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.

Professor George Dargo, of the New England School of Law, says in *OxfordSC* that the European system, 'is the most widespread and important legal tradition in the modern world'.

Bonaparte placed 36th in Professor Darien McWhirter's list of 100 people who most influenced the law.

18. The moral failure of law schools

Academics were awkwardly placed when they became part of the cartel. Universities are supposed to find and teach the truth; Justice Russell Fox says the search for truth gives a legal system its moral face; English law had not sought the truth since about 500 AD. Blackstone cunningly dodged every issue of truth, fairness, justice, morality, and reality

by asserting that a deity invented the system Another implausible and partial solution was to say morality does not matter. Those who took that position include Harvard's Christopher Columbus Langdell and Oliver Wendell Holmes Jnr in the 19th century, and Oxford's H.L.A. Hart in the 20th.

Christopher Columbus Langdell (1826-1906), dean of the Harvard law school 1875-95, wore a long beard. A psychiatrist might ask: 'What is that man hiding?' Perhaps the effects of his invention, the case method of teaching law. In *The Moral Failure of Law Schools* (*Troika*, November-December 1996), Alan Hirsch, later Professor of Legal Studies at Williams College, Massachusetts, explained how the case method corrupts law students and destroys their idealism:

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

legend has it, snapped at a student: 'If it's justice you want, go to divinity school.'

Law professor Nancy Lee Firak, of Northern Kentucky University, wrote in '*Ethical Fictions as Ethical Foundations': Justifying Professional Ethics* (Osgoode Hall Law Journal, 1986): 'Lawyers are trained to cast the facts of a single event in several different (even contradictory) forms and are then taught how to argue that each form accurately represents reality.' In short, how to lie. That suggests law schools stand foursquare for artifice, chicanery and greed.

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

Oliver Wendell Holmes Jnr (1841-1935) graduated from Harvard Law School in 1867 and was briefly a professor there in 1882. He wrote in *The Path of the Law* (1897): 'For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether.' President Theodore Roosevelt put Holmes on the Supreme Court at 61 in 1902, but they disagreed on the Sherman Act (1890), which made price-fixing by cartels a crime. Roosevelt said of Holmes: 'Out of a banana, I could carve a firmer backbone.' Holmes stuck to the court like a limpet

until 1931 when Chief Justice Charles Evan Hughes told him that, at 90, it was time to go.

On his *Legal 100*, Professor McWhirter places Holmes 18th, Langdell 43rd, and Oxford professor Herbert Lionel Adolphus Hart (1907-92) 89th. He says Hart argued 'throughout his career that law and morality should be separated', and was 'the most important legal philosopher of the 20th century'. Hart, however, is perhaps better remembered for being cuckolded by a number of Oxford dons, including Sir Isaiah Berlin (1909-97). Perhaps they took the view that if justice and morality should be separated, so could adultery and morality.

Thane Rosenbaum is a former corporate lawyer who teaches law at Fordham University, New York. He wrote in *The Myth of Moral Justice: Why Our Legal System Fails to Do What's Right* (HarperCollins, 2004):

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

Professor Rosenbaum told me in 2005 that he agrees with Justice Russell Fox that a legal system gets its moral face from a search for the truth. It follows that the adversary system has no moral

centre, and that judges and lawyers are also reviled because they say things they know are not true.

Malcolm Turnbull (BCL Oxon), an Australian politician, was encouraged by elements of his (Liberal) party in November 2009 to say that global warming was over-rated. Declining, he said he was no longer a barrister, and hence could not run an argument in which he did not believe.

In his book, Professor Rosenbaum suggested a formula that would at least relieve judges of hypocrisy:

> I am required by law to do what I must do today, even though I realize that it will strike some, including me, as immoral … Neither can I pretend that the result is just, because I know it is not. Nonetheless, I am bound to apply the law in this way, which will paradoxically produce both the correct legal result and the wrong moral outcome.

Has any judge said something like that?

19. Judicial corruption in common law world

USA. 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', in particular organised crime conducted by powerful and respectable industrialists. Those largely responsible, with their positions in Professor McWhirter's *Legal 100* in brackets, were William Blackstone (13), John

Locke (16), James Madison (1), Alexander Hamilton (2), and John Marshall (3).

The contributions of Locke and Blackstone were noted earlier. McWhirter said: 'No figure in history had a greater effect on the "law" of later generations than James Madison.' Madison was responsible for the US retention of the anti-truth system.

McWhirter said Alexander Hamilton (1757-1804) 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 believed that the business of America is business and that government by an oligarchy of rich business men was the best way to build a powerful country. Perhaps inspired by Britain's 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.

The Constitution was ratified in 1789. Article II Section 2 effectively resulted in government by oligarchy. It says the President, 'with the advice and

consent of the Senate, shall appoint … public ministers', including members of Cabinet.

Smart business types can thus shuffle round a revolving door of business and government for decades. In 2004 Donald Rumsfeld, 72, had been on the shuffle for 47 years when President George W. Bush sacked him as Minister for War. In 2008, former President G.H.W. Bush, 83, had been shuffling for 42 years, and Dick Cheney, 67, for 38.

The Yazoo matter offers a glimpse of how judges would accommodate respectable organised criminals. *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 sales from it. Investors sought an advisory opinion from Alexander Hamilton. He told them what they wanted to hear: the cancellation was unconstitutional. A Yazoo test case, *Fletcher v Peck*, ground through the courts.

President John Adams (63 in *The Legal 100*) stacked the courts at 'midnight' of the day he was to leave office, 20 January 1801. He made John

Marshall (1755-1835), a land speculator and protégé of Alexander Hamilton, Chief Justice. *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.'

Judges should clearly have the power to act as a brake on bad legislation, but only if they are properly trained and appointed. Judicial error is inevitable when the court consists of untrained former trial lawyers appointed by dubious politicians, e.g. *Gore v Bush* (2000).

Alexander Hamilton took part in a duel with Aaron Burr (1756-1836) at Weehawken, New Jersey, on Wednesday, 11 July, 1804. Hamilton, lawyer and gentleman, aimed high. Burr, lawyer, shot him in the stomach. Hamilton died next day but his Yazoo opinion lived on in *Fletcher v Peck* (1810): Marshall gave the green light to respectable organised criminals. *OxfordSC* says the Contracts Clause of the Constitution seemed to be on Georgia's side, but Marshall said the Yazoo cancellation was unconstitutional. He upheld the corrupt grants and voided the legislation which cured them. Article II Section 4 of the Constitution says bribery warrants removal of a President, but Marshall took the view that bribery is appropriate for business. He 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.

Historian Gustavus Myers said *Fletcher v Peck* 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 19th 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 Chief Justice John Marshall gave the green light to corruption, the New York culture barely distinguished between organised crime in the judiciary, politics and on the streets. Jimmy Breslin reported (*Damon Runyon*, Ticknor and Fields, 1991) 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.

A lawyer named Macrery paid the $10,000; Hines procured a five-year appointment. Judge Macrery later told Hines: 'I only pay once', but

shortly died of alcoholic poisoning. A Tammany lawyer called for an investigation. He said Judge Macrery had been beaten to death. 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.'

FBI boss (1935-72) J. Edgar Hoover (1895-72) accepted Mafia bribes in the form of tips on fixed horse races supplied by a cut-out, reporter Walter Winchell.

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 its court system since the county was created in 1831.

Carl Sifakis noted a scale for bribing judges in *The Mafia Encyclopaedia* (Checkmark, second edition 1999). Jake (Greasy Thumb) Guzik (1887-1956), a fixer for the Chicago Mob, devised the scale. Guzik got his nickname from counting out banknotes for police and politicians at his table at St Hubert's Old English Grill and Chop House. The Guzik Scale should be multiplied by perhaps 20:

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 Chicago fixer, Murray (The Camel) Humphreys (1899-1965), the only Welshman to reach the higher echelons of the Mafia. He said: '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 1971. In 1980 the Justice Department and the FBI began Operation *Greylord*, a RICO investigation into organised crime in the Cook County court system. The 1970 RICO (Racketeer-influenced and Corrupt Organizations) legislation is an exception to the common law rule which conceals evidence of a pattern of criminal behaviour, respectable and otherwise. It seems probable that Chief Justice John Marshall would have found a way to rule RICO unconstitutional, at least for pin-striped organised criminals, but the legislation got past the appellate courts. Between 1984 and 1994, RICO imprisoned 20 judges, 50 lawyers, and sundry police and court officials in the Cook County system for extortion and bribery. Judge Tom Maloney was

convicted of taking bribes in three murder cases. He served 12 years.

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. They coached him on running cases; pressured opposing lawyers to settle, and gave 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 a 'cash for kids' extortion, Pennsylvania judges Mark Ciavarella and Michael Conahan were accused in 2008 of taking US$2.6 million in bribes to send alleged juvenile offenders to private prisons. In February 2009, they plea-bargained the penalty down to seven years, but a judge rejected the bargain. Ciavarella and Conahan then changed their plea to not guilty and were charged on 48 counts of racketeering, extortion and bribery. In October 2009, the Pennsylvania Supreme Court expunged the convictions of some 6500 juveniles sent to prison by Ciavarella.

Britain. England is England yet. It would be idle to suppose that Britain, home of systemic corruption from the 11th century, desisted in the 20th.

An insider-trading scandal in 1912 concerned the British Marconi company, then about to get a major order from the Liberal [formerly Whig] Government. Cabinet Ministers who bought shares in Marconi's US subsidiary included David Lloyd

George (Chancellor of the Exchequer), Herbert Samuel (Postmaster-General), and Sir Rufus Isaacs (Attorney-General). Rufus (1860-1935) was brother of Godfrey Isaacs, managing director of the British Marconi company.

An inquiry whitewashed the crimes, and Rufus, now Lord Reading, became Chief Justice in 1913. This gave him the chance in 1914 to invent a discretion (see *Christie* below) which enables judges to conceal ALL evidence against people like, well, him. Now Marquis of Reading, he decently waited for a year after his wife's death in 1930 before marrying his private secretary, Stella, 37.

The *Honours (Prevention of Abuses) Act* of 1925 came into being because a pair of organised criminals, Prime Minister (1916-22) David Lloyd George (1863-1945), a lawyer, and his bagman, Maundy Gregory, extorted bribes for honours. Gregory charged what the traffic would bear. Lloyd George invented the Order of the British Empire (OBE) in 1917; by 1922, he had awarded 25,000 OBEs. Discussing the bribes in a 1998 Churchill Society Lecture, John Lidstone said multiplying the 1920s values of the bribes by 100 gives rough current values. The scale, with current values in brackets, were: OBE £100 (£10,000). Knight: £10,000-£15,000 (£1 million-£1.5 million). Baronet: from £25,000 (£2.5 million). Baron: £30,000-£50,000 (£3 million-£5 million). Viscount: £80,000-£120,000 (£8 million-£12 million).

Lloyd George decently gave the Liberal Party some of the proceeds, but kept an estimated £1.5

million (£150 million) for himself. Gregory got a flat £30,000 a year (£3 million, £18 million) over the six years Lloyd George was Prime Minister. In 1933, Maundy Gregory was charged and got six months and a fine of £50 (£5000), but Lloyd George was not charged. In 1945, he was made an Earl.

There has been suspicion that later politicians and their bagmen extorted bribes for honours, but Maundy Gregory remains the only person charged under the 1925 Act.

India. The Chief Justice of India, Sam Bharucha, implied in 2001 that upwards of 20% of judges were corrupt. He said: ' … 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.'

Australia. Chief Justice Sir Garfield Barwick was accused in 1980 of not disclosing his interest in companies before the court. The offence carried 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.

Lionel Murphy, Attorney-General in a Labor Government, went up to the High Court in 1975. In 1985, Justice Murphy was charged with attempting to pervert justice on behalf of "my little mate", lawyer Morgan Ryan. Justice Murphy was found guilty but got a re-trial and was acquitted. An inquiry by three retired judges found 14 instances of his possible criminal behaviour, but the inquiry died with him in 1986 and a Labor Government sealed the inquiry papers until 2016.

A Sydney organised criminal, George Freeman, used the J. Edgar Hoover technique to bribe NSW Chief Magistrate Murray Farquhar, but did not bother to use a cut-out. He rang Farquhar every Wednesday with tips which were 97-98% accurate, according to Farquhar's clerk, Camille Abood, who put the money on and collected the winnings. Farquhar was imprisoned in 1985 for perverting justice in a case of theft of $55,000.

C. What Common Lawyers Do

This section is a collation of views on various aspects of lawyers' activities. As noted, the Sophists taught lawyers how to lie 2500 years ago.

1. Down the ages

Some of the following disobliging references to lawyers come from Marlyn Robinson's *The Mouthpiece: Lawyerly Quotations from Popular Culture* (Tarlton Law Library, University of Texas):

Cicero (106-43BC), Roman lawyer (4 in *The Legal 100*): 'When you have no basis for an argument, abuse the plaintiff.'

Gaius Verres, Governor of Sicily 70-73BC: 'What I steal the first year goes to increase my own fortune, but the profits of the second year go to lawyers and defense counsels, and the whole of the third year's take, the largest, is reserved for judges.'

Gaius Cornelius Tacitus (c.55-120AD), Roman lawyer and historian: 'No commodity was so publicly for sale as the perfidy of lawyers.'

Tacitus quoted Gaius Silius (either the father or son of that name who were Roman consuls in the 1st century; both came to bad ends): 'If no one paid a fee for lawsuits, there would be less of them! As it is, feuds, charges, malevolence and slander are encouraged. For just as physical illness brings revenue to doctors, so a diseased legal system entices advocates.'

Henry Brinkelow (d. 1546): 'The lawyer can not vnderstond the matter tyl he fele his mony.'

Jonathan Swift (1726): ' … a Society of Men among us, bred up from their Youth in the Art of proving by Words multiplied for the Purpose, that *White* is *Black*, and *Black* is *White*, according as they are paid.'

Jeremy Bentham (1821): 'The duty of an advocate is to take fees, and in return for those fees to display to the utmost advantage whatsoever falsehoods the solicitor has put into his brief.'

Mexican curse: 'May your life be filled with lawyers.'

Don Vito Corleone: 'A lawyer with a briefcase can steal more than a thousand men with guns.' – Mario Puzo, *The Godfather*, 1969.

Seymour Washman: 'All successful criminal lawyers I know are egomaniacs... there isn't a criminal lawyer I know – certainly including myself – who hasn't interpreted a not guilty verdict as proof of his unique gift, his insight into how to manipulate people.' (*Confessions of a Defense Attorney*, *Village Voice*, 28 September 1978.)

Lamar Quin: 'Mouthpieces for sale to the highest bidder, available to anybody, any crook, any sleazebag with enough money to pay our outrageous fees … you'll meet so many crooked lawyers you'll want to quit and find an honest job.' (John Grisham, lawyer-novelist, *The Firm*, 1991.)

On the other hand, Viscount (Frederick) Maugham (1866-1958), Chancery judge 1928-34, Lord Chancellor 1938-39 said: 'Lawyers are the

custodians of civilisation, than which there can be no higher or nobler duty.'

2. Serial lying

Harvard ethics professor Arthur Applbaum said in *Professional Detachment* (Harvard Law Review, 1995): 'Lawyers might accurately be described as serial liars because they repeatedly try to induce others to believe in the truth of propositions, or in the validity of arguments, that they believe to be false.'

Lawyers said what they do is zealous advocacy sanctioned by the system. Professor Applbaum replied in *Ethics for Adversaries* (2000) that this was 'a strategy of redescription': the Executioner of Paris, Charles-Henri Sanson, was sanctioned by the state but he was still a serial killer. Sanson had the 'professional detachment' of lawyers; he did not distinguish between enemies of the Bourbon regime, Louis XVI himself, and leaders of losing republican factions. In 1793, at the height of the Terror, he beheaded 300 men and women in three days. His son Gabriel slipped in the blood, fell off the guillotine, and was himself killed. That seems fair.

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

[Taking] zealousness to its adversarial limits (all the while promoting the adversarial system as a system of justice) poses a serious moral problem. Basically, we need to

admit that there is occasion for shame in our profession. It would be overly dramatic to say that it is a surplus of shame that is driving lawyers from the profession, but something is.

Professor Elkins noted an American Bar Association poll in 1988. It showed that '41% of a representative sample of lawyers would choose another profession if they had to make the choice again', and that 'alcoholism among lawyers is almost twice as high as for the general population'.

An Australian survey for a young lawyers' body found in 2004 that almost half of the respondents did not see themselves practising law in five years' time. *The Sydney Morning Herald* (7 September 2006) reported: 'LawCover, an Australian insurer reported a disturbingly high number of lawyers with depression, stress, alcohol dependency, and gambling addiction.' In 2006, a survey of 7,000 professionals by Beaton Consulting found lawyers were the second unhappiest [behind patent attorneys] of all occupations.

Lawyers in the US had the highest rate of depression of more than 100 occupations in a 1990 study by Johns Hopkins University, and were almost four times as likely to experience it as the general population.

The question is: if lawyers did not have to lie and pervert justice, but got less money, would they be less, or more, unhappy, depressed, drunk, and likely to gamble?

3. Ethics

Some lawyers, no less than some journalists, take the view that ethics is a county in south-east England, home of the succulent Colchester oyster. Sanson, Executioner of Paris, did not invent the system which sanctioned his ghastly work, but lawyers did invent the adversary system and its 'ethics' which sanctions theirs. Professor Lester Brickman, of New York's Cardozo School of Law, said in 1997: 'When the ethics rules are written by those whose financial interests are at stake, no one can doubt the outcome.'

Ethics and morals are synonymous. Professor David Luban wrote in *Lawyers and Justice: An Ethical Study*: ' … the standard conception [of lawyers' ethics] simply amounts to an institutionalized immunity from the requirements of conscience.' He said Professor Murray Schwartz, of UCLA, was criticizing lawyers' ethics when he wrote in *The Professionalism and Accountability of Lawyers* (*California Law Review*, 1978): 'When acting as an advocate for a client, a lawyer … is neither legally, professionally, nor morally accountable for the means used or the ends achieved.' I mentioned that to a Sydney psychiatrist, Dr Elizabeth O'Brien. (No relation to my daughter.) She said: 'That sounds like psychopathy.' Psychopaths have no conscience.

Reporter Ross Coulthart asked Justice Geoffrey Davies, of the Queensland appeal court, about ethics in a television programme, *The Justice System Goes on Trial* (*Sunday*, August 23, 1998):

Do you think there's a case to argue that some of the ethical rules that lawyers have actually almost encourage dishonesty among lawyers? – Yes I do. One of the examples is that a lawyer can ethically deny an allegation in the opponent's pleading knowing it to be true.

You're kidding. So you can basically lie? – Well, what lawyers would say is that you are putting the other side to proof.

It's a lie though, isn't it? – It is.

Law professor Charles Wolfram, of Cornell University, New York, wrote in *Modern Legal Ethics* (West, 1986): '[The lawyer's role is] institutionally schizophrenic . . . a lawyer's objective within the system is to achieve a result favorable to the lawyer's client, possibly despite justice, the law and the facts.'

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

Bruce Anthony Hyman, 48, is said to be only British lawyer in 800 years to go to prison for pervert justice. Hyman, a barrister, represented a woman whose ex-husband, representing himself, was seeking greater access to their daughter. Hyman forged a document, anonymously sent it to the ex-husband, and denounced him as the probable forger when he tendered it. Exposed as the source, Hyman

got 12 months in September 2007, but was released in two months.

Professor Luban begins his book on ethics with *The Case of the Wicked Uncle*. The following summary is drawn from his book and the CDNB which spells the uncle's title as Anglesey rather than Anglesea.

The uncle, Richard Annesley (b. 1694), was a white collar organised criminal. When his brother, Lord Latham, died in 1727, he used bribery to steal the title from his nephew, James Annesley (b.1715), and had the boy kidnapped and sent into slavery in America. He succeeded a cousin as sixth Earl of Anglesey in 1737.

James Annesley escaped and returned to Dublin in 1741. His uncle offered a Dublin solicitor, James Giffard, £10,000 (some £1 million today) to get the young man hanged for an accidental shooting. 'If I cannot hang James Annesley,' the Earl said, 'it is better for me to quit this kingdom and go to France, and let Jemmy have his right.'

Giffard prosecuted James for murder, but a jury at London's Old Bailey found him not guilty. Giffard charged the Earl £800 (c.£80,000 today), but Anglesey refused to pay. Giffard sued for the money and their conspiracy to procure a judicial killing emerged at the action. James then sued his uncle to be declared the rightful Lord Latham.

The trial began in the Dublin Court of Exchequer on 11 November 1743 and ran for a then record 15 days. When Giffard was called as a witness for James, Anglesey's new lawyers adopted a strategy that could have credence only in an Alice

in Wonderland system. They argued that the attempt to procure Annesley's execution was 1) A perfectly proper legal proceeding, and 2) So wicked that no one could believe a lawyer and his client would be party to it. Thomas Burroughs, for Anglesey, put the second argument to Giffard:

> Did you suppose from thence that he [the Earl] would dispose of that £10,000 in any shape to bring about the death of the plaintiff? – I did.
>
> Did you not apprehend that to be a most wicked crime? – I did.
>
> If so, how could you … engage in that project, without making any objection to it? – I may as well ask you, how you came to be engaged for the defendant in this suit?

Giffard was thus claiming in 1743, 10 years before Blackstone began lecturing on a system 'dictated by God himself', that the system allows lawyers to engage in systematic criminal activity for money.

Justice Sir James Mathew (1830-1908) observed: 'Justice is open to all, like the Ritz Hotel.' James Annesley was awarded the verdict and the title of Lord Latham, but his uncle's lawyers procured – by bribery, it was believed at the time – a writ of error to set the verdict aside. James had no money to pursue his claim in the House of Lords. Anglesey continued as Lord Latham until he died in 1761, a year after the real Lord Latham.

Lawyers' 'sacred duty' to do whatever it takes comes from the fertile brain of Henry Brougham

(1778-1868): he invented *The Edinburgh Review* (1802), London University (1828), a single-steed, four-wheel conveyance (1829), and Cannes (1834). In 1820, he defended Queen Caroline in a divorce action brought against her by George IV (1762-1830), who 'looked more like an elephant than a man', in the House of Lords. Brougham informed their lordships:

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

That sounds good, if a little overripe, and Professor Dershowitz notes it approvingly in *The Best Defense*, but Professor Franklin Strier, of California State University, indicates in *Reconstructing Justice: An Agenda for Trial Reform* (University of Chicago Press, 1994) that Brougham later admitted it was blackmail, which is the crime of theft by extortion. The *Act of Settlement* (1701) said a king who marries a Catholic must be treated 'as if he were naturally dead'. Brougham's words were a threat, in code, to His Most Sacred Majesty that, unless he dropped the action, Brougham would reveal that he had secretly married a Catholic, Mrs Maria Fitzherbert. That was an offer George could not refuse: it would inevitably rob him of the crown, the palaces and the money.

Lawyers today routinely resort to blackmail in negligence and libel cases. A more polite term, greymail, is used when they demand documents they know governments dare not disclose. Compared to blackmail and conspiracy to murder, lying may seem relatively mild, but lawyers control evidence and habitual lying necessarily poisons justice at the fount.

Law professor Monroe Freedman, then of George Washington University Law Center, published *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions* in the *Michigan Law Review* in 1966. The questions, with his answers in brackets, were:

> Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth? [Yes]
>
> Is it proper to put a witness on the stand when you know he will commit perjury? [Yes]
>
> Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury? [Yes]

Professor David Luban said in his study of ethics that Professor Freedman 'later reversed himself' on the third question in *Lawyers' Ethics in an Adversary System* (*Bobbs-Merrill*, 1975], but a study by Kenneth Mann (*Defending White-Collar Crime: A Portrait of Attorneys at Work*, Yale University Press 1985) indicated that lawyers typically follow Freedman's original advice. Professor Luban continued:

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

In short, even if a client tells his lawyer he is guilty of rape, the lawyer can let the rapist go in the box and falsely deny his crime on oath, and can back up that lie by cross-examining the girl about her sex life to falsely suggest she consented. The technique of 'destroying' such witnesses is at once brutal and pornographic, and tends to confirm the view of Professor James R Elkins, that the adversary system's philosophy of cruelty leads to 'professional malevolence'.

Age has not wearied Professor Monroe Freedman. Now of Hofstra University (founded 1970), New York, in 2006 he published *In Praise of Overzealous Representation – Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct* (*Hofstra Law Review*, vol 34). The abstract says:

This article concludes that there are circumstances in which a lawyer can ethically make a false statement of fact to a tribunal, can ethically make a false statement of material fact to a third person, and can ethically engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Dishonest, fraudulent and deceitful trial lawyers become judges without missing a beat.

A Sydney lawyer, Stuart Littlemore, stated lawyers' ethics accurately when Andrew Denton interviewed him on Channel 7, a television station, in October 1995:

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

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

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

Littlemore: Not at all.

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

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

.

Sydney lawyer John Marsden (1942-2006) admitted in *I Am What I Am* (Viking, 2004) that he used a false consent defence to get Ivan Milat off rape in 1974:

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

Milat went on to rape and murder seven young backpackers from, variously, Germany, England and Australia, in circumstances similar to the 1974 case. He was found guilty of the murders and sent down for life in 1996.

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

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

cluster of values – procedural justice and the defense of rights – that are associated with the adversary system.

Professor Luban quoted Professor Murray Schwartz's response to that argument:

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

As we have seen, the system IS immoral because, apart from everything else, it does not search for the truth. The Principle of Non-accountability thus disappears.

Aristotle's *petitio principii* fallacy says if the major premise is false, the conclusion is invalid. The adversary system syllogism goes something like this:

Major premise: The adversary system is the best system.

Minor premise: It requires trial lawyers to pervert justice.

Conclusion: Perverting justice is ethically acceptable.

The adversary system is demonstrably not a system of justice, let alone the best. Lawyers' ethics are thus based on a fallacy.

4. The cartel: law as business

Common lawyers like to think they are members of a learned profession, but the law has effectively been a business since the lawyer-judge cartel was formed to maximise profits (partly by extorting from litigants) more than 800 years ago.

Lawyers may say: 'Cartel? What cartel?' Chief Judge Richard Posner's description was noted in the section on the origin of the common law. Chief Judge Dennis Jacobs is head of the federal Court of Appeals for the Second Circuit, which is based in New York and covers New York State, Connecticut and Vermont. His lecture, *The Secret Life of Judges*, delivered at Fordham University on 20 November 2006, was published in the *Fordham Law Review* in May 2007. Chief Judge Jacobs said judges have:

> … a habit of mind that, among so many admirable features of the judicial mentality, amounts to a serious and secret bias … an inner turn of mind that favors, empowers, and enables our profession and our brothers and sisters at the bar … It is an insidious bias because it is hard to make out in the vast maze of judicial work … that are woven together like an elaborate oriental rug in which the underlying image of the dragon emerges only after you stare for a while. I discern in this jumble a bias in favour of the bar lawyers: what they do; how they do it; and how they prosper in goods and influence. This is the figure in the carpet.

Associate Professor Benjamin Barton, of the University of Tennessee College of Law, put the

question, *Do Judges Systematically Favor the Interests of the Legal Profession*? in the *Alabama Law Review* of December 2007. In what may be termed the Barton Hypothesis, he answered his question thus at page two of his 52-page (14,821 words) paper:

> Here is my lawyer-judge hypothesis in a nutshell: many legal outcomes can be explained, and future cases predicted, by asking a very simple question: is there a plausible legal result in this case that will significantly affect the interests of the legal profession (positively or negatively)? If so, the case will be decided in the way that offers the best result for the legal profession.

Max Weber (1864-1920), the German polymath who taught law, political economy, economics, and sociology, wrote in 1915.

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

If Larsen E. Pettifogger (*The Kingdom of Id*) were a little smarter, he would be the quintessential lawyer-businessman. In *Greed on Trial* (*The Atlantic Monthly*, June 2004), Alex Beam quoted Robert Popeo, a plaintiff's lawyer who was seeking an extra US$1.3 billion for starving tobacco lawyers, as saying: '... the

law is an industry now, not a learned profession.' An editorial in *The Financial Times* of 16 June 2005, stated:

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

People in business do not have a privilege of secrecy in their dealings with each other. Professor David Luban has noted: '[If a] lawyer is really just another businessman, [lawyers] lose whatever claim they have to the perquisites and immunities of the legal profession, [including] such invaluable goodies as the attorney-client privilege.'

5. A feeding frenzy of lawyers

The *Wikipedia* states: 'Several economic studies and legal decisions of antitrust authorities have found that the median price increase achieved by cartels in the last 200 years is around 25%.' That may be the norm, but trial lawyers have never been satisfied with 25%, e.g. *Jennens v Jennens*. That raises a question: are they the most avaricious of all businessmen? Some pointers:

As noted, law professor John Banzhaf, of George Washington University, Washington, DC,

said in 2002: 'Like sharks smell blood, lawyers smell money.' In *Anatomy of a Murder* (1958), Judge John Voelker (1903-91) has lawyer Paul Biegler echo the Mafia motto, 'Get the money, and trust no-one.'

Lawyer Arthur Train wrote in *The Confessions of Artemus Quibble 77* (1924):

> There are three golden rules in the profession … the first … thoroughly terrify your client. Second, find out how much money he has and where it is. Third, get it.'

Johnnie Cochran knew that O.J. Simpson was guilty of murder but took US$500,000 to pervert justice on his behalf. At Cochran's funeral in April 2005, Simpson said: 'I thought he represented … the best in what our adversarial legal system was about.'

Robert Blake, a US actor found not guilty of murdering his wife, said in March 2005: 'You're innocent until proven broke.' He said he had spent US$10 million on his defence. Alec Baldwin, a US actor, said in 2008 that his divorce had cost him $20 million, and that judges were 'like pit bosses, keeping the money flowing'.

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

> The American public says lawyers are greedy, manipulative, corrupt and do a poor job of policing

themselves … Specifically, respondents said that lawyers: are more interested in winning than seeing that justice is served (74%); spend too much time finding technicalities to get criminals off (73%); are more interested in making money than serving clients (69%)…. A respondent said: '"Lawyers] get into a courtroom and they are like sharks. They want that money".'

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

6. The law as game

Geoffrey Robertson QC, author of *The Justice Game* (Random House, 1998), was asked in 1998: 'Should justice be a game?' He replied: 'Should it? No. Is it? Yes. We can't avoid the fact that the adversary system … does make justice a game.'

US jurist John Henry Wigmore (1863-1943) referred to 'the game of litigation'. Judge Learned Hand (1872-1961) recalled that he once said to Justice Oliver Wendell Holmes Jnr: 'Well, sir, goodbye. Do justice!'

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

In *We, the Jury* (Basic Books 1994), Jeffrey Abramson, a lawyer and Professor of Politics at Brandeis University, Massachusetts, quoted Stephen

Adler, of *The Wall Street Journal*, as reporting that jury consultants openly admit that:

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

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

Norman Mailer (1923-2007) told me in 2000: 'I've always looked upon our legal system as a high-stakes game played at the top by very skilful men, and once in a while even justice is served.'

The adversary system may be a game, but the playing field is not level. Later sections note how the game is rigged to get money for lawyers.

7. Zealous prosecutors

Prosecutors must know the system is unfairly rigged against victims, detectives, jurors, the community, and themselves, but they do not agitate for a fair

system, and some try to balance defence lawyers' dirty tricks with their own. The win-at-all-costs culture thus gets the worst of both worlds. Criminals get off and the innocent – particularly the poor and those whose colour is different from those in the majority – go to prison.

Claire Cooper, of *The Sacramento Bee*, noted in February 2004 that in two trials in Solano County, California, prosecutors identified Jonathan Shaw and Mango Watts as the single robber who held a gun to a restaurant manager's head. Cooper said three appellate judges said the prosecutions were 'something between stunningly dishonorable and outright deplorable', but that they could not reopen the case because the Supreme Court had 'never directly addressed the issue of whether due process permits two persons to be convicted for a crime that only one committed'.

Irving Younger (1932-88) was a defence lawyer, judge, academic, inventor of the sodomised parrot defence (see below, Diminished responsibility), and hypocrite. He complained (*The Perjury Routine*, *The Nation*, 3 May 1967) that judges do not assume that 'arresting officers are committing perjury'. Younger said:

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

If it is wrong for police to lie to put criminals in prison, it is wrong for lawyers to lie to keep them out.

8. The judge as Humpty Dumpty

When lawyers got control of the process, judges had to be passive, but they do the decent thing: they try to stay awake. Lord Coleridge's wife sat on the bench and nudged him. A Sydney judge, Roddy Meagher, had his tipstaff at the ready to kick him. Lord Thankerton's solution enraged barristers; he took to knitting on the Bench.

Given the system's distance from reality, it is appropriate that judges' mindset is accurately described in *Through the Looking Glass, and What Alice Found There* (Macmillan, 1871):

> 'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean -- neither more nor less.'
>
> 'The question is,' said Alice, 'whether you *can* make words mean so many different things.'
>
> 'The question is,' said Humpty Dumpty, 'which is to be master -- that's all.'

US Chief Justice (1969-86) Warren Burger (1907-95 confirmed the Humpty mindset. Bob Woodward and Scott Armstrong reported in *The Brethren* (Coronet, 1979) that Burger told his brother judge, John Marshall Harlin II: "We are the Supreme Court and we can do what we want."

In *Bush v Gore* (Monday, December 13, 2000), five Humpties effectively said democracy means you don't count all the votes. They stopped the counting of Florida votes which, research showed a year later, would have made Albert Gore President rather than George W. Bush. There is a view that some consequences were not good. The Humpties were: William Hubbs Rehnquist (1924-2006, judge 1972-2006), Sandra Day O'Connor (b. 1930, judge 1981-2006), Antonin Scalia (b. 1936, judge 1986-), Anthony Kennedy (b. 1936, judge 1988-), and Clarence Thomas (b. 1948, judge 1991-). A dissenter, Justice John Paul Stevens (b. 1920, judge 1975-) observed:

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

Don Vito Corleone said lawyers can steal more than 1000 gangsters, but he did not say how they are helped by judges, e.g. Justice Brett on discovery (1882), Lord Atkin on negligence (1932) and tax evasion (1936), Chief Justice Owen Dixon on tax evasion (1957), and Chief Justice Garfield Barwick on tax evasion (1964-81). Their actions, detailed later, tend to support the Barton Hypothesis.

Judging is different from advocacy, but judges are not trained as judges; they are lawyers one day and judges the next. Abimbola A. Olowofoyekuw, a lawyer, pointed out in *Suing Judges: a Study of Judicial Immunity* (Oxford, The Clarendon Press, 1993):

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

Since judges' only training is as lawyers, do they suddenly stop lying and perverting justice when they go aloft? Alan Dershowitz wrote in *The Best Defense*:

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

People who persistently make mistakes are dismissed, but it is difficult to get rid of judges who are persistently wrong. In Europe, judges are trained

separately from lawyers and appointed on the basis of rigorous examinations.

In the common law world, a judge is said to be a lawyer who knows a politician. A US judge, Curtis Bok, said in 1941: 'It has been said that a judge is a member of the Bar who once knew a Governor.'

In *Trial by Jury* (1875), barrister W. S. Gilbert has a judge admit: 'It is patent to the mob/That my being made a nob/Was effected by a job.' Chorus: 'And a good job too.' During the administration (2001-2009) of President George W. Bush, potential appointees to the Supreme Court were subjected to questioning by Vice-President Richard Cheney. In 2009, President Barack Obama (Harvard Law School) continued the procedure with Sonia Sotomayor.

Chief Justice (NSW) Jim Spigelman said Sir Owen Dixon (1886-1972, High Court 1929-64, Chief Justice 1952-64) was 'Australia's greatest jurist' and that his court was 'one of the great common law benches of history'. Spigelman must have been unaware that Dixon took court further into fraud. He wrote judgments for Justice Sir George Rich (1863-1956, High Court 1913-50), and let Rich put his name on them. He also wrote judgments at variance with his own and let other judges sign them. Lawyers could use the fraudulent judgments in argument before the court.

The origin of lawyers' immunity from suit is a brazen example of the Barton Hypothesis. Courtesy of jurist Brett Dawson, we can name the guilty men: Sir Jonathan Pollock (1783-1870), Sir William Watson (1796-1860) and Sir George Bramwell (1808-92). In

Swinfen v Lord Chelmsford (Exchequer Court, 1860), the judges were put to the exigency of protecting a former – and, as it turned out, future – Lord Chancellor who had cheated his client.

Lord Chelmsford (1794-1878) had a glittering career. Born Fred Thesiger, at 13 he was a plucky little midshipmite at the Battle of Copenhagen. Perhaps tiring for the moment of rum, sodomy and the lash, he left the Navy at 17 and took to the bar and Tory politics. He rose to Solicitor General, Attorney General, and Lord Chancellor in 1858, but the 14th Earl of Derby's Government fell in 1859, and he fell with it.

Down on his luck and with mouths to feed – his son, Alf, a future appellate judge, was still at Oxford – Lord Chelmsford had to resort to the bar. A client, Ms Patricia Swinfen, instructed him by telegram not to settle but, finding himself double-booked, he took the time-honoured course of settling the action which promised the smaller fee, Ms Swinfen's.

A June 2004 editorial in FLAC (For Legally Abused Citizens) Australia noted how Pollock *et al* defrauded Ms Swinfen and established immunity. The 'reasoning' of the court was: we can't find any case where a barrister has been successfully sued for negligence. Therefore, it must be the law that barristers cannot be sued for negligence. That notion still obtains in Australia, if in few other countries.

The most recent assertion of lawyers' immunity – largely on the ground that legal actions must have some finality – was *D'Orta-Ekenaike v Victoria Legal Aid* (Australian High Court, March 10, 2005). Those

in favour were Murray Gleeson CJ and Michael McHugh, Bill Gummow, Ken Hayne, Dyson Hayden, and Ian Callinan JJ. When the lone dissenter, Justice Michael Kirby, shortly had an emergency heart bypass operation, *Justinian*, commented: 'It's sad to see that the only judge on the court with a heart is now having trouble with it.' A barristers' carousing song might go: O, the moon shines tonight/On Mrs Porter'/And on her D'Orta.

In May 2006 the Ontario Chief Justice's Advisory Committee on Criminal Trials defined the function of judges thus:

> Central to the adversary system is the concept that it is the lawyers who prepare and present the case … Trial judges would prefer to be, *and should be*, passive observers … there is no need for the trial judge to become involved in trial management.

It is preferable for judges to be awake when concealing evidence, and when telling the jurors to decide what the remaining evidence means, but for the rest of the trial they might as well be the scarecrows described by T.S. Eliot:

> We are the hollow men
> We are the stuffed men
> Leaning together
> Headpiece filled with straw

Sleeping is fairly passive, but Australian High Court judges ruled in September 2008 that two men found

guilty on drug charges did not get a fair trial because the trial judge, Ian Dodd, was sometimes asleep. The judges, who were paid AU$7,254.42 a week, were apparently unaware that no trial is fair because fairness means truth.

Oxford law professor Patrick Atiyah wrote in *Justice and predictability in the common law* (NSW Law Journal 1992): ' … less predictability in the law means more litigation.' Justice Sir Frank McKinnon (1871-1946) said in *Salisbury v Gilmore* (1942) that the law lords are 'the voices of infallibility, by a narrow majority'. David Goldberg QC, a London tax lawyer, said in 1997:

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

That means appeal courts are effectively casinos, lacking only scantily-clad young ladies offering the gamblers high-octane cocktails. Lawyers can thus advise clients to have another roll of the dice; they might win, however dubious their case.

Lawyers can get two bites of the appeal cherry because many common law countries have appeal courts for provinces and another for the nation. Britain has two appeal courts, the Court of Appeal and the judicial committee of the House of Lords.

Sir Alan Herbert (1890-1971) was called to the Bar in 1918 but never practised, perhaps because he feared he could not keep a straight face. He put the casino question in *Why Is the House of Lords?* (Punch, 1933). In *Board of Inland Revenue v Haddock*, he has the Master of the Rolls (head of the Court of Appeal) admit:

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

Harold Clough, a Perth engineer and former President of the Australian Chamber of Commerce, said in 1998:

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

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

During the 'troubles' in Northern Ireland in the 1970s, it was said that accused are presumed

innocent until proved Irish. At the 1974 trial of the innocent Birmingham Six, Justice Sir Nigel Cyprian Bridge (1917-2007) told the jury: 'I am of the opinion, not shared by all my brothers on the bench, that if a judge has formed a clear view it is much better to let the jury see that.' Bridge summed up for a conviction. Mike Mansfield QC noted his technique in *Presumed Guilty*: *The British Legal System Exposed* (Heinemann, 1993):

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

Justice Sir Joseph Cantley (1910-93) presided at the 1979 trial of Jeremy Thorpe, a barrister/Liberal politician, who was accused of conspiring to have Andrew (Gino) Newton murder Thorpe's former lover, Norman Scott, in 1975. Cantley summed up for an acquittal. He said the evidence of the chief prosecution witness, Peter Bessell (1921-85), a Liberal politician, was 'a tissue of lies'. The jury was originally split 6-6, but eventually found Thorpe not guilty. A few days later, Peter Cook (1937-95) detonated a parody of Canley's summing-up at the Secret Policeman's Ball for Amnesty International. Cook, who had said: 'I could have been a judge, but I never had the Latin', called his summing-up *Entirely a Matter for You*, which is judgespeak for 'entirely a matter for yours truly'. Cook said:

We have heard for example from a Mr Bex Bissell, a man who by his own admission is a liar, a humbug, a hypocrite, a vagabond, a loathsome spotted reptile and a self-confessed chicken-strangler. You may choose if you wish to believe the transparent tissue of odious lies which streamed on and on from his disgusting, reedy, slavering lips. That is entirely a matter for you ... We have been forced to listen to the whinings of Mr Norman St John Scott, a scrounger, a parasite, a pervert, a worm, a self-confessed player of the pink oboe, a man, who by his own admission, chews pillows ... On the evidence of the so-called hitman, Mr Olivia Newton John, I would prefer to draw a discreet veil. He is a piece of slimy refuse, unable to carry out the simplest murder plot ... You are now to retire, as indeed should I, carefully to consider your verdict of Not Guilty.

Justice Sir Bernard Caulfield (1914-94) presided at a 1987 libel case in which a politician, Jeffrey Archer, falsely denied having resorted to a dwarfish prostitute, Monica Coghlan. Caulfield seemed entranced by the icy charm of Mrs Mary Archer, who stood by her man. Caulfield asked the jury:

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

The jury gave Archer £500,000, and Caulfied added costs of £700,000. Prime Minister John Major made

Archer a peer in 1992. In 2001, Lord Archer got four years for perjury at the libel trial.

9. A country's values

Business economist James R. Forcier wrote in *Judicial Excess: The Political Economy of the American Legal System* (University Press of America, 1994):

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

Japan uses a truth-seeking system. When Forcier wrote, the population of Washington DC was 500,000, but Washington alone then had 50,000 lawyers, three times as many as Japan. In 1992, France, had 22,000 lawyers.

D. The corrupt civil process

Judge Learned Hand (1872-1961), said in 1921: 'I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.'

Civil litigation is like a cancer; it grows exponentially because lawyers can spin the process out. Trained French and German judges dispose of civil cases in a few hours. Justice Russell Fox wrote in *Justice in the 21st Century*:

> … there is many a crack in the image of the ideal [of justice]. Mostly these arise from the practice of leaving the practitioner in charge of the collection and presentation of the evidence, which means that the judge may only hear incomplete or inaccurate or unreliable evidence; some of what is relevant may be deliberately withheld.

Philip K. Howard, a US lawyer, notes in *Life Without Lawyers* (Norton, 2009): 'In 2007, 384,330 cases were filed in federal trial and appellate courts, not including bankruptcy cases. In the state courts there were 47.3 million, not including traffic cases.'

One of the cases Howard noted was *Pearson v Chung*. In 2005, Judge Roy Pearson had asked South Korean immigrants named Chung, who had a Washington dry cleaning business, to alter his trousers. By mistake, they went to another branch, where they were altered according to Pearson's

instructions and returned some days after the due date, May 5, 2005.

Judge Pearson refused to accept the trousers and sued the Chungs for US$67 million. He claimed inconvenience, mental anguish, and lawyers' fees of $500,000 for representing himself.

In what must be noted as exceptions to the Barton Hypothesis, 13 judges ruled against Judge Pearson: Judge Judith Barntoff in June 2007, three appellate judges in December 2008, and nine appellate judges in March 2009. Donors met the Chungs' lawyers' fees, $100,000, but the stress of four years of litigation cannot be calculated.

Sir Hugh Laddie QC (b. 1946), a former Justice of the UK High Court, reflected on the length and cost of civil litigation in *Legal Week* on May 26, 2006. He wrote: "Go back to the drawing board and consider the possibility that the adversarial system is past its sell-by date."

Legal Week polled senior partners at 100 law firms on whether the system had passed its sell-by date. The organ reported on June 8, 2006 that 40% agreed. The other 60% said the adversary system is 'an essential pillar of British justice'.

On May 22, 2007, Sir Hugh Laddie, now Professor of Intellectual Property Law at University College London, noted in *The Times* that a small to medium patent case costs three to 10 times more in England than in Germany or the Netherlands.

Sir Hugh wrote: 'Perhaps it is time to do the unthinkable and start making our system much more like that used by our continental colleagues.'

1. Interminable pleadings

Edward Jacob KC (d. 1841) was editor of *Chancery Reports*. Nicholas Mullany noted in *Pleadings* that Justice Sir William James remarked in *Hall v Eve* (1877):

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

Written pleadings, the vehicle for the invention of the adversary system, are supposed to narrow the issues but are largely useless: as noted earlier, judges have allowed lawyers to lie in pleadings for five centuries. Speaking on behalf of the West Australian Law Reform Commission in 1998, Mullany, said:

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

Lawyers can go on lying in pleadings interminably in see-saw fashion: statement of claim, defence, reply, rejoinder, surrejoinder, rebutter, surrebutter, counter-claim, defence to counter claim, reply …

Judicature Acts introduced by Lord Chancellor Selborne in 1873 and by Lord Chancellor Cairns in 1875 purported to reform pleadings, but Mullany