

necessarily better than a system which does not seek the truth and is controlled by trained liars.

## k. Conclusion

The foregoing leads to hard questions which all affected by the adversary system, including judges, lawyers (academic and practising), litigants, police, and those obliged to fund it, would do well to consider.

What exactly did Don Vito mean when he said a lawyer can steal more than a thousand men with guns? Did he mean they steal money from clients by spun-out pleadings and discovery, and steal justice from victims and the community?

The *Macquarie* says ‘corrupt’ comes from the Latin *corruptus*, broken in pieces. Definitions include: destroyed, dishonest, without integrity, debased in character, perverted, tainted, made bad by errors. If Justice Fox is right in saying that justice is fairness, fairness is truth, and morality comes from a search for truth, is the adversary system effectively a corrupt form of justice?

Is it effectively a criminal enterprise? Organised crime is systematic criminal activity for money or power; a criminal enterprise is the vehicle through which the activity is conducted. Lawyers habitually engage in practices normally regarded as criminal, e.g. perverting justice, and get money for it.

However, they would say they are compelled by the system, a good thing in itself, to do what they do, and hence cannot have the necessary *mens rea* (guilty mind). Further, ‘enterprise’ suggests active participation. Perhaps a passive usage would be more appropriate, e.g. the system can IN EFFECT amount to a criminal enterprise, but participants are not necessarily guilty.

It may not be relevant to that particular point, but the adversary system does get the accolade from an organisation which IS a criminal enterprise, the Sicilian Mafia. It is noted in Section 3 that the Mafia’s response to 475 members being put on trial by investigating magistrates in 1986 was to ‘persuade’ the Italian parliament to change to a more adversarial system in 1988.

A tap on a Brooklyn telephone recorded US gangsters’ joy on behalf of their Sicilian colleagues. A heroin dealer, Joe Gambino, said: ‘Oh, so it’s like here, in America?’

The other man, just back from Sicily, said: ‘No, it’s better, much better.’

Material in Part 2 shows that the common law had a long tradition of trickle down extortion, and that it still has pockets of judicial extortion; in the last 20 years, 70 Chicago judges and lawyers went to prison for that sort of criminal enterprise.

## 2. How It Happened

### a. What Law Schools Don't Teach

Justice Russell Fox said understanding facts depends heavily on context. Justice Ron Sackville, of the Australian Federal Court, said 'great care must be taken to understand the social and historical context in which a legal system has developed'. In 1993, the Runciman inquiry gave this as the reason for rejecting truth for the second time in eight centuries.

Every system is the product of a distinctive history and culture, and the more different the history and culture from our own, the greater must be the danger that an attempted transplant must fail.

The common law's history, culture and context can be stated briefly. For 700 years from the Dark Ages, England and Europe used the same anti-truth accusatorial (PROVE IT!) system. They diverged at a time when the master of Europe happened to be an upright churchman, and England was run by organised criminals. After 1215, Europe changed to a pro-truth investigative (WHAT HAPPENED?) system, but England rejected that system and persisted with the accusatorial system. The adversary system is a lawyer-run variant of the PROVE IT! system.

Europe has thus had a pro-truth culture for 800 years; England – and its colonies – has had an anti-truth culture for some 1500 years. Viscount Runciman was right; changing to a pro-truth system would be difficult for lawyers: it would deprive them money.

### 1. Trial by Ordeal; Verdict by Inscrutable Deity

Historian Michael Woodiwiss has made much history and journalism obsolete. In *Organized Crime and American Power: A History* (University of Toronto Press, 2001), he defined organised crime as 'systematic criminal activity for money or power'. He says we should look beyond the Mafia to the 'powerful and respectable' because 'organised criminal enterprise was deeply embedded in the machinery of law and government from at least the time of the Roman empire'.

The West Roman Empire collapsed under the weight of its corruption in 476. In the Dark Ages (c.476 – c.750) and for much of the Middle Ages (c.750-1453), the legal system in western Europe and England regressed from truth-based roman law to an anti-truth accusatorial system

called the Judgment of God (*judicium dei*). A accused B; B said: ‘Prove it.’ The verdict was supposed to be revealed by an inscrutable deity.

Trials took several forms. The wager of law was the equivalent of modern self-regulation. The accused swore he was innocent, and was presumed to be telling the truth if the deity did not strike him with lightning. Trial by ordeal included walking on hot ploughshares, carrying a hot iron for nine feet, and taking a stone out of boiling water. An ‘expert’ inspected the damage three days later and interpreted the deity’s verdict. Accused clerics had to swallow the ‘cursed morsel’, a feather concealed in piece of food. If he choked, it was presumed that the deity had judged him to be guilty.

In ‘swimming a witch’ (trial by cold water) the suspect was trussed and thrown in to a stretch of water blessed by a priest. If she sank, she was not a witch because the blessed water had received her. If she floated, she was a witch because the water had rejected her. She was fished out and hanged or burned at the stake. Alleged witches were swum and hanged in England in 1647, and 20 were hanged in Salem, Massachusetts, in 1692.

The Church opposed the Judgment of God from the time of Agobard, Bishop of Lyons (d. 840), on the ground that it was improper to tempt the deity. Pope Stephen VI tried to stop the practice in 877, but the spectacle was too exciting to be successfully proscribed. After 1066, the Normans introduced to England another spectacle, trial by combat, also known as the judicial duel, wager of battle, and trial by battle. Accuser and accused swore before a judicial officer they were telling the truth and then fought a duel. The winner got the verdict; the loser, if still alive, was hanged. Trial by battle was last demanded by a murderer, Abraham Thornton, in 1817. He got the verdict when his accuser declined to take part in the duel.

## 2. Origin of the Common Law in a Culture of Trickle-Down Extortion

England was always as corrupt as any country in Europe, if not more so, and incomparably the best at calling it something else: bribes and/or extortions become gifts, presents, favours, patronage, *doucens*, commissions, gratuities, honoraria, unofficial taxes. In a former colony, the US, bribes are referred to as juice in California, ice in Florida, grease in New York. Corruption and racket are likewise euphemisms for organised crime.

Michael Woodiwiss notes that in 1930 Raymond Moley said Europe’s medieval feudal system was ‘a good deal of a [protection] racket’: lords extorted goods and services from peasants in return for ‘protection against other plundering lords and vagabonds’. He says ‘William of Normandy did most to establish such a system in early Britain’.

Richard Condon said modern man thinks money brings power, but medieval man knew power brought money. William I (1027-87) and his son, William II (c.1056-1100), had the standard medieval mind. After William I’s 6500 mercenaries defeated King Harold’s 7000 troops at Hastings in 1066,

William franchised 90% of the country to 300 of his favourites and established a property system based on trickle-down extortion.

The 300 ‘magnates’, or ‘great men of the realm’ were part-time judges and full-time organised criminals: they franchised land to freemen and extorted goods and services from them; they extorted from merchants travelling through their land; and they ‘sometimes led or employed bands of brigands to plunder towns and villages’. Freemen in turn franchised land to its original owners and extorted from them.

The British Empire was to a degree a criminal enterprise based on theft of land and, later, human beings. The empire dates from 1072, when William compelled the Scottish King, Malcolm III, to do him homage. It expanded to South Wales in 1079, to Ireland in 1172, and to Virginia in 1607. The empire then developed a triangular trade in goods and slaves between Africa, America and England

London’s population was between 14,000 and 18,000 when King (1087-1100) William II institutionalised trickle-down extortion in the trade of authority. Professor John Gillingham, a mediaevalist at the London School of Economics, said in *The Oxford History of Britain vol II The Middle Ages* (OUP1992) that William put every public office, from Chancellor down, on sale. The buyer in turn extorted bribes from those who had to deal with the office. As head of the royal secretariat, the Chancery, the Chancellor was a sort of mediaeval Prime Minister. It was in the context of this culture of systemic corruption that the common law is generally understood to have begun in the reign of King Henry II (1154-89).

The jury system was invented in 1166. When a crime was reported, 12 neighbours had to use their local knowledge to suggest a suspect (possibly including an enemy). The suspect was still tried by ordeal, and the verdict was still believed to come from an inscrutable deity.

Professor Theodore Plucknett said professional, i.e. paid, lawyers first appeared in a new court (later called the Court of Common Pleas) set up by Henry II in 1178 to deal with civil litigation. Law professor J.H. Baker, of Cambridge, says in *An Introduction to English Legal History* (Butterworths, third edition 1990) that professional judges had appeared by 1200. London’s population was then 20,000-25,000. The courts sat in Westminster Hall of Westminster Palace; lawyers had their own pillars at which they met clients.

### 3. The Lawyer-Judge Cartel

*People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.*

- Adam Smith, *The Wealth of Nations*, 1776

Professor J. H. Baker said: ‘England possessed from an early date a bench and bar united by their membership of a common profession.’ The Chicago economist and appellate judge, Richard Posner, wrote in *Overcoming Law*:

The legal profession in its traditional form is a cartel of providers of services related to society’s laws ... Should we be surprised to find that self-interest has played as big a role in legal thought as in medical thought? ... The history of the legal profession is to a great extent, and despite noisy and incessant protestation and apologetics, the history of all branches of the profession, including the professoriat and the judiciary, to secure a lustrous place in the financial and social-status sun.

Leaving on one side the fact that the common law professoriat did not begin until Blackstone procured Oxford’s first Vinerian chair in 1758, Judge Posner’s observation suggests that the common law has always been a business. He said the US cartel began to implode about 1960 through pressure of competition.

#### **4. A 13<sup>th</sup> Century Tax Evasion Scheme: *Magna Carta***

*Magna Carta* is invoked to support all manner of legal claims, but it was essentially an attempt by magnates to evade taxation and to dilute the power of the monarch. Scutage was a tax in lieu of military service. When King (1199-1216) John insisted that the tax be paid by magnates who had refused service in France, they gathered in force outside London (pop. c 25,000) in June 1215 to demand, at sword-point, that John sign a charter. Some sections, with comments.

Section 21: ‘Earls and barons shall not be amerced [fined] except through their peers.’ Peers were unlikely to order each other to pay scutage

Section 39: ‘No freeman shall be ... imprisoned ... except by the lawful judgment of his peers or by the law of the land’. Freemen owned freehold land and were one level below the magnates.

Section 40: ‘To no one will we sell, to no one will we refuse or delay, right or justice’. That seems to confirm that justice could be bought.

To gain time, John signed the charter and, as a vassal of Pope Innocent III, appealed to Rome. The Pontiff annulled the charter in August 1215 on the ground that John had signed under duress and without his (Innocent’s) consent. The Great Charter was thus in force for nine weeks.

#### **5. England Rejects Truth**

A church conference in Rome in November 1215 agreed to end clerical participation in trial by ordeal and to use a truth-based system based on the old roman law to investigate alleged clerical misbehaviour. European courts

then changed from the accusatorial system to an investigative (inquisitorial) system, but England hesitated. When King John died in October 1216, his successor, Henry III, was nine; the decision on the system was left to the judges, which effectively meant the cartel, then consisting of a dozen or so lawyers and judges. In 1219, they accepted that trial by ordeal had to end, but rejected the investigative system, and persisted with an accusatorial system.

One reason was ethnocentrism, defined as ‘the belief in the inherent superiority of one’s own group and culture accompanied by a feeling of contempt for other groups and cultures’. Law professor Richard Jackson, of Cambridge, said in *The Machinery of Justice in England* (Cambridge University Press, seventh edition 1977) that a cause of the rejection was ‘an insular dislike of things foreign’.

Another reason was the defective jury system. Professor Theodore Plucknett said it was ‘just a newer sort of ordeal ... the jury states a simple verdict of guilty or not guilty and the court accepts it, as unquestionably as it used to accept the pronouncements of the hot iron or the cold water’. Professor Jackson said: ‘Jury trial simply replaced trial by ordeal, the verdict of the jury having the same finality and the same inscrutability as the Judgment of God.’

A result of the rejection of truth was that the British Empire – then consisting of England, Scotland, Wales and Ireland - had a system which preferred procedure to truth, form to substance, ‘rights’ to justice, and appearance and legal fictions to reality. In the Middle Ages, for example, if a man paid a debt but did not make sure the bond was cancelled, it was no defence to prove he had repaid; the bond was held to be incontrovertible evidence that he still owed the money.

The rejection of truth also facilitated corruption; it is easier to pervert justice for money if the system does not require truth. In the following centuries, British judges tended to extort to get the money, while European judges tended to torture to get the truth.

## **6. Judicial Extortion in the Late Middle Ages**

Westminster Palace was the centre of power and money in the later Middle Ages. The king lived there; the magnates sat in the House of Lords; the cartel operated in Westminster Hall; lawyers, who like to hear their voices and to protect the system which get them money, migrated to the Commons. Simon de Montfort invented the Commons in 1265 during the Barons’ War of 1264-68, another failed attempt by magnates to usurp the monarch’s power; it took lawyers another four centuries to achieve that.

Professor John Gillingham said William II’s system of ‘patronage’, i.e. trickle-down extortion, was still operating in the reign of Edward I (1272-1307), when London had a population of some 35,000. Lawyers could thus

still buy the office of judge, and those who did had an incentive to convict; they got a share of the fines they imposed.

Judges were accused of murder, sorcery and corruption in 1289. The Chief Justice of Common Pleas fled the country, and seven judges were dismissed, including Ralph de Hengham, Chief Justice of the King's Bench (criminal trials). In 1301 de Hengham was appointed Chief Justice of Common Pleas, presumably by paying Edward I. Venality means open to bribery. A poem from the early 1300s was titled *Song on the Venality of the Judges*. Another, *The Simonie*, from about 1321, has a poor man standing outside the court while a rich man bearing gifts is welcomed inside.

By 1300, the lawyer-judge cartel had been formalised as the Order of Serjeants-at-Law, aka the Order of the Coif. It was originally an order of ecclesiastic lawyers; the coif, a piece of silk worn on the head, represented the clerical tonsure. Professor Theodore Plucknett said that by 1300 the Serjeants were 'a close guild in complete control of the legal profession'. Fewer than 1000 were appointed Serjeants over the next 550 years. Some US law schools still award an Order of the Coif to bright students. Professor J. H. Baker says 'ministers sold the coif for bribes' in the 17<sup>th</sup> century', but it was worth buying three centuries earlier. Professor Plucknett says Serjeants' wealth in the 14<sup>th</sup> century 'must have been enormous'; on appointment, they had to hold feasts 'comparable to a king's coronation, and to distribute liveries and gold rings in profusion'. By 1340, with London's population at 40,000-50,000, Serjeants had acquired a monopoly of work in the common law courts, a monopoly of appointment as judges, and a monopoly of legal education. Professor Plucknett said:

... the middle of the fourteenth century coincides with Parliament's first assertions of its powers ... and the dominant interest in it were the common lawyers ... bench, bar and Parliament, therefore, were alike under the influence of the conservative professionalised lawyer.

English-speaking citizens are thus said to have enjoyed government of, by and for serial liars for 650 years. In the 1380s, Richard II made the royal secretariat, the Chancery, a court. It purported to be a court of equity (fairness) to provide a remedy for the rigidities and injustices of the common law courts, but the Chancellor was its judge and jury; and the Chancery Court inevitably became as corrupt as the other courts. Professor Baker says 'already by 1393 there were complaints of its abuse'.

Professor Plucknett says that in the Middle Ages Serjeants, i.e. the inner cartel, lived together during term time in the Serjeants' Inns, 'and discussed their cases informally together simply as Serjeants, without distinction between those on the bench and those at the bar'. He says that by 1400 the 'judges and Serjeants together' were deciding difficult cases in the Exchequer Chamber, and, presumably, dividing the extortions.

*London Lickpenny* (c.1400-1450) is a poem about a poor ploughman from Kent. He seeks justice in Westminster Hall but, lacking money, can find no justice in the King's Bench, the Common Pleas, or the Chancery Court. Dissatisfaction with the legal system was a reason for Jack Cade's revolt in 1450. He briefly had control of London, and according to Shakespeare's *Henry VI Part II* (1594), agreed with Dick the Butcher's final solution: 'Let's kill all the lawyers', but was himself killed.

## 7. Judges Give Lawyers Control of the Civil Process

We know a lot about the Wars of the Roses (1455-87). They were skirmishes between gangs of organised criminals in the houses of Lancaster (red rose) and York (white rose) for power and money, i.e. control of the monarchy. Actual fighting totalled only three months and did not unduly trouble citizens, but there were 17 melees, and the crown changed hands five times: Henry VI, Edward IV, Henry VI, Edward IV, Richard III, Henry VII.

The civil adversary system began in the same period as the Wars of the Roses, but we don't know much about it, possibly because members of the cartel was at pains to cover their tracks. Yale professor John Langbein wrote in *The Origins of Adversary Criminal Trial* (Oxford, 2004):

... we know relatively little about the conduct of civil trials before the 19<sup>th</sup> century. The law reports tell us about pleading, about decisions on issues of law, and about the post-verdict review of trial outcomes, but they do not tell us much about how civil trials actually transpired.

The few academics who are interested in the origin of the adversary system usually date it from the 18<sup>th</sup> century, when lawyers began to get control of criminal evidence, but lawyers actually began to get control of civil evidence in the 15<sup>th</sup> century. It can safely be assumed that the motive, as well as the effect, was to get control of the money. Professor Stephan Landsman wrote in *Readings on Adversarial Justice*:

... adversarial process was in the interest of lawyers as a group. It created ever more work for attorneys, as increasing numbers of potential clients sought legal advice.

But why did judges give up their power to control the process? Jurist Brett Dawson believes it may have been for reasons no more sinister than sloth; 'they went on the bench to retire'. On the other hand, it may be that, like the Pontiff, the Mafia and corrupt detectives, the cartel thought in centuries: with control of the process, lawyers could sharply increase their profits and retire more comfortably to the bench. At all events, the vehicle for the civil handover was the method of pleading. Much of the following data comes

from Nicholas Mullany's 1998 paper, *Pleadings – Sacrificing the Sacrosanct*, for the WA Law Reform Commission.

Written pleadings are now the first step in the civil process. In the 15<sup>th</sup> century, when barristers pled orally before a judge, pleadings were the second last step. Cambridge law professor Frederick Maitland said the barristers and the judge 'licked the plea into shape', presumably in an hour or so. Oxford law professor Sir William Holdsworth described the process:

... the debate between opposing counsel, [was] carried on subject to the advice or the ruling of the judge ... Suggested pleas will, after a little discussion, be seen to be untenable; a proposition to demur will, after a few remarks by the judge, be obviously the wrong move. The counsel feel their way towards an issue which each can accept and allow to be enrolled. If the issue was a question of fact, the matter was then ready to go before a jury.

Professor Holdsworth said the first record of a paper (written) pleading was in 1460. Sir John Prisot, Chief Justice (1449-60) of the Common Pleas saw that written pleadings would make it easier for lawyers to lie. He said:

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

Professor J.H. Baker said it was more than a century before judges accepted written pleadings only, but 'by Charles I's time [1625-49]' oral pleadings were 'a thing of the past'. Sir John Prisot's suspicion proved correct; US law professor E.R. Sunderland wrote in 1937:

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

That means that lawyers have been able to lie in pleadings for five centuries, and judges have never found a way to stop them.

## **8. Judicial Extortion 1485-1810**

When the Wars of the Roses ended in 1485, the last man standing was the Lancastrian Henry Tudor, who became Henry VII. The CDNB says he 'practised much extortion', but that was the point of the wars. In *Judicial Ethics in Australia* (Law Book Company, second edition 1997), Justice

James Thomas, of the Queensland appeal court, said of the Tudor period (1485-1603):

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

Justice Thomas noted that in 1554 the Count of Egmont bribed Britain's entire Royal Council and reported to Philip of Spain that 'more could be done with money in England than anywhere in the world'. Britain invaded America in 1607 and added theft of human beings from West Africa to theft of land. British justice also continued to be effectively a criminal enterprise, at least for some. Sir John Evelyn, the diarist, recorded admissions by four senior members of the cartel, including Lord Chancellor (1685-89) George Jeffreys, on 26 November 1686:

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

Two years later, lawyers got control of the political process by overthrowing King James II and installing their own Dutch king. Professor Plucknett said: 'It was the common lawyers who were mainly instrumental in making parliamentary supremacy [over the monarch] a fact'. John Locke (1632-1704), a Whig conspirator, justified the lawyers' treason in *Two Treatises of Government* (1690). The second, which continues to have a profound effect in the US, said citizens have certain natural rights, including a sacred right to property, and that governments which do not protect those rights can legitimately be overthrown. Since no government can protect every right, including the right not to be lied to, he supplied a pretext for any usurpation.

The 1688 revolution was called 'glorious', presumably because organised criminals in the Whig oligarchy rightly anticipated making glorious sums over the next century. In *English Society in the Eighteenth Century* (Penguin, 1982), historian Roy Porter noted how they operated:

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

The Duke of Newcastle, the oligarchy's bagman 1724-62, was himself Prime Minister 1754-56 and 1757-62. Walpole, Prime Minister 1721-42, said of parliamentarians: 'All these men have their price.' Most judges were former Whig politicians. Justice James Thomas wrote:

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

The head of the corrupt Chancery Court, Lord Chancellor (1718-25) Macclesfield, a former Whig politician, continued England's 600-year-old tradition of trickle-down extortion. He usually extorted £5000 [c. £500,000 today] from barristers who sought appointment as Masters in Chancery in order to extort more directly from litigants. A barrister, Francis Elde, had to use a clothesbasket to convey the bribe to Lord Macclesfield and his bagman, Master Peter Cottingham.

Justice Thomas said William Murray, Lord Mansfield (1705-93) was 'another senior judge of this period who was trained in the service of the Whig oligarchy and continued to be closely involved in government after he was elevated to the bench'. In 1756, Murray became a Serjeant and Lord Chief Justice and continued to sit in corrupt Cabinets, where he favoured coercing American colonists, until 1774, and he remained an active politician until 1784. Judges were still extorting bribes from barristers in return for legal office in 1810.

## 9. Judges Give Lawyers Control of the Criminal Process

Lawyers did not appear in the criminal courts until the 18<sup>th</sup> century; there was no money in it: wealthy and respectable organised criminals were not normally accused. Jeremy Bentham said 'plunderable matter was seldom to be found' in the purses of accused; Professor Stephan Landsman said: 'Not even the judges, who received sizable fees in civil litigation, could hope to profit from the criminal docket.' Prosecutions were private; those in court were judge, jurors, accuser, accused and their witnesses; trials were nasty, brutish and short.

England's trade in goods and slaves in the 17<sup>th</sup> century sharply increased its wealth and population. London's population almost tripled, from some 200,000 in 1600, to 350,000-400,000 in 1650, to 575,000-600,000 in 1700. Unrespectable organised crime followed; after 600 years, lawyers began to discover a tender care for the 'rights' of accused. Lawyers began to appear in criminal courts after a 1692 Act and the Treason Act of 1696.

The 1692 Act offered a reward of £40 (c. £4000 today) for information leading to the conviction of highway robbers and other thieves. An organised criminal from the lower orders, Jonathan Wild (1682?-1725), had a gang of thieves, took his share of the proceeds, and informed on them for the reward. Wild was hanged in 1725, but lives on in representations of Prime Minister Sir Robert Walpole in John Gay's *Beggars' Opera* (1728), Henry Fielding's *The History of Jonathan Wild the Great* (1743), and *The Threepenny Opera*, by Kurt Weill and Bertolt Brecht in 1928.

Defence lawyers found that the truth engine easily exposed lying informants like Wild, but did not appear in great numbers until much later in the 18<sup>th</sup> century. Research on Old Bailey trials by Professor John M. Beattie, of the University of Toronto, showed that defence lawyers appeared in 2.1% of trials in the 1770s, 20.2% in 1786, and 36.6% in 1795. By the first decade of the 19<sup>th</sup> century, judges had given lawyers control of the process, and could indulge their taste for sloth in the criminal courts, but had to stay awake long enough to agree to the anti-truth devices which make it quite easy for their former colleagues to get rich criminals off.

## 10. Judicial Extortion in the US and Other Former Colonies

Historian Michael Woodiwiss said: '... the US legal and criminal justice systems were set up in ways that showed a great deal of latitude to certain kinds of organised criminal activity.' Those largely responsible were John Locke, Blackstone, James Madison, Alexander Hamilton, and John Marshall.

US law professor Darien McWhirter's *The Legal 100: A Ranking of the Individuals Who Have Most Influenced the Law* (Citadel, 1998) says: 'Locke ... laid the philosophical foundation for the legal and governmental system that developed in the United States.' In 1692, Locke said people have certain natural rights, including a sacred right to property. 'People' was not interpreted to mean Indians, Negroes, or women. In 1791, Blackstone persuaded Madison to incorporate English common law, and what that entailed, in the Bill of Rights. *The Legal 100* says Alexander Hamilton was:

America's first great business lawyer ... he saw, as few did at the time, the connection between banking, industry, and national power. The statutes he drafted and the institutions he created launched America on course toward becoming the world's greatest industrial power.

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

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

Oligarchy, was institutionalised by Article II Section 2 of the Constitution ratified in 1789. It says the President, ‘with the advice and consent of the Senate, shall appoint ... public ministers’, including members of the Cabinet. clever businessmen can thus shuffle round a revolving door of business and government for decades. In 2005, Donald Rumsfeld, 73, had been on the shuffle for 48 years, former President G.H.W. Bush, 81, for 39, and Richard (Dick) Cheney, 64, for 36. For example, when President Gerald Ford gave Thojib Soeharto the all clear to unlawfully use US weapons in his invasion of East Timor in 1975, Rumsfeld was Secretary for Defense, as he was in 2005, and Cheney was Ford’s chief of staff, i. e. gatekeeper. *OxfordSC* reported:

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

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

President John Adams appointed Hamilton’s protégé, John Marshall (1755-1835), a former land speculator, Chief Justice in stacking the courts at “midnight” of the day he was to retire, 20 January 1801. In Marshall’s period (1801-35), the cartel was akin to the Serjeants in the 14<sup>th</sup> century. In a case of judicial extortion, *US v Murphy* (1985), Judge Frank Easterbrook noted:

When John Marshall was the Chief Justice, the Justices and many of the lawyers who practiced in the Supreme Court lived in the same boarding house and took their meals together.

*Chambers Biographical Dictionary* (Larousse, sixth edition 1997) says Marshall ‘is the single most influential figure in US legal history ... His most important decision was in the case of *Marbury v Madison* (1803), which established the principle of judicial review, asserting the Court’s authority to determine the constitutionality of legislation.’ Marshall thus made untrained and unelected Humpties supreme over Congress.

Hamilton, lawyer and gentleman, aimed high in a duel in 1804; Aaron Burr, lawyer, aimed at his stomach. Hamilton died but his Yazoo opinion lived. Article II Section 4 of the Constitution says bribery is sufficiently heinous to warrant removal of the President, and *OxfordSC* says that in *Fletcher v Peck* (1810) the Contracts Clause of the Constitution appeared to be on Georgia's side. But Marshall dutifully parroted Hamilton's line that the Yazoo cancellation was unconstitutional. He upheld the corrupt grants, voided the legislation which cured them, and even said: 'It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state.' Marshall thus effectively defined the business of America as a business in which fraud, bribery, extortion, force etc. are acceptable, even necessary, tools.

*Fletcher v Peck* was a useful precedent for pin-striped organised criminals. Historian Gustavus Myers said it was 'the first of a long line of court decisions 'validating grants and franchises of all kinds secured by bribery and fraud'. Michael Woodiwiss says that in the later 19<sup>th</sup> century success in business went to those 'best able to bribe, blackmail, extort, exploit, and intimidate'. The great disclosure journalist, Ida Tarbell, reported in 1904 that John D. Rockefeller's Standard Oil became dominant by 'force and fraud', and that similar methods were 'employed by all sorts of businessmen, from corner grocers up to bankers. If exposed, they are excused on the ground that this is business'. Or 'bidness', as Mafiosi call it.

A century after Marshall, the New York culture barely distinguished between organised crime in the judiciary, politics and on the streets. In *Damon Runyon* (Ticknor and Fields, 1991), Jimmy Breslin said that in the 1920s Tammany boss Jimmy Hines, a business partner of another organised criminal, Arthur (Dutch Schultz) Flegenheimer, extorted \$10,000 (perhaps \$200,000 today) from lawyers who wanted to be Criminal Court judges so they could extort in turn from bootleggers and other organised criminals.

A lawyer named Macrery paid the \$10,000 and Hines procured a five-year appointment. Later, Judge Macrery told Hines: 'I only pay once', but shortly died of alcoholic poisoning. When a Tammany lawyer put it about that Macrery had been beaten to death and sought an investigation, Judge George Ewald's wife went to Hines's waiting room and announced: 'I am here to pay the ten thousand dollars now. It is not time yet, but I would rather pay it now than have my husband killed later on.' Hines told Runyon at Lindy's delicatessen:

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

Cook County (2003 est. pop. 5.35 million), Illinois, includes Chicago (2000 census 2.9 million). Respectable organised criminals on the bench and at the bar have probably infested the county's court system since Cook County was created in 1831. Carl Sifakis notes the Guzik Scale of buying judges in *The Mafia Encyclopedia* (Checkmark, second edition 1999). It was devised by Jake (Greasy Thumb) Guzik (1887-1956), a fixer for the Chicago Mob. (His figures should be multiplied by perhaps 20). He said:

You buy a judge by weight, like iron in a junkyard. A justice of the peace or a magistrate can be had for a five-dollar bill. In municipal courts he will cost you ten. In circuit or superior courts he wants fifteen. The state appellate court or the state supreme court is on a par with the federal courts. By the time a judge reaches such courts he is middle-aged, thick around the middle, fat between the ears. He's heavy. You can't buy a federal judge for less than a twenty-dollar bill.

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

The American Bar Association rated the Cook County Circuit Court as the best court system in a major US city. In 1980, the Justice Department and the FBI began an investigation into the system. From 1984 to 1994, the FBI's Operation *Greylord* and the following Operation *Gambat* used the RICO legislation to put away 20 judges, 50 lawyers, and sundry police and court officials for extortion and bribery. Judge Thomas J. Maloney was even convicted of taking bribes in three murder cases.

Three San Diego judges, G. Dennis Adams, Michael Greer, and Judge of the Year James A. Malkus, took bribes from Lawyer of the Year Patrick Frega. In return they coached him on how to run his cases, pressured opposing lawyers to settle, and assigned his cases to 'friendly' judges. They all went to prison in 2000. Jurist Walter Olson observed:

To paraphrase Oscar Wilde: losing one local judge in a corruption scandal is a misfortune. Losing two looks rather like carelessness. Losing three suggests a pattern.

In England, where William II instituted a culture of public sector organised crime in the 11<sup>th</sup> century, it was idle to suppose that it stopped in the 20<sup>th</sup>. In *Cockburn Sums Up* (Quartet, 1981), Claud Cockburn recalled the naïveté of Kingsley Martin, editor of *The New Statesman* in the 1930s. He wrote:

I would mention ... that, obviously, the explanation for this or that turn of events was that this or that official, this or that political leader, had been richly bribed by this or that interested party. Kingsley would look at me with his kindly indulgent smile which held at the same time a touch of pity for my continental-type ignorance of what is done and what is not done in England.

Cockburn said of the 1960s and 1970s:

There was nothing astonishing in the extent and blatancy of the corruption which are no greater in Britain than in France or the United States. What truly astonished me was the extent to which the British Establishment, including the corrupters and the corrupted, have, despite all, managed to keep alive for public circulation the legend that that sort of thing does not happen in England: or that when it happens it is an unusual phenomenon, swiftly dealt with and eliminated the moment there is any evidence of its existence.

Geoffrey Robertson QC wrote in *The Justice Game* in 1998: '[Britain] clings to the illusion that it has the least corrupt Parliament in the world. '

Alarminglly, the Chief Justice of India, Sam Bharucha, said in 2001:

... more than 80 per cent of the Judges in this country, across the board, are honest and incorruptible. It is that smaller percentage that brings the entire judiciary into disrepute.

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

Justice Lionel Murphy, also of the High Court, was charged in 1985 with attempting to pervert justice on behalf of a lawyer, Morgan Ryan. Justice Murphy was found guilty, got a re-trial, and was acquitted. An inquiry by three retired judges found 14 instances of his possible criminal behaviour, but he died in 1986 and the inquiry papers were sealed until 2016.

FBI boss J. Edgar Hoover accepted Mafia bribes in the form of tips on fixed horse races through a cut-out, reporter Walter Winchell, but a corrupt NSW Chief Magistrate, Murray Farquhar, regularly got similar tips directly from an organised criminal, George Freeman. Farquhar was imprisoned in 1985 for fixing a case of theft of \$55,000.

## **b. Conclusion**

Corruption among judges and lawyers does not necessarily mean a legal system is wrong, but the history of the common law and the adversary system does not inspire confidence.

English common law began in the 12<sup>th</sup> century in a culture of universal extortion. A cartel of lawyers and judges rejected truth early in the 13<sup>th</sup> century. That error was compounded when judges, many of them corrupt, began to let lawyers (described as serial liars who believe ethics is an English county) take control of the civil process in the 15<sup>th</sup> century, and of the criminal process in the 18<sup>th</sup>.

The cartel has since invented some 26 anti-truth devices which encourage rich criminals to pay lawyers. Extortion from litigants, clients and opponents still exists

### 3. The Solution

The adversary system's perverts justice every day because of three basic reasons: it does not seek the truth; lawyers control the process; and a cartel of lawyers-and untrained judges has overall control.

All three can be corrected by: training judges separately from lawyers in techniques of searching for the truth. The anti-truth devices can then be abolished by putting jurors on the bench with the judge, and having the judges advise them on the weight to be given evidence, e.g. hearsay. In other pro-truth procedures, the judge will question witnesses in a neutral way, and allow them to tell the whole truth by giving evidence as a narrative; lawyers will not be allowed to use cross-examination to obscure the truth; and judge and jurors will give reasons for their verdict and penalty.

The solutions are more or less the way the investigative system works for 1,600,000,000 people in European countries, their former colonies and Japan and South Korea. It protects the innocent better than the adversary system, and puts away 90% of the 99% of accused who are guilty in serious criminal cases, against the adversary system's fewer than 50%.

Implementation would not be difficult; some common law countries already use the European system – not very well - to investigate the truth at inquests and commissions of inquiry.

The European system has a presumption of innocence for suspects, but one of the most effective lies put out by common lawyers in law schools and elsewhere is that it has a presumption of guilt

#### a. Origin of the Investigative (Inquisitorial) System

Roman law at least nominally sought the truth and was controlled by judges, but it was not codified and the *Columbia* says much of it was 'confused, contradictory or redundant'. And corrupt. Justinian (482-565), Emperor of the East Roman (Byzantine) empire from 527, had Tribonian and a committee of legal academics and advocates codify roman law. Their *Corpus Juris Civilis* was completed by 535 and remained in use in the Byzantine Empire until Constantinople (formerly Byzantium) fell to the (Turkish) Ottoman Empire in 1453. As noted above, law in West Europe and Britain regressed into superstition after the fall of West Roman Empire in 476, but a

digest of Justinian's Code was discovered in Italy about 1070, and scholars at the University of Bologna began to study the Code.

Lotario de' Conte di Segni, son of Count Trasimund of Segni and nephew of Pope Clement III, was born in 1160 or 1161. After early education in Rome, he studied theology at the University of Paris and jurisprudence at the University of Bologna. Pope Gregory VIII ordained him sub-deacon in 1187, Pope Clement III created him Cardinal in 1190, and after the death of Pope Celestine III, the cardinals elected him Pope on 8 January 1198. Justice Ken Marks wrote in *'Thinking up' about the right of silence* (1984) that he had 'devised inquisitorial techniques [for investigating alleged clerical misbehaviour].in a series of decrees beginning in 1189-90'. Professor Richard Jackson wrote in *The Machinery of Justice in England* (seventh edition 1977):

[The] technique was to send a trusted person along to inquire into the allegations. This founded the inquisitorial concept of a trial, whereby the judge is expected to find out for himself what has happened, and he will do this by examining all persons, including the accused or suspected person, who may be able to enlighten him.

As Pope, Innocent was zealous in repressing simony, i.e. selling ecclesiastical office, the clerical equivalent of systemic trickle-down extortion in England's trade of authority. His term (1198-1216) was the high point of the papacy's temporal power: he had authority over Sicily, was virtual lord of Christian Spain, Scandinavia, Hungary, and the Latin East. He was in a position to order the election of Frederick II as German king, and became overlord of England and Ireland.

On 19 April 1213, Innocent issued a papal Bull inviting spiritual and temporal princes to attend an ecumenical council in Rome in November 1215, a lead-time that ensured maximum attendance. Justice Ken Marks said the 'glittering' event was attended by ambassadors from King John of England, Frederick II, king of the Holy Roman Empire, the Latin Emperor of Constantinople, King Philip II of France, and the kings of Aragon, Hungary, Cyprus, and Jerusalem, along with 71 archbishops, 412 bishops, and 900 abbots and priors.

The council is called the Fourth Lateran Council because it was the fourth held at the Lateran Basilica. It began on 11 November 1215, and Innocent's 70 canons (decrees) were approved by the end of the month. In terms of the future of European law, Canons 8 and 18 were the key decrees.

Canon 8 confirmed Innocent's system of investigating misbehaviour. It said superiors must 'carefully inquire into the truth' of the allegations. The suspect was to be allowed to defend himself in the presence of 'the seniors of the church so that if they prove to be true, the guilty party may be duly punished without the superior being both accuser and judge in the matter'.

Canon 18 effectively ended trial by ordeal; it banned ‘any blessing’ by clerics to ‘judicial tests or ordeals by hot or cold water or hot iron’.

Temporal courts in Europe shortly adopted Innocent’s investigative system but the English lawyer-judge cartel persisted with the accusatorial system. Professor George Dargo, of the New England School of Law, said in OxfordSC that the civil law, i.e. the European investigative system, ‘is the most widespread and important legal tradition in the modern world’. The man who invented the system, Innocent, is not in *The Legal 100*, but novelists Erle Stanley Gardner and John Mortimer are.

## **b. Judicial Torture in Europe**

European trials had a number of odious features. Some were secret; some suspects had to defend themselves without knowing the allegations; truth-seeking judges soon fell into anti-truth error. There were no jurors, and it was recognised that judicial power carried the risk of oppression. The result was an impossibly high standard of proof: judges could convict only on the basis of two eyewitnesses or a confession. That eliminated circumstantial evidence; two eyewitnesses were rare; criminals might not dutifully confess.

Judges wrongly believed torture might produce truth, but suspects were given a modicum of protection. Torture could only be used where there was one reputable eyewitness or compelling circumstantial evidence’ it was permitted only to elicit facts, not a confession; and the judge was not to suggest the answer he wanted. In practice, however, the torture rules were as futile as ethics rules later promulgated by Anglo-American bar associations. As a method of finding the truth, torture is notoriously unreliable: the tortured are likely to confess to anything, e.g. the Birmingham Six. Professor Langbein noted in *The Origins of Adversary Criminal Trial*:

... efforts at surrounding coercion with safeguard proved illusory. In case after case, the true culprit was ultimately discovered after the innocent person had confessed under torture and been convicted and executed ... but long into the eighteenth century the law of torture remained a defining feature of the Continental tradition in criminal procedure.

Judicial torture in Europe enabled common lawyers to claim that their corrupt Dark Ages system was better. Hypocrisy, ethnocentrism and self-deception induced a contempt for the European system which persists to this day; they still slyly hint that it is akin to the Spanish Inquisition. Professor Langbein said that from the time of the Henry VIII’s Reformation (1534):

... disdain for Continental criminal procedure became enmeshed in English hostility to the leading Continental regimes – the papacy, the French, and the Spaniards. At least from the time of Foxe’s *Book of Martyrs* (1563) the Spanish Inquisition was held up for particular vilification ... English writers from [Sir

John] Fortescue [1394?-1476?; his *De Laudibus Legum Angliae* was first printed 1537] to Sir Thomas Smith [1513-77] to Blackstone [1723-80] extolled the superiority of England's torture-free procedure.

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

### c. Bonaparte Reforms the Investigative System

Revolutionary France proposed a fair society and new laws based on rational principles in 1789. Jean Jacques Cambacères spent the next decade grappling with a code of laws but all drafts were rejected. The issue was decided by another accident of history, this time in north Italy.

On Saturday 12 June 1800, an Austrian General, Michael von Melas, defeated First Consul Bonaparte at the Battle of Marengo. Rumours shortly reached Paris that Bonaparte was probably dead and certainly finished, but he had sent a message to General Louis Desaix, whom he had unwisely sent to block Melas's presumed retreat to Genoa: 'For God's sake, come back, if still you can.' On his arrival, Desaix breezily advised Bonaparte: 'This battle is completely lost, but it is only two o'clock; there is time to win another.' Desaix led the charge and was killed, but the day was won by his infantry, François Kellerman's cavalry, and Auguste Marmont's artillery. To distinguish it from the earlier battle, this is known as the Battle of Chicken Marengo from the recipe invented by Bonaparte's cook, Dunand, from the materials to hand, a chicken, tomatoes, mushrooms, eggs, and prawns.

Bonaparte hastily showed himself in Paris, falsely claimed credit for the victory, and applied his intellect and energy to drafting a code of civil law. He said he wanted everyone to be able to read and understand the code and so know their duty. He set up a committee of four lawyers, of whom the most significant were Jean-Étienne-Marie Portalis, nearly blind, 54, and François-Denis Tronchet, 73, in August. They met in Tronchet's house, and had a draft printed by 1 January 1801. Judges added their comments and the draft was discussed clause-by-clause at more than 90 meetings of the Council of State (*Conseil d'Etat*) between July and December 1801.

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

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

Bonaparte himself said:

In these discussions I have sometimes said things which a quarter of an hour later I have found were all wrong. I have no wish to pass for being worth more than I really am ... Tronchet, I admire your intelligence and the strength of your memory. For a man of your age, it is exceptional and deserves to be pointed out. Portalis, you would be the greatest of speakers if you only knew when to stop ... Cambacères, I sometimes suspect you of behaving like a talented lawyer who can defend a case or reject an idea without the slightest reference to his own personal feelings.

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

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

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

The Napoleon codification successfully achieved a number of goals. The law was to be accessible to all, uniform throughout France and based on democratic principles and economic liberalism. The code is still considered a masterpiece of French prose, and has been called the greatest book of French literature by the poet Paul Valery. The Civil Code was supposed to have been read regularly by the novelist Stendahl as a stylistic model for his own writing. It was quickly translated into many languages and its popularity spread throughout Europe. Similar codes were enacted in most of the countries of the world which were not under the common law system. What had started as a French achievement became a model for a worldwide legal revolution.

## d. Flaws in the Investigative System

The European system is by no means perfect. In France, investigating magistrates have the power to keep suspects to hand for weeks or months for further questioning as more evidence comes in. This can be seen as a 'softening-up' process.

Nor would it be helpful to borrow much from the current Italian system. Italy has moved to a more adversarial system in order to help organised criminals escape justice. Alexander Stille explained how it happened in *Excellent Cadavers: The Mafia and the Death of the First Italian Republic* (Pantheon, 1995). Judge Giovanni Falcone put 475 Mafiosi on trial in Palermo in February 1986. It was still proceeding when national elections were held in June 1987. The Mafia, virtually the criminal wing of Giulio Andreotti's Christian Democrat party, punished the party for failing to stop the investigations: votes were transferred to other parties on condition that the judges were emasculated and the law changed.

In December 1987, 344 Mafiosi were found guilty. In 1988, the pool of judges investigating the Mafia was dismantled, and the Italian Parliament passed changes to the criminal code which limited the power of investigating judges. On 20 September 1988, a tap on a telephone in the Cafe Giardino in Brooklyn recorded a conversation between a heroin-dealer, Joe Gambino, and an anonymous hood just back from Palermo. The dialogue, in Sicilian, suggests that in their view the function of the adversary system is to anally penetrate judges and police:

**Hood:** Now they've approved the new law, now they can't prosecute as they did in the past ... They can't arrest people when they want. Before they do, they have to have solid proof, they have to convict first and arrest later.

**Gambino:** Oh, so it's like here, in America.

**Hood:** No, it's better, much better. Now these bastards, the magistrates and cops, can't even dream of arresting anyone the way they do now.

**Gambino:** The cops will take it up the ass. And [Falcone] won't be able to do anything either? ... They'll all take it up the ass.

**Hood:** Yeah, they'll take it in the ass.

Judge Falcone and his colleague, Judge Paolo Borsellino, knew they would be killed for seriously investigating the Mafia, and they were assassinated in 1992. Their heroism is a reproach to the poltroonery of common law judges who remain silent in the face of the adversary system's manifest lack of justice, fairness, truth, and morality.

## e. The Two Systems Compared

Professor David Luban, of Georgetown University, would be the Red Rum of common law ethicists except that he sails into the last fence. As noted above, he says all arguments in favour of the adversary system fail, but change is not worth the trouble because ‘the available alternatives aren't demonstrably better than the adversary system’. Leaving on one side the fact that a pro-truth and hence moral system in which trained judges gather and present facts is likely to be better than an anti-truth and hence immoral system in which serial liars gather and present ‘facts’, the superiority of the investigative system can be demonstrated mathematically in terms of accuracy of verdict and cost. First, accuracy. Justice James Burchett, of the Australian Federal Court, said in 1996:

My reading suggests that even those comparative lawyers who are critical of the French criminal law do accept that French courts are fair, and that the verdict reached is generally accurate.

France and Germany convict 90% of the 99% of accused who are guilty - the 99% rate in Japan and Indonesia is too high – while the adversary process convicts fewer than 50%, but up to 50 in every thousand prisoners are innocent. David Rose noted in his book, *In the Name of the Law: The Collapse of Criminal Justice* (Jonathan Cape, 1996), that one of the first acts of the 1991-93 Runciman inquiry into the criminal system ‘was to order research into two nearby jurisdictions which broadly follow inquisitorial principles, France and Germany.’ The research resulted in *A Report on the Administration of Criminal Justice in the Pre-Trial phase in France and Germany*, by Professor Leonard Leigh and Lucia Zedner (Her Majesty's Stationery Office, 1992). Rose reported: ‘[They] reached several immediately striking conclusions’:

First, they found that in neither country was it likely that miscarriages of justice such as the Guildford or Birmingham cases would occur. Second, in contrast to the stratified and often vexed relationship between the different actors in the criminal process in England, on the continent this relationship was marked by ‘a high degree of confidence, and of co-operation and mutual trust’. Finally, public confidence in both systems remained high in their respective countries.

Leigh and Zedner said: ‘The low acquittal rates in France and Germany and the apparent paucity of cases of unjust convictions are the product of the care taken in the initial stages of the criminal process.’ A series of pre-trial filters also ensures that the innocent are rarely charged, let alone convicted. Leigh and Zedner wrote:

At the end of the *instruction* [investigation] the accused's lawyer will be given an opportunity to examine the dossier and to make representations before the prosecutor decides whether or not the matter should proceed further. If the prosecutor, on receipt of the dossier from the examining magistrate, believes that the case should proceed, he will transfer the file to the *chambre d'accusation*. This court then assesses the correctness of the decision and thus serves as a further filter in the system. It may order that the case proceed, that it be dropped, that the charges be re-assessed ... This court also sits in appeal on refusals of pre-trial liberty and on refusals by the examining magistrate to order investigations into matters suggested by the defence.

Second, cost. Justice Fox says trials in the adversary system are two to 10 times longer than hearings in the investigative system. An International Bar Association conference in Melbourne in 1994 heard a report that a French trial costs about a third to a half that of a common law trial. The investigative system thus convicts at least twice as many serious criminals at half the cost and protects the innocent better.

The Hannes case offers a comparison of the length and cost of criminal trials in the two systems. Simon Gautier Hannes was an executive director of the Macquarie Bank, a Sydney investment bank. He earned about A\$2 million a year in salary and bonuses. In 1996 his bank was advising Thomas Nationwide Transport(TNT) in connection with a takeover bid by a Dutch company, KPN. On 9 September 1996. Hannes went to 15 banks. The reporting threshold for cash transactions in Australia is \$10,000. At some banks, Hannes got bank cheques of about \$9000; at others he withdrew cash from his own accounts. He then put \$90,000 into a new account at stockbrokers Ord Minnett in the name of M. Booth. On 17 September, an Ord Minnett broker received instructions by telephone to invest the \$90,000 in options over shares in TNT. When KPN's takeover bid became public on 2 October 1996, M. Booth made a profit of \$2 million.

Early in 1997, Hannes was charged with insider trading. His defence was that he and a Mr X had set up an investment syndicate, and that Mr X had bought the TNT options without telling him. Hannes did not give evidence and did not produce Mr X, but his lawyers argued that the prosecution could not prove beyond reasonable doubt that Mr X did not exist.

Bron McKillop, of the law school at Sydney University, is an authority on the investigative system. He wrote *Anatomy of a French Murder Case* (Hawkins, 1997), and lectures each year in France and Germany. I asked him how Hannes would have been dealt with in France. He said:

The investigator (judge, prosecutor or police) would have interrogated Hannes and required 'X' and M. Booth to present themselves for interrogation, failing which the appropriate adverse inference would have been drawn by the investigator, and by the trial court. All the financial transactions would have been established in detail in the dossier. These matters would have been taken

on board through the dossier at the trial, confirmed by oral evidence of the material witnesses and probably also through the interrogation of Hannes by the presiding judge. The trial would probably have lasted a day or so, a week tops, with Hannes almost certainly convicted.

In the adversary system Hannes had a committal hearing, a 55-day trial over 10 months (guilty), a successful appeal, and a 75-day re-trial over 11 months (guilty). He got 2 ½ years and a fine of \$100,000. Elisabeth Sexton reported in *The Sydney Morning Herald* of 20 November 2002 that Hannes had spent \$3.1 million on legal costs which sometimes reached \$13,000 a day. His various court outings cost the public at least \$2 million.

Justice Fox compared civil litigation in the two systems. He wrote: ‘In a civil action [in the adversary system] a large part of the cost is incurred in the pre-trial phase. This comprises pleadings, court directions, compulsory conferences, discovery and interrogatories, and other matters as the case requires ... The whole operation is costly to the parties and to the government as well.’ But, he wrote:

In a civil matter in France, evidence is customarily assembled in written form by one of a court of three judges, and he or she reports to the court on it. The practice is for the reporting judge to accept the evidence presented by the parties and to do little, if any, separate investigation himself. When a witness is called, he is first examined by the President, and counsel for the parties may examine later (‘cross-examination’ is not a term known to continental jurisprudence.) Few witnesses are called to give oral evidence. Hearings (the correct term, there being no “trials”) are without juries and are not concentrated, continuous affairs. The first hearing may occupy no more than one hour, whereupon there can be an adjournment, so that one party or the other may produce further evidence, or for a related purpose. The next hearing may be the final one, and commonly does not last longer than an hour or so. The point for present purposes is that the whole case may be disposed of in less than a day overall; relatively few occupy much more. In other continental countries, and in Japan, the position is much the same. This result is greatly helped by the fact that France, in common with other civil law countries, does not have any exclusionary rules of evidence.

If the French system can dispose of a civil case in a day or two, what can be said of *BCCI v Bank of England*, which recalled *Jarndyce v Jarndyce*, and perhaps even its original, *Jennens v Jennens* (1798-1915)? Creditors of BCCI were claiming £850 million in compensation from the bank for claimed errors and omissions by its officials, and the bank was reported to have allowed £20 million a year for legal fees. That seems wise; before the case even began, arguments over discovery were referred twice to the Court to Appeal and once to the House of Lords, and the opening remarks by Gordon Pollock QC, for BCCI, took 80 sitting days, and those by Nicholas Stadlen QC, for the Old Lady, took 119.

The rapidity of European civil litigation gives the poor and middling some access to justice, while in Anglo-American litigation the time and money wasted on pleadings and discovery prevents access to most except the rich and wealthy corporations.

Since judges do most of the work, investigative systems require roughly six times as many (trained) judges as adversary systems. West Germany had one judge for every 3606 people in 1983 (17,000 in a population of 61,306,700).

Pro-rata, common law countries changing to a WHAT HAPPENED? system would need roughly the following numbers of judges: India: 280,000, USA: 77,000, United Kingdom: 17,000, South Africa: 13,000, Canada: 8900, Australia: 5000, New Zealand: 1100, Ireland: 1100. It would cost US\$15.4 billion to pay 77,000 US judges US\$200,000 a year.

On the other hand, investigative systems require fewer lawyers. In 1992, Washington (pop. 500,000) had 45,000 lawyers; France (pop. 60 million) had 20,000 lawyers. Reducing the number of lawyers reduces hidden costs. In *Justice in the 21<sup>st</sup> Century*, Justice Fox quotes a 1989 report to the US Congress which stated:

Excessive litigation has an adverse effect on economic growth, not only in direct costs but in the way the tort system alters individuals' behaviour. One of the primary factors determining economic growth is technological innovation. To the degree that technological innovation is inhibited by the tort system ... economic growth suffers. Stephen Magee, professor of finance at the University of Texas at Austin, estimates that the excess supply of lawyers in the USA reduces economic output by [US]\$300 billion to [US]\$600 billion.

## **f. Manifesting the Truth**

### **1. Civil Litigation in Germany**

Interestingly, German civil litigation is akin to that in England before lawyers began to get control of the process in the 15<sup>th</sup> century. Discovery is virtually non-existent; the judge sends for any documents he needs. The approach has been called the 'conference method' of adjudication. The tone, a routine business meeting, lessens tension and theatrics and encourages compromise and settlement. The loser pays system also encourages settlement before judgment.

Professor John Langbein has an overview of the system in *The German Advantage in Civil Procedure* (1985). He noted two fundamental differences between German and Anglo-American civil procedures. First, it is the judge rather than lawyers who mainly gathers and sifts evidence. Second, the judge gathers and evaluates evidence over a series of hearings; there is no distinction between pre-trial and trial, between discovering

evidence and presenting it. The proceedings start with a lawyer making a complaint. The complaint lays out the key facts, a legal theory, and asks for a remedy. Supporting documents are attached or indicated, and witnesses identified. The defendant does the same. German lawyers rarely have contact with witnesses outside the court. This is both a serious ethical breach and self-defeating: German judges explicitly express doubts about the reliability of witnesses who have discussed the case with counsel or who have been seen consorting with the client.

The judge examines the material and sends for public records. He now has the beginning of a dossier; all subsequent evidence-gathering and submissions go into the dossier, and it is continuously open to inspection by the lawyers. The judge calls a hearing and possibly some of the witnesses. He may be able to resolve the case by discussing it with the lawyers and their clients and suggesting avenues of compromise. If the parties persist, he will act as examiner-in-chief of the witnesses. Counsel for either party may then pose additional questions, but in Germany ‘counsel are not prominent as examiners’.

In the adversarial process, lawyers choose what aspects of their cases they will put before a passive judge who is ignorant of the facts. Professor Langbein says that in Germany the judge ranges over the entire case, ‘constantly looking for the jugular - for the issue of law or fact that might dispose of the case’.

In the adversary system, lawyers are paid by the hour and court reporters by the page. The German incentive is the other way: evidence is rarely recorded verbatim. The judge periodically pauses to dictate a summary into the dossier and the lawyers can suggest improvements. The summaries are useful for quick refreshers at later hearings, and for the written judgment and the appeal court.

Judges sit without a jury and they function without the common law rules of evidence (such as hearsay) that exclude probative evidence. There are no ‘saxophones’;(Professor Langbein’s term for expert witnesses on whom the lawyers who hire them play tunes). If there is a technical problem, the judge, in consultation with the lawyers, selects the expert or experts and defines their role. The lawyers can comment orally or in writing when the judge has heard witnesses or procured other evidence, and can suggest further proofs or advance legal theories.

‘Thus,’ says Professor Langbein, ‘non-adversarial proof-taking alternates with adversarial dialogue across as many hearings as necessary. The process merges the investigatory function of our pre-trial discovery and evidence-presenting function of our trial.’

## 2. Criminal Pre-Trial in France

In serious cases, overworked investigating magistrates do much of the work. They supervise detectives (and hence reduce fabrication), reconstruct the crime, stage a confrontation between suspect and victim or relatives, and build up a dossier of all relevant evidence for and against the suspect.

The suspect is seen as a valuable source of information and he generally accepts this, despite the right of silence. The dossier is made available to the suspect's lawyer in case he can show the truth lies elsewhere. If he can show there is considerable doubt, that is the end of it.

## 3. Criminal Trial in France

At trial, the jurors, if any, sit on the bench with the judge or judges. Guilty pleas are not accepted; it is the task of judge and jurors to find out for themselves the truth of the matter. The presiding judge uses the dossier to question as many witnesses as necessary for 'the manifestation of the truth'. Witnesses can tell the whole truth by giving their evidence as a narrative rather than by Yes-No answers.

The accused is not on oath. His life, character and previous convictions are presented. He has a right to remain silent, but adverse inferences can be drawn if he refuses to give evidence.

Lawyers for prosecution and defence can question witnesses but in some jurisdictions only through the judge; they are not allowed to cross-examine directly lest they pollute the truth.

On the standard of proof, Bron McKillop says there is probably no real difference between beyond reasonable doubt and the European 'conviction of guilt', the French *conviction intime* and the German *freie uberzeugung*. A doubt must be resolved in favour of the accused. While the English formula is negative and confusing; French jurors understand what 'intimately [thoroughly] convinced' means.

Judge(s) and jurors reach the verdict and penalty together and give their reasons. There is no double-jeopardy rule; the prosecution can appeal against not guilty verdicts.

Trial results automatically go to appeal courts for review. The dossier helps the appellate judges to scrutinise the lower court's reasoning, application of the law and findings of fact. A drawback is that the evidence of witnesses at the trial is not reviewed because it is not recorded in the dossier.

The investigative system thus generally destroys any claim that the adversary system is fairer to accused. Professor Gordon van Kessel said in *Adversary excesses in the American criminal trial* (*Notre Dame Law Review*, 1992):

It is arguable that by allowing the defendants full discovery of the state's case, an opportunity to give unsworn narrative testimony, and a right to written reasons supporting the fact-finder's decision, the non-adversary system shows greater respect for the accused.

## **g. Tide Turns against the Adversary System**

US Chief Justice (1969-86) Warren Burger told the American Bar Association in 1984:

Trials by the adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.

Judge Burton Katz said in *Justice Overruled*:

A system that exalts a criminal's rights over the victim's, procedure over substance, and adversarial supremacy over the quest for truth and justice is on the verge of moral bankruptcy. It will not survive, because the people will not support it.

A Queensland appellate judge, Geoffrey Davies, wrote in *The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System* (Australian Institute of Judicial Administration, 2002):

Two related misapprehensions have inhibited change to our civil justice system. The first of these is a belief that our traditional civil justice system has, over time, developed the best means of ascertaining the truth and of achieving fairness between the parties. And the second ... is a perception that the civil systems of Europe are so different from ours and so inferior to ours in each of those important respects that nothing can be gained by borrowing from them.

In 2004, the Australian Family court was experimenting with a largely lawyer-free investigative system for custody cases.

In India, which has two-thirds of the 1.6 billion people affected by the adversary system, a committee recommended change to an investigative criminal system in April 2003. The committee consisted of the chairman, Justice V.S. Malimath, former Chief Justice of the Karnataka and Kerala High Courts, and D.V. Subba Rao, Chairman of the Bar Council of India, N.R. Madhava Menon, Vice-Chancellor of the West Bengal National University of Juridical Sciences, Amitabh Gupta, former Director-General of Police, Rajasthan, S. Varadachary, former Adviser to the Planning Commission of India, and Durgadas Gupta, Joint Secretary in the Ministry of Home Affairs.

Justice Malimath said that at the core of the report was the 'duty of the court to search for truth'. The report recommended that judges be

empowered to summon and examine any person they consider appropriate. It said the system had to be amended to give judges the power to examine and cross-examine the accused at trial, and to draw adverse inferences if he refuses to answer.

Presenting the report, Justice Malimath said the criminal justice system was weighted in favour of the accused and did not adequately focus on justice for victims of crime. The committee had therefore recommended that the victim should be given the right to take part in serious criminal cases with a penalty of seven years or more.

India's Malimath inquiry into the criminal justice system was thus profoundly better than Britain's Runciman inquiry, but as of October 2005 Indian lawyers and misguided allies were still fighting a rearguard action to stop changing to a moral system.

#### **h. Convergence?**

In April 2005, the British Labor Government, headed by barrister Tony Blair, was reported to be demanding the right to veto European Union decisions affecting taxation, defence, social security, justice, and foreign affairs. However, there is talk in Europe and England of 'convergence' between the two systems. It might seem impossible for a pro-truth system run by trained judges to converge with an anti-truth system run by serial liars, but a small compromise on cross-examination might allow the English legal establishment to claim the inquisitorial system has become more adversarial.

The suggested compromise is the method adopted by the Hon Gerald Fitzgerald QC and Justice James Wood when they ran major commissions of inquiry in Australia. The commissioner allowed lawyers for suspects to cross-examine for as long as he believed they were helping him find the truth, and sat them down abruptly when they started to use their old tricks to obscure it.

#### **i. Conclusion**

Fairness, justice and morality require a search for truth. The adversary version of the Dark Ages PROVE IT! system does not seek the truth; the process is controlled by lawyers who claim ethical obligations to lie and pervert justice; untrained former lawyers prone to the Humpty Option control courtrooms; civil law is in part unfair to business, industry, the professions, the media, and the public; criminal law is unfair to victims, relatives, detectives, prosecutors, witnesses, jurors, and to a public totalling 1,600,000,000.

The European system is not perfect, but it is everything the adversary system is not. It seeks the truth; judges are trained, and trained separately

from lawyers, and they control the pre-trial and trial process; the system is generally fair to both sides, accused and public; it does not conceal relevant evidence; it does not allow barristers to pollute the truth in cross-examination; jurors and judges sit together on the bench and give reasons for their verdict and penalty. It puts away 90% of criminals against the adversary system's fewer than 50%.

In the English-speaking world, the case for change to a moral system is unanswerable. It will happen when common lawyers in legislatures learn to fear outraged voters more than they love a corrupt system.

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## Definitions

**Abuse of process.** *Butterworths*: ‘The misuse or unjust or unfair use of court process and procedure ... generally any process that gives rise to unfairness ... Criminal contempt of court through abuse of the court’s process ... includes serious misconduct such as ... intentionally deceiving the court ...’ The definitions imply that the adversary system itself is an abuse of process.

**Accusatorial (PROVE IT!) System.** A accuses B; B says: ‘Prove it’. It was used in Europe and England from the Dark Ages until early in the 13<sup>th</sup> century. Since then, the Dark Ages system has been used only in England and its colonies.

**Adversary System.** An anti-truth accusatorial system in which lawyers control the evidence, the process, and the money, and untrained judges control the court. English judges began to let lawyers take control of the civil process in the 15<sup>th</sup> century and of the criminal process in the 18<sup>th</sup> century.

**Bagman.** A collector/distributor of bribes/extortions, e.g. the Duke of Newcastle, Chicago lawyers who collected judges’ extortions.

**Cartel, The.** A syndicate of common lawyers and judges first formed about 1180 to maximize their profits.

**Civil Law.** The law of the people. Codified criminal and civil law deriving from Roman law and used in European countries, their former colonies, and Japan and South Korea with a total population of c.1.6 billion.

**Common law.** Cartel-made law used in England and its former colonies, including the USA, Canada, India, New Zealand and Australia, with a total population of c.1.6 billion, of whom some three million are lawyers.

**Conversion rate.** Historian Roy Porter said that multiplying 18<sup>th</sup> century English pounds by 100 gives a rough equivalent of their value today.

**Corruption.** A euphemism for organised crime, usually in the public sector.

**Criminal Enterprise, A.** The vehicle through which organised crimes are committed, e.g. a court system in the case of judicial extortion; the Roman, British and US empires; and the Gambino Mafia family.

**Dickens Principle.** ‘The one great principle of the English law is to make business for itself’, i.e. trial lawyers.

**Ethics.** ‘A system of moral principles, by which human actions and proposals may be judged good or bad or right or wrong.’ – Macquarie Dictionary. In the adversary system, legal ethics are client-based rather than morality-based.

**Humpty Option, The.** Judges’ power to assert that words have meanings different from their real meanings, e.g. ‘absolutely’ does not mean ‘absolutely’. The option derives from *Through the Looking Glass, and What Alice Found There*.

**Investigative (Inquisitorial/WHAT HAPPENED?) System.** A pro-truth system in which trained judges control the court and the process. Used by civil law countries since early in the 13<sup>th</sup> century.

**Justice.** This book accepts former Justice Russell Fox’s definition: justice means fairness, fairness means truth, and the search for truth gives a justice system its necessary moral dimension.

**Kleptocracy.** Literally, rule by thieves; a euphemism for rule by organised criminals.

**Law Lords.** Lords of Appeal in Ordinary; life peers who are members of England’s highest appeal court, the Judicial Committee of the House of Lords.

**Legal Fiction.** A lie, e.g. Australia was ‘deemed’ to be uninhabited when a British criminal enterprise invaded the country and stole the land.

**Lord Chancellor.** A politician who was head of the UK judiciary until 2003.

**Magnates.** The ‘great men of the realm’; originally 300 organised criminals to whom William the Conqueror gave a large part of England after he took control in 1066.

**Manuel Test, The.** ‘A fair go all round’. From a 1971 statement by NSW Conciliation Commissioner Gilbert Manuel.

**Master of the Rolls.** Head of England’s second-highest court, the Court of Appeal.

**Organised crime.** Systematic criminal activity for money or power.

**Organised Criminal.** Title IX of the US Organized Crime Control Act (1970) defines an organised criminal as one who exhibits a pattern (over 10

years) of two or more chargeable offences (not necessarily convictions) which carry penalties of at least a year in prison.

**Parties.** Clients in civil litigation. A legal fiction says the parties rather than their lawyers control the process.

**Probative.** Tending to prove guilt.

**RICO.** Racketeer-Influenced and Corrupt Organizations (Title IX of the US Organized Crime Control Act of 1970). RICO is an exception to the rule against evidence of a pattern of criminal behaviour. It applies to all organised criminals, including businessmen, judges and lawyers, and members of the Mafia.

**Rule of Law, The.** A legal fiction. It holds that all persons and organisations, including governments, are subject to the same laws.

**Saxophones.** Expert witnesses. Law professor John Langbein says trial lawyers play tunes on expert witnesses they hire.

**Trial (Litigation) Lawyers.** Lawyers who do court work, some 40% of the total, i.e. most barristers and about 30% of solicitors. In this book 'lawyers' usually refers to trial lawyers.

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