A. What is justice?

Everyone except common lawyers knows that truth is central to justice. The feather in the cap of Maat, the Egyptian goddess of justice nearly 5000 years ago, symbolised justice, truth and morality. Roman law was based, however shakily, on truth. The world's most widespread system, the investigative system, has sought the truth since early in the 13th century.

Judge Harold Rothwax, of the New York State Supreme Court, wrote in *Guilty: The Collapse of Criminal Justice* (Random House, 1996): 'Without truth there can be no justice.' The Hon Russell Fox QC (b. 1920), a former Justice of the Australian Federal Court, opens his book, *Justice in the 21st Century* (Cavendish 2000), with this:

> For present purposes, truth can be taken to mean the reality of what happened and is happening. This is what the ordinary person understands by the word, and the undoubted view of the general public is that the findings of a court, human error aside, represent the truth in this sense.

Justice Fox's book, the product of 11 years of research, has the *imprimatur* of a joint launch by Sir Gerard Brennan, former Chief Justice of the Australian High Court, and (by video link) Lord Woolf, Lord Chief Justice of England and Wales.

At the launch, Sir Gerard introduced me to the author. Justice Fox made ticking signs in the air and

said: 'I read your book [*The Cartel*, 1998)]. You'll be able to tick off where I agree with you.' Thanks, judge, but it's more the other way round. Justice Fox wrote:

> … in legal procedure the meaning which approximates most closely to it [justice] is 'fairness' … the public estimate must be correct, that justice marches with the truth. Only in this way does the concept present a moral face, as distinct from one where the winner is the person with the greatest resources and best advocacy. This is the view taken on the continent and in other countries, where the whole system of justice proceeds on the footing that the truth is to be ascertained. Hence the investigational, or inquisitorial, approach of the French, which even provides that, the true facts having been found by a judicial officer, their presentation is not to be polluted by the parties.' [That is, by the parties' lawyers.]

In short, everything turns on truth. Justice means fairness, fairness to all and morality require a search for the truth; and truth means reality.

Sir John Mortimer QC (1923-2009), author of *Rumpole of the Bailey*, was one of the few common lawyers to admit that the adversary system ticks none of those boxes; it fails every test of justice. In *Where There's a Will* (Viking 2003), Sir John noted 'the gulf between the law and reality, the law and morality or, in many cases, the law and justice … or even common sense'.

The gulf between common law and common sense is not a problem for common lawyers. 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.'

Nor are common lawyers concerned about the gulf between law and reality. The little girl who tumbled down the rabbit hole would find a common law trial almost as unreal as the trial of a knave for alleged tart theft which ends *Alice's Adventures in Wonderland* (Macmillan, 1865). The judge, a cardboard figure, the King of Hearts, says from time to time: 'Consider your verdict'. Not yet, his associate, a White Rabbit, gently advises. Like Lady Coleridge (see below, The judge as Humpty Dumpty), the judge's wife sits on the bench. She frequently shouts: 'Off with her head!', and 'Sentence first – verdict afterwards.'

The gulf between law and reality exists because England has not tried to find the truth for 1500 years, and specifically rejected truth as the basis of justice in 1219 and again in 1993. Judge Rothwax noted: 'Our system is a carefully crafted maze, constructed of elaborate and impenetrable barriers to the truth.' The barriers are at least 24 mechanisms which defeat truth, including six rules which conceal relevant evidence.

Justice Fox said the adversary system relies 'on the parties [i.e. their lawyers] for the gathering and presentation of the facts. They are presented as the true facts, and there was a stir quite some years ago

[in 1982] when I showed how wide of the mark our system takes us.'

Common lawyers claim that concealing evidence makes trials fair to accused but, as Judge Fox noted, fairness to all requires a search for the truth. In what may be termed the Manuel Test, Gilbert Manuel, an Australian boilermaker who became a conciliation commissioner, said in a 1971 unfair dismissal case that his task was to deliver 'a fair go all round'.

Justice Geoffrey Davies, of the Queensland Court of Appeal, wrote in a paper, *The reality of civil justice reform: why we must abandon the essential elements of our system* (Australian Institute of Judicial Administration, 2002:

> … to invest our system with the virtues of ascertaining the truth or of achieving fairness between the parties does not stand up to close examination. In truth, it achieves neither …at least by the 1980s, judges had come to recognize that … it was not effective to ascertain the independent truth, [but this] would, I suspect, come as a considerable surprise to most members of the public who see the legitimacy of our system in its capacity to ascertain the truth whilst according procedural fairness.

If other judges knew by the 1980s that the system achieves neither fairness nor truth, why did they not try to change it?

Investigating the truth is not lawyers' *metier*, but many are found in regulatory bureaucracies, including the US Securities and Exchange

Commission (SEC), whose mission is 'to protect investors'. For instance, Bernie Madoff (b. 1938) founded Madoff Investment Securities in 1960, promising returns of 20-25%. It was a Ponzi scheme; he paid old investors with money from new investors. The scheme was remarkably durable because the SEC failed to investigate indications that something was wrong. When Madoff confessed and was charged with fraud in December 2008, it was alleged that he had defrauded investors of $50 billion. *The Philadelphia Bulletin*'s Marc Kramer interviewed Erin Arvedlund, author of a book about Madoff's operation, *Too Good to Be True* (Penguin, 2009) in September 2009.

Kramer: Why do you think the government never really caught on even with various people expressing their doubts?

Arvedlund: The SEC Inspector General's report says it all; once I read it I didn't know whether to laugh or cry. Biggest upshot: fire the lawyers and hire real fraud examiners at the SEC.

B. Origins of the two systems

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

> Lawyers have been notorious for duplicity, if not bald-faced deception, for so long that the lying lawyer is a cliché even for those people – a happy lot – who have not required their services … Ask the man in the street (or the woman) whether lawyers ever lie, and the answer is likely to be: 'This is a joke, right?'

Lawyers have been trying to make others believe what the lawyers know to be false for at least 2500 years, since the Sophists showed Athenian lawyers how to 'make the worst appear the better reason', and were denounced by Socrates as morally bankrupt and by Plato as charlatans.

David Pannick QC wrote in *Advocates* (OUP 1992): 'The central objection to advocacy … is that expressed by Socrates: that oratory is employed in the service of evil and so impedes the punishment of wrongdoing.'

Billy Flynn (Richard Gere), the 'greasy Mick lawyer' in the film, *Chicago* (2002), called lying tap-

dancing. He reminded film critic Joel Siegel (1943-2007), of an old joke: 'It's only the 99% of lawyers who give the rest a bad name.' The bad name actually comes largely from the 40% who are trial lawyers. The other 60% may be really nice persons who would never tell a lie or pervert justice. One of the really nice lawyers, Chaz Wannon, gave me some lawyer jokes. One was: How do you save a lawyer from drowning? Chaz said: 'Shoot him before he hits the water.' In this book, 'lawyers' generally refers to certain trial lawyers.

A truth-seeking system thus keeps lawyers on a tight leash. Roman law sought the truth – however shakily – and judges controlled the process, but the *Columbia Encyclopaedia* (Fifth Edition, 1993) says it was 'confused, contradictory or redundant'. Roman law was not codified.

The West Roman Empire collapsed in 476 when Odoacer's Goths deposed the last Emperor, Romulus Augustulus. Roman law disappeared in West Europe for more than seven centuries (and in England forever) but continued in the East Roman (Byzantine) Empire.

A Byzantine emperor, Justinian (482-565, Emperor 527-65), instructed Tribonian and other lawyers to codify Roman law. They completed the *Corpus Juris Civilis* (the law of the people) in 535. It remained in use in the Byzantine Empire until superseded by Islamic (Sharia) law after Constantinople (formerly Byzantium) fell to the Ottoman (Turkish) Empire in 1453.

Western Europe and England meanwhile regressed to mumbo jumbo during the Dark Ages (c.476-750) and until relatively late in the Middle Ages (c.750-1453). The *Judicium Dei* (Judgment of God) was an accusatorial (prove it) system: A accused B; B said: Prove it; an inscrutable deity gave the verdict.

The form of trial varied. The most convenient for accused was the wager (contract/oath) of law. For example, a person accused of not paying a debt could swear he had repaid it. When the deity did not strike him down, he was clearly telling the truth. In serious cases, he could produce character witnesses (compurgators) prepared to swear his oath could be trusted. The modern equivalent of the wager of law is self-regulation. An accused cleric had to swallow food containing a feather. If he choked on the 'cursed morsel', he was guilty.

The Judgment of God included such barbaric ordeals as walking on hot ploughshares, carrying a hot iron for nine feet, and taking a stone out of boiling water. Three days later, an expert inspected the damage and interpreted the deity's verdict.

In 'swimming a witch' (trial by cold water), the accused was trussed and thrown in a stretch of water blest by a priest. If the water 'received' her, i.e. she sank, she was not a witch. If the water 'rejected' her, i.e. she floated, she was a witch, and was fished out and hanged or burned to death. Alleged witches were swum and hanged in England as late as 1647, and 20 were hanged in Salem, Massachusetts, in 1692.

The Church opposed trial by ordeal from the time of Agobard, Bishop of Lyons (d. 840), on the ground that it was naughty to tempt the deity, but the spectacle was too exciting to be successfully proscribed.

William the Conqueror, King of England 1066-87), introduced trial by battle also known as the wager of battle, trial by combat, and the judicial duel. Accuser and accused swore they were telling the truth and then fought a duel. The deity ensured that the winner was the one in the right. The loser, if still alive, was hanged.

Accused women and children were allowed to hire a professional 'champion' to do the duelling. I asked Sir John Mortimer QC in 2001 where the adversary system came from. He said it began with trial by battle. In fact, it began four centuries later.

Trial by ordeal nominally ended in England in 1219 but some aspects, e.g. swimming a witch, persisted in isolated cases. In 1817, a judge thought Trial by Battle was still available. He allowed Abraham Thornton to get off a murder charge when the accuser did not pick up a gauntlet thrown down by Thornton. Parliament had to legislate to repair the judge's error.

1. Organised criminals start common law

The British and European systems are different because of accidents of history. At the crucial moments in the 13th century, organised criminals ran

the British system and the master of Europe was a quite upright churchman.

In *Organized Crime and American Power: A History* (University of Toronto Press, 2001), British historian Michael Woodiwiss defines organised crime as 'systematic criminal activity for money or power'. He says the definition applies to the powerful and respectable as well as the Mob. A criminal enterprise is the vehicle through which organised crimes are committed. For instance, the Cook County court system was the vehicle through which Chicago judges systematically extorted bribes from accused late in the 20th century. Lawyers and court officials were the judges' bagmen.

Woodiwiss notes that in 1930 Raymond Moley said Europe's 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'. Woodiwiss says 'William of Normandy did most to establish such a system in early Britain.'

Richard Condon said modern man thinks money brings power. Medieval man knew power brings money. William I (1027-87) and his son, William II (c.1056-1100), had standard medieval minds. After William I's 6500 Norman mercenaries defeated King Harold's 7000 troops at Hastings in 1066, William franchised 90 per cent of the country to 300 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; extorted from merchants travelling through their land; and 'sometimes led or employed bands of brigands to plunder towns and villages'. The freemen in turn franchised land to its original owners and extorted from them.

The British Empire was a criminal enterprise based on theft of land, and later of human beings. The empire dates from 1072, when William I 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. Britain then developed a triangular trade in goods and slaves between Africa, America and England.

Britain was always as corrupt as any country in Europe, if not more so, and incomparably the best at what Harvard ethicist Arthur Applbaum calls a 'strategy of redescription'. Bribes and/or extortions were redescribed as gifts, presents, favours, patronage, *doucers*, commissions, gratuities, honoraria, unofficial taxes, kickbacks. The colonies learned well: bribes are juice in California, ice in Florida, grease in New York.

King (1087-1100) William II institutionalised organised crime in the trade of authority. History professor John Gillingham, of the London School of Economics, noted in *The Oxford History of Britain vol II The Middle Ages* (OUP 1992) that William II put every public office, from Chancellor down, on sale, and the buyer in turn extorted bribes from people who had to deal with the office. The Chancellor was

head of Chancery, the royal secretariat, and hence a sort of mediaeval Prime Minister. The Chancery also became a court late in the 14th century, and some Chancellors continued their corruption into the 20th century.

The common law and the jury system are held to date from the Assize of Clarendon in 1166, during the reign of Henry II (1133-89, monarch 1154-89). When a crime was reported, 12 neighbours were asked to use local knowledge to suggest a suspect. This offered the chance to blacken an enemy. The trial was still by ordeal and a deity still gave the verdict.

The common law is judge-made law as opposed to statute law, and is common to the whole country. Henry II began the practice of sending judges out to make the whole country subject to common rather than local law in 1166. In the culture of the time, justices in *eyre*, i.e. travelling judges, were more inclined to extort bribes than to deliver justice. Cambridge law professor J. H. Baker (Sir John, as he became in 2003) (b. 1944) wrote in *An Introduction to English Legal History* (Third Edition Butterworth 1990):

> The general *eyres* begat fear and awe in the entire population. The justices did not always proceed according to modern standards of probity or fairness … we read of complaints that the *eyre* of 1198 reduced the whole kingdom to poverty from coast to coast … Counties might pay heavy fines for lenient treatment, or even buy off an *eyre* altogether.

2. The legal cartel begins

British judges and lawyers were first professionalised, i.e. paid, towards the end of the 12th century. Professor Theodore Plucknett, of the London School of Economics, says in *A Concise History of the Common Law* (fifth edition Butterworths 1956) that lawyers were first paid when they appeared in a new civil court (later called the Court of Common Pleas) set up by Henry II in 1178. They received clients at particular pillars in the courts at Westminster Hall, a section of Westminster Palace, the king's residence.

Professor J. H. Baker says in *An Introduction to English Legal History* (third edition, Butterworths 1990) that judges were paid by 1200 and 'England possessed from an early date a bench and bar united by their membership of a common profession'. Adam Smith (1723-90), spiritual father of the greed is good business theory, said in *Inquiry into the Nature and Causes of the Wealth of Nations* (1776): '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'.

Chief Judge Richard Posner, a Chicago economist and appellate judge, wrote in *Overcoming Law* (1995):

The legal profession in its traditional form is a cartel of providers of services related to society's laws … 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 [from the late 18th century] and the judiciary, to secure a lustrous place in the financial and social-status sun.

Members of a cartel collude to further their interests, including maximising profits, typically by adding 25% to the price of an item. The legal cartel's additions to the price of 'justice' are incalculable.

In view of the total corruption in the trade of authority when the lawyer-judge cartel began to operate, it can be assumed that its aims included getting their share of the graft, and that judges used lawyers as cut-outs or bagmen, as Chicago judges did quite recently.

It can also be assumed that the cartel aimed to arrange the system in ways which would increase business for lawyers. Charles Dickens, who worked for a law firm when he was 16, observed in *Bleak House* (1853): 'The one great principle of the English law is to make business for itself.' Today, large law firms calculate 'profit per partner'.

3. Origin of the investigative system

A digest of Justinian's codification of Roman Law, *Corpus Juris Civilis*, was discovered in Italy about 1070 and was studied by scholars at the West's oldest university, Bologna, founded 1088.

Lotario de Conti di Segni, son of Count Trasimund of Segni and nephew of Pope Clement III, was born

in 1160 or 1161. He studied theology at the University of Paris and jurisprudence – the philosophical basis of law – at the University of Bologna. Gregory VIII ordained him sub-deacon in 1187. Clement III made him a Cardinal in 1190.

Justice Ken Marks, of the Victorian Supreme Court, wrote in *'Thinking up' about the right of silence* (1984) that Segni 'devised inquisitional techniques [to investigate alleged clerical misbehaviour] in a series of decrees beginning in 1189-90'. Professor Richard Jackson, of Cambridge, 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.

Pope Celestine III died, aged about 92, on 8 January 1198. Segni was elected Pope the same day and chose Innocent III as his papal name. He was zealous in extirpating simony, i.e. selling ecclesiastical office, the clerical equivalent of selling public offices in England. Innocents' term (1198-1216) was the high point of the papacy's temporal power. He had authority over Sicily and was virtual lord of Christian Spain, Scandinavia, Hungary, and the Latin East. He made Frederick II German king and was 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.

4. Magna Carta: a tax evasion scheme

Magna Carta is invoked to support all manner of legal claims, but it was essentially an attempt by the magnates to evade tax and dilute the power of the king. Arthur Marriott QC, of London, said in *Breaking the Deadlock* a lecture on international arbitration in Sydney in October 2005: 'Magna Carta was of course a charter for the feudal aristocracy.'

Scutage was a tax in lieu of military service. When King (1199-1216) John insisted that magnates pay scutage when they refused service in France, the great men gathered outside London in June 1215, and demanded at sword-point that the king 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 other peers 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. They were unlikely to imprison their peers.

Section 40: 'To no one will we sell, to no one will we refuse or delay, right or justice'. That tends to confirm that a bribe would buy justice, and a job as a judge.

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

5. The Fourth Lateran Council

Innocent III's ecumenical council was a "glittering" church-state affair. Justice Ken Marks says it was attended by ambassadors from King John of England, the king of the Holy Roman Empire, Frederick II, King Philip II of France, the Latin Emperor of Constantinople, and the kings of Aragon, Hungary, Cyprus, and Jerusalem. Also present were 71 archbishops, 412 bishops, and 900 abbots and priors.

The conference is called the Fourth Lateran Council because it was the fourth ecumenical council held in the Lateran basilica. It began on 11 November 1215 and Innocent's 70 canons (decrees) were approved by the end of the month. Canons 8 and 18 were the keys to the future of European law.

Canon 8 confirmed his investigative system of investigating clerical 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 banned 'any blessing' by clerics to 'judicial tests or ordeals by hot or cold water or hot iron'. That effectively ended trial by ordeal.

Temporal courts in Europe shortly adopted Innocent's version of Roman law. The investigative system is now the most widespread system in the world, but few common lawyers have heard of Innocent or the Lateran Council. Innocent is not mentioned in Professor Baker's *Introduction to English Legal History*, nor did he make the cut in US law professor Darien McWhirter's *The Legal 100: A Ranking of the Individuals Who Have Most Influenced the Law* (Citadel, 1998).

Erle Stanley Gardner (1889-1970), a lawyer-novelist, was 99th in *The Legal 100*. His 80 Perry Mason books and television productions based on them give readers and viewers two quaint impressions: 1. All accused are innocent. 2. The truth of their innocence always emerges at trial.

Sir John Mortimer QC placed 100th. Despite his view that there is a gulf between law and reality, morality, and common sense, *Rumpole* gives the impression that justice somehow happens at trial.

6. The cartel rejects truth

While Europe opted for truth, England hesitated. Henry III was nine when he succeeded John in October 1216. The decision was left to the judges, which in practice meant the cartel. Professor Theodore Plucknett said of the relationship in the 13th century: 'When the same half-dozen judges are

constantly being addressed by the same score or so of practitioners, these two small groups cannot help influencing each other.'

Europe had spoken, but English lawyers and judges were making a lot of money from the accusatorial system, and the role of lawyers in a truth-seeking system would necessarily be minimal. In 1219, the cartel accepted that trial by ordeal had to go, but decided to reject the investigative system and to persist with the accusatorial system, minus the ordeal and with inscrutable jurors instead of the inscrutable deity.

Professor Theodore Plucknett said a trial was now '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 Richard 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.'

Ethnocentrism is a 'belief in the inherent superiority of one's own group and culture accompanied by a feeling of contempt for other groups and cultures', e. g. 'Wogs begin at Calais'. Professor Richard Jackson said 'an insular dislike of things foreign' was a cause of the rejection of the truth-seeking system.

Nothing changes. An inquiry into the British criminal system began in 1991 after it emerged that police had used torture to procure false confessions. In 1993, its report rejected a truth-seeking system

because: 'Every system is the product of a distinct 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.'

An effect of the rejection of truth in 1219 is that the common law can prefer legal fictions to truth, form to substance, rights to justice, and appearance to reality. The parol (oral) evidence rule of contracts developed in the 13th century held that documentary evidence takes precedence over oral evidence. For instance, if a man paid a debt but did not make sure the bond was cancelled, it was useless to bring witnesses to prove he paid the debt: the bond was held to be incontrovertible proof that the debt was still owed. The parol evidence rule still obtains in some common law jurisdictions.

7. Judicial torture in England

Trial judges had an incentive for trial to begin; they got a share of the fines they imposed. But trials could not start until the accused pled one way or the other, and some refused to plead: if convicted, their goods were forfeit and their families would be destitute, particularly if he was hanged. In the 13th century, judges tried prison to encourage a plea. That did not work. In the 15th, they tried crushing accused with large boulders. That did not always work either.

Sir William Holdsworth (1877-1944) noted in *A History of English Law* (the 1927 edition) that it was not until 1827 that Parliament told judges to take a refusal to plead as a plea of not guilty.

Judges apparently also used torture to obtain confessions, just like the despised continentals. The CDNB laconically notes that in 1628 Sir Thomas Richardson (1569-1635), Chief Justice of the Common Pleas, 'refused to allow [John] Felton to be racked to induce confession, a step which marks an epoch in the history of criminal jurisprudence'. Felton (1595?-1628) assassinated the incompetent and unpopular 'favourite' of James I, the Duke of Buckingham (1592-1628), at Portsmouth in 1628. Felton was 'described as a national benefactor in popular ballads', but was hanged.

8. Judicial torture in Europe

The investigative system soon had odious features. Some trials were secret; some suspects were not informed of the allegations; and some judges fell into anti-truth error. While some British judges resorted to extortion to get the money, some European judges resorted to torture to get, as they wrongly believed, the truth.

Their methods of torture included simulated drowning or 'waterboarding'. (In a war on a high-order abstraction, 'terrorism', that followed a terrorist attack in New York on 11 September 2001, US administration lawyers advised the Central Intelligence Agency that 'waterboarding' is not

torture.) David Gitlitz, professor of Spanish Studies at the University of Rhode Island, says medieval judges did not pretend water-boarding was not torture. He wrote in *The Providence Journal* of 8 February 2008: 'Since the middle of the 13th century it [waterboarding] had been used by European civil and ecclesiastical courts.'

There were no jurors in the investigative system and it was recognised that judges' power risked oppression. An impossibly high standard of proof was required: judges could convict only on the basis of two eyewitnesses or a confession. That eliminated circumstantial evidence; two eyewitnesses were rare; and criminals might not dutifully confess.

Suspects were given some protection. Torture could only be used where there was one reputable eyewitness or compelling circumstantial evidence, and it was permitted only to elicit facts, not a confession. The judge was not to suggest the answer he wanted.

In practice, the torture rules were as futile as Anglo-American Bar Associations' ethics rules. Torture is notoriously unreliable: the tortured are likely to confess to anything, e.g. the Birmingham Six, who were tortured by British police in 1974. Professor John Langbein, of Yale, noted in *The Origins of Adversary Criminal Trial* (OUP 2004):

> … efforts at surrounding coercion with safeguards 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.

European judges did not begin to stop torturing suspects until 1754.

9. British judicial extortion in the 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.

Simon de Montfort invented the House of Commons in 1265 during a second failed attempt to usurp the king's power, the Barons' War of 1264-68. Lawyers migrated to the Commons to hear the sound of their own voices; to protect their legal system; and to intrigue against the king. It took them four centuries to destroy the monarchy.

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 about 35,000. Lawyers could still buy the office of judge, and judges still had an incentive to convict: a share of the fines.

The great men of the realm also continued to be effectively white collar organised criminals. To stop people stating the truth about them, Edward I invented a crime, *Scandalum Magnatum*, slandering the magnates (Statute of Westminster, 1275).

Judges were accused of corruption, sorcery and murder in 1289. The Chief Justice of Common Pleas fled the country, and seven judges were dismissed. They included Ralph de Hengham, Chief Justice of the King's Bench (criminal trials), but in 1301 he was appointed Chief Justice of the Common Pleas, presumably by bribing 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.

Lawyers took effective control of Parliament about 1350. Professor Theodore 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.' Hence the view that for more than 650 years democracy in the English-speaking world has been defined as government of the lawyers, by the lawyers, and for the lawyers. The *Scandalum Magnatum* was re-enacted in 1378 to stop people muttering about judges, prelates, and certain named officials, many no doubt as corrupt as the great men of the realm.

Richard II made the royal secretariat, the Chancery, a court in the 1380s. 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 traditionally corrupt Chancellor was its

judge and jury; the Chancery Court inevitably became as corrupt as the others. Professor J. H. Baker says 'already by 1393 there were complaints of its abuse'.

The cartel's executive was effectively the Order of Serjeants-at-Law (Order of the Coif). Serjeants were originally an order of ecclesiastic lawyers; the coif, a piece of silk worn on the head, represented the clerical tonsure. Professor Theodore Plucknett said: 'In the course of the 14th century the Serjeants [became] a close guild in complete control of the legal profession … By the close of the 14th century the judges are all members of the order of Serjeants, and Serjeants alone can be heard in the principal court, that of Common Pleas.' (Civil cases.)

The Serjeants thus had a monopoly of work in the civil courts, a monopoly of appointment as judges, and a monopoly of legal education. Fewer than 1000 Serjeants were appointed from about 1400 until their monopoly ended in 1846.

Today, some US law schools give bright students an Order of the Coif. Perhaps they should think about that. Professor John Baker says 'ministers sold the coif for bribes' in the 17th century, but the opportunities for corruption clearly made it worth buying in the 14th, although London's population was then only about 45,000. Professor Theodore Plucknett says Serjeants' wealth in the 14th century 'must have been enormous'. On appointment, they were obliged to hold feasts 'comparable to a king's coronation, and to distribute liveries and gold rings in profusion'.

Professor Plucknett said that in the Middle Ages Serjeants 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'. They presumably also used the Inns to divide up 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.

Jack Cade's revolt in 1450 was partly caused by dissatisfaction with the legal system. Cade briefly controlled 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 Cade was himself killed.

10. Origin of the adversary system

Academics tell law students the adversary system is the best system of justice, but few, if any, know when and how it began. (There is no entry for 'adversary system' in J.H. Baker's *An Introduction to English Legal History*.) Professor John Langbein wrote in *The Origins of Adversary Criminal Trial*:

… we know relatively little about the conduct of civil trials before the 19th 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.

Some academics place the beginning of the adversary system in the 18th century, when lawyers began to get control of the criminal process, but lawyers had control of the civil process much earlier. If you control the evidence, you control the money. Lawyers started getting control with pleadings, and judges did not stop them. What follows comes mainly from *Pleadings – Sacrificing the Sacrosanct* by a Perth barrister, Nicholas Mullany (BCL Oxon) for the West Australian Law Reform Commission in 1998.

Written pleadings are now the first step in the civil process, but were the second last step when barristers pled orally before a judge, much as they do today in France and Germany. Cambridge law professor Frederic Maitland (1850-1906) said the lawyers and the judge 'licked the plea into shape', presumably in an hour or two. Sir William Holdsworth described the process in *A History of English Law* (the third edition, 1923):

… 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.

Lawyers began to get control of evidence when they started sending written pleadings to each other, thus cutting the judge out of the first stage of the process. Professor Holdsworth said the first record of a paper (written) pleading was in 1460. Sir John Prisot (d.1460), Chief Justice (1449-60) of the Common Pleas suggested, perhaps with his dying breath, 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 John Baker says that '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 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 supports the view that justice is broken in the adversary system.

11. British corruption from 1455

Lawyers and the rest of us know little about the origin of the civil adversary system, but we know a lot about events that happened at the same time, the Wars of the Roses (1455-85). They were really skirmishes between the houses of Lancaster (red rose) and York (white rose) for power and money, i.e. control of the monarchy. The 17 melees totalled three months over 30 years and did not unduly inconvenience citizens, but the crown changed hands five times: Henry VI, Edward IV, Henry VI, Edward IV, Richard III, Henry VII.

The last man standing was a Lancastrian, Henry Tudor (1457-1509), who became Henry VII (1485-1509). The CDNB says Henry VII 'practised much extortion', but that after all was the point of the wars.

Of the Tudor period (1485-1603), Justice James Thomas, of the Queensland Court of Appeal, says in *Judicial Ethics in Australia* (Law Book Company, second edition 1997):

> With few exceptions, all officials (including judges) were … corrupt. [Cardinal] Wolsey [Henry VIII's 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.

From 1534, when King (1509-47) Henry VIII (1491-1547) made himself head of the Church of England, common lawyers claimed that judicial torture in Europe confirmed the superiority of the British system. Professor John Langbein said that from the time of the Reformation:

> … 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 [William] Blackstone [1723-80] extolled the superiority of England's torture-free procedure.

That merely confirms that lawyers lie. As we have seen, British judges engaged in torture as well as extortion. Corruption remained universal in the trade of authority. Justice James Thomas notes that in 1554 the Count of Egmont, having bribed the entire Royal Council, reported to Philip of Spain that 'more could be done with money in England than anywhere in the world'.

A lie in 1568 by Chief Judge Sir James Dyer is the remote cause of millions of criminals escaping justice by way of the privilege against self-incrimination. His lie by omission concerned the canon (church) law on self-incrimination, which derived from a fourth-century lawyer and prelate, St John Chrysostom. Translated from the Latin, the

canon law stated: '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.'

Dyer omitted everything except 'no one is compelled to accuse himself' (*nemo tenetur seipsum prodere*), and used that to free an accused who refused to speak. For two centuries, however, judges ignored Dyer's lie.

Samuel Pepys (1633-1703), a corrupt naval bureaucrat, diarist, womaniser, and hypocrite, was in the great British tradition of calling bribery something else. Claire Tomalin reported (*Samuel Pepys*, Viking, 2002) that in 1663, John Luellin, a cut-out for a timber merchant, John Dering, offered Pepys £200 a year (at least £20,000 today), and 50 gold pieces immediately if he took timber.

Tomalin wrote: 'Pepys explained he was not to be bribed, but was prepared to accept an "acknowledgment" of his services'. He took £50 (c. £5000) on the spot, and gave Luellin £2 (c. £200) 'for his trouble'.

In cases of disputed wills in the Chancery court, lawyers were paid, not by clients, but from the deceased estates. From at least 1650 to early in the 20th century, the court was a criminal enterprise involving elements of the cartel. The sole Chancery judge, the Chancellor, was a curiosity. Until 2003, he was at once head of the judiciary and a politician, with a seat in Cabinet. Professor John Baker wrote:

For two centuries before Dickens wrote *Bleak House* [i.e. from about 1650], the word 'Chancery' had become synonymous with expense, delay and despair; throughout the 17th and 18th centuries 10,000 to 20,000 cases were pending, and the time taken to dispose of them could be as long as 30 years … Two distinguished chancellors [Bacon 1621, Macclesfield 1725] were dismissed for accepting 'presents' … Gold or silver could open paths through the Chancery morass.

Tulkinghorn, the pseudonym of a lawyer who writes for *Justinian*, extracted some of the details from historian David Lemmings' *Professors of the Law* (OUP, 2000). This excerpt of four paragraphs from Tulkinghorn's *Justinian* piece on 30 March 2007 appears here with his permission:

'Australian history professor David Lemmings wrote: "There are substantial grounds for suspicion that the eighteenth century Chancery was operating an elaborate racket in the administration of the law, which amounted to a conspiracy for making the most out of a declining source of work." He backs up his suspicion with many pages of evidence in his book … leaving one in no doubt. Charles Dickens, writing in the 1850s, made it quite clear that his novel *Bleak House*, which exposed the Chancery racketeering, was grounded in fact.

'In England, from 1580 to 1640, there was a civil litigation boom. Litigation lawyers charged reasonable fees, typically less than 10 per cent of the amount at stake. In 1640 there were about 29,000

cases in "advanced stages" in the national courts. The boom was followed by a long "bust", which cannot be blamed on the English civil war, but on a policy adopted by the leading litigation lawyers. They would not meet the market any more. They would focus on cases that could support higher fees, and then find ways to extract those fees. Successful lawyers still operate on that principle today.

'By 1750 increased fees had dramatically reduced the supply of willing civil litigants, and the number of cases being actively pursued was a *sixth* of the 1640 figure. However, the number of lawyers had not gone down, and the total amount of litigation activity being generated by that reduced number of cases, and the amount of legal fees being paid, had actually gone up. Seventy-five per cent of the barristers of England, faced with declining work in Kings Bench and Common Pleas, had turned to the Chancery Court (which dealt with deceased estates) and became litigational racketeers.

'By 1800 the Court of Chancery was finalising only 30-90 cases a year, but creating 5,000 to 7,000 "hearings" per year, in order to give lawyers something to do. Chancery judges were obviously in on the racket, and all judges would have known about it. Payment came from the assets of the deceased estates.'

12. Origin of criminal adversary system

Lawyers tend to prate about their sacred obligation to defend criminals, and accused should certainly

have someone to speak for them, but they were on their own for more than five centuries after the common law began in 1166. The only people at a criminal trial were the accused, his (private) accuser, their witnesses, the judge, and the jurors.

It is said that lawyers were not allowed in the criminal courts, but they had enough power to get control of civil evidence; if they wanted to defend criminals, judges would not have stopped them. The reality is that criminal work was not a business proposition. The *Scandalum Magnatum* protected wealthy white collar organised criminals from being accused, and ordinary criminals were not rich. 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.'

Trade in goods and slaves made England rich and populous in the 17th century. London's population is estimated to have tripled, from 200,000 to 600,000, between 1600 and 1700. Unrespectable organised crime followed; lawyers discovered a tender care for the rights of accused. They began to appear in criminal courts after a 1692 Act offered a reward of £40 (c. £4000 today) for information leading to the conviction of highway robbers and other thieves. Trial lawyers easily exposed those who made false accusations to get the £40, but they did not appear in numbers until the end of the 18th century.

Research on Old Bailey trials by University of Toronto law professor John M. Beattie showed that lawyers appeared in 2.1% of trials in the 1770s, 20.2% in 1786, and 36.6% in 1795. Since 1790, judges have agreed to a series of anti-truth devices which make it relatively easy to get rich criminals off.

13. A glorious lawyer-driven revolution

Sir John Evelyn (1620-1706) recorded in his diary (published 1818-19) of 26 November 1686 that four senior members of the cartel, including Lord Chancellor (1685-89) George Jeffreys (1644-89), admitted to systematic theft from clients. Evelyn wrote:

> I din'd at my L. Chancelors, where being 3 other Serjeants 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.

In 1688, lawyers in Parliament organised the overthrow of the monarch, James II, and the installation of a Dutch king. Professor Theodore Plucknett said: 'It was the common lawyers who were mainly instrumental in making parliamentary supremacy a fact.'

A Whig conspirator in the overthrow, John Locke (1632-1704), justified the treason in *Two Treatises of Government* (1690). The second, which

continues to have a profound effect in the United States, 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, Locke supplied a pretext for any usurpation, at home or abroad.

The overthrow of the monarchy was called a 'Glorious Revolution', perhaps because organised criminals among the Whig oligarchs who ran Britain for much of the 18th century rightly anticipated making glorious sums of money. In *English Society in the Eighteenth Century* (Penguin, 1982), historian Roy Porter noted some of their techniques:

> Offices could be traded … Many offices further allowed the incumbent to take commissions from contractors, to accept *doucers*, 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.

None of those white collar organised criminals was hanged. Jonathan Wild (1682?-1725) was. A blue collar organised criminal, he ran a gang of thieves, took his share of the proceeds, informed on gang members for the reward, and was hanged in 1725. Wild lives on in thinly-disguised portraits of

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 (1928).

Walpole (1676-1745), Prime Minister 1715-17 and 1720-42, said of politicians: 'All these men have their price.' The Duke of Newcastle (Thomas Pelham-Holles, 1693-1768), was the oligarchy's bagman from 1724-62. He was Prime Minister 1754-56 and 1757-62. 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.

Thomas Parker, Lord Macclesfield (1666?-1732), a Whig, was Lord Chancellor 1718-25. He extorted bribes of £5000 [c. £500,000 today] from barristers who sought appointment as Masters in Chancery *The Oxford Book of Legal Anecdotes* (OUP 1986) records an account by Theobald Mathew (1866-1939) of the case of a barrister, Francis Elde, who had to use a clothesbasket to convey the bribe to Lord Macclesfield and his bagman, Master Peter Cottingham:

Anxious to be appointed, Mr Elde saw the Lord Chancellor himself, who was even more delicate than Mr Cottingham. Lord Macclesfield said he thought Mr Elde would make a good officer, and asked Mr Elde to consider of it. Mr Elde considered of it accordingly for two days, and then returned to say that 'if his Lordship would admit him he would make him a present of £5000.' To this Lord Macclesfield virtuously replied: 'You and I must not make bargains.' A few days later Mr Elde met Cottingham. Cottingham, when told of his offer of £5000 to Lord Macclesfield, significantly rejoined: 'Guineas are handsomer.' Determined to secure the office, Mr Elde repaired to his chambers, found a clothes-basket, placed in it 5000 guineas in cash and notes, handed it to Mr Cottingham at the Lord Chancellor's house, saw Mr Cottingham carry it upstairs, was invited to dine by the Lord Chancellor, and was sworn in after dinner. Some months later his basket was returned to him but, added Master Elde, with no money in it.

Following an inquiry, Lord Macclesfield resigned in January 1725 and was impeached (accused) in May 1725. He was found guilty and fined £30,000 (c.£3 million today). He paid the fine in six weeks.

Justice James 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'. Mansfield became a Serjeant and Lord Chief Justice in 1756. He sat in corrupt Cabinets, where he favoured coercing American colonists, until 1774, and remained an active politician until 1784.

Judges were still extorting bribes from barristers in return for legal office in 1810.

14. Origin of law schools

For the first six centuries of the common law, senior lawyers ran legal education on an apprenticeship basis. It must have been rather like Mr Alphonse Capone mentoring promising thugs. In 1753, William Blackstone (1723-80), began lecturing at Oxford on what purported to be the common law. Charles Viner (1678-1756) used the copyright to his *Abridgment of Law and Equity* (23 vols, 1742-53) to endow a common law chair, scholarships and fellowships at Oxford. Blackstone became the first Vinerian professor in 1758. Law schools followed at Cambridge in 1800, Harvard in 1817, and Sydney in 1855.

Blackstone was a fat, near-sighted charlatan with a grating voice and a fondness for port. As a former trial lawyer, he must have known that the common law held that truth does not matter; that liars controlled the civil process and were beginning to appear in the criminal courts; that judges were untrained and mostly corrupt; and that the Chancery Court, for one, was a criminal enterprise. Blackstone said none of that; he said the law was 'dictated by God Himself'. That would mean the deity does not care for morality, but Blackstone meant the system is incapable of fundamental error. His successors have dutifully adhered to that line.

Jeremy Bentham (1748-1832) was a child prodigy who went to Oxford at 12, got a bachelor's degree at 15, a master's at 18, and was called to the Bar at 21. He heard Blackstone lecture and judged him to be defective. He saw in Blackstone a 'spirit of obsequious quietism' which 'scarce ever let him recognise a difference' between what the law is and what it should be.

Professor Plucknett kindly said Blackstone lacked 'excessive learning'; that he regarded 'legal history as an object of "temperate curiosity" rather than exact scholarship'; that his 'equipment in jurisprudence was also somewhat slender'; and that he was led 'to tolerate' the system by a 'romantic fancy' which compared 'it to a picturesque old Gothic castle'.

Blackstone published his lectures as *Commentaries on the Laws of England* in four volumes from 1765 to 1769. Jeremy Bentham described the work as 'ignorance on stilts', but fairy tales are popular: sales of the book in Britain and America made Blackstone's fortune. He was made a judge in 1770.

Lawyers like to quote Blackstone's assertion: 'Under our system of justice, it is better that 10 guilty men go free than that one innocent man be convicted.' That provided an excuse to help the new breed of criminal defence lawyer with a series of get-the-guilty-off devices. Thomas Starkie, a Cambridge academic, improved on Blackstone in 1824. He said: 'The maxim of the law … is that it is better that 99 … offenders shall escape than that one innocent man be

condemned.' The reality today is that in 100 cases up to five innocent men are convicted and more than 50 guilty men escape justice. Truth-seeking systems are much better at both.

Blackstone's successors have generally adopted a posture of ostrichism about the system's history and vices, but some ease their consciences by writing papers critical of an aspect of the system (but not the system as a whole or its basis), safe in the knowledge that judges and trial lawyers will ignore the papers and they will be unintelligible to the public. As St Paul almost said, academics discussing justice are but as sounding brass or tinkling cymbals.

15. US fatally persists with common law

William Jefferson and other lawyers favoured changing to the pro-truth investigative system when the American colonies broke with England in 1776, but it seems that Blackstone fatally persuaded James Madison (1751-1836) to persist with the common law. Madison was not a lawyer but he read law books, and in 1791 he was largely responsible for the first eight amendments to the Constitution which are taken to be the Bill of Rights.

The Seventh Amendment says: ' … no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.' That suggests that the common law applies only to appellate courts, and that lower courts could search for the truth. The Bill of Rights says nothing about the adversary system

for the sufficient reason that lawyers did not admit it is an adversary system until the mid-20th century.

Blackstone had repeated Justice Dyer's 1568 lie that no one is compelled to accuse himself, and Madison entombed it in the Constitution as the Fifth Amendment: ' … nor shall be compelled in any criminal case to be a witness against himself.'.

16. Jennens v Jennens (Jarndyce v Jarndyce)

The Sporting Magazine reported in 1794: 'A water lawyer, or in plainer terms a shark, was caught last month near Workington.' US law professor John Banzhaf said: 'Like sharks smell blood, lawyers smell money.' Judge-lawyer collusion continued in the Chancery Court. By 1800, the Chancellor was holding 6000 hearings a year, but finalising only about 60 cases, or 1%. Sir Thomas Erskine May (1815-86), a barrister, described the reality of civil litigation at the start of the 19th century in *Constitutional History of England Since the Accession of George III 1760-1860*. The work appeared in 1861-63. Erskine May wrote:

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

The Jennens matter lasted several lifetimes. William Jennens, 97, an unmarried loan shark, was the richest commoner in England, worth about £500 million of our money. He went to a solicitor to make a will but forgot his spectacles, and the solicitor's did not fit. He died a few days later, on Tuesday, June 19, 1798, the unsigned will in his pocket.

In a rational system, a judge would determine Jennens' wishes by examining the solicitor and the will, and dispose of the case in an hour. Not in a system which insists that appearance trumps reality. Jane Mulvagh writes in *Madresfield: The Real Brideshead* (Black Swan 2009): 'A will was found in his [Jennens'] coat pocket, sealed but not signed and therefore useless.'

Details of subsequent events are to a degree obscure. Mulvagh says part of the estate was shortly split between distant cousins in the Lygon (pron. Liggon), Andover and Curzon families, and that the Lygon share was 'the equivalent in today's terms of forty million pounds'. If the Andovers and Curzons got a similar amount, it would leave the equivalent of some £380 million today to be picked over.

It seems that 32 successive Chancellors, beginning with Lord Eldon (Chancellor 1801-06 and 1807-27) let *Jennens* run. Dickens was born in 1812. In 1852-53, he used *Jennens* as the model for *Jarndyce v Jarndyce* in *Bleak House*, and it was still going when he died in 1870. It was not until 1915 that the Chancery vultures and/or water lawyers had totally 'devoured' the remainder of the estate, and *Jennens v Jennens* ended.

A few things may be noted by way of footnotes to the *Jennens* saga. The Lygon share was the basis of a renewed fortune. *Madresfield*, the family seat, in the west midlands was extended and, in the time-honoured cash for honours way, Lord Lygon's wife, Catherine, bribed George III with £10,000 (£10 million today) in 1815 to have her husband made Earl Beauchamp.

William Lygon, seventh Earl Beauchamp (1872-1938), was the Lord Lundy in one of Hilaire Belloc's *Cautionary Tales for Children* (1907):

> "Sir! you have disappointed us!
> We had intended you to be
> The next Prime Minister but three:
> The stocks were sold; the Press was squared:
> The Middle Class was quite prepared.
> But as it is! . . . My language fails!
> Go out and govern New South Wales!"

The seventh Earl Beauchamp, 26, was a generally popular Governor of NSW from 1899, although some exception was taken to his remark about the 'birthstain' of the citizenry, a reference to the convict ancestry of most of the British invaders. Homesick, the Earl returned to England after 18 months in 1900. He was made Lord Warden of the Cinque Ports in 1914.

Evelyn Waugh (1903-66) became a pal of the Earl's son, Hugh Lygon (1904-36) at Oxford in 1922, and often visited him at Madresfield. Like his father, Hughie was a homosexual, which was then a crime.

Earl Beauchamp's brother in law, the second Duke of Westminster (1879-1953), was a serial adulterer – one of his mistresses was the French courtesan and couturier, Gabrielle (Coco) Chanel (1883-1971) – and tax evader (see below, Larceny by trick). In 1930, the Duke outed the Earl to King George V. George said: 'I thought men like that shot themselves.' The Earl went into exile. Hughie died when he fell out of a car in Bavaria and hit his head on the concrete.

In Waugh's novel, *Brideshead Revisited* (1945), Brideshead is based on Madresfield, Lord Marchmain on Earl Beauchamp, and Lord Sebastian Flyte on Hughie.

17. Bonaparte reforms investigative system

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

Revolutionary France proposed a fair society and laws based on rational principles. Jean Jacques Cambacéres spent the decade from 1789 grappling with a code but all his drafts were rejected. The issue

was decided by another accident of history in Piedmont, North Italy, on Saturday, 14 June, 1800.

The first Battle of Marengo was between a French army under First Consul Napoleon Bonaparte and an Austrian army under General Michael von Melas. Bonaparte, wrongly believing that Melas would retreat to Genoa, sent General Louis Desaix to cut off his presumed retreat, but Melas attacked at 9 am. Bonaparte sent a message to Desaix: 'For God's sake, come back, if still you can.'

Archie Macdonell noted in *Napoleon and His Marshals* (Macmillan 1934, Prion 1996) that one of Bonaparte's generals, Nicolas Soult, had been wounded and captured in a skirmish outside Genoa and was taken to an Austrian hospital at Alessandria near Marengo. Macdonell wrote:

> All day long on June 14, 1800 Soult … listened to the sound of the guns at Marengo. He knew very well that the fortune of France was at stake, and that the First Consul, by coming over the St Bernard instead of making a frontal attack along the coast route, was staking everything on a single battle. For hours there was no news at Alessandria, but Soult's expert ear told him all that he needed to know. The bombardment was getting fainter and fainter, and that could only mean that the First Consul was being driven back. A French victory meant that Melas was fatally cut off from Vienna. But the coin had two sides, and an Austrian victory meant that Bonaparte was fatally cut off from France.

By 2 pm that afternoon, Melas had forced the French to retreat for two miles. Macdonell: 'In the afternoon

of that thundery summer's day the first Austrian wounded began to come in to Soult's hospital with their stories of victory all along the line, and at 4 pm there was a terrible silence in the east.' Rumours shortly reached Paris that Bonaparte was probably dead and certainly finished.

But Desaix had arrived on the field at 3 pm and breezily advised the First Consul: 'This battle is completely lost, but it is only two o'clock [sic]; there is time to win another.' Macdonell: '[General Auguste Marmont, commanding the guns, had fought furiously all day until he had only five pieces left. Five more were brought up from reserve and Desaix had eight.'

The so-called (at least by the present writer) Battle of Chicken Marengo began at 5 pm with a 20-minute bombardment by Marmont's artillery. Bonaparte's greatest achievement, the reform of the investigative system, turned on what happened in a few minutes after 5.20 pm. Macdonell briskly reported:

The French counter-attack was, by chance, one of the most perfectly timed tactical operations by combined infantry, artillery, and cavalry in the whole history of warfare… Suddenly, through the dense smoke, [Marmont] saw, not 50 yards in front, a battalion of Austrian Grenadiers advancing in perfect formation to counter the counter-attack, and some of Desaix's men were tumbling back in confusion. Marmont, whatever his faults might be, was a quick thinker, and he unlimbered his four guns and fired four rounds of canister at point-blank range into the compact battalion, and at that precise moment, while the

Austrians were staggering under the blow and an Austrian ammunition-wagon was exploding with a monstrous detonation, Desaix went forward with a shout [and was killed by a bullet to his head], and young [Francois] Kellermann, son of old Valmy [Francois Christophe] Kellermann, came thundering down on the flank, through the mulberry trees and the tall luxuriant vines, with a handful of heavy cavalry. A minute earlier, or three minutes later, and the thing could not have succeeded, but the timing was perfect, and North Italy was recovered in that moment for the French Republic … at eight o'clock … the Austrian surgeons came rushing to their distinguished guest [Soult] with the news of the utter rout of their men.

Bonaparte rightly gets the credit for reforming the investigative system but without Desaix, Marmont and Kellermann, the system might still be a shambles of local variations and interpretations.

Bonaparte, who did not eat before a battle, was famished. His cook, Dunand, invented a meal from the materials to hand, a chicken, some tomatoes, mushrooms, eggs, prawns, and a crayfish, all cooked in brandy flames. Today's Pollo Marengo is essentially chicken, mushrooms and tomatoes.

Austria sued for peace; Bonaparte hastily showed himself in Paris, falsely claimed credit for the victory, and in the breathing space acquired by the Austrian capitulation, 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 his duty.

In August 1800, Bonaparte 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. 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 read law books to prepare himself and chaired more than half the meetings. A council member, Antoine 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 … Cambacéres, 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 Tribunate on 24 November 1801, but it was rejected 65-13. Napoleon withdrew the draft on 3 January 1802 and removed obstructive Tribunes. The 36 sections of the Civil Code, largely written by Portalis, 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), and *Code Penal* (1810). Along with the Civil Code, they are regarded as the Napoleonic Code. The Criminal Code invented the *juge d'instruction* (investigating 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):