

said 'they did not introduce a system which operated to define the issues in dispute between the parties'. A committee chaired by Lord Chief Justice Coleridge in 1881 'supposed' from the statistics for more than 20,000 cases in 1879 that 'pleadings were of little use', but all further attempts at reform have been sabotaged.

Mullany quoted Peter Hayes QC, of Melbourne, as stating in a 1998 paper for the Law Institute of Victoria:

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

In 1998, the WA law reform commissioners – WA Bar Association President Wayne Martin QC, law professor Ralph Simmonds, of Murdoch University, and Crown Counsel Robert Cock QC – reported:

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

They recommended a procedure which 'resembles most closely that prevailing in Germany'. In effect, they recommended a return to the oral method of pleading that obtained before the invention of the adversary system. Lawyers would presumably still

lie in oral pleadings, but at least the pleadings would be over in a day.

Martin, Simmonds and Cock said the change could generally be made ‘without the assistance of the legislature’. That is, the judges could make the change themselves. That was in 1998. Simmonds went on to the WA Supreme Court in February 2004, and Martin became Chief Justice in April 2006, but in 2009 the court had not yet ended paper pleadings.

2. Interminable discovery

Discovery is moving documents from one law office to another. A courier will do it for a few dollars; lawyers can charge millions. Lawyers for one client ask lawyers for the other to ‘discover’ and hand over documents which might help their side or hinder the other’s. The other side responds with lists of the documents they are prepared to reveal, those no longer available and why, and those they want to conceal on grounds of privilege, e.g. client-lawyer secrecy.

Discovery was originally a monopoly of equity lawyers, i.e. those who worked in the corrupt Chancery Court, but was extended to other lawyers by the Common Law Procedure Act of 1854.

A few words by Lord Justice (of Appeal) William Baliol Brett (1815-99) in the guano discovery case, *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company* has made billions for lawyers. Brett said any document is discoverable if it *might*, directly or indirectly, lead to a ‘train of

inquiry' which might help the lawyer's case or damage his adversary's. (Emphasis added.)

That made discovery open-ended. Brett became Master of the Rolls in 1883, Baron Esher in 1885, and Viscount Esher on his retirement, aged 82, in 1897. Thanks to him, millions of documents can be discovered, but only a very few are relevant. A UK appellate judge, Lord Justice Johan Steyn said in 1992:

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

Justice David Ipp, then of the WA Supreme Court, said, in Part II of *Reforms to the Adversarial Process in Civil Litigation* (Australian Law Journal, 1995):

... the usual result is that the number of those documents that are critical to the result of the trial are substantially less than 50 [but] sometimes hundreds of thousands [are] discovered.

Lawyers say that if they don't turn over every stone, they could be done for negligence. *The Economist* reported in 1992 that discovery accounts for 60% of the time and money spent on US lawsuits, and that in 1988 a Louis Harris survey showed:

... a big majority of litigators for both plaintiffs and defendants said that discovery is used as a weapon to

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

The admissions indicate that many trial lawyers habitually use discovery to extort from their own clients.

Lawyers also use discovery as a tool of blackmail. Perth barrister Paul Mendelow noted in *Discovery: Should the Whistle-blowers Stop the Train of Inquiry?* (WA Law Reform Commission, 1998): 'Parties may attempt to force favourable settlement by driving up costs [of discovery] beyond the value of the case.' Mendelow quoted a 1994 article, *Some Lessons from Santos*, by Justice Peter Heerey, concerning *Trade Practices Commission v Santos Ltd and Sagasco Holdings Ltd* (1993), in which discovery lasted for a year. Mendelow wrote:

Justice Heerey's focus of criticism ... was that it was a mistake to have a general, unqualified order for discovery - in accordance with the test of relevance propounded by the *Peruvian Guano* case. The circumstances pertaining to discovery in this matter resulted in practitioners being 'recruited into a burgeoning army engaged in discovering, inspecting, filing, listing, copying, storing, carrying about, and otherwise dealing with 100,000 documents which had been accumulated for the purposes' of this litigation. An expression that developed

amongst junior practitioners who had been ensnared in the discovery process was: 'I have been Santossed'.

BT [British Telecom Australasia] v the State of NSW and Telstra arose out of a contract signed in 1992 by which BT was to supply certain telecommunications services to NSW. Telstra was also to be a supplier directly or indirectly through BT. NSW terminated the contract in August 1995. BT began proceedings in the Federal Court against NSW and Telstra.

By May 1998, lawyers for the parties estimated that the costs of discovery alone had reached AU\$19 million (AU\$32 million at 2009 rates), much of it down to taxpayers. Justice Ronnie Sackville (b. 1943) said:

I have repeatedly said that all parties [i.e. their lawyers] in this litigation have given insufficient attention to the need to control their own request for discovery in the interests of keeping the discovery process within manageable bounds. One consequence of the approach taken by the parties is that discovery in this case has assumed mammoth proportions. A second is that the parties are in continuous disputation as fresh discovery issues are raised, each said to require the time of the Court to resolve. Not only is this extraordinarily costly and, in my opinion, wasteful, but it diverts attention from the need, in a case that has now been going on for three years, to prepare for trial. It also imposes a disproportionate burden on the Court.

In what was reported to be 'a highly unusual move', Justice Sackville said he wanted to see the principals

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at the next sitting. In June 1998, he urged three senior executives of the actual 'parties' to consider mediation. He said: 'This is not a case which is incapable of resolution. After all, it only involves money.' The trial was expected to run for six months, but Sackville's advice was taken. Former Federal Court Justice Trevor Morling QC (b. 1927) took all concerned to Singapore, presumably to concentrate their minds, and mediated a settlement in a week. On February 15, 1999, a cryptic press release said Morling described the settlement as 'eminently reasonable' but the terms were secret.

3. Unfair bias in favour of plaintiffs

Jurist Brett Dawson says aspects of civil law, notably libel (outside the US) and negligence, are unfairly biased in favour of plaintiffs' lawyers. He says the bias encourages people to sue, and the sued have to pay lawyers to defend them.

The bias is compounded by the fact that in eight centuries jurors have never had to give reasons. They can thus award unjust sums against defendants in the belief that they are redistributing wealth and punishing rich companies. In reality, they enrich lawyers and punish shareholders.

Negligence. Lord (James) Atkin (1867-1944, Lord of Appeal in Ordinary 1928-44) had a dome as bald and as conical as that of Humpty Dumpty or M. Hercule Poirot, and he was as capable of talking drivel as either. Lord Atkin opened the negligence floodgates in *Donoghue v Stevenson* (House of Lords,

1932), an appeal concerning an alleged (but unproved) snail in a bottle of Scottish ginger beer. He said:

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

When lawyers hear the word ‘reasonable’, they rub their hands together: it has as many meanings as there are human beings. Atkin did not say the neighbour should exercise common sense and personal responsibility, e.g. in avoiding tobacco or a hole in the road. Justice Russell Fox demolished Atkin thus: ‘The simple fact is that no one can define negligence, nor in most cases is it possible to form an accurate view of the facts.’ He said Atkin’s ‘principle’:

... sounded good and proved very durable ... in theory, one can talk in terms of ‘proximity’ and ‘reasonable foreseeability’, and ‘what a reasonable person would have done’. In practice, these are but shibboleths which offer no obstacle to the inclination of judges and juries to provide compensation for the injured (or damaged) plaintiff... Many are not worried by this phenomenon, recognising it as a convenient form of injury (and damage) insurance, and governments are saved the necessity of introducing a

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scheme to achieve a similar result. It is however a very expensive pseudo-scheme because to each claim are added legal costs and these can be 30, 40 or 50% of the amount recovered, sometimes more. Eventually, the community at large, or a large percentage of it, bears the burden, and insurance companies (if they are cautious) and lawyers profit.

The US system does not always oblige losing litigants to pay the winner's costs, and it allows lawyers to charge a contingency (speculative) fee of up to 40% of the payout. It also allows jurors to make punitive awards.

The annual Stella Awards for outrageous negligence verdicts are in honour of Stella Liebeck, 79, who spilled coffee on her lap at McDonald's in 1992, and was initially awarded US\$2.86 million by the New Mexico District Court.

Florida plaintiff lawyers traditionally took 40% of the first \$1 million in medical liability payouts, 30% of the second \$1 million, and 20% of any higher amount. In November 2004, 63% of Florida voters approved a legislative amendment which capped lawyers' fees at 30% of awards up to \$250,000 and 10% of amounts over \$250,000. The lawyers would thus get \$500,000 of a \$5 million payout, but Jane Musgrave reported in *The Palm Beach Post* of July 24, 2005: ' ... personal injury lawyers quickly found a way around the new limits: They simply ask clients to waive their constitutional right to larger shares of any malpractice award they might get.'

The US Surgeon-General warned against smoking in 1964. Richard Boeken, 57, smoked 40 Marlboro cigarettes a day and got cancer, but swore he did not know smoking was dangerous until 1994. In 2000, Los Angeles jurors ordered Philip Morris shareholders to pay Boeken US\$3000 million, of which his lawyers presumably expected to get at least \$1000 million. On appeal, the payout was reduced to US\$50 million.

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

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

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

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It presumably follows that lawyers who do not take personal responsibility for perverting justice are not fully human, do not lead an ethical life, do not participate in a just society; and prevent society from being ordered in a fair way.

Justice Russell Fox said his concern about negligence law stemmed from 'the waste in cost involved, and court time, and damage to court integrity'. He noted that Justice Rae Else-Mitchell, of the NSW Supreme Court, said in 1972:

... the case for all claims arising out of motor vehicle and industrial accidents being decided on a no-fault basis by an administrative tribunal is unanswerable ... more people would be able to go to court and the taxpayer would be better off in the end.

Gough Whitlam QC (b. 1916), Labor Prime Minister of Australia 1972-75, sought to introduce no-fault compensation for injury, but noted in *The Curtin Lecture* (1985) that his Government was thwarted by the stone-walling tactics of interested parties 'aided and abetted by Labor lawyers who specialised in work for unions.' He said:

The basis of their [Labor lawyers'] thriving practices is to charge unions for the expert advice in cases of accidents to unionists at work and on the way to and from work and at the same time to render gratuitous advice to union officials on methods to entrench themselves in office.

A no-fault scheme eliminates lawyers because there is nothing to argue about, and thus eliminates

blackmail and increases the money available to care for victims. It also eliminates Santa Claus judges and jurors, but lawyers say it deprives people of basic common law rights. There is more money in rights than justice.

Libel. Criminal law has a presumption of innocence for defendants and judges conceal the truth about them. Libel law has a presumption of guilt for defendants and judges conceal the truth about plaintiffs. Witnesses for defendants can say they believe the plaintiff's reputation is not good, but they can't say why.

Libel law has thus protected rogues, including organised criminals, some powerful and respectable, for seven centuries. It began in 1275 when Edward I's Statute of Westminster invented the crime of *Scandalum Magnatum*, slandering the magnates, most of whom were robber barons. Truth, at least nominally, was a defence. The legislation was re-enacted in 1378 to include judges, prelates, and certain officials.

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

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

The corrupt Whig oligarchs were tricked into letting the Licensing Act lapse in 1695. Modern journalism, with its intrinsic threat to the power and corruption of politicians and judges, was thus able to begin on 19 February 1704, when Daniel Defoe's *The Review* appeared. Face prevented the reimposition of the Licensing Act, but otherwise all the apparatus of a corrupt trade of authority were immediately deployed to silence the Press: secrecy – always the bottom line on corruption – taxation, bribery, and libel law. Reporting what was said in Parliament became a crime, and *the Review* and other journals, including Addison and Steele's *The Spectator*, were taxed out of existence in 1712.

Many proprietors were bribed for the rest of the century. Francis Williams, the historian of the British Press, says in *Dangerous Estate* (Longmans Green 1957): 'There was hardly a newspaper in those years [the 18th century] that was not in receipt of secret subsidies of one kind or another.' Prime Minister (1721-42) Robert Walpole used the secret police to pay more than £50,000 (about £5 million at today's rates) to newspapers and pamphleteers between 1732 and 1742. Agents for Pitt the Younger (1759-1806), the Tory Prime Minister 1783-1801 and 1804-06, paid bribes of at least £5000 [£500,000 today] a

year to newspapers at the time of the French Revolution. Nine newspapers got an annual bribe; *The Times* got £300 (c. £30,000)

Libel law, however, has proved the most effective and enduring method of silencing the Press. Professor Theodore Plucknett says that in 1704 (the year modern journalism began) Chief Justice (1689-1710) Sir John Holt (1642-1710) said 'it is very necessary for all governments that people should have a good opinion of it'. Professor Plucknett said it seemed to follow that:

any publication which reflected upon the Government was criminal ... Until 1792 the strict legal theory has been accurately summed up in these words: 'A seditious libel means written censure upon any public man whatever for any conduct whatever, or upon any law or institution whatever.

Judges had thus made it a crime to write the truth about corrupt politicians and judges, about bad laws, and about institutions run as criminal enterprises, e.g. Parliament and the courts. To ensure conviction, judges gave the verdict in libel cases; jurors' only role was to decide whether the accused had published the slur.

The Zenger case helped make the US the only English-speaking country in which freedom of speech and information are not legal fictions. John Peter Zenger, proprietor of *The New York Weekly Journal*, criticised the colonial Governor, William Cosby, and was tried on a charge of seditious libel

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on 4 August 1735. Zenger's Philadelphia lawyer, Andrew Hamilton, admitted that he had published the slurs, but argued that citizens should have a right to tell the truth about public officials, and offered to prove the slurs were true. The jurors insisted on finding Zenger not guilty.

The verdict did not change the law, but it did diminish prosecutions for seditious libel, and it did help to establish the notion that, at least in libel, truth is so important that it should be an absolute defence, and that jurors should give the verdict.

Lord Mansfield (1705-93, 7th in *The Legal 100*) was Leader of the House when the oligarchy's bagman, the Duke of Newcastle, was Prime Minister 1754-56, and was ineffably obtuse on policy towards American colonists. In his other role, Lord Chief Justice (1756-88), Mansfield invented a brilliant lie: the greater the truth the greater the libel. That is, the more corrupt a politician or judge is, the greater the penalty for exposing him.

The first academic, Blackstone, supported Mansfield's lie on libel, but public outrage resulted in Charles James Fox's Libel Act (1792), which gave libel verdicts to jurors. Judges apparently feared that jurors would refuse to convict journalists who exposed their corruption and that of politicians. Professor Theodore Plucknett said the Act 'was passed in spite of the unanimous opinion given by the judges at the demand of the House of Lords'.

James Madison's First Amendment (1791) to the US Constitution stated: 'Congress shall make no law ... abridging the freedom of speech, or of the press;

or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’ But for 173 years the onus of proof in US libel cases, as in other common law countries, lay on the defendant rather than the complainant.

Anthony Lewis (b. 1927) notes in *Freedom for the Thought that We Hate – A Biography of the First Amendment* (Basic Books 2008) that libel law in several US States had what lawyers called the ‘three galloping presumptions’:

1. ... any publication that was challenged in a libel action was presumed to be false; the burden was on the publisher to prove it was true.

2. ... damage was presumed. The person suing did not have to prove actual damage, say to his career, as he or she would have to prove in other civil damage cases, such as medical malpractice.

3. ... the publisher’s fault was presumed.

In *New York Times v Sullivan* (1964), the Supreme Court voted 9-0 to repudiate those plainly false presumptions, and to rule that the First Amendment implied freedom of information.

For the court, Justice (1956-90) William Brennan (1906-97) said public officials could only win a libel case if they could show that the slur derived from ‘actual malice’, i.e. ‘knowledge that the [material] was false’, or from a ‘reckless disregard of whether it was false or not’. Actual malice was later extended to cover public ‘figures’. Most significantly, *NYT v Sullivan* shifted the onus of proof from the defendant

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to the complainant. In other common law countries, the onus remains on the defendant.

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

The mere publication of words defamatory of the plaintiff gives rise to a *prima facie* cause of action ... a plaintiff has the benefit of the presumptions of falsity and of damage. He is not required to prove that the words are false; the law presumes in his favour that they are. The law also presumes that defamatory words cause harm. Thus it is not necessary for the plaintiff to ... to prove that he suffered material or financial loss ... Furthermore, a plaintiff is not required to establish that the defendant intended to harm his reputation ...

Libel law thus oppresses defendants (and the community) outside the US because seven obviously false presumptions unfairly bias the system in favour of plaintiffs. Appearance (reputation) is preferred to reality (character). The private right to reputation is preferred to the public right to information. A slur is always false. The author of a slur is always guilty. The subject of a slur is always innocent. A slur is always intentional. A slur always causes damage.

Geoffrey Robertson QC wrote in *The Justice Game*: 'London is the libel capital of the world

because English law heavily favours plaintiffs ... So there have been celebrated cases where newspapers have published the truth, yet lost.' Sydney cannot be far behind. John Wicklein, reported in the *Columbia Journalism Review* (November/December 1991):

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

The bias against defendants encourages 'libel terrorism' and/or blackmail as practised by Robert Maxwell (1923-91), an organised criminal, asset stripper, newspaper proprietor, and megalomaniac. Libel lawyer David Hooper wrote in *Reputations Under Fire: Winners and Losers in the Libel Business* (Little, Brown, 2000):

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

Maxwell won only one libel action, but he was able to use libel terrorism to rob the public of their right

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to information for three decades before he jumped, or was pushed, or fell off his boat and drowned in 1991.

SLAPP suits (strategic lawsuits against public participation) can amount to libel terrorism. Julian Petley noted in *Free Press* 108 (Jan/Feb 1999) that professors Penelope Canan and George Pring, of the University of Denver, invented the acronym when they noticed 'that corporations were increasingly threatening individuals in the environment movement with actions for defamation, conspiracy, invasion of privacy, interference with business, etc'.

The unfair bias against defendants also means that liars and their lawyers get money from honest soldiers for truth. A short list:

Pianist Wladziu Valentino Liberace, who falsely swore he was heterosexual.

British politicians Aneurin Bevan, Dick Crossman and Morgan Phillips, who falsely denied they were 'pissed as newts' at a conference of Italian Socialists in Venice.

Lord (Bob) Boothby, who falsely denied he had a sexual relationship with an organised criminal, Ronnie Kray.

Dr John Bodkin Adams, who falsely denied he was a serial killer of Eastbourne widows who changed their wills in his favour.

Jeffrey Archer, who falsely denied he had sex with a prostitute.

Juni Morosi, a secretary, who falsely denied she had sex with the Deputy Prime Minister of Australia, Dr Jim Cairns.

Fred Hanson, Police Commissioner of New South Wales, who falsely denied he was corrupt.

Murray Farquhar, chief Stipendiary Magistrate of New South Wales, who falsely denied he was corrupt.

Sir Les Thiess, a Queensland developer, who falsely denied he bribed the Premier of Queensland, Sir Johannes Bjelke-Petersen.

Sir Bob Askin (1907-81, NSW Premier 1965-75, falsely denied he was an organised criminal and would probably have got money from an honest politician, John Hatton, but died before the case got on.

In 2005, Australia's first law officer, Philip Ruddock, announced a plan to allow people to sue from the grave. I reminded him in *Justinian* that Voltaire observed in 1785: 'We owe respect to the living; to the dead we owe only truth', and that his legislation would inevitably be dubbed the Askin/Murphy clause in honour of Askin and High Court Justice Lionel Murphy, who was also a criminal. Ruddock eventually dropped the plan.

'Libel tourism' is the practice of suing US authors and publishers in London because in the US the complainant has to prove the slur is false, but in England the defendant has to prove the slur is true. However, US judges have taken the view that libel defendants cannot get justice in Britain. US courts usually enforce orders made by overseas courts but not when the orders are based on laws 'repugnant' to US law. In 1997, a Maryland court refused to enforce a British libel verdict because, on

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fundamental issues of free speech and a free Press, British law 'is totally different' from First Amendment principles 'in virtually every significant respect'. But if publishers have assets in England, they have to pay.

Libel tourist, convicted paedophile, and fugitive from US justice Roman Polanski sued New York-based *Vanity Fair* in London. The organ had reported in 2002 that in 1969, days after Polanski's actress-wife Sharon Tate was murdered, he tried to seduce a Swedish model in Elaine's restaurant by promising to get her into films. At the trial in 2005, the judge, Sir (a knighthood is automatic for High Court judges) David Eady (b. 1943), concealed from the jury the full details of Polanski's offer to the girl, 13, in the paedophile case to get her into *Vogue*. Polanski gave evidence by video link from Paris. When the jury found in his favour, Eady gave him £50,000; *Vanity Fair's* costs were reported to be some £1.5 million.

Khalid bin Mahfouz (1949-2009) owned 20% of the Bank of Credit and Commerce International (BCCI) between 1986 and 1990. BCCI engaged in all manner of doubtful practices, including fraud, bribery, money-laundering, arms trafficking, and supporting terror. Mahfouz sued or threatened to sue people who accused him of knowingly supporting terrorism 33 times. Mahfouz, who lived in Ireland and was worth US\$3.2 billion, thus contrived to be at once a libel terrorist, a libel tourist, and a libel lawyer's dream.

Funding Evil (Bonus Books, 2003), by a New York scholar, Dr. Rachel Ehrenfeld, was not published in England, but 23 books got into the country via online purchases. Mahfouz sued in London. Dr Ehrenfeld did not waste money on defending the action in 2005. In her absence, the libel judge, Sir David Eady, specifically rejected assertions that Mahfouz was forum shopping, gave him US\$230,000 and ordered Dr Ehrenfeld to apologise to him and destroy all existing copies of her book.

Reacting to the Mahfouz-Ehrenfeld case, state legislators in New York unanimously passed a law to protect New York authors and publishers against libel tourism in 2008.

Signing the legislation on 1 May 2008, Governor David Paterson said: 'The statute combats such "forum shopping" in two ways. First, it bars New York courts from enforcing a foreign libel judgment unless the country where it was decided grants the same or better protection as US standards for freedom of speech. Second, it expands an individual's ability to have a court declare a foreign libel judgment invalid in New York. Without this statute, an author could be forced to live indefinitely under the pall of a libel judgment, deterring publishers from disseminating that author's work.' Rory Lancman, a member of the New York Legislative Assembly said: 'Today we reaffirm New York's place as the free speech capital of the world.'

A Free Speech Protection Act was introduced into the US Congress in 2008. If enacted, the

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legislation would allow US authors and publishers to countersue and gain triple damages if a jury found that a foreign suit is part of a scheme to defeat the constitutional right to free speech.

4. Blackmail (theft by extortion)

Lawyers and clients get money in cases of alleged negligence and libel by pitching doubtful claims at a sum lower than the cost of litigation. The calculation is that the target company will make a commercial decision to submit to the extortion.

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

5. US workplace disputes: not a fair go all round

It was in a workplace dispute case in 1971 that Gilbert Manuel, a NSW Conciliation Commissioner, enunciated the Manuel Test, 'a fair go all round' for employee and employer. US juries tend to be unfair to defendant employers. Jurist Walter K. Olson says workplace disputes take up roughly half the business of US civil courts.

Jerold Mackenzie, who worked at the Miller brewery in Milwaukee, related an incident from *Seinfeld*, a television comedy of manners, in 1993. The 'office scold' complained; Mackenzie was dismissed. Under the Manuel Test, Mackenzie might

have got six months' wages, perhaps \$30,000, or been reinstated on two conditions: that he apologise to the lady, and that she stop making a nuisance of herself. In *Mackenzie v Miller Brewing* (1997), Milwaukee jurors gave Mackenzie US\$26.6 million. His San Francisco lawyers, Littler, Mendelson, presumably got at least US\$8 million.

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

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

6. Larceny by trick: tax evasion

Larceny by trick is the crime of theft by fraud or deceit. If systematic, it is organised crime. Tax evasion is devised by lawyers, judges, accountants, and bankers. David Marr observed in *Barwick* (Allen & Unwin, 1980):

... the best minds of the Bar are engaged, as [Garfield] Barwick QC was engaged, in tax avoidance, and from the best minds at the Bar High Court judges are chosen. The

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High Court has an inbuilt tendency to be a tax avoider's forum.

London tax lawyers can make £2 million a year. H. L. Mencken (1880-1956) observed:

If all the lawyers were hanged tomorrow, and their bones sold to a mah-jongg factory, we'd be freer and safer, and our taxes would be reduced by almost half.

Justice Russell Fox noted in *Justice in the 21st Century* that the British legal system was originally designed to benefit landowners, and was 'later adjusted to the requirements of the wealthy and the powerful'. Adam Smith, who knew about cartels and that greed is good, said that the man who evades tax is 'in every respect, an excellent citizen'. Hugh Richard Grosvenor, second Duke of Westminster, evaded tax, loved Hitler and hated Jews, but had the saving grace of owning much of Mayfair and Belgravia. In *Inland Revenue Commissioners v Duke of Westminster* (1936), Lord Atkin said:

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

Atkin's decision applied only to the rich. Poor and humble wage and salary earners cannot evade tax; it

is deducted at source. Australia was a vaguely 'fair go all round' sort of country. Section 260 of the Income Tax Assessment Act 1936 proclaimed:

Contracts to evade tax void. Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly ... relieving any person from liability to pay any income tax ...defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or preventing the operation of this Act in any respect; be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act ...

The operative word is 'absolutely'. The task for tax lawyers and judges was thus to defeat the Parliament's intention. A friend of Garfield Barwick (1903-97), Clyde Cameron, said of him: 'I'd never known anyone who is able to so easily explain in a way that is so uncontroversial that a piece of white paper is jet black and a piece of black paper is snow white.'

In *Keighery v Federal Commissioner of Taxation* (High Court, 1957), Barwick argued that 'absolutely' does not mean absolutely; there could be exceptions. Five judges agreed: Chief Justice Sir Owen Dixon, who was capable of fraud (see above, The judge as Humpty Dumpty), and Justices Sir Dudley Williams, Sir Eddie McTiernan, Sir Frank Kitto, and Sir Alan Taylor. Only Sir William Webb dissented. The five

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judges' lie opened the tax evasion floodgates in Australia.

Barwick went into politics in the conservative interest in 1958. It was said that Robert Menzies QC (1894-1978; Prime Minister 1939-41 and 1949-66), saw Barwick, 'the undisputed lion of the Sydney Bar', as his eventual successor. He made him Attorney-General. The security section of Barwick's *Crimes Act* 1960 had a presumption of guilt for persons of 'known character'. The leader of the Opposition, Gough Whitlam QC, referred to the section as 'this odious provision'. Barwick, like most lawyers, had a useful capacity for self-deception. Professor Jenny Hocking, author of *Gough Whitlam* (Melbourne University Press, 2008), wrote:

Barwick was accustomed to unquestioned respect, to reverent acceptance of his legal opinion; this depiction of his proposals as dangerous, draconian and undemocratic besmirched his reputation and disturbed him.

Whitlam refused to withdraw his claim that Barwick was a liar; he told the House: 'This truculent runt thinks he can get away with anything.' Barwick got away with it at the Bar and on the Bench for 54 years but not in Parliament. A colleague, Harold Holt (who, as Prime Minister in 1967, swam out to sea and got eaten by sea lice), kindly led Barwick, weeping, from the chamber. Professor Hocking said Barwick's political career 'was effectively over'.

Menzies tried Barwick as Foreign Minister but he failed there too. A job had to be found for him

outside Parliament. Menzies could have sent him somewhere harmless, like Ambassador to Uttar Pradesh or the US, but in 1964, he made him Chief Justice, where his lies on tax matters were frankly criminal. In *Casuarina P/L v the Federal Commissioner of Taxation* (1970), Barwick, Sir Victor Windeyer, Sir Harry Gibbs, and Sir William Owen finished off the 1936 Tax Act. David Marr said *Casuarina* concerned 'a wholly artificial scheme ... to avoid tax ... The *Casuarina* case became the cornerstone of the tax avoidance industry'.

Barwick, Gibbs, and Sir Douglas Menzies committed another fraud on the revenue and pay-as-you-earn taxpayers in *Curran v Federal Commissioner of Taxation* (1974). The lie this time was that a profit of \$2782 was a loss of \$186,046. John Ahern, a Brisbane accountant, explained how *Curran* worked in *A Taxing Time* (1990, Copyright Publishing). This is a précis of Ahern's explanation:

A company with shares worth \$100 issues 100,000 bonus shares at \$1 a share. The shares are now deemed to be worth \$100,100 but are actually worth about \$100. The shares are sold for, say, \$200, a profit of \$100, but Barwick *et al* would say it is a loss of \$99,900.

Self-employed people, e.g. doctors, rushed into schemes based on *Curran*. John Ahern, who adopted the posture of Barwick & Co, went to prison, but the judges were not charged, let alone sent to prison.

The amount of tax money 'liberated' from the Treasury in the eight years after *Casuarina*: was

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\$A800 million, some A\$10.8 billion at 2009 rates. Treasurer John Howard resorted to retrospective legislation in 1978 to try to get back some of the money lost through *Curran* and similar schemes.

Economics Professor Russell Mathews said in 1980 that Australian wage and salary earners paid 81.2% of all income tax. In 1981, Howard's Part IVA to the 1936 Act again purported to bar 'blatant, artificial or contrived arrangements', but judges and lawyers can always defeat the English language. In 1985 Professor Mathews said:

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

Don Vito would understand.

An Australian tax office survey in the early 1990s found that 'a significant segment of the BRW [*Business Review Weekly*] magazine's Rich List claimed to have a taxable income below the minimum wage'. Michael Carmody, the Australian Tax Commissioner, said in 1999 that tax schemes had caused '\$3.5 billion in claims and rising'. Brian Toohey reported in *The Australian Financial Review* of July 2-3, 2005:

When the Howard government was elected in 1996, the Income Tax Act was about 3000 pages. It is now estimated to be more than 10,000 pages, not counting the

innumerable interpretative guidelines and rulings issued by the ATO [Australian Tax Office]...

In *The Cheating of America: How Tax Avoidance & Evasion by the Super Rich Are Costing the Country Billions* (Morrow, 2001), Charles Lewis and Bill Allison, of the Center for Public Integrity, reported that in 1998 the Internal Revenue Service Commissioner, Charles Rosotti, said that avoidance and evasion were costing each taxpayer \$1600 a year, some \$480 billion, and that:

... thousands of the most affluent individuals and corporations routinely avoid and evade paying billions of dollars in taxes each year. And the level of unabashed greed seems to be increasing. Everyone from the principals of the largest accounting, law and brokerage firms to the sleaziest, fly-by-night Internet shysters are promoting offshore, cyberspace, and other avoidance schemes, and many of the most respected corporations and individuals are heeding their advice.

Secrecy is always the bottom line on corruption. Swiss banks sell secrecy. In February 2009, a leading Swiss bank, UBS, admitted to criminality in selling offshore banking services which facilitated tax evasion, and paid fines of US\$780 million. In August 2009, UBS agreed to turn over 4450 US accounts suspected by the Internal Revenue Service of tax evasion to Swiss authorities for onpassing to the IRS. Clients were expected to stonewall the disclosures in Swiss courts. *The [London] Financial Times* reported in April 2004:

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An international task force to combat tax avoidance is to be set up by the US, Australia, the UK and Canada. The task force, which is expected to be based in New York, will focus on tax avoidance schemes employed by business and take joint action against such schemes.

The remedy is simpler: 1) Legislation proclaiming that artificial schemes to evade tax are absolutely forbidden because they are unfair to pay-as-you-earners. 2) Any judge who finds an exception will be instantly dismissed.

7. Class actions

The Duke of Newcastle, bagman for the corrupt Whig oligarchy, had to find 'pasture enough for the beasts that they must feed'.

Likewise the law. There were 213,000 lawyers in the US in 1960; in 1991 there were 772,000. More pasture had to be found. Jurist Walter K. Olson says (*The Rule of Lawyers* St Martin's Press, 2003) that in the mid-1970s proposals 'that judges create some new right to sue' were 'all but ubiquitous'. He saw Ralph Nader (b. 1934, Harvard Law School graduate 1958) as being useful in that cause. Olson wrote:

The trial bar's most valuable asset of all in public debate, of course, has long been its ally Ralph Nader, one of the few public figures who can obtain news coverage just by showing up somewhere, and who, since his emergence in public life nearly forty years ago, has reliably been on hand to hold press conferences and tape commercials for

whatever the trial lawyer cause of the moment may happen to be.

Nader and Mark Green edited *Verdicts on Lawyers* (Crowell 1976). Beverley C. Moore, a lawyer who worked for Nader for five years, and Fred Harris, a Democratic Senator, wrote a chapter called *Class Actions: Let the People In*. Olson wrote:

Moore and Harris argued that courts should act to make it much easier for lawyers to file class-action suits against American business. [They had] a long list of the injuries, ailments, frustrations, and indignities of everyday life over which, in their opinion, the courts should permit class-action lawsuits. The list enumerated some 24 varieties of harm, paired in each case with the various businesses that could be sued over them. 'Tooth decay ... Sugar industry (food manufacturers)' was no. 15, "Air, water, noise, other environmental pollution ... Business enterprises generally" was no. 23. The ill effects of smoking and liquor consumption, of course, could be laid at the door of the tobacco industry and the producers of alcoholic beverages ... Food manufacturers would [also] face law suits over ... a wide range of other maladies, including heart disease, concerns linked to fat intake, and adult-onset diabetes. As befits an essay in a book co-edited by Ralph Nader, automakers would come in for a particularly rough time of it ...

Olson concluded:

By even a conservative reckoning, the items on the list would have led to the redistribution of well over \$1 trillion a year back in 1976, at a time when the gross

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national product (GNP) of the United States stood at \$1.8 trillion ... More than half the nation's GNP, in other words, would be routed through lawyers' offices. A lot of it would stay there: Moore and Harris enthusiastically endorsed the arrangements by which courts let class-action lawyers collect fees for their efforts, amounting to a share of the class's claimed recovery – sometimes as high as a third.

It seems to me that executives who have guilty knowledge of harmful practice and/or products should be dealt with in the criminal courts, and that the Manuel Test should apply to others involved: victims, shareholders, lawyers. In *Justice in the 21st Century*, Justice Russell Fox showed how class actions relating to asbestos, tobacco, intra-uterine devices, breast implants, and the like can be dealt with at minimum cost. He wrote:

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

The great Tobacco-Medicaid wheeze of the 1990s should dispel any doubt that the adversary system is a business. The venture offended a rule which 'bars a lawyer from charging or collecting a clearly excessive fee', and some cases involved 'pay to play', i.e. a lawyer donates to a law officer's election campaign and in return gets public legal work. The American Bar Association deploras the practice.

The Surgeon-General warned that smoking is a risk in 1964. Most tobacco suits thereafter failed on the ground that the complainant failed to exercise personal responsibility. In 1993, a Mississippi lawyer, Mike Lewis, gave Mike Moore, the Mississippi (Democrat) Attorney-General, the idea of shifting the goalposts from individuals to taxpayers who paid the Medicaid funds which cared for sufferers. Moore invited Dickie Scruggs – surely a Dickens invention – to research and develop a Medicaid case.

Scruggs (b. 1946), a Democrat, had contributed to Mike Moore's election campaign, and had earlier worked with an Alabama lawyer, William Roberts Wilson Jnr on asbestos cases. Wilson later claimed that Scruggs cheated him out of millions from the asbestos litigation and used the money to fund tobacco claims. Wilson's case against Scruggs was still on foot in 2009.

In May 1994, Moore sought from tobacco companies \$940 million said to have been spent by Mississippi on people with tobacco-related illnesses. To persuade other state attorneys-general to join the

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action, Moore and Scruggs, known as Mo and Scro, traversed the country in Scruggs's Lear Jet.

Walter Olson said most Attorneys-General who joined the action gave the business to private lawyers 'who were often among their most important campaign donors ... a pay-to-play scandal [was] waiting to happen'. Catherine Crier, a former Texas judge who became host of *Catherine Crier Live* on Court TV, says in *The Case Against Lawyers* (Broadway, 2002) that in 1998 it was alleged that Texas Attorney-General Dan Morales (Democrat) 'had solicited large sums' from five law firms he hired to do the tobacco work, and that lawyer Joe Jamail was quoted in *The Houston Chronicle* as saying: 'Morales solicited \$1 million from each of several lawyers he considered hiring.'

With 46 Attorneys-General on board, the tobacco companies folded. In November 1998, they put their names to a Master Settlement Agreement (MSA) of US\$246 billion over several decades. Cigarette prices shortly rose by 45 cents a pack. In view of the millions they stood to gain, lawyers decently waived their usual contingency fee of 40% of the payout. Walter Olson said the fees ranged from 3% to 25%. Scruggs' firm was reported to have been rewarded with as much as \$848 million.

Lawyer Robert A. Levy, author of *Shakedown: How Corporations, Government and Trial Lawyers Abuse the Judicial Process* (Cato Institute, 2004), said in 1999: 'In Florida, judge Harold J. Cohen ... denounced the state's 25 percent contingency contract, observing that the fee, \$233 million per lawyer, 'shocks the

conscience of the Court.' The average contingency fee worked out at about 8.8%. Levy told me in May 2005:

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

Texas Attorney-General Dan Morales was charged by Federal investigators with falsifying documents to try to get US\$520 million from the tobacco settlement for a lawyer friend, Marc Murr, who had done little or no work on the tobacco action. In 2003, Morales plea-bargained his sentence down to four years.

In March 2007, Dickie Scruggs and others offered a Mississippi judge, Henry Lackey, a bribe in return for a favourable ruling in a squabble over money with another law firm. Informed by Judge Lackey, FBI agents wired him and set up a sting. In October 2007, Scruggs was involved in payments totalling \$50,000 made by others to Judge Lackey.

A federal grand jury indicted Scruggs and four others in November 2007 on charges of conspiracy to bribe a judge. If convicted, he would face up to 75 years in prison. A December party at his mansion to raise funds for Mrs Hillary Clinton's presidential

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campaign was hurriedly cancelled. Scruggs plea-bargained his sentence down to seven years. In March 2008, he pleaded guilty to conspiracy to bribe and went to prison. It was reported in September 2009 that lawyers Lee Young and Charles Mikhail had filed a federal lawsuit claiming Scruggs still owed each of them \$194,000 from the 1998 tobacco agreement.

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

No win, no fee sounds good, but what if you lose? A judge ordered a tobacco company to pay a Melbourne cancer victim, Rolah McCabe, \$700,000 in 2002, but the Victorian appeal court reversed the decision; the children of the now-dead Mrs McCabe became liable for fees said to be at least A\$4 million.

And what if you win? A Queensland law firm, Baker and Johnson, whose logo is a charging two-horned rhinoceros, got \$5000 compensation for a woman's back injury. They kept the \$5000 and asked her for another \$7000.

8. Defence of civil adversary system

Defenders of the civil adversary system say its virtues include client control and neutral and passive judges. Professor Stephan Landsman, now

of DePaul University, Chicago, wrote in a section called *Defense of the Adversarial Process* in his *Readings on Adversarial Justice: The American Approach to Adjudication* (West, 1988, sponsored by the American Bar Association): 'The adversary process provides litigants with the means to control their lawsuits. The parties are pre-eminent in choosing the forum, designating the proofs, and running the process.'

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

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

Professor Landsman also wrote:

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

If resolving disputes – not making money for lawyers – is really the objective, America would be better off using the lawyer-free method invented by Confucius (551-479 BC) at about the same time the Sophists were teaching Athenian lawyers how to lie.

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In the Confucian system, mediators decide cases on the circumstances rather than by reference to an abstract system. Despite Mao Zedong, China's system is still vaguely based on Confucian benevolence and reciprocity. Among 1200 million, there are said to be 800 qualified lawyers and 10 million mediators, not all, one trusts, members of the secret police. Pro-rata, the US would have 180 lawyers, England 40, and Australia 12. London would have five lawyers, Washington two-fifths of a lawyer, and Canberra one-fifth of a lawyer. That sounds about right.

E. 24 anti-truth devices

* indicates a rule which conceals evidence

Defence lawyers had a business problem when they appeared in the criminal courts in increasing numbers in the last decade of the 18th century. On my calculation, the criminal system then had only four devices which could be used to defeat the truth: the accusatorial system itself, cross-examination, inscrutable jurors, and double jeopardy. (Blackstone's lie about not having to give an explanation was inserted into the US Bill of Rights in 1791, but it did not become entrenched in British law until the middle of the 19th century.)

Criminal trials, run by judges rather than lawyers, were nasty, brutish and short. The average was half an hour; conviction was fairly certain. Rich criminals probably tended not to waste money on lawyers. Since 1800, however, judges have increased the anti-truth mechanisms from four to at least 24, including six rules which conceal evidence from jurors. The devices give rich criminals a good chance of avoiding the consequences, and so encourage them to pay lawyers. At least 10 were used to get a murderer, O. J. Simpson, off.

Most accused are guilty. Harvard law professor and criminal lawyer Alan Dershowitz wrote in *The Best Defense* that the first two rules of 'the justice game' (his term) are:

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Rule I: Almost all criminal defendants are, in fact, guilty.

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

We can take 'almost all' to mean at least 90-95%. Hence the observation by US lawyer Maurice Nadjari. 'You can't make a living defending innocent men.' In effect, defence lawyers (and judges sitting alone) are almost invariably accessories after the fact.

Justice is fairness. The bottom line is that judges have unfairly skewed the system in favour of defence lawyers and their criminal clients, and against victims, detectives, prosecutors, witnesses, jurors, and the public. Professor Dershowitz wrote in *The Best Defense*:

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

Dershowitz was quoted in the *U.S. News & World Report* of 9 August 1982 as saying:

The defendant wants to hide the truth because he's generally guilty. The defense attorney's job is to make sure the jury does not arrive at that truth. The prosecution wants to make sure the process by which the evidence was obtained is not truthfully presented, because, as often as not, that process will raise questions.

The community are entitled to expect the media to report what is concealed from their representatives, the jurors, at important trials. The splash in *The (Brisbane) Courier-Mail* on the day after the verdict in the corruption trial of Queensland police chief Sir Terence Lewis in 1991 (see below: *Concealing any or all evidence*) was WHAT THE JURY DID NOT HEAR, by Jason Gagliardi. The Editor, Desmond Houghton, then instructed his court reporters to stay in court during legal argument in major trials and note and later report the concealed evidence.

The trial of John Thomas Sweeney (b. 1956) on a charge of first degree (premeditated) murder illustrates some of the anti-truth devices noted below. After an actress, Dominique Dunne (1956-82), left Sweeney, he strangled her in November 1982. The medical evidence at his 1983 trial was that it takes a strangler at least four minutes to kill his victim.

Among the evidence concealed by Judge Burton Katz was evidence by a Lillian Pierce that Sweeney had assaulted her 10 times during a two-year relationship, and evidence by the victim's mother, Ellen Dunne, that Dominique had come to her in hysterics when Sweeney first beat her. Katz concealed the evidence on the ground that the 'prejudicial effect outweighed the probative value.' (See below *The Christie* discretion.) He also concealed all the victim's statements in the last five weeks of her life to her agent, fellow actors, and friends that she feared Sweeney. (See below: *Concealing second-hand evidence.*)

The case shows how lawyers and judges are prey to what George Orwell called 'doublethink', holding two contradictory beliefs at the same time, also known as 'cognitive dissonance'. Katz knew it was premeditated murder, but at the end of the prosecution case, having felt obliged to conceal evidence of planning, he eliminated first-degree murder, and told the jury they could only consider manslaughter and second-degree murder. The jury went for voluntary manslaughter.

At the sentencing a month later, Katz said: 'I will state on the record that I believe this is murder. I believe that Sweeney is a murderer and not a manslaughterer ... This is a killing with malice.' He gave Sweeney the maximum for manslaughter, 6 ½ years. He served 4 ½. The procedure shocked the victim's father, Dominick Dunne (1925-2009). His report, *A father's account of the trial of his daughter's killer*, appeared in *Vanity Fair* in March 1984.

The order of the anti-truth devices given here is roughly the way they appear in the pre-trial and trial processes. The rules for concealing evidence are marked with an asterisk

***1. Concealing suspects' evidence**

The privilege against self-incrimination, of which the 'right' of silence is a part, allows suspects to say nothing to police or jurors. At bottom, the immunity from supplying evidence derives from two lies. The correct formulation of the duty of a suspect or accused is attributed to St. John Chrysostom (c. 347-

407), a Syrian lawyer who became Archbishop of Constantinople. The suspect's duty became canon law and was quoted by Justice Ken Marks, of the Victorian Supreme Court, in his 25,000-word article, *'Thinking up' about the right of silence and unsworn statements* (*Victorian Law Institute Journal*, 1984).

The canon law was: *Licet nemo tenetur seipsum prodere, tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare*. That is: '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.'

Justice Marks noted that in 1568 Sir James Dyer, Chief Judge of the Court of Common Pleas, omitted everything except 'no one is compelled to accuse himself' (*nemo tenetur seipsum prodere*), and freed a suspect on that basis. A lawyer, Rick McDonnell, drew Justice Marks's paper to my attention in 1997, 13 years after it appeared. When I asked the judge for a copy, he said I was only the second person to speak to him about it.

Judges ignored Dyer's lie for 200 years. Yale professor John Langbein's research (published in 1994) on the period 1660-1800 showed there was not 'a single case in which an accused refused to speak on asserted grounds of privilege, or in which he makes the least allusion to a privilege against self-incrimination'. However, Blackstone wrote in his *Commentaries* (1765-69): 'At the common law, *nemo tenebatur prodere seipsum*.' (No-one was compelled to accuse himself.). That was not the common law at

all, but James Madison fatally entombed it in the US Constitution as the Fifth Amendment in 1791.

Justice Michael McHugh referred to *The Privilege Against Self-Incrimination: Its Origins and Development* (University of Chicago Press, 1997), in [Joseph] *Azzopardi v The Queen* (Australian High Court, 2001). McHugh said the book, by Dick Helmholz, Charles Gray, John Langbein, Eben Moglen Henry Smith, and Albert Alschuler, demonstrated that the immunity 'did not become firmly established as a principle of the criminal law until the mid-19th century or later'.

Jeremy Bentham observed in 1827 that the privilege is irrational and was perpetuated only by those 'duped and corrupted by English lawyers', e.g. Blackstone. The dupes, willing or otherwise, included Sir Harry Gibbs (1917-2005), who famously said in 1974 that a profit was a loss, and became Australia's Chief Justice in 1981. Gibbs defined the privilege in *Sorby v The Commonwealth* (1983). Quoting *Lamb v Munster* (1882), Gibbs said a suspect cannot be compelled 'to answer any question, or to produce any document or thing, if to do so "may tend to bring him into the peril and possibility of being convicted as a criminal".'

The privilege tends to confirm Brett Dawson's view that criminal law is a get-the-guilty-off game. Cambridge law professor Glanville Williams said in *The Proof of Guilt: A Study of the English Criminal Trial* (Stevens, 1963):

... immunity from being questioned is a rule which by its nature can protect the guilty only. It is not a rule that may operate to acquit some guilty for fear of convicting some innocent.

US Chief Justice (1953-69) Earl Warren (1891-1974) thus spoke truer than he knew when he said in *Miranda v Arizona* (1966) that the privilege is 'the essential mainstay of our adversary system'.

Alun Jones QC said: 'I am told that over half of all defendants in America decline to give evidence.' Law lecturer Dave Dixon, of the University of NSW, said in 1997 that about half those who remained silent are convicted, i.e. 25% of the total. Blackstone's lie is thus one of his great legacies to criminals and their lawyers.

Justice Lionel Murphy, of the Australian High Court, was charged with perverting justice. He gave evidence, was seen to be shifty and evasive and was found guilty. He got a retrial on a technicality, refused to give evidence, and got off in 1986.

O. J. Simpson got off murder charges largely because of race, but the 'right' of silence helped. He had to give evidence at his civil trial in 1996, and was seen to be shifty, evasive and contradictory. He was found responsible for the murders.

As a matter of human dignity, suspects can refuse to talk but silence risks adverse inference. They would probably demonstrate their innocence if they could, but judges in the second half of the 20th century compounded Blackstone's lie: they gave silent suspects immunity from adverse inference.

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Justice Geoffrey Davies, of the Queensland Court of Appeal, noted that immunity from inference offends reality and common sense. He wrote in *The Prohibition Against Adverse Inferences from Silence: A Rule without a Reason?* (Part 1, *Australian Law Journal*, 2000):

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

The Australian High Court edged towards removing immunity from adverse inferences in *Weissensteiner v Her Majesty* (1993), and British legislators abolished it in 1994, but Australian legal bureaucrats largely restored the immunity in the Commonwealth and NSW *Evidence Acts* of 1995. Section 20 (2) of the NSW Act says judges - but not prosecutors - can comment on an accused's refusal to speak, but cannot suggest it was because he was guilty.

2. Prove it!

As noted in the Origins section, the criminal adversary system is a quite recent and lawyer-run version of the anti-truth accusatorial (Prove it!) system that came out of the Dark Ages. In the new version, prosecutors are required to prove a case after evidence has been concealed. That reaches its

logical conclusion when a judge conceals ALL the evidence and then invites a bemused prosecutor to prove his case. That happened in an Australian case which concerned an alleged white collar theft of \$66 million. (See below. *Concealing evidence said to have been improperly gained.*)

Three New York detectives, Gescard Isnora, Michael Oliver and Marc Cooper, fired 50 shots into an unarmed man, Sean Bell, in November 2006. They were charged with manslaughter. An ounce of evidence is said to be worth a pound of demeanour. In April 2008, Judge Arthur Cooperman, 74, sitting without a jury, rejected the evidence of all 50 prosecutions witnesses, partly, he said, because of their demeanour. The detectives refused to give evidence. Judge Cooperman was thus not able to assess their demeanour. He found them not guilty.

3. Legal aid

A British (Labour) Attorney-General, Sir Hartley ('We are the masters [now]') Shawcross (1902-2003) invented legal aid in 1949. Arthur Marriott QC, of London, told a Sydney audience in October 2005: 'Perhaps the main impact of the [Legal Aid] Act was the extraordinary growth in the numbers of practising lawyers.'

Legal aid is effectively a fraud on the public and taxpayers in almost all criminal cases because the accused are guilty. Accused are entitled to a defence, but legal aid lawyers should not be allowed to use public moneys to defeat truth and pervert justice.

At least in two Australian states, there is a gulf between the budgets for legal aid and the Director of Public Prosecutions (DPP). Tony Koch reported in *The Australian* (17 May, 2008) that the Queensland DPP's budget was less than a third of legal aid from state and federal sources: the DPP got about \$30 million to try to put criminals in prison; trial lawyers got \$101.3 million a year to try to keep them out.

In New South Wales, the DPP's budget for 2007-08 was \$96 million; the legal aid budget was \$214 million. In 2009, DPP Nicholas Cowdery QC was obliged to drop some prosecutions, and could not provide lawyers for some courts.

4. Improper use of presumption of innocence

The presumption of innocence is a nice legal fiction; if taken literally, no criminal would be charged. The reality is a presumption of agnosticism: the suspect/accused may be innocent, or he may not. The presumption is not absolute; some jurisdictions have a presumption of guilt for such cases as goods in custody: if police find heroin in the trunk of a car, it is presumed to be the owner's unless he can prove otherwise.

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

Lord Chief Justice Rayner Goddard got a severe birching for saying of pattern evidence (*R v Sims*,

1946): 'If one starts with the general proposition that all evidence that is logically probative [tending to prove guilt] is admissible unless excluded [by a specific rule], then evidence of this kind does not have to seek a justification.' The law lords said (*R v Hall*, 1952) Goddard was wrong because his view tended to subvert the presumption of innocence. He might have replied that all probative evidence tends to subvert the presumption of innocence, but he had to toe their lordships' line.

5. Precedent

Stare decisis (the decision stands) means abiding by precedents set by judges who may have been wrong or corrupt, but lock bad law into the system. Judges and lawyers can also riffle through precedents until they find one that suits their agenda.

Precedent also offends the rule against hearsay (see below), which conceals the evidence of speakers who are not available for cross-examination which might show they were wrong. The corrupt Lord Eldon said in *Sheddon v Goodrich* (1803): '... it is better the law should be certain than that every judge should speculate upon improvements in it.' Unfortunately, Lord Eldon is not available for cross-examination.

It was only after criminal work became a business proposition for lawyers that judges became bound by precedent, however bad. Professor Theodore Plucknett wrote in *A Concise History of the Common Law*: '... even as late as the days of Baron

Parke [1782-1868; Court of Exchequer 1834, created baron 1856] ... it was possible for that very learned judge to ignore decisions of the House of Lords ... The 19th century produced the changes which were necessary for the establishment of the rigid ... theory as it exists today.'

David Pannick QC, of London, wrote in *Judges* (Oxford 1988): 'There are many things wrong with the English legal system. A large proportion of them can be explained by our reverence for the doctrine of precedent. We do things not for any rational reason but because they have previously been done that way.' He noted an 18th century judge, Samuel Lovell, who was 'overtaken by the tide', but refused to escape drowning unless a precedent could be quoted for judges mounting the coach-box.

6. The theory of the case: fabricating a defence

Although lawyers know that almost all accused are guilty, they claim that legal 'ethics' allow them to do whatever it takes, including fabricating a defence, to create a 'reasonable' doubt in the mind of a juror.

Techniques vary, but most involve attempts to shift the blame from the client to, variously, the victim, police, prosecutor, the media, or some other person or thing. That is called the theory of the case: it is not our guy; therefore it must be some other person or thing. A criminal trial can thus be a lavishly-produced charade. The judge, who will have used the theory of the case in his days as a trial