lawyer, may mentally tick off the fabrications as they are produced.

John Dobies, a Sydney lawyer, pilloried the theory of the case in what he called The Polar Bear Defence. If there were scratches on the body of a murder victim, the murderer may have been a polar bear. The lawyers would hire witnesses expert on the incidence of polar bears in Sydney, and others prepared to swear they saw a polar bear that day.

Professor David Luban wrote in *Lawyers and Justice*:

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

Lawyer/reporter Jeffrey Toobin wrote in *The Run of His Life: The People v. O. J. Simpson* (Touchstone 1997):

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

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

The SOD Defence is that some other dude did it. Toobin noted that another member of the Simpson team, Professor Gerald Uelmen, of the Santa Clara law school, said the murder 'bears all the hallmarks of a drug-related homicide, in which the frequency of multiple victims, the use of knives, the use of stealth, is much more frequent than it is in the case of domestic violence'. Toobin commented: 'As Uelmen uttered the words "drug-related", there was an audible intake of breath in the courtroom. The suggestion was (and remains) preposterous, even on Uelmen's own terms …'

In June 2008, an Australian lawyer, Robin Tampoe, admitted that he concocted a defence for Schapelle Corby, who was found guilty of importing 4.5 kilograms of marijuana into Bali, Indonesia, in 2005, and got 20 years. Tampoe said the defence, that corrupt airport baggage handlers in Australia put the marijuana in her bag, was false. Miss Corby's Indonesia lawyer, Erwin Siregar, described Tampoe's statement as 'a crazy admission'. In June 2009, a Queensland judge, Roslyn Atkinson, struck

Tampoe off for bringing the profession into disrepute. She said:

A person acting as a criminal defence legal practitioner cannot under any circumstances invent facts or invent a defence. To say such a thing is scandalous and is likely to cause the public to lose confidence in not only the legal profession but in the criminal justice system, because it suggests that in response to a criminal charge what one should do is find a legal practitioner who will make up a defence for the alleged offender. Nothing could be further from the truth.

7. The abuse excuse

Lyle and Erik Menendez, of Hollywood, murdered their parents to get their money in 1989. They had the same trial, but with separate juries, in 1993. Leslie Abramson, for Erik, claimed years of verbal and physical abuse by their father, Jose, drove them to do what they did. A psychiatrist said Erik's brain had been 're-wired by fear'. She supported this claim with her research on snails. Both sets of jurors were deadlocked; some jurors thought they were guilty of manslaughter only.

At the second trial in 1996, the judge ruled much of the abuse evidence irrelevant but admitted a claim that Erik suffered from Post Traumatic Stress Disorder which prevented him from formulating thoughts necessary for premeditated murder. Both were found guilty of murder and sentenced to life without parole.

8. The self-abuse excuse

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

9. The lecture

When the lawyers have decided on the theory of the case, they may coach the accused – subtly or otherwise – in case they decide to let him give evidence. Judge (1957-59) John Voelker (1903-91), of the Michigan Supreme Court, published *Anatomy of Murder* in 1958 under the pen name Robert Traver. It was inspired by a case in which Voelker was the defence lawyer. Fred D. Shapiro quoted from the book in *OxfordLQ*: :

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

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

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

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

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

'Morally, perhaps, but not legally.'

Biegler told his client a murderer might not be guilty if he was temporarily mad, and advised him to go back to his cell and think about it. The client took the hint, and got off. One remedy is to make lawyers take an oath to tell the truth.

10. Delay

Delay helps criminals. Witnesses die or forget; prosecutors tire or calculate the costs. Peter Faris QC, former head of Australia's National Crime Authority (NCA), told the 6th International Criminal Law Congress in Melbourne in 1996:

Excellent books have been written discussing criminal defences. In my view, the major criminal defences, in order of importance, are as follows:

1. Delay.
2. Confusion.
3. Allegations of conspiracy by the police and prosecuting authorities to conceal and tamper with the evidence, thus raising a reasonable doubt.
4. Defences set out in the excellent books.

Mervyn Wood (1917-2006), a corrupt NSW Police Commissioner (1976-79), confirmed Faris's point about delay. He colluded with a corrupt magistrate, Murray Farquhar, to fix a drug case in 1979; was charged in 1986 with attempting to pervert justice; and committed for trial in 1989. In 1991, a Dizzo (District Court) judge, John Sinclair, permanently stayed the perversion charge because of the delay (seven years) in charging Wood.

Lawyers supervised the (Australian) NCA's investigations into suspected organised crime. A case concerning John Dorman Elliott and others (see below: Concealing evidence said to have been improperly gained) began in 1989; charges alleging theft of $66 million were laid in 1993; the case collapsed in 1996 when the judge wrongly concealed the evidence of some 130 witnesses. The NCA lawyers' dismay was recorded by its oversight body, the Parliamentary Joint Committee (PJC), in its *Third Evaluation of the* NCA (1998). The PJC reported that Greg Melick, a barrister member of the NCA, said:

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

11. Plea-bargaining

Professor John Langbein wrote in *The Historical Origins of the Privilege Against Self-Incrimination at Common Law* (Michigan Law Review, March 1994):

> ... when our criminal procedural system crumbled in the twentieth century under caseload pressures, our response was to dispense with trial altogether, transforming the pre-trial process into our no-trial plea-bargaining system.

Caseloads are a factor, but plea-bargaining is an admission that the system's anti-truth devices make it difficult to get convictions. Prosecutors offer suspects a no-risk bargain: accept a large fine or a few years in prison against the possibility of going to prison forever. Plea-bargaining works two ways. It can put the innocent in prison and give the guilty a much lighter sentence and thus deprive victims and the community of justice.

Judges (and jurors) in France and Germany do not accept guilty pleas. They have to find the truth for themselves, and they know a guilty plea can be false because of torture, coercion or to protect others.

12. Preliminary (committal) hearings

Preliminary hearings presume that prosecutors are incompetent. A minor judicial officer has to decide whether the prosecution's evidence is sufficient to commit an accused for trial. Apart from making more money for defence lawyers and depleting

prosecution budgets, preliminary hearings are all one way: only the prosecution case has to be revealed. This helps defence lawyers to fabricate a defence, to 'destroy' key witnesses out of the sight of jurors, and to deter them from giving evidence at the trial.

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

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

13. Separate trials

Several defendants in the same case may get separate trials if some evidence against one is different from that against others. Also, a person charged with several similar crimes can get a separate trial on each charge because the evidence of all the victims might reveal a devastating pattern (see below Concealing a pattern of criminal behaviour). Natasha Wallace reported in *The Sydney Morning Herald* of 2 July 2004:

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

The children may have wondered what Judge Latham thought as she sat passively through the eight trials.

14. Only a bit mad: diminished responsibility

In most crimes, the prosecution has to prove both a wrongful act (*actus reus*) and a wrongful intent (*mens rea*). It is not a crime to think about murder, nor is it a crime to commit murder if you were mad at the time. The latter derives from a House of Lords opinion in *M'Naghten* (1843).

Diminished responsibility is a relatively recent wrinkle on *M'Naghten*. In the 1960s, judges began to accept lawyers' arguments that if the accused was only a little bit mad, he might be only a little bit guilty. Trials tended to become contests between psychiatrists.

The Hon Burton S. Katz, no longer a judge, wrote in *Justice Overruled: Unmasking the Criminal Justice System* (Warner, 1997):

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

Three cases in point:

Twinkies. Dan White was dismissed from the San Francisco public service in 1978. He got a gun; evaded metal detectors by climbing through a City Hall basement window; evaded Mayor George Moscone's bodyguards; killed Moscone with four shots; reloaded; went to the office of another official, Harvey Milk, and killed him with five shots.

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

Bobbitt. Lorena Bobbitt got a kitchen knife and sliced off half her husband's penis while he was in a drunken slumber in 1993. In 1994, a jury found her not guilty of malicious wounding on the ground that

her temporary insanity gave her an irresistible impulse to wound.

Anu Singh. Helen Garner reported in *Joe Cinque's Consolation: A True Story of Death, Grief and the Law* (Picador, 2004) that Anu Singh, 25, a self-obsessed drama queen and final year law student in Canberra, Australia, got advice on how to inject an overdose of heroin in September 1997.

During the night of Saturday, 25 October 1997, Singh put a knockout drug, Rohypnol, in the coffee of her amiable boy friend, Joe Cinque, 26, a civil engineer. At about 3 am on the Sunday, Singh injected heroin into Cinque's body, but he failed to die. She went out, bought more heroin and injected him again at about 10 am. He died about 2 pm. She was charged with murder.

In April 1998, the trial judge, Ken Crispin, sitting without a jury, agreed with psychiatrists who said Singh's responsibility was diminished because she was somewhat mentally disturbed. He found she was not guilty of murder but guilty of manslaughter. He gave her a minimum of four years, backdated to the date of her incarceration, October 26, 1997.

Sing passed her law finals in prison, and was out in October 2001. A glittering career was predicted. Adversarial cross-examination is the Theatre of Cruelty. The cruellest action is robbing a person of his life.

Garner noted 'the ugly divide between morals and the law'. She asked whether 'the moral failure of the law' gives judges an 'icy chill'? The answer is no.

If the system's lack of morality chilled judges, they would do something about it.

***15. Concealing client-lawyer conspiracy**

Raymond Chandler's Philip Marlowe said in *The Long Goodbye* (1953): 'How long do you think the big-shot mobsters would last if the lawyers didn't show them how to operate?'

The privilege of client-lawyer secrecy is a major plank of Professor Benjamin Barton's theory that judges favour lawyers' interests. Judges say the privilege helps the administration of justice. That confirms that common lawyers have a peculiar idea of justice; the privilege protects the guilty and does not protect the innocent.

The privilege resided in the lawyer, not the client when it first appeared in *Berd v Lovelace* (1577). Perhaps indulging a taste for irony, Justice Michael Kirby, said in *The Commissioner, Australian Federal Police and Others* v *Propend Finance Pty Ltd and Others* (Australian High Court, 1997): 'Early cases suggested that [the privilege] belonged to a solicitor and derived from his honour as a "professional man and a gentleman".'

A gentleman presumably would not waive the privilege and disclose details of his criminal conspiracy with a client, but rich criminals got a nasty surprise in 1743 when, as noted in the section on ethics, James Giffard, a lawyer but no gentleman, revealed that he conspired with an organised criminal to procure a judicial killing.

Justice Sir Francis Buller (1746-1800) did the decent thing. In *Wilson v Rastall* (1792) he decided earlier judges were wrong, and that the privilege belongs to the client, not the lawyer. Rich criminals could now conspire with lawyers safe in the knowledge that only criminals could waive the privilege.

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

Henry Brougham, who had successfully blackmailed George IV in 1820, was Lord Chancellor 1830-33. Lord Brougham ruled that any legal transaction might lead to litigation; all transactions involving lawyers must therefore be secret.

Justice Sir James Knight-Bruce (1791-1866) made an argument for secrecy in *Pearse v Pearse* (1846). He begins with a lie; descends into puerility and finally invokes Othello to claim that truth does not matter. He said:

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

Truth, like other good things, may be loved unwisely, may be pursued too keenly, may cost too much.

Professor David Luban says that the privilege cannot exist if lawyers are in business. It is clear that the common law has been a business since it began in the 12th century.

Richard Ackland, proprietor of *Justinian*, noted the reality in *The Sydney Morning Herald* of 2 April 2004:

The truth is that companies of various shapes and sizes have for many years wheeled barrowloads of documents through the portals of the large law firms on the pretext of getting legal advice, but really hoping to achieve an ambit privilege from disclosing all sorts of unattractive details of their day-by-day conduct.

As noted, the courts have been trying to shut the Press up since Defoe invented modern journalism in 1704. The super-injunction – an order to conceal the existence of an injunction to conceal something – is merely the latest wrinkle.

Carter-Ruck, a London law firm, obtained super-injunctions in 2009 on behalf of a shipping company Trafigura, to: 1) Prevent *The Guardian* from publishing details of data covered by client-lawyer secrecy; 2) Prevent disclosure that an injunction had been obtained; 3) Prevent disclosure that a member of Parliament had put a question about the matter on the notice paper. *The Economist* reported the upshot:

This week a national newspaper ran a fascinating story about absolutely nothing. *The Guardian* reported on its front page on October 13th that a question had been tabled by an MP in Parliament, but that the newspaper could not reveal 'who has asked the question, what the question is, which minister might answer it, or where the question is to be found'. The reason, it explained no less cryptically, was that 'legal obstacles, which cannot be identified, involve proceedings, which cannot be mentioned, on behalf of a client who must remain secret'.

The super-injunction implying that judges could also shut members of Parliament up was a step too far; freedom of speech in Parliament has been absolute since 1771. Politicians were furious.

In any event, The *Guardian* article and an equally obscure and/or cunning Twitter by the editor, Alan Rusbridger, had led to discovery of the question on a parliamentary website. The data injuncted via client-lawyer secrecy were also published on Wikileaks and discussed on SideWiki. The horse having bolted, Carter-Ruck withdrew the injunction and super-injunctions.

A message from the Trafigura episode may be that data which judges conceal from jurors, e.g. evidence in criminal and civil actions, could likewise get into the public domain while a case is proceeding

The privilege damns itself doubly: it protects the guilty but not the possibly innocent. A judge sent me the judgment in *Carter v Managing Partner Northmead Hale Davey and Others* (Australian High Court 1995). He said: 'Read this and weep.'

Louis James Carter, a Brisbane accountant was charged with fraud. He said certain documents said to be covered by the privilege would prove his innocence. Should judges opt for justice or law? The voices of infallibility went for law, by the usual narrow margin. Justices Mary Gaudron and John Toohey said Carter should get the documents. Chief Justice Sir Gerard Brennan, Justice Michael McHugh and a rather apologetic Justice Sir Billy Deane said he should not. Carter got four years.

***16. Concealing hearsay**

In the investigative system hearsay evidence is weighed, not concealed. That was also the common law practice until lawyers got control of the criminal process. Professor Julius Stone and former Justice W.A.N. Wells wrote in *Evidence: Its History and Policies* (Butterworths, 1991):

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

The excuse for concealing second-hand evidence is that the original speaker is not available for cross-

examination which might show he was wrong, confused, or simply lying. If that were a valid excuse for concealing evidence, judges would not be bound by precedents made before, say, 1900. Nor would we accept that the US broke from Britain, or that Britain won the Battle of Waterloo.

O.J. Simpson was accused of having cut the throat of his wife, Nicole, on Sunday, 12 June, 1994. In January 1995, Judge Lance Ito used the hearsay rule to conceal evidence of her diary entries in which she said she was afraid Simpson might kill her, and evidence that she rang a refuge five days before her murder and said Simpson was stalking her and that she was afraid. Judge Ito said:

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

Lord Justice Stephen Sedley said (*Howzat? London Review of Books*, 25 September 2003) that the English and US criminal process is still caught up in:

> … the absurdities of the rule against hearsay evidence … which even lawyers have difficulty in understanding and applying. (Is it permissible to testify that when the accused ran off, someone shouted 'Stop thief!' and so on.)

An exception to the rule against hearsay is a statement by someone who knows he is dying. Acting Leading Stoker A.R. Gordon, in company

with Stoker E.J. Elias, stabbed Stoker J.J. Riley 14 times on the battle cruiser HMAS *Australia* in March 1942 to prevent him reporting their homosexual activities. Before he died, Riley told three officers that Gordon had stabbed him, but their evidence was concealed because a doctor did not tell Riley he was going to die. Gordon and Elias were convicted on circumstantial evidence.

***17. Concealing a pattern**

Justice Russell Fox says an understanding of facts depends heavily on context, but as Dr Bob Moles notes in the Foreword to this book: ' … most of what we need to know to place the knowledge in context in trials is ruled to be inadmissible … '

The rule against 'similar facts' specifically hides evidence of a pattern of criminal behaviour. In another lie by omission, prosecutors are obliged to falsely imply that the accused is a first offender. For instance, in 2003 an incompetent Welsh thief's 247 previous convictions were concealed from the jury. He was found not guilty of theft. The rule thus eliminates much context, truncates the chronology – always the first element of deduction – and protects repeat criminals, e.g. serial rapists and organised criminals such as extorting judges and the Mob.

The rule, a relatively recent concoction, derives from a case of systematic murder of babies. Sydney 'baby-farmers' John and Sarah Makin took in unwanted babies for a fee; murdered them; and buried the bodies in their back yards. They were

charged with murdering one baby. The trial judge let in evidence of 12 other dead babies found in the yards of their various previous homes. The guilty verdict was appealed up to the Privy Council in England on the basis that evidence of the other 12 murders was unfair to the Makins.

In *Makin v Attorney-General of NSW*, the Privy Council dismissed the appeal, but Lord Chancellor (1886 and 1892-95) Farrer Herschell (1837-99) used words which have been taken to mean that pattern evidence will almost never be admitted. Herschell said:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely to have committed the offence for which he is being tried.

Dr John Forbes said in *Similar Facts* that, 'despite complaints that *Makin* is vague if not almost vacuous', Herschell's remarks 'still enjoy scriptural status'. Dr Forbes noted a US version in *People v Molineux* (1901): 'The State cannot prove against a defendant any crime not alleged in the indictment … as aiding the proofs that he is guilty of the crime charged.' Oliver Cyriax, a lawyer, wrote in *The Penguin Encyclopedia of Crime* (1996):

> It is generally agreed that the date-rape case against William Kennedy Smith failed on the first day of the trial,

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

Jason Van Der Baan committed a number of sex crimes in Sydney between 1994 and 1996. In 2001 he was convicted on two sex crimes and sentenced to eight years. He was then charged with the murder of his aunt, Mrs Irene Wilson, 39, at her home in 1995. She was found face down on a bed with her hands tied behind her back and a cord around her neck. In 2002, the trial judge, Greg James, felt that the law obliged him to conceal:

- Van Der Baan's two previous convictions for sexual assault.
- His confession to an undercover police officer in prison.
- Evidence that he tied up other victims in the same way as the murderer of Mrs Wilson.
- Evidence that he was obsessed with her and had stolen her underwear and cut out the crotch.

The defence was of the SOD variety. A friend of Mrs Wilson was cross-examined as if he was a suspect. He was not allowed to sit with the family in court because it would be unfair to the accused if the jury

could see he was still a friend of the family. The jury took only three hours to find Van Der Baan not guilty. Even Dominick Dunne could not have improved on the words of Mrs Wilson's brother:

> This trial was not about the murder of my sister … it wasn't about truth or about justice; it was about points of law. All we hear about are the rights of the accused. What about her rights to have lived and seen her children grow? What about the rights of her children to be cared for by a loving mother?

Van Der Baan hoped to get parole on the other crimes when DNA (deoxyribonucleic acid) evidence tied him to a sex crime in 1995 and another in 1996. He pleaded guilty to the charges in April 2009.

The US has had an exception to the rule against pattern evidence since 1970, but only for organised criminals in the Mafia, in business, and in the judiciary. The exception was the product of an unlikely combination of a Mob hitter, a Senator, a young lawyer, and a complex President. Senator John McClellan (Democrat, Arkansas, 1896-1977), a lawyer, chaired the Sub-committee on Investigations from 1955 to 1973. In 1963, an assassin in the Genovese family, Joe Valachi (1903-71), explained the structure of the Mafia to the sub-committee and, via television, to the public.

Bob Blakey was the principal draftsman of subsequent legislation to deal with organised crime. The legislation was to hand when Richard Nixon ran for President in 1968 partly on law and order, and

was passed in 1970 as the Organized Crime Control Act. The RICO (Racketeer-Influenced and Corrupt Organisations) legislation is Title IX of the Act.

RICO was plainly going to make it harder for lawyers to get rich organised criminals off. I asked Blakey, now a law professor at Notre Dame, in 2001 how he got RICO past the American Bar Association. He replied:

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

RICO's effect on the Mob confirmed that the pattern rule perverts justice on a huge scale. It put away 23 previously untouched Mafia bosses throughout the US between 1981 and 1992 including those of the five New York families: Frank (Funzi) Tieri and Anthony (Fat Tony) Salerno (Genovese family), Anthony (Tony Ducks) Corallo and Vittorio Amuso (Lucchese family), Carmine (The Snake) Persico and Vicorio Orena (Colombo family), and John Gotti (Gambino family). Vincente (Chin) Gigante (Genovese family) was convicted in 1997.

RICO was used to imprison 70 white collar organised criminals in Chicago: 20 judges and their 50 bagmen (lawyers and court officials) between 1984 and 1994

In 1994, US federal rules of evidence were revised to allow the use of prior alleged acts in

federal sex cases. A few states, including California, Indiana, Illinois and Missouri, adopted similar rules.

In 2004, British Home Secretary David Blunkett, announced a plan to give judges a discretion to let jurors hear of an accused's previous convictions. He said: 'These reforms put victims at the heart of the justice system. Trials should be a search for the truth [!] and juries should be trusted with all the relevant evidence to help them to reach proper and fair decisions.'

Blunkett no doubt meant well, but Professor Benjamin Barton would say it is unwise to give judges a discretion in matters which affect lawyers' financial interests. And if the Government really believed that trials should be a search for truth, they would abolish the other 23 anti-truth devices.

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

***18. Concealing improperly gained evidence**

Common law countries vary on concealing evidence said to have been improperly procured.

British judges tend to let the evidence in if it is reliable. Australian judges have been supposed to let the evidence in since *Bunning v Cross* (High Court, 1978), if it is reliable and if the investigators' misbehaviour is less vile than the crime alleged. A similar rule applies in Canada. The US position was

uncertain from 1791 to 1961. The Fourth Amendment stated:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated …

No one knows what 'unreasonable' means. Judge Harold Rothwax says in *Guilty: The Collapse of Criminal Justice* that 'in more than 90 per cent of cases, the police don't know what the law is', i.e. what is reasonable in the particular case. He added. 'A chief judge riding in the back seat of a police car wouldn't know what the law is!'

Justice Benjamin Cardozo (1870-1938, Supreme Court 1932-38) did not like concealing the evidence. He said: ''The criminal is to go free because the constable has blundered'. More criminals have gone free since 1961 because of devious manoeuvres by Tom Clark (1899-1977, Supreme Court 1949-67). It seems more likely than not that Murray (The Camel) Humphreys, a fixer for the Chicago Mob, organised Clark's appointment to the court.

A fix was needed because the Chicago boss, Paul (The Waiter) Ricca (1897-1972, b. Felice De Lucia, Naples), got 10 years in 1943 for extorting from Hollywood film studios. In 1947, possible new charges promised to defeat his chance of parole. The privilege of client-lawyer secrecy made it safe for Ricca to conspire with his lawyers. Carl Sifakis reported:

Printed accounts [in Chicago] had Ricca telling his lawyers to find out who had the final say in granting him a speedy release, saying: 'That man must want something: money, favours, a seat in the Supreme Court. Find out what he wants and get it for him.'

The man who got the job was a thinking man's mobster. Sifakis said Alphonse Capone (1899-1947) said:

Anybody can use a gun. The Hump uses his head. He can shoot if he has to, but he likes to negotiate with cash when he can. I like that in a man.

Gus Russo wrote in *The Outfit: The Role of Chicago's Underworld in the Shaping of Modern America* (Bloomsbury, 2004):

After considering the problem, Humphreys hit upon the solution: He would tap a 68-year-old Missouri attorney named Paul Dillon, a litigator he had employed in 1939 … Humphreys' kinship with the Missouri-based Dillon was a natural result of his role as the Outfit's political liaison to that state. And in the shadowy world of underworld-upperworld collusions, this linkage gave Humphreys leverage over the most powerful politician in the United States … Dillon's gangster associates in Kansas City, Missouri, had sponsored the ascendancy of the 33rd president of the United States, Harry S. Truman. Humphreys knew that by playing the Kansas City card he was subtly threatening to open a Pandora's box that Washington would be forced to address.

Oliver Cyriax said it was claimed that the terms of The Camel's deal were that Truman would get 'a $5 million backhander'; Attorney-General Tom Clark would release Ricca; and Clark would get the next vacant seat on the Supreme Court. Clark released Ricca in 1947. Truman put Clark on the court in 1949.

In 1957, a boxing promoter with electric hair Don King (b. 1931), told Cleveland police of a bomb suspect. Police broke into Dolree Mapp's premises. There was no bomber, but they charged Mapp with possessing obscene materials. She appealed her conviction to the Supreme Court.

Judge Harold Rothwax says *Mapp v Ohio* (1961) was a straightforward First Amendment (free speech) case. The 'search and seizure' Fourth Amendment was not argued at the hearing, nor was it raised when the judges conferred. They voted 9-0 to reverse the conviction on First Amendment grounds, but Clark wrote the opinion on Fourth Amendment grounds. He said all evidence wrongly gained must be concealed. Judge Harold Rothwax observed:

> Clark's opinion stood, but the vote of the justices was quite revealing. Although the majority … agreed that Mapp's conviction should be reversed, only four of the judges (a minority) agreed on Fourth Amendment grounds … What Clark and his allies did was comparable to the Supreme Court overruling *Roe v Wade* [1973], the abortion rights decision, with a case involving free speech.

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

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

Lawyers supervised the Australian National Crime Authority's investigations into white and blue collar organised crime. In 1993, the NCA charged John Dorman Elliott, Kenneth Biggins, and Peter Scanlon with stealing $66 million from a Melbourne brewery they controlled.

In 1996, without empanelling a jury, Justice Frank Hollis Rivers Vincent heard argument about what evidence he would conceal. That took six months. Robert Richter appeared for Elliott. Vincent then said in effect he would suppress the evidence of some 130 witnesses because NCA lawyers had obtained evidence improperly. He said the lawyers' errors were inadvertent, not deliberate. In a *Bunning v Cross* situation, lawyers' inadvertent errors could hardly be worse than alleged theft of $66 million. The prosecutor offered no other evidence. Vincent declared Elliott, Biggins and Scanlon not guilty.

Garry Livermore, a barrister who had led the NCA investigation from 1989, gave evidence to the Joint Parliamentary Committee on the NCA on Monday, 8 October 1997. He seemed a little peeved, perhaps because the investigation, various legal skirmishes, and the non-trial had cost taxpayers some $20 million, and also by Elliott's self-proclaimed sexual athleticism. *Hansard* recorded Livermore as saying of Elliot, Biggins and Scanlon:

> They were gone. They would have been gone if the evidence had been led before a jury. The evidence against them was overwhelming … Not one of some 130 witnesses ever gave evidence before a jury in this matter. It is a disgrace and blight on the system… Mr Chairman, I attended the Carlton football match at Optus Oval the Saturday after Mr Justice Vincent's ruling throwing out all the evidence in the case. I sat down and listened to Mr Elliott … roar to the crowd [that] he had 'stuck it right up the NCA'. He had not done that at all. What he had done was stick it right up the system and he stuck it up you, Mr Chairman, and every law-abiding member of the Australian community.

That may be, but it was the adversary system which – to continue Mr Elliott's typically delicate metaphor – raped and pillaged the body politic. The Victorian appeal court later found that Vincent was wrong to conceal the evidence [from himself] because the NCA lawyers had got the evidence properly, but the horse had bolted: Elliott, Biggins and Scanlon could not be retried, because the common law said wrong

not guilty verdicts can never be wrong (see Double Jeopardy below).

The obvious remedy is to admit all improperly-gained evidence if it is reliable, and to punish erring detectives at a special tribunal. That has not been tried, perhaps because detectives might insist that lawyers who pervert justice should also be punished.

***19. Concealing any or all evidence (*Christie*)**

The *Christie* discretion is a piece of metaphysical claptrap expounded by British judges in *R v Christie* (Court of Appeal, 1914). They included Lord Reading, who escaped justice for insider trading in the Marconi scandal of 1913. Dr John Forbes said in *Evidence in Queensland* (The Law Book Company, 1992) that the '*Christie* discretion may contain 'a large subjective element' [*R v Sang*, 1980]; that its operation may sometimes be 'whimsical or idiosyncratic' [S*elvey v DPP, 1970*]; and that:

> If there ever was such a thing as judicial corruption, it might well reside in the expanding and almost inscrutable discretions which can alter the whole course of a criminal inquiry.

Professor Julius Stone and former Justice W.A.N. Wells said in *Evidence: Its History and Policies* that evidence concealed by the *Christie* discretion 'must be of comparatively little probative weight, [and] this slight relevance must be accompanied by a great

potentiality for prejudice'. Judges should thus first decide that the evidence points only slightly towards guilt, and only then consider whether it is highly prejudicial. In practice, however, they may first note that the evidence is likely to cause a guilty verdict, and then decide it is only slightly probative.

David Rose (*In the Name of the Law: The Collapse of Criminal Justice*, Jonathan Cape 1996) quotes a detective: ' … as far as I can see, prejudicial means evidence that proves he did it.'

Even if the judge is plainly wrong when he says evidence is only slightly probative, he cannot be reversed because his opinion concerns facts and appeal courts deal only with law. That means judges can never be wrong on facts, but Judge Brian Boulton, of the Queensland District Court, revealed in 1992 that the head of his court, Judge John Helman, had admitted that there might be 'chaos' if different judges applied the discretion to the same evidence.

It was evidence concealed via the *Christie* discretion that first prompted me to look into the West's two systems. In 1987-88, I reported an 18-month inquiry into the truth of corruption in Queensland for *The Sydney Morning Herald* and *The* (Brisbane) *Sun*. The inquiry, chaired by the Hon Gerald Fitzgerald QC, used the investigative system: evidence was not concealed; suspects had to give evidence. That system revealed beyond the slightest doubt that the Police Commissioner, Sir Terence Lewis (b. 1929), was a major organised criminal: he franchised organised crime and extorted bribes from

franchisees, including Sydney yachtsman Jack Rooklyn. Lewis obviously lied in giving evidence.

Lewis was tried for corruption in the District Court under the adversary system in 1991. Judge Anthony Healy presided. The Crown prudently retained the leader of the criminal bar, Bob Mulholland QC, to prosecute. John Jerrard appeared for Lewis.

Jerrard may have achieved what defence lawyers fear above all; asking one question too many. He asked it of Jack Herbert (1924-2004), Lewis's bagman. Herbert was born in London; served in the RAF; joined the Metropolitan Police (Scotland Yard) in 1946; and migrated to Australia in 1947. He was a uniformed cop until he got into plain clothes in the Queensland Licensing Branch in 1959, and was there corrupted. With the mind of a bookkeeper, Herbert became the bagman for the Branch's extortions from illegal liquor sellers (sly-groggers) and bookmakers.

Lewis had been a bagman for a corrupt Commissioner (1957-69), Frank Bischof (1904-79). In 1965, Herbert began to pay Lewis a small share of Licensing Branch bribes. When Herbert apologised for the paltry sums, Lewis graciously said: 'Little fish are sweet.' In 1976, the Premier, Sir Johannes Bjelke-Petersen (1911-2005), also an organised criminal, made Lewis his police chief. In 1980, Herbert, now out of the force, became Lewis's bagman. They used codes to discuss extortees, and meeting places to share the proceeds. Lewis kept the codes in notebooks.

When the Fitzgerald inquiry began in 1987, Herbert, advised by Jack Rooklyn, fled to England, but was sprung by the Met and brought back to Australia in an Air Force plane on a promise of immunity if he told the truth about corruption.

Herbert was the leading witness against Lewis at his corruption trial under the adversary system in 1991. Lewis refused to give evidence. Judge Healy concealed a deal of evidence via the *Christie* discretion. He said: ' … some of the evidence identified by Mr Mulholland as corroborative [of Herbert's evidence] appears to me to be of little probative value but of the kind that would be highly prejudicial to the accused if I admit it.' Some evidence thus concealed:

- Lewis's diary entries, which Mulholland said he could prove were concoctions, purporting to show he was a successful punter in a period, 1979-1987, when it was alleged he was corrupt.
- His false sworn denial in 1980 that he had ever had anything to do with the organised criminal, Jack Rooklyn.
- His transfer to Lady Lewis of his interest in their mansion when he learned that Assistant Commissioner Graeme Parker had 'rolled over' and was confessing to corruption.
- His false sworn claim that he made the transfer to protect the mansion from creditors at a time when he had no credit problems.
- A tape of telephone calls between Herbert and a Barry MacNamara in which they fret that Lewis

stiffed them and an accountant, John Garde, of their share of a $25,000 bribe Herbert arranged for Rooklyn to pay to Lewis.

Of the $25,000, Lewis was to get $15,000. The other three were to split $10,000, but Lewis gave Herbert only $9000. MacNamara says on the tape: 'Oh, I think it is a shitty trick, you know, I really do … And to think, for a f*ckin' sh*tty thousand dollars … I think it's a very bad act.' Later, MacNamara says Garde 'took it badly … he's going to give that bloke [Lewis] a grand light this month'. Herbert cautioned: 'Terry loves this stuff … he might be a bit upset if I did it back to him'. Judge Healy told Jerrard:

I have come to the conclusion that this tape is not capable of corroborating Herbert … I do not think it is part of the *res gestae* [the material facts of a case as opposed to hearsay]. Therefore I exclude it. But if I am wrong about that, the conversation tends to suggest, and this is Herbert's evidence, that your client is a person who is capable of ratting on his friends. That's not part of the indictment either. It would be very prejudicial to him to let it in, so I am excluding it.

That *Christie* ruling meant that the judge took the view that the tape only slightly tended to prove Lewis's guilt.

The jurors heard only a fraction of the material uncovered by Fitzgerald. It is understood that they initially believed that Herbert had vilely traduced an honest cop in order to grain immunity, but that the

following passage concerning the 'little fish' bribes caused them to look at Sir Terence with new eyes:

> Jerrard: What did he promise to do?
>
> Herbert: It's not what he promised. It's what I had in my mind – and other members of the Licensing Branch – what he could do.
>
> What was that? – He was very, very friendly with Mr Bischof. It was well known in circles that Mr Bischof was a grafter, the same as myself, and back in those days – whilst I'm called the bagman now – the accused was well known in police circles as the Commissioner's bagman.
>
> That's a very easy allegation, that one, isn't it? – You asked me. I've told you. I didn't want to mention it, but if I didn't mention it to you, I'm not telling the truth, of which I'm sworn to ….
>
> If you are raised in Queensland, it was practically taught in schools, this allegation? – Yes, it was widely known,

Healy let the Lewis-Herbert codes in. Mulholland told the jury they were the smoking gun, but Healy said Herbert's evidence was worthless, and that 'there is no evidence which is capable of corroborating [it]'. The appeal court later said Healy was wrong, that the codes did corroborate Herbert, but there would have been no appeal if the jury had found Lewis not guilty. Healy concluded: 'You may convict on the uncorroborated evidence of [Herbert], but it would be dangerous to do so.'

Had the jurors heard all the evidence exposed by the investigative system, I imagine they would

have found Lewis guilty without leaving the box. They did find him guilty, but it took five days. Healy promptly gave him the max, 14 years. I took the view that, however inconvenient, it was a good result for Sir Terence: anyone can get a knighthood, but Her Majesty soon admitted him to an exclusive club; he was only the 14th knight to be stripped of his knighthood since the 14th century.

In 1995, the Australian and NSW *Evidence Act*(s) narrowed the probative-prejudicial gap to almost zero. Section 137 of the NSW version states:

> In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

The effect was shown after Rhonda Buckley, 51, a grandmother, was strangled in Newcastle, NSW, on Tuesday, September 25, 2001. Next day, her lover, Lyle Simpson, 47, attempted to kill himself. DNA tests showed that Simpson's semen was on her body. At Simpson's murder trial in March 2005, his legal aid lawyer, Joanne Harris, persuaded Justice Anthony Whealy to conceal his suicide attempt because it might cause him 'unfair prejudice'. DPP Nicholas Cowdery QC decided not to proceed. Simpson walked.

20. Cross-examination

Sir Thomas Smith (1513-77) appears to be the first to mention cross-examination. In his *De Republica Anglorum* (published 1583), he notes a (civil) trial which had 'not only the examination but also the cross-examination of witnesses in the presence of the judge, the parties, their counsel and the jury'.

John Henry Wigmore (1863-1943) was dean of the law school at Northwestern University at Evanston, Illinois, 1901-29. He got his law degree from Harvard in 1887, and thus knew as little about justice as anyone trained by Christopher Columbus Langdell. In *A Treatise on the System of Evidence in Trials at Common* Law (1904), Wigmore said cross-examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of truth'. That is true, but it also false in several respects. It implies that the system seeks the truth, and it omits two things: that the aim of defence lawyers is usually to obscure the truth, and that accused can avoid the truth engine by staying out of the witness box.

Irving Younger (1932-88), prosecutor, defence lawyer, judge, and academic, is revered for his lectures on the law (a snip at US$720 for the DVD). His basic approach is revealed in a question he suggested be put to a hostile witness: 'Is it not true that last night you committed sodomy on a parrot?'

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

> Cross-examination may help the elucidation of the truth, but it may also obscure the truth, and quite often is designed to that end … a clever cross-examiner can make even the most reliable testimony look questionable, and can so confuse the context that an understanding of the answers becomes blurred.

Techniques to create a 'reasonable' doubt include lying to witnesses, asking the same question with slight variations to trick them into answering Yes when they mean No; and verbal thuggery to intimidate and 'destroy' dangerous witnesses.

The oath imposed on witnesses to tell the truth, the whole truth and nothing but the truth is a legal fiction. The whole truth cannot be told in Yes-No answers, e.g. Have you stopped beating your wife? But one of Younger's *10 Commandments of Cross-examination* is: 'Never permit the witness to explain his or her answers.' In France and Germany, witnesses give evidence as a narrative.

Defence lawyers fear the truth because almost all their clients are guilty. Younger commanded: 'Never ask a question to which you don't already know the answer.' Even the sainted Atticus Finch (*To Kill A Mockingbird*, 1960), who put thousands of young idealists into the lying trade, said:

> Never, never, never, on cross-examination ask a witness a question you don't already know the answer to, was a tenet I absorbed with my baby food. Do it, and you'll often get an answer you don't want, an answer that might wreck your case.

OxfordLQ notes a passage in lawyer-novelist Erle Stanley Gardner's *The Case of the Queenly Contestant* (1967):

> [Perry] Mason: 'The purpose of cross-examination is to find out whether a witness is telling the truth.'
>
> Lovett laughed sarcastically. "That's the line they try to teach you in the law books and in the colleges. Actually, when you come right down to it, you know and I know, Mason, that the object of cross-examination is first to find out to your own satisfaction if a witness is telling the truth, then you go on to the next step – which is to try and confuse the witness so that any testimony the witness has given is open to doubt..'

Rape is a crime which incurs a prison sentence of up to 35 years, but malevolent cross-examination is a factor in the fact that the adversary system does not deter serial rapists. A 1993 British Home Office study found that 99% of rapists escape justice. In 2003, the NSW Bureau of Crime Statistics and Research estimated that 12,000 women were victims of a sexual or indecent assault, but only 2707 (22.6%) reported the crime to police. Of those, 858 (31.7%) were charged; and 361 (42%) were found guilty. In terms of the estimates of actual rapes, that is a conviction rate of 3%.

In May 2007, Janet Fife-Yeomans and Lisa Davies reported in *The* (Sydney) *Daily Telegraph* that 70-90% of rapes are not reported; that 80% of reported rapes are not prosecuted; and that of those prosecuted nearly 75% are found not guilty. If, say, 80% of rapes are not reported, the figures mean that

20 in 100 are reported, four are prosecuted, and one results in a guilty verdict.

The rates are low partly because brutal and pornographic cross-examination deters victims from testifying. Dr Caroline Taylor, author of *Court-Licensed Abuse* (Peter Lang, 2004), told *The Sydney Morning Herald*'s Edmund Tadros on 9 December 2004:

…the "sluts and nuts" defence – the complainant either asked for it or is lying – is common … It is typically trial by attrition, where the courts exclude compelling evidence or evidence that is central to fact-finding. The gaps can then be filled in with the legal codswallop about the lying, conniving, slutty, nutty woman.

Tadros quoted Stephen Odgers, chairman of the NSW Bar Association criminal law committee, as saying:

I've had complainants who have vomited in the witness stand in response to questions I've asked them. My reaction as a person who may suspect that they are innocent victims – I can only feel sympathy for them. Then there's me as my job, performing my role, which I believe to be an important role in the system of justice, who believes that I acted ethically. I've cross-examined in what I regard as a perfectly legitimate manner, and it's regrettable, but I don't blame myself for that outcome.

'Belinda', 22, the victim in one of four cases in *Court-Licensed Abuse*, said:

I know it's part of [the lawyer's] tactics but you don't need to keep asking the same question. That's one of the most confusing parts, where they keep asking the same question and they're rewording it to try and slip you up.

Dr Taylor said:

What the defence barrister wants to do is continually shock and confront [the complainant] to affect the quality of her evidence. A standard tactic … is to attack complainants with such ferocity at a committal hearing that they are too afraid to go to trial.

I asked an authority of the French and German systems, Bron McKillop, of Sydney University's law school, in January 2008 if I would be right to assume that courts in those countries convict in 90% of rape cases. He replied:

Your assumption is, I believe, broadly correct. In France the acquittal rate across the three levels of criminal jurisdiction (including the *cour d'assises* which hears rape cases [*viols*] is about 5%. I am not aware of any particular variation for rape as opposed to other offences. In the investigation systems, the compilation of a dossier available at the trial and the criteria for committal result in a similarity of outcomes across the boards. I don't have the figures for Germany but I would think that the systemic civil [European] law similarities would result in similar outcomes, although the lesser role played by the dossier at a German trial and the greater reliance on oral evidence may result in more acquittals.

Common lawyers claim they are ethically obliged to even cross-examine child victims in a brutal and pornographic way. *Four Corners*, a programme on a public broadcaster, the Australian Broadcasting Corporation, aired a television programme on sex crimes against children in 1999. Reporter Peter George noted a case in which a mother heard her five-year-old son crying in a lodger's room. The boy came out with his shorts in his hand and told her what happened. She called police and semen was found in his anal passage. There was a witness, an immediate complaint, and evidence corroborating the boy and his mother. The verdict was not guilty.

Four Corners re-enacted the preliminary hearing of a case in which a Queensland mother said her best friend's husband anally penetrated her son, 7. Russell Clutterbuck cross-examined the boy for five hours, with breaks to stem the sobbing. Clutterbuck asked him questions about oral sex:

Have you ever seen this done before? – No.
Have you ever been in the house when your mother's done this? – No.
Are you sure? – Yes …
You didn't tell the other policewoman the first time, did you? – No.
No. That's because it didn't happen, isn't it, John? - It did happen …
Well why are you crying if the story is true, John? - Cos you said it isn't. …
John, you know what telling lies means, don't you? And that's what you're doing today, isn't it? - I'm not telling lies ...

See, I can stand here all afternoon and ask you all sorts of questions and until you tell me the truth I won't stop.

The trial verdict was not guilty.

Dr Caroline Taylor told Edmund Tadros in 2004: 'If people knew that kids as young as seven have been asked whether they fingered their own vagina, they would ask: "What is going on here?".'

An Australian study found that lawyers and judges whose children had been sexually violated would not subject them to the second trauma of cross-examination.

In 2002, the Auckland (New Zealand) Law Society issued a paper suggesting that in rape cases the right of silence could be removed, and the charges heard according to inquisitorial procedures. In 2009, the Justice Minister, Simon Power, was considering further suggestions that truth-seeking procedures be used in rape cases.

21. Inscrutable jurors

Professor John Langbein quotes a German legal maxim, *Ohne Begrundung kein Urtre,* without a statement of reasons, there can be no valid judgment. If so, no common law jury verdict is valid; jurors have never had to give reasons. The system has been open to confusion and corruption since it was invented in 1166, e.g. O.J. Simpson and a man tried for heifer-rustling at Dubbo, Australia, in the 19th century. Barrister Aubrey Gillespie-Jones

reported the verdict in *The Lawyer Who Laughed* (Century Hutchinson, 1978):

> Judge's associate: Do you find the accused guilty or not guilty of cattle-stealing?
>
> Foreman: Not guilty, if he returns the cows.
>
> Judge: You swore you would try the issue between our Sovereign Lady the Queen and the accused and find a true verdict according to the evidence. Go out and reconsider your verdict …
>
> Associate. Have you decided on your verdict?
>
> Foreman: Yes, we have. We find the accused not guilty, and he doesn't have to return the cows.

Professor Mark Findlay, of Sydney University, did a study of jurors for the Australian Institute of Judicial Administration. In *Jury Management in NSW* (1994), he reported that he had access to a diary kept by a woman juror during a long trial. She noted:

> On the first day, a majority decided that the accused must be guilty because he wore an earring; he looked too glitzy; he was ugly and hence probably bad; and his lawyer looked positively evil. During the trial the majority, led by a handsome banker, 'only listened to evidence or argument which reinforced their conclusion of guilt'.

The woman was bullied and ostracised, described as a 'pinko lezzo', and threatened with being put on a hit list if she went against a guilty verdict. The verdict was eventually decided by a golf appointment. On the last day, the banker, expecting an early result, arranged to play golf, but 'when it

became clear that [the woman and another juror] were not going to go along with a guilty verdict', he 'changed his mind and was followed by the rest'.

22. Reasonable doubt

Along with the right of silence, the formula for the standard of proof, beyond reasonable doubt, is the most effective device for getting criminals off. Anyone can have a doubt; 'reasonable' has as many meanings as there are jurors; in some countries judges are not allowed to tell them that the formula simply means the same as the French formula, *conviction intime*: are we intimately (thoroughly) convinced?

As might be expected, the negative common law formula did not obtain until after lawyers had taken over the criminal process. Professor John Langbein wrote in *The Historical Origins of the Privilege Against Self-Incrimination*:

> … the precise doctrinal formulation of the beyond-a-reasonable-doubt standard of proof in Anglo-American criminal procedure occurred at the end of the 18th century as part of the elaboration of the adversary system of criminal procedure. [Professor John] Beattie points to formulations of the standard of proof used in jury instructions of the 1780s that were still well short of beyond reasonable doubt.

In 1998, the New Zealand Law Reform Commission published a study of 312 jurors who sat on 48 cases ranging from attempted burglary to murder. The

study confirmed that the formula baffles jurors. The Commission reported:

> … many jurors, and the jury as a whole, were uncertain what 'beyond reasonable doubt' meant. They generally thought in terms of percentages, and debated and disagreed with each other about the percentage required for 'beyond reasonable doubt', variously interpreting it as 100 per cent, 95 per cent, 75 per cent, and even 50 per cent. Occasionally this produced profound misunderstandings about the standard of proof.

In the Hannes case mentioned below, the defence was that a Mr X, rather than Hannes, performed a certain action, and that, although Mr X was not produced, the prosecution could not prove beyond reasonable doubt that he did not exist. It might be thought that the jurors' common sense would find such a defence laughable, but they deliberated for five days and then asked Judge Cecily Backhouse to explain reasonable doubt. She told them:

> The Crown must satisfy you of the guilt of the accused by establishing each of the essential ingredients of the charges to that standard, that is, beyond a reasonable doubt ... the accused is entitled to any reasonable doubt in your minds and the accused does not have to prove he is innocent ... the accused is presumed to be innocent until the Crown has established that guilt.

In short, reasonable doubt means reasonable doubt or, as Miss Gertrude Stein (1874-1946) put it, a rose is a rose is a rose. One day, a jury foreman will politely

say: 'I'll put the question again, judge.' Dr John Forbes wrote in *Evidence Law in Queensland* (7th edition, Lawbook Co, 2008):

The beginners' handbook (Bench Book) for Queensland judges – the existence of which is now officially, if somewhat coyly, acknowledged – recommends this circumlocution: 'A reasonable doubt is such a doubt as you … consider to be reasonable … It is therefore for you, and each of you, to say whether you have a doubt which you consider reasonable. If, at the end of your deliberations, you, as reasonable persons, are in doubt about the guilt of the accused, the charge has not been proved beyond reasonable doubt.

Dr Forbes commented:

Mesmeric repetition of the mantra as insurance against an appeal, or by a defender striving for a doubt, reasonable or unreasonable, may be taken by jurors unaccustomed or averse to responsibility, as invitations to acquit. It is then a short step to the comforting thought: 'I have just been described as a reasonable person. I think I have a doubt. Therefore it is reasonable.'

Justice Robin Millhouse, of the South Australian Supreme Court, said in 1999:

Very few people who've come up in the criminal courts when I've been trying them have not been guilty, but a lot of them have got off because jurors' common sense falters in the face of warnings about reasonable doubt. I've often felt my heart sink when I know a bloke's probably guilty,

to have to give all these warnings and I'm afraid the jury will heed them. And they often do.

Justice Christopher Wright, of the Tasmanian Supreme Court, said in 2000:

Too often unsure jurors will shelter behind the standard of proof beyond reasonable doubt, making it the safe option ... I am fully convinced that juries return a wrong verdict in about 25% of all cases.

Angelo Cusumano was murdered during an armed holdup of his Sydney store. Two men pleaded not guilty. A third man, Aaron Robinson, pleaded guilty to murder and told police that one of the others had given him ammunition for the murder weapon. However, Robinson refused to give evidence against the other two, and his statement about the loaded gun was concealed as hearsay. The prosecution thus could not prove that the other two knew the weapon was loaded. When they were found not guilty in 1998, a juror apologised to the victim's widow. Learning of the apology, a radio broadcaster, John Laws, asked the juror on air why she apologised. She said:

To me there was absolutely no doubt. To one other juror there was absolutely no doubt. People confessed on the jury that in their hearts they felt – but that it hadn't been proven ... I said ... please let us bring in an undecided verdict, and they said, absolutely not, it hadn't been proven ... And I fought for three days ... but I was too

weak ... My heart goes out to Mrs Cusumano and those children.

It is not a crime in the US to ask a juror what happened. It is in NSW. Laws was charged, convicted, and given a suspended sentence of 15 months.

A Melbourne lawyer kindly added to the sum of my knowledge on what he called 'the elephant in the room'. In *Justinian* (15 July 2008), I reported that, in a message to the proprietor, the lawyer noted a case in which 'the obviously bloody-minded jury', having been given 'the required but totally unhelpful non-direction on the standard of proof … responded with a question: "Reasonable doubt - 70 to 80%?"' The lawyer said the judge and a majority of counsel:

> … agreed that the judge would repeat the standard direction (with the jury no doubt wondering what on earth did this idiot have for breakfast or lunch depending on when the redirection was given) but on no account mention the 'P' word lest the silly sods get the idea that such a test is permissible in some way.

He added: 'Mr Whitton might be interested to know, if he doesn't already, that our trial directions are now publicly available on the web – see them at the Judicial College of Victoria website …' Thus encouraged, I found that the trial directions (Bench Notes to the Victorian Criminal Charge Book) state:

Although in England the term "beyond reasonable doubt" is seen to be synonymous with the term 'sure' (see e.g., *R v Hepworth and Fearnley* [1955] 2 QB 600; *R v Onufrejczyk* [1955] 1 QB 388), this is not the case in Australia (*Thomas* v *R* [1960] 102 CLR 584; *Dawson v R* [1961] 106 CLR 1; *R v Punj* [2002] QCA 333).'

A little more research caused me to exclaim: Eddie Freaking McTiernan! I noted in *Justinian*:

That means that Britain, home of the common law, now allows judges to tell jurors what the elephant means, but the colony has obstinately persisted in error for 48 years. The date of *Thomas v R*, 1960, means the guilty men were on the High Court run by the fraudulent Sir Owen Dixon. The lead judgment purported to have been written by Justice Sir Eddie McTiernan (1892-1990, Labor MP 1929-30, High Court 1930-76). That raised two questions: Why would any future judge take the slightest notice of that ancient Labor Party hack and world champion judicial limpet? And how many Australian murderers, rapists and organised criminals have escaped justice since 1960, when Eddie shut the door on an explanation of the formula?

23. Double jeopardy

Perhaps the feeblest excuse for the corrupt system is that common lawyers cannot think straight. Double jeopardy said wrong not guilty verdicts are never wrong. This shining example of bottomless stupidity persisted in England for 839 years, and was then abolished by Parliament, not judges.

Double jeopardy is the product of the false notion that being tried twice is the same as being

punished twice. The error, deliberate or otherwise, derives from 1164. Henry II wanted his courts to re-try 'criminous clerks' who had already been found guilty and punished by church courts, but Archbishop Thomas (a) Becket (1118?-70) insisted that persons should not be punished twice for the same offence. Further quarrels between Henry and 'this turbulent priest' led to Becket's murder in Canterbury cathedral.

It seems fair that those found guilty (*autrefois convict*) and punished should not to be retried for the same offence, but judges purported to also believe that those found not guilty (*autrefois acquit*) should not be retried. William Blackstone parroted that ancient confusion in his *Commentaries*: ' … no man is to be brought into jeopardy of his life, more than once, for the same offence', and he was fatally echoed in the US Constitutions' Fifth Amendment in 1791: ' … nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.'

The other 23 anti-truth devices get more than half the guilty criminals off, but justice thus perverted must stay perverted forever, even when the judge wrongly concealed evidence e.g. *Elliot*, and when new and compelling evidence emerges, e.g. DNA evidence.

Britain finally and retrospectively abolished double jeopardy for those acquitted of major crimes as from Monday 4 April, 2005. The National Crime Faculty then calculated that 35 persons acquitted of murder could be re-investigated and new charges