, the fraud is compounded by obliging the community to pay lawyers to obscure the truth, get criminals off, and generally pervert justice. Legal aid should only be paid to lawyer to help the system find the truth.

h. Perversions of Justice Against the Innocent

Under our system of justice, it is better that 10 guilty men go free than that one innocent man be convicted.

- W. Blackstone 1765

The reality is that at least one innocent person is found guilty, and more than 50 criminals go free, but lawyers endlessly regurgitate Blackstone. He said those words when lawyers were at last finding money in criminal work. When judges gave them final control of the criminal process some 40 years later, Blackstone's words gave the cartel an excuse to start inventing the get-the-rich-off devices noted above, and the bar was shortly raised tenfold; law professor Thomas Starkie KC, of Cambridge, said in 1824:

The maxim of the law … is that it is better that 99 … offenders shall escape than that one innocent man be condemned.

The adversary system's win-at-all-costs culture gets the worst of both worlds; many criminals get off, and some innocent, particularly the unrich, suffer perversions of justice. It is estimated that at least 1% of British prison inmates are innocent, i.e. 700 of 70,000 in 2002. In Australia, at least 235 of 23,555 inmates in 2003 were probably innocent. In the US it is estimated that upwards of 5% are innocent, i.e. perhaps 105,000.of 2.1 million in 2004.

1. The US

The number of innocent inmates clearly make it too risky for guilty verdict to proceed to execution. As noted above, 12 of 285 (4.2%) on Death Row in Illinois were found to have been wrongly convicted. If the same percentage applied in Texas, six of the 152 executed during the term of Governor George Bush on the advice of Alberto Gonzales were probably innocent.

The US Bureau of Justice Statistics (BJS) 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 in 1936 on fabricated evidence for allegedly kidnapping Colonel Lindbergh's baby.

The Supreme Court voted 5-4 to abolish the death penalty in *Furman v Georgia* (1972). Justices Potter Stewart, Byron White, William Douglas, William Brennan, and Thurgood Marshall outvoted Chief Justice Warren Burger and Justices Harry Blackmun, Lewis Powell and William Hubbs Rehnquist. But four years later, Stewart and White switched sides and Douglas had been replaced by John Paul Stevens. In *Gregg v Georgia* (1976), Burger, Stewart, White, Powell, Blackmun, Rehnquist, and Stevens outvoted Brennan and Marshall to restore executions. Marshall dissented in every such case until he retired in 1991. Relatives of those wrongly killed from 1976 were no doubt gratified when Blackmun (1908-99, Justice 1970-94) admitted in 1994 that he had been wrong about the death penalty.

From 1976 to 2004, there were 944 executions; 37 may have been innocent. In May 2001, after a spate of forced releases from Death Row, *Time* reported that 20 of the 38 States with death penalties were considering moratoriums on executions. At the end of 2003, there were 3374 on Death Row in 37 States and the federal system; 134 may have been innocent.

2. Britain

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. It was fortunate for Irish suspected of terror that England abolished executions in 1965. 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. In 1988, Lord Denning turned Blackstone and Starkie on their heads. 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, Appeal Court Justices Lloyd, Mustill and Farquharson acquitted and freed the Six, after 16 years in prison. Viscount Runciman was then asked to investigate the possibility of change to a pro-truth system. Research for the inquiry showed that perversions suffered by the Birmingham Six and the Guildford Four were unlikely to occur in France and Germany, but most involved in the inquiry were lawyers, and its report recommended persisting with the anti-truth system.

The inquiry did recommend that a body be set up to investigate possible perversions against the innocent (but not those in favour of the guilty). The Criminal Cases Review Commission (CCRC) began work in 1998 with eight non-lawyers and six lawyers as Commissioners. It has a staff of 100 and they use the European system to investigate the truth; a Commissioner, Dr James MacKeith, a forensic psychiatrist, told me they accept all available evidence.

The CCRC sends its recommendations to a non-truth body, the Court of Criminal Appeal, for final decision. The court has agreed with the CCRC in 70% of cases. To 31 March 2005, the CCRC had received 7602 applications and had referred 271 cases to the appeal court. The court had heard 216 cases and had quashed 151 convictions and upheld 65 convictions. Some results:

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

Derek Bentley. Hanged 1953. Conviction quashed because the trial judge, 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 a total of 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.

3. Australia.

Ronald Ryan was the last man hanged in Australia. I happened to be an official witness at the execution in Melbourne in 1967, and received his letter from the grave. He said he was not guilty of intent, and I am inclined to believe him; manslaughter and a prison term would have been appropriate.

A dingo (a wild dog) killed Mrs Lindy Chamberlain's baby daughter, Azaria, but the mother was found guilty of murder in Darwin in 1982. An inquiry found the truth and the conviction was quashed in 1988.

i. Presumption of Guilt: Unfair Bias Against Accused

a. Contempt by publication.

A law of contempt by publication does not exist in the European system because it does not conceal evidence, and barely exists in the US because the First Amendment protects the right to know. It only exists in other common law countries because the cartel concealed evidence after lawyers got control of the criminal process early in the 19th century. Prior to that, judges admitted most relevant evidence and informally advised jurors on weight. That was no longer possible after the adversary process isolated judges from jurors.

The alleged crime concerns publication of evidence which may be concealed from jurors, e.g. the accused's pattern of crime, at a trial which is imminent or proceeding, and so may prevent a 'fair' trial. It is offensive to staples of the common law: the necessity for the alleged offender to have a guilty mind, the presumption of innocence, and trial by jury. It presumes accused are guilty even though their action was inadvertent, and accused are not allowed trial by jury, possibly because jurors might refuse to convict.

A Sydney case illustrates how unfair and unjust the law can be. A lawyer, Christopher Murphy, unaware that a trial was proceeding, 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. However, the judges were unaware that the same man was again on trial, and his convictions were mentioned at the contempt trial and reported in the Press. A judge then aborted his second trial. The judges and the media were not charged with contempt, but in February 1995 the judges confirmed the original guilty verdicts on Murphy and the organ, and ordered the organ to pay the prosecution costs as well as

their own. This effective penalty, estimated to be A$120,000, was enough to cripple a small newspaper.

b. Contempt by Affront

The law of contempt by affront originated in mediaeval superstition: an inscrutable deity appointed the monarch; the monarch appointed the judge; an affront to the beak was thus an affront to the deity and the monarch.

Justice Sir John Eardley Wilmot (1709-1792) said (R v Almon, 1765) contempt law was necessary to keep 'a blaze of glory' around the courts. Translation: it deterred pamphleteers from reporting that most judges were corrupt. Wilmot said it was 'immemorial usage and practice' for judges to give contempt verdicts. His opinion was never delivered, but it is still the leading authority for trial without jury in Australian affront cases.

The first US Chief Justice (1789-95), John Jay, told jurors in *Georgia v Brailsford* (1794) they "have … a right … to judge the law as well as the fact in controversy". Judges don't give them a chance to judge the law of affront.

Recent British contempt history shows how Humpties can effortlessly 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, presumably before he succumbed to dementia:

> 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."

However, over three cases, *Tisdall* (1983), *Warner* (1987) and *Goodwin* (1990), law reinstated the common law rule that the private right of revenge takes precedence over the public right to information.

Although judicial work is the most error-riddled industry there is, some judges insist on being treated as if enveloped in a Christ-like blaze of glory. When Malcolm Turnbull (BCL Oxon) referred to judges by surname only in 1977, 'Justice' Harry (a profit is a loss)

Gibbs warned him that he 'felt it was a contempt of court to refer to a judge other than as "Mr Justice Bloggs'." Turnbull in effect told him to grow up.

j. Defence of the Criminal Adversary System

Defences of the criminal adversary system come down to assertions that it protects citizens' 'rights' and protects them from oppression by the leviathan state. Professor Stephan Landsman said in *Readings on Adversarial Justice*: *The American Approach to Adjudication*: 'For centuries adversarial courts have served as a counterbalance to official tyranny and have worked to broaden the scope of individual rights.'

The oppression argument tends to collapse in the face of oppression on a vast scale by the adversary system itself. Its unfairness oppresses victims of crime; cruelty in cross-examination oppresses witnesses in general and women and children in particular; negligence law oppresses doctors, accountants, teachers, local councils, and business and manufacturing shareholders; 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 1997 Brisbane conference:

> There are four standard arguments on behalf of the adversary system. These are (1) that it is the best way to find the truth; (2) that it is the best way to ensure that all parties' rights are protected; (3) that it is part of our tradition and culture; and (4) ... the adversary system is the way clients participate in the litigation process.

He said all those arguments fail, and that: '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.' He concluded:

> 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; and (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.

That argument also fails. An available alternative, the European investigative system, which seeks the truth and is controlled by trained judges is