brought. The Bar Council and civil liberties groups opposed the legislation, but a Home Office spokesman stated the obvious:

> It is important that the public should have full confidence in the ability of the criminal justice system to deliver justice. This can be undermined if it is not possible to convict offenders for very serious crimes where there is strong and viable evidence of their guilt.

DNA testing, which became available only in 1986, can deliver justice for innocent prisoners. *The New York Times* reported on 19 June 2009 that since 1992 DNA testing had exonerated 238 people in the US, some on Death Row. However, the Fifth Amendment means that the US is constitutionally unable to abolish double jeopardy and to use DNA to retry criminals, including rapists and murderers.

Truth-seeking systems allow not guilty verdicts to be appealed and, if necessary, retried.

24. Judges second-guessing jurors

Justice Sir Gerard Brennan said in *M v The Queen* (Australian High Court, 1994):

> … an assessment of evidence by an appellate court is a poor substitute for the assessment made by the jury. And that is so for a very basic reason: our belief in the validity of the life experience of juries.

Ordinary citizens also have a better sense of justice than judges, but appellate judges can overturn jurors

because they think they know better. Dr John Forbes wrote in *Evidence Law in Queensland* (7th edition):

> The [judges'] 'unsafe and unsatisfactory' formula, like discretionary exclusion, has returned many a burglar (and other suspects) to their friends and their relations … The 'unsafe verdict' is largely a post-1950 creation that enhances the power of judges to override a jury's verdict of 'guilty' … Despite an official reluctance to admit that the appeal court 'second guesses' the jury, that is what happens.

In 1973, Deidre Kennedy, aged one year and five months, was abducted from her home in Ipswich, Queensland, clothed in stolen women's underwear, bitten on the left thigh, raped, and strangled. Her body was thrown on to the roof of a public lavatory.

Raymond John Carroll was tried for the baby's murder in 1985. The jury heard evidence that he repeatedly bit his own baby daughter on the thigh; that ondontological examination showed the bite marks on the baby's thigh were his; that he stole women's underwear; and that his alibi was false.

The jurors found that Carroll committed the murder, but appellate judges Sir Wally Campbell, Sir George Kneipp and Tom Shepherdson knew better. They said Justice (as he then was) Angelo Vasta was wrong to admit 'prejudicial' evidence that Carroll bit his own baby, and that the jurors should have had a reasonable doubt that he was guilty. They did not order a re-trial; they said Carroll was not guilty.

In 2000, Carroll was charged with perjury on the ground that he had falsely denied his guilt at the murder trial. New evidence confirmed that the teeth marks on Deidre Kennedy were his, and that he had confessed to the murder. Carroll was found guilty and sent down for 2 years, but appellate judges Margaret McMurdo, Catherine Holmes and Glen Williams invoked double jeopardy to overturn the verdict: they said Carroll had effectively been tried twice for the same crime.

In December 2002, High Court judges Murray Gleeson CJ and Mary Gaudron, Michael McHugh, Bill Gummow, and Ken Hayne JJ agreed with McMurdo *et al*. McHugh huffed that the perjury prosecution was a 'vexatious … abuse of process'. Twenty-four jurors had thus been second-guessed by 11 appellate judges.

Jurist Brett Dawson commented: 'How do those judges sleep at night? The *Carroll* case is a model for judicial disintegration of the social fabric.'

It has been reported that Raymond John Carroll has made a point of appearing at the checkout of an Ipswich Woolworths store manned by the mother of the baby bitten, raped and strangled in 1973.

F. Sliding round truth problem

As the non-lawyer public and Judge Fox know, everything turns on the search for truth: justice, fairness, reality, morality but, as the foregoing shows, a system which has six ways of concealing evidence and 18 other mechanisms which obscure or defeat the truth is not trying to find the truth. I asked an academic how lawyers deal with the truth problem. Waggling his hand, he said: 'They slide round it. '

Mostly, they just ignore it. Of those who do confront the problem, some blandly say the system does search for the truth. Others say justice is process, not truth. Some even say that justice is better than truth. A selection:

John Scott, Lord Eldon, (1751-1838) said in *Ex parte Lloyd* (1822): ' … truth is best discovered by powerful statements on both sides of the question'.

Law professor Monroe Freedman echoed Lord Eldon in P*rofessional Responsibility* (1966):

> The attorney … does participate in a search for the truth … The attorney functions in an adversary system based upon the presupposition that the most effective means of determining truth is to present to a judge and jury a clash between proponents of conflicting views.

Law professor David Luban said in *Lawyers and Justice*: 'No trial lawyer seriously believes that the best way to get at the truth is through the clash of opposing points of view.'

Judge Richard Posner noted that adversarial procedures are contests of liars. The addition of a few words demonstrates the reality of Eldon's proposition: 'Truth is best discovered by trained liars making powerful statements on both sides of the question.'

Justice Potter Stewart, speaking for the US Supreme Court, said in *Tehan v Shott* (1966): '…the basic purpose of a trial is the determination of truth.'

Law professor John Strait Applegate, then of the University of Cincinnati College of Law, wrote in *Witness Preparation* (Texas Law Review 1989):

> The public perception of the function of the judicial system and ethical rules support the [public's] view that ascertaining the truth is the paramount goal of the adversarial system and the primary basis of its legitimacy.

That means the public assumes that the system seeks the truth and is thus a legitimate system. The assumptions are natural but wrong. It also means the public will support change to a truth-seeking (and hence legitimate) system.

Chief Justice (NSW) Jim Spigelman said on his appointment in 1998:

> [The legal] profession has an ethical dimension and values justice, truth and fairness … The common law and the adversary system – a manifestation of the power of Socratic dialogue – is [sic] one of the greatest mechanisms for the identification of truth and the maintenance of social stability that has ever been devised.

Law professor Michael Asimow, of the University of California at Los Angeles, summed up his and other lawyers' views that justice is process in *Nova Law Review* (Winter 2000). He wrote: '[The] general public and lawyers differ about whether justice means truth or justice means process.' That means 0.2% per cent of the community believe that justice is process. Justice David Ipp, of the West Australian Supreme Court, said in 2000: 'When the legal system does not reflect community values it loses its legitimacy.'

Professor Michael Asimow noted that the public's belief that justice means truth dooms lawyers to be mistrusted and sadly unloved. He continued:

> Lawyers will always be distrusted, in part because their assigned task is to play whatever role and manipulate whatever law a client's interest demands … lawyers are doomed to be unloved because criminal practice is their most public function As lawyers see it, justice requires that an person have the benefit of appropriate process, such as the reasonable doubt rule or the privilege against self-incrimination. This perspective is not shared by most members of the public, especially when it comes to criminal law. Most people think that justice means finding the truth regardless of the adversarial system, procedural technicalities, statutory loopholes, police or prosecutorial misconduct, or lawyers' tricks.

David Maxwell Fyfe (1900-67) was an exponent of the view that justice is better than truth, but he was naïve about the system's capacity to convict the

innocent. As Home Secretary in 1953, Fyfe refused to stop the hanging of an innocent youth, Derek Bentley, 19 (mental age 11). Fyfe said: 'There is no possibility of an innocent man being hanged in England.' He was thus eminently qualified to become Lord Chancellor (and Viscount Kilmuir) in 1954. He wrote in *The Migration of the Common Law* (Law Quarterly Report, 1960):

> Now the first and most striking feature of the common law is that it puts justice before truth. The issue in a criminal prosecution is not, basically, 'guilty or not guilty?' but 'can the prosecution prove its case according to the rules?' These rules are designed to ensure 'fair play' at the expense of truth. The attitude of the common law to a civil action is essentially the same: the question is 'has the plaintiff established his claim by lawful evidence?' not 'has he really got a good claim?' Again, justice comes before truth.

Justice Russell Fox demolished Kilmuir thus: 'This statement in fact begs the present question by saying that justice is what the parties [i.e. their lawyers] present in evidence, true or not.'

Harold Macmillan (1894-1986, Prime Minister 1957-63) finally dismissed Kilmuir during the Night of the Long Knives in 1962. Kilmuir complained that his cook would have got more notice. Macmillan said it was harder to get a good cook than a Chancellor. Derek Bentley's conviction was quashed in 1998.

G. Conviction rates

The words 'fair trial' are never far from the lips of common lawyers and judges, but former prosecutor William T. Pizzi, now a law professor at the University of Colorado, said in *Trials Without Truth* (New York University Press, 1999):

> The goal of the defense attorney is not to obtain a fair trial for the defendant; a fair trial might spell disaster for the client because it would likely result in a conviction, given the evidence. Instead the goal is to win above all and that means doing almost everything to win. It may require what lawyers refer to as a 'scorched earth' defense in which anyone and everyone is likely to come under attack – including not just prosecution witnesses, but the prosecutor personally as well as the judge.

Sir Lionel Luckhoo QC (1914-97), a Guyanese of Indian descent, was listed in *The Guinness Book of Records* (1990) as the world's most successful lawyer: he procured 245 not guilty murder verdicts in a row. Luckhoo probably knew that perhaps 241 (99%) were guilty. Luckhoo was knighted in 1966, presumably for services to perverting justice. His client, the Rev Jim Jones, presided over the murder/suicides of 913 people at Jonestown, Guyana, in 1978, but saved Luckhoo's record by suiciding himself. In 1980, Luckhoo declared himself 'Ambassador for God'.

Estimates of conviction rates in the adversary system vary, but it is clear that more than half

known serious criminals get off. Law professor Michael Zander said in 1989 that since 1979 approximately 50% of all accused were acquitted in British criminal trials.

In 1997, Dr Lucy Sullivan, of the Sydney Centre for Independent Studies, noted 1993 figures showing that the murder conviction rate in NSW was 26.5%. The rape figure was 11.5%. In 2004, NSW Bureau of Crime Statistics figures showed that the rate in sexual assault cases in NSW was 19%.

The conviction rate in India is 16%. *The Hindu* reported in September 2003 that Mallikarjun Kharge, Home Minister for the state of Karnataka, had urged the Indian Government to change to a truth-seeking system because the conviction rate in Karnataka was 28% and the national average was 16%. India's population in July 2009 was estimated to be 1.17 billion, almost 75% of the total afflicted by the anti-truth system.

The New South Wales Independent Commission Against Corruption (ICAC) uses the investigative system to find the truth about the corrupt in the public sector, but charges are heard in the adversary system. In the period 1989-95, 63 of 208 were found guilty, a conviction rate of 30.3%.

Inquests likewise use the investigative system, but some evidence heard by the coroner will be concealed either by the DPP or the trial judge.

In 1984, Jennifer Tanner died from two bullets from a bolt-action rifle that required reloading. The bullets went through her fingers and into her brain. Police said it was suicide. In 1998, a Victorian

Coroner found that Jennifer Tanner's brother-in-law, Detective-Sergeant Denis Tanner, shot and killed her. The DPP did not charge Tanner.

In 1994, Detective-Sergeant Geoffrey Bowen was murdered by letter bomb. In 1998, a South Australian coroner found that an organised criminal, Dominic Perre, had sent the bomb. The DPP did not charge Perre.

The implied reason for the major cause of low conviction rates – concealing evidence – is that jurors' mental calibre is low. *OxfordLQ* quotes law/economics professor Gordon Tullock, of George Mason University, Virginia, as stating in *The Logic of the Law* (1971):

> When I took courses on Evidence in law school, the explanation given for this giant collection of rules was simply that Juries were stupid.

If that were the case, the remedy would be to use intelligent semi-professional lay judges, as they do in Germany. While noting that no other legal system conceals evidence, Professor Julius Stone QC and former Justice W. A. N. Wells put the stupid theory more delicately in *Evidence*:

> [The] great canons of exclusion of relevant facts [are] unique in the world's evidential systems. [They] sprang from the exigencies of protecting lay jurymen from dangers of confusion and prejudice. They represented the judges' evaluation of the mental calibre of the jury. To some extent this evaluation was excessively low, and

presented unnecessary obstacles for the free exercise of their common sense.

The argument gets sillier: judges sitting alone are bound to conceal the same evidence from themselves. Stone and Wells said 'these rules are today applied to all trials, whether before a jury or before a judge alone'. That must mean that judges are as stupid as they think jurors are. In fact, and bearing in mind that almost all accused are guilty, judges are apparently more stupid. Janet Fife-Yeomans reported in *The Australian* of 27 August 1994:

> Figures from the NSW District Court show that the jury convicted in half the cases while the judge, when hearing a case alone, convicted in only a quarter.

Jurors deliver wrong not guilty verdicts in 50% of cases because of lawyers' tricks and because judges conceal evidence. Judges sitting alone don't have those excuses. They know lawyers' tricks; they hear the evidence before concealing it from themselves; and they know that 99% of accused are guilty. In another example of Orwell's doublethink, they then find as many as 75% of accused not guilty when they know they are guilty.

Some of their not guilty verdicts may be more sinister than mere stupidity. Since there is no appeal against an acquittal, some judges may let criminals off to avoid the shame of being overturned by stupid

appellate judges. And some may merely be doing favours for the defence Bar.

The public is not deceived. *The* [Sydney] *Daily Telegraph* reported in July 2004 that 92% of 7,000 readers believe the judicial system is unfair, and that 78% believe it favours criminals.

A criminal system exists to protect the community, and police are demanding that they be allowed to do their job properly. Ian Blair, Deputy Commissioner of London's Metropolitan Police said in May 2003:

> We need inclusivity of evidence. If the jury is the light by which freedom shines, why don't we tell them the truth and allow them as adults to weigh that truth?

Chief Justice David Malcolm, of Western Australia, said in 1999:

> Historically, the concept of a fair trial has applied [only] to the accused. In my view, that concept needs to be changed - a trial should be fair not only to the accused but also to the victim and the prosecution.

H. Convicting the innocent

The adversary system's win-at-all-costs culture gets the worst of both worlds: criminals get off, and innocent people, particularly the poor, go to prison. Some estimates for the US, Britain and Australia:

The US. C. Ronald Huff, Ayre Rattner and Edward Sagarin estimated (*Convicted But Innocent, Wrongful Conviction and Public Policy*, Sage, 1996) that 5% of convictions per year in the US are wrong. That is approximately 10,000. Their figures suggest that at the start of 2008 perhaps 150,000 of some three million inmates were innocent.

The Chicago Tribune's Ken Armstrong and Steve Mills reported in 1999 that 12 of 285 (4.2%) prisoners on the Illinois Death Row since 1977 were found to have been wrongly convicted, and that throughout the US at least 381 homicide convictions had been 'thrown out because prosecutors concealed evidence suggesting innocence or knowingly used false evidence'.

It is thus too much of a risk to kill those found guilty. The US Bureau of Justice Statistics says 3859 people were executed between 1930 and 1972. If 4% were not guilty, the state wrongly killed 154, including Bruno Hauptmann, who was convicted on fabricated evidence in 1936 for allegedly kidnapping Colonel Lindbergh's baby.

Five US Supreme Court judges – Potter Stewart, Byron White, William Douglas, William Brennan, and Thurgood Marshall – abolished the death

penalty in *Furman v Georgia* (1972) on constitutional grounds, i.e. that it was 'cruel and unusual punishment'. The four in favour of executions were Warren Burger CJ, Harry Blackmun, Lewis Powell and William Hubbs Rehnquist.

Four years later, Douglas had been replaced by John Paul Stevens and Stewart and White switched. In *Gregg v Georgia* (1976), the vote was 7-2 to restore executions. In favour were Burger, Stewart, White, Powell, Blackmun, Rehnquist, and Stevens. Brennan and Marshall were against. They dissented in every death penalty case until they retired, Brennan in 1990 and Marshall in 1991.

From 1976 to 1 April 2008, there were 1099 executions; 44 were probably innocent. Relatives of those killed were no doubt gratified when Harry Blackmun (1908-99, Justice 1970-94) admitted in 1994 that he had been wrong about the death penalty, and when John Paul Stevens (b. 20 April 1920, Supreme Court 1975-) said on 16 April 2008 he now believed the death penalty is unconstitutional

George W. Bush allowed the executions of 152 people – six probably innocent – during his period as Governor of Texas (January 1995-December 2000), many on the cursory advice of his lawyer, Alberto (Seedy) Gonzales. Bush thus presided over an execution every nine days; Britain's Lord Chief Justice (1946-58) Rayner Goddard (1877-1971), who achieved an orgasm when he ordered an execution, would have been an ecstatic Governor of Texas.

After a spate of forced releases from Death Row, *Time* reported in May 2001 that 20 of the 38

States with death penalties were considering moratoriums on executions. On 1 April 2008 there were 3261 on death row; 130 (4%) were probably innocent.

Britain. Mike Mansfield QC noted in *Presumed Guilty* that studies by English probation officers found that '500 or more' (at least 1%) prisoners were wrongly convicted. Timothy Evans was wrongly hanged for murder in 1950 and pardoned in 1966. Uproar followed the hangings of Derek Bentley in 1953 and James Hanratty in 1962. England abolished executions in 1965. That was fortunate for Irish suspected of terror.

In 1974, detectives tortured the Birmingham Six to get false confessions to murder. In 1980, Lord (Alf) Denning (1899-1999, Master of the Rolls 1962-82) heard the Six's civil action alleging assault by police. He said:

> If the six men win it will mean that the police were guilty of perjury, that they were guilty of violence and threats, that the confessions were involuntary and were improperly admitted in evidence and that the convictions were erroneous ... This is such an appalling vista that every sensible person in the land would say it cannot be right that these actions should go any further.

The Six continued to seek justice. Lord Denning, 89, turned Blackstone and Starkie on their heads in 1988. The kindest thing to say about the following statement is that he had sadly succumbed to dementia. He said

It is better that some innocent men remain in gaol than that the integrity of the English judicial system be impugned … Hanging ought to be retained for murder most foul. We shouldn't have all these campaigns to get the Birmingham Six released if they'd been hanged. They'd have been forgotten, and the whole community would be satisfied.

In 1991, after 16 years in prison, the Six were acquitted and freed by appeal court Justices Lloyd, Mustill and Farquharson. The Home Secretary, Kenneth Baker, a lawyer, then set up an inquiry into the criminal system chaired by Viscount (Garry) Runciman, a sociologist. Some saw the inquiry as a damage limitation exercise; others hoped it might result in change to a truth-based system.

Research for the inquiry showed that the innocent are rarely charged in France and Germany, but the Runciman Report (1993) was a throwback to 1219: it said the UK should persist with the Dark Ages system.

The only useful thing to emerge from the inquiry was a recommendation that a body be set up to investigate possible perversions against the innocent. The Criminal Cases Review Commission (CCRC) began work in 1998. It consisted of eight non-lawyers and six lawyers and had a staff of 100.

A Commissioner, Dr James MacKeith, a forensic psychiatrist, told me that the commissioners accept all relevant evidence. The recommendations of the pro-truth CCRC have to be ratified by the Court of

Criminal Appeal (CCA), which adheres to the anti-truth system. In what may be an example of the British spirit of compromise, the CCA has agreed with the CCRC in 70% of cases. To 31 August 2008, the CCRC had received 11,061 applications and had referred 395 cases to the appeal court. The court had quashed the convictions in 260 cases and upheld the convictions in 110 cases. Some results:

Mahmood Mattan. Hanged 1952. Conviction quashed 1998 because evidence of main prosecution witness was unreliable.

Derek Bentley. Hanged 1953. Conviction quashed because Lord Chief Justice Rayner Goddard, misdirected the jury. Lord Chief Justice Bingham said Lord Goddard was 'blatantly prejudiced' and denied Bentley 'that fair trial that is the birthright of every British citizen'.

Stephen Downing. Convicted of murder in 1973 and would have been paroled in 1990 if he said he was guilty. He refused and remained in prison for 29 years. His conviction was quashed in 2002 after forensic evidence against him was found to be unreliable.

Patrick Nicholls. Convicted of murder 1975 and sentenced to life. Conviction quashed because new evidence showed the 'victim' died from natural causes.

William Gorman and **Patrick McKinney.** Convicted of terrorism 1980 and given indefinite sentences. Convictions quashed 1999 because Electrostatic Document Analysis (ESDA) of police

interview notes showed significant rewriting of pages.

David Ryan James. Convicted of murder 1995. Conviction quashed because the 'victim's' suicide note was found in 1996.

Australia. If, as in Britain, 1% of Australian prisoners are not guilty, 235 of 23,555 inmates in 2003 were probably innocent. Australia has not risked killing the alleged guilty since 1967. Listed here, courtesy of the New South Wales Council of Civil Liberties' website, are the dates of the last executions in the various states, with, in brackets, the dates when the states formally abolished the death penalty:

> Queensland 1913 (1922)
> NSW 1940 (1955 for murder; 1985 for treason and piracy).
> Tasmania 1946 (1968).
> Commonwealth and Australian Capital Territory no executions (1973).
> Northern Territory 1952 (1973).
> Victoria 1967 (1975).
> South Australia 1964 (1976).
> Western Australia 1964 (1984).

As it happens, I was an official witness, on behalf of Mr Rupert Murdoch's *Truth*, at the last execution in Australia, that of a minor criminal named Ronald Ryan, in Melbourne in 1967. My account, in a book called *Amazing Scenes*: *Adventures of a Reptile of the Press* (Fairfax Library, 1987), begins with a nod – theft if you insist – to Graham Greene's *The Third*

Man: 'One Friday in February 1967 I got a letter from the man I had seen hanged a week before. A week later, the hangman sent a carping letter.'

Ryan's letter, written on 10 feet of lavatory paper the night before he was hanged, said he was not guilty of intent. I tend to believe him, and that life for manslaughter would have been appropriate. The hangman, a Melbourne chemist, took exception to my observation that his movements were hurried and jerky. He wrote: 'I have carried out executions throughout Australia and beyond Australia for the past 38 years, and I have never been told that my work has been jerky.'

A dingo (a wild dog) kidnapped Mrs Lindy Chamberlain's baby daughter, Azaria, from their tent near Uluru, Central Australia, in 1980, but in 1982 Lindy was found guilty of murdering the baby. A later inquiry found the truth, and her conviction was quashed in 1988.

Ian Barker QC prosecuted Mrs Chamberlain. In 1994, as chairman of the NSW Bar Association, he said my book, *Trial by Voodoo*, was the silliest book of the decade. I said he might very well be right, but he was the wrong person to say it: he was the guy who got the dingo off.

I. Contempt: guilt presumed

Contempt by affront is contempt of the judge in court. Contempt by publication allegedly prejudices 'fair' trials. Both are crimes, but outside the US the common law presumes that alleged offenders are guilty, and judges, not jurors, deliver the verdicts.

Affront originated in mediaeval superstition. The deity appointed the king; the king appointed the judge; an affront to a judge was thus an affront to the deity. The offender would suffer eternal damnation, and meanwhile instant retaliation.

Oliver Cyriax reports that in 1631 one Noy threw a brickbat at Judge Richardson – possibly Sir Thomas Richardson (1569-1635), Chief Justice of the King's Bench (criminal cases) 1631 – but missed. Richardson had Noy's hand cut off and displayed on a gibbet, and then had him hanged in the court.

Justice Sir John Eardley Wilmot (1709-1792) prepared an opinion for *R v Almon* (1765), as case of affront against a reporter, John Almon (1737-1805). Wilmot said contempt law was necessary to keep 'a blaze of glory' around the courts, judges alone gave the verdict because that was 'immemorial usage and practice'. His opinion was never delivered, but it is still the leading authority for trial without jury in Australian contempt cases.

Some judges still believe they are enveloped in a blaze of glory. In 1977, Malcolm Turnbull (BCL Oxon), who was then a journalist, referred to judges by surname only. The egregious Harry (a profit is a

loss) Gibbs warned him that 'it was contempt to refer to a judge in any way other than as Mr Justice Bloggs'. Turnbull invited Gibbs to grow up.

Contempt by publication offends against the need for an alleged offender to have a guilty mind, the presumption of innocence, and trial by jury. It punishes media organisations which publish, even inadvertently, material which might be concealed from jurors.

Christopher Murphy, a Sydney lawyer, was not aware that a trial was proceeding when he mentioned the accused's convictions in a newspaper article in 1993. The judge aborted the trial; Murphy and the organ were charged with contempt; three appellate judges found them guilty in 1994.

Unfortunately, the same man was again on trial; his convictions were mentioned at the contempt trial and reported in the Press; his new trial was aborted. The judges and the media were not charged with contempt, but in 1995 the judges confirmed the original guilty verdicts, and ordered the organ to pay the prosecution costs as well as their own. The penalty, some A$120,000, was enough to cripple a small newspaper.

Recent British contempt history shows how judges can subvert the will of Parliament. In *BSC v Granada* (1981), Lord (Cyril) Salmon (1903-91) adopted a formula developed by the Master of the Rolls, Lord Denning. Denning said (presumably before he went ga-ga):

The public has a right of access to information which is of public concern and of which the public ought to know. The newspapers are the agents, so to speak, of the public to collect that information and to tell the public of it. In support of this right of access, the newspapers should not in general be compelled to disclose their sources of information.

The Thatchist regime agreed. Section 10 of the *Contempt of Court Act* 1981 stated:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible unless it is established to the satisfaction of the court that disclosure is necessary in the interests of justice, national security, or for the prevention of disorder or crime.

It took judges only three cases over seven years – *Tisdall* (1983), *Warner* (1987), *Goodwin* (1990) – to destroy the *Contempt of Court Act.* None of the judges was dismissed.

Contempt by publication does not exist in Europe because evidence is not concealed, and barely exists in the US because the First Amendment protects the public's right to information

J. Defence of the criminal system

Defence of the criminal system comes down to assertions that it protects the innocent and the 'rights' of accused, and protects everyone from oppression by the leviathan state.

Professor Stephan Landsman said in *Readings on Adversarial Justice*: 'For centuries adversarial courts have served as a counterbalance to official tyranny and have worked to broaden the scope of individual rights.'

There is something in that, particularly in relation to selfless lawyers who try to help the poor and defenceless, but the argument collapses in the face of the system's own tyranny. Its unfairness oppresses victims of crime. Cruel cross-examination oppresses witnesses in general and women and children in particular. Negligence law oppresses doctors, accountants, teachers, local councils, shareholders in business and manufacturing. Interminable pleadings and discovery oppress litigants. Unfair libel and contempt laws oppress citizens, journalists and media shareholders.

In *Twenty Theses on Adversarial Ethics*, Professor David Luban told a Brisbane conference in 1997:

There are four standard arguments on behalf of the adversary system:

(1) It is the best way to find the truth.

(2) It is the best way to ensure that all parties' rights are protected.

(3) It is part of our tradition and culture.
(4) ... the adversary system is the way clients participate in the litigation process.

Professor Luban said all four arguments fail. He continued:

Only a pragmatic justification of the adversary system succeeds. I don't mean to argue that the adversary system should be abandoned, however. Only if we had strong evidence that real-world alternatives such as the Continental European procedural regime are substantially better would it be worth contemplating a far-reaching change, one that would exile almost every Australian jurist from the only legal regime he or she knows … A common-law country should retain the adversary system because:

(1) It needs some procedural system;
(2) The available alternatives aren't demonstrably better than the adversary system.
(3) The adversary system is the system in place. This is the pragmatic justification for the adversary system. It is logically weak but practically strong.

Professor Luban's argument also fails. An available alternative, the investigative system, which seeks the truth and trained judges control evidence must be better than a system which does not seek the truth and trained liars control the evidence.

I told Professor Luban in April 2007, that he would be the Red Rum of ethicists except that he sails into the last fence. He replied: 'I don't get the

Red Rum allusion, but it sounds like a good thing to be.'

I told him Red Rum was the world's greatest steeplechaser, three times winner of the Grand National. His third win, in 1977, was one of the great moments in British sporting history. He said: 'I'm honored to be included in Red Rum's company!'

In *Professional Detachment*, Harvard ethics professor Arthur Applbaum demolished two of lawyers' traditional claims:

> … at trial, a good lawyer regularly intends to induce beliefs in juries that the lawyer believes to be false, and so deceives the jurors. In trying to evade this simple and obvious fact, much breath is wasted on clever equivocation or bad epistemology [the investigation of human knowledge], such as 'it is the job of the jury, not the lawyer, to render a verdict' (true but beside the point), or 'the lawyer cannot know what is true or false until the jury decides' (false and beside the point).

K. A criminal enterprise?

Debbie Kilroy, 28, got six years in prison in 1989 for drug-trafficking. In 2007, she was admitted to practise as a lawyer in Queensland. She said: 'It's usually the other way round: they become lawyers, then they commit the offences.'

That raises a question: is the adversary system a criminal enterprise? (See Definitions.) Lawyers and judges get money from doing things that would be criminal in anyone else, e.g. perverting justice.

However, it is usually necessary to prove a wrongful intent (*mens rea*) as well as a wrongful act (*actus reus*). Judges and lawyers may lack the necessary guilty mind because law schools have told them for 200 years that the adversary system is the best system and that it requires them to do those things.

Professor (of planning) Bent Flyvbjerg, of Aalborg University, Denmark, wrote in *Rationality and Power: Democracy in Practice* (University of Chicago Press, 1998):

> Power often finds deception, self-deception, lies, and rationalizations more useful for its purposes than truth and rationality, [but that] does not necessarily imply dishonesty. It is not unusual to find individuals, organizations, and whole societies actually believing their own rationalizations. Nietzsche, in fact, claims this self-delusion to be part of the will to power … The greater the power the less the rationality.

Anything can be rationalised. John Bryson, barrister and author of *Evil Angels*, which detailed the Lindy Chamberlain case, told postgraduate law students at Melbourne University (*When the Rule of Law Meets the Real World*, 2001):

> First, we believe as we wish to believe, always, always, always. Second, the passion with which we believe rises in absolute proportion to the importance to us of success in our current enterprise.

Robert French, Chief Justice of the High Court of Australia, undoubtedly believed what he was reported (*The Australian*, 5 September 2009) as saying (in indirect speech):

> Common law in Australia had enshrined rights and freedoms, including freedom of speech and the press, and a range of others, including privilege against self-incrimination, and the right to access a legal counsel when accused of a serious crime.

One assumes that Chief Justice French absorbed that stuff at law school. Unfortunately, as we have seen, freedom of speech and freedom of the Press do not exist in the common law world (except in the US), and the privilege against self-incrimination is based on a lie.

L. Impetus for change

Justice Geoffrey Davies, of the Queensland appeal court, noted results of rationalisation and self-deception in *The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System* (Australian Institute of Judicial Administration, 2002). His remarks apply equally to the criminal system. He said:

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

Nonetheless, impetus for change has been growing in recent decades. Warren Burger, later US Chief Justice 1969-86) said in 1967:

> I assume that no one will take issue with me when I say that these North European countries are as enlightened as the United States in the value they place on the individual and on human dignity. [Those countries] do not consider it necessary to use a device like our Fifth Amendment, under which an accused person may not be required to testify. They go swiftly, efficiently and directly to the question of whether the accused is guilty.

Harry Whitmore, Professor of Law at the University of NSW, wrote in *The Sydney Morning Herald* (6 April 1981):

> Some distinguished lawyers are indeed ashamed of the system in which they are working … it is a process which is as likely to suppress or distort the truth as to reveal it. The technique is often a charade … It would be quite easy to develop a better system partially based on the European 'inquisitorial' system of justice … … a judge … should be concerned to find the truth.

In 1984, Chief Justice Burger gave the American Bar Association a glimpse of the future:

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

Former judge Burton Katz wrote in *Justice Overruled* (1997):

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

Thomas Babington Macaulay (1800-59), a Whig barrister and historian, said a lawyer 'with a wig on his head and a band round his neck will do for a guinea what he would otherwise think it wicked and

infamous to do for an empire'. In 1837, as legal adviser to the Supreme Council of India, Macaulay drew up a Penal Code based on the lawyer-run adversary system, minus some grosser technicalities. The code, revised by Sir Barnes Peacock (1810-90, Chief Justice of Calcutta 1859-70), became law in 1860.

India today has three-quarters of the 1.6 billion who suffer the injustice of the adversary system. As noted above, India's conviction rate is 16%. Lord Macaulay's system thus puts away one-sixth of guilty accused.

A blue ribbon committee recommended in April 2003 that India change to a truth-seeking criminal system. The chairman was Justice V.S. Malimath, former Chief Justice of the Karnataka and Kerala High Courts. Committee members included D.V. Subba Rao, Chairman of the Bar Council of India, Amitabh Gupta, former Director-General of Police, and Durgadas Gupta, Joint Secretary in the Ministry of Home Affairs.

Justice Malimath said that at the core of the report was the 'duty of the court to search for truth', and that the criminal system was weighted in favour of the accused. The report recommended that judges be given the power to summon and examine anyone they consider appropriate; to examine and cross-examine accused at trial; and to draw adverse inferences from a refusal to answer. At least in India, victims of crime would no longer have to suffer from Blackstone's lie.

By late 2009, however, the Malimath recommendations were still to be passed into law. That may be due to rearguard actions by lawyers and by organisations who wrongly believe that the adversary system protects the innocent, e.g. Amnesty International and civil liberties groups. Or it may be nothing more sinister than that reform in India proceeds at a measured pace. It took 23 years for Lord Macaulay's 'reforms' to be put in place.

In 2004, the Australian Family court began to experiment with a largely lawyer-free investigative system for custody cases.

The Australian (21 March 2005) reported that Mick Keelty, the Federal Police Commissioner, and other experts said a 'system such as the one used in France' would more effectively deal with terror suspects. Commissioner Keelty had stated the obvious, but it was not obvious to Australia's first law officer Philip Ruddock. He told *The Australian* he 'was not currently in favour of a French-style system', because 'that involves a whole lot of principles that if introduced here would create a great deal of problems'.

The United Nations set up the International Association of Prosecutors (IAP) following a sharp increase in transnational organised crime after the collapse of the Soviet Empire in 1991. The IAP now represents 128 countries in both systems. The NSW DPP, Nick Cowdery QC, who is on the IAP's Executive Committee, said on 10 October 2008: 'I've had some discussions about moving towards some aspects of the inquisitorial system too in the context

of the [IAP]. I'm sure these discussions are being held all over the place very often.'

The Australian (31 October 2008) reported the Victorian DPP, Jeremy Rapke QC, as saying 'something very serious is amiss with the manner in which criminal trials are conducted', and that Rob Hulls, the Victorian first law officer, had said that lawyers need to abandon many of their adversarial traditions and join him in a cultural revolution based on an active, problem-solving judiciary.

Also on 31 October, 2008 Emeritus Professor (law) David Flint wrote in *The Australian* that Australia needs a Royal Commission to examine critically the criminal justice system. That is certainly true, but the chairman of any such inquiry should be book-ended by non-lawyers.

M. Convergence fails

Bob Askin, a famously corrupt NSW politician, told colleagues when his party won the 1965 election: 'We're in the tart shop now, boys.' The adversary tart shop provides endless confections for the few who run it. Some lawyers in the investigative system probably gaze wistfully at the tart shop.

Under pressure of change, common lawyers' fallback position is 'convergence' between the two systems, but with lawyers still controlling the evidence (and the money). Convergence is touted as a happy compromise, but a system run by trained judges who search for the truth cannot possibly converge successfully with an anti-truth system run by trained liars, who search for the money.

In 1993, the United Nations foolishly let common lawyers and judges have a slice of the action in dealing with crimes committed in what was Yugoslavia. The International Criminal Tribunal for former Yugoslavia (ICTY) boasts on its website:

> It [ICTY] has created an independent system of law, comprising of elements from adversarial and inquisitory criminal procedure traditions … It has established a unique legal aid system, and groomed a group of defence attorneys highly qualified to represent accused in war crimes proceedings.

The folly of 'convergence' was amply demonstrated at the Milošević farce. Slobodan Milošević (1941-

2006), a Serb, was President of Yugoslavia from 1997 to 2000. He was arrested in March 2001 and eventually sent to The Hague to stand trial at the ICTY on charges of crimes against humanity, violating the laws or customs of war, grave breaches of the Geneva Conventions and genocide in Croatia, Bosnia, and Kosovo.

The farce began on 12 February 2002. Two judges were from the adversary system, Presiding Judge Patrick Robinson, of Jamaica, and Judge Iain Bonomy, of Scotland. One was from the pro-truth system, Judge O-Gon Kwon, of South Korea. Milošević appeared for himself.

It took two years to present no more than the case concerning genocide in Croatia, Bosnia and Kosovo. Milošević, who suffered from a heart condition, asked to be treated in a heart surgery centre in Moscow, but the ICTY refused on the ground that he might escape. He was shortly found dead in his cell of a heart attack on 11 March 2006. The ICTY denied any responsibility. His death was sad news for the 'convergent' lawyers. In more than four years, they had called 300 witnesses and were probably looking forward to many more years of gainful employ, and nice Dutch food.

Dr Radovan Karadzic (b. 1945), a Montenegrin poet, psychiatrist and (Serb) politician, was arrested in Belgrade, Yugoslavia, on 21 July 2008, and sent to The Hague on ICTY charges of genocide and war crimes against Bosnian Muslims and Bosnian Croats.

Amid reports that Karadzic's trial was expected to take 10 years, Geoffrey Robertson QC said (*The*

Independent, 1 August 2008): ' … it may be necessary to abandon the Anglo-American model of adversarial trial and shift instead to the European inquisitorial process'. In that process, judges present only enough evidence to manifest the truth.

The ICTY did not take Robertson's advice, but Reed Stevenson, of Reuters, reported on Tuesday, 9 September 2009, that Judge O-Gon Kwon had urged prosecutors to 'streamline their case'. Stevenson said 'prosecutors said last week they would reduce the number of locations to be mentioned in evidence and cut their witness list by more than a quarter. But Kwon on Monday detailed several more areas for prosecutors to cut'.

Representing himself, Dr Karadzic asked for another 10 months to prepare. Judge Kwon said he had had enough time already. Kwon hoped the trial would start in October 2009 and be over in 2 ½ to three years, in 2012. In what may have been a useful piece of greymail, Dr Karadzic asked for documents from the administration of President Bill Clinton. If they were not forthcoming, the tribunal might find it difficult to convict.

The European Union has 25 members. Only three, the UK, Ireland and Malta, are in the anti-truth tradition. The Milošević and Karadzic trials should remind the other 22 countries that 'convergence' between the two systems would be inimical to justice, and would merely divert huge sums of money to lawyers.

N. The remedy

Professor David Luban said: 'The O. J. Simpson trial has persuaded most Americans that the adversary system is at best grotesque.' This book has sought to identify causes and consequences of the grotesquerie.

Causes. A cartel of lawyers and judges runs the system as a business; the system does not seek the truth; trial lawyers, i.e. trained liars, are in charge of evidence; judges are untrained former trial lawyers.

Consequences. Too many innocent people go to prison; too many criminals get off; civil hearings take too long.

The investigative system is better in every respect. There is no cartel; judges trained separately from lawyers control evidence and search for the truth; lawyers' role is minimal. That is not to say the system is perfect. In France, for instance, the *juge d'istruction* (investigating judge) can detain suspects for lengthy periods, ostensibly for suspects to be available for further questioning as new evidence comes in, but detention can be seen as a softening-up hangover from the old torture days.

Nor would it be helpful to borrow from the new Italian system. That system has tilted towards the adversary system to help members of the Sicilian Mafia escape justice. Alexander Stille explained how it happened in *Excellent Cadavers: The Mafia and the Death of the First Italian Republic* (Pantheon, 1995).

The Sicilian Mafia was virtually the criminal wing of Giulio Andreotti's Christian Democrat party. In February 1986, Giovanni Falcone, an investigating judge, put 475 Mafiosi on trial in Palermo. At national elections in June 1987, the Mafia voted for parties other than Andreotti's on two conditions: investigating judges were to be emasculated and the law changed. This punished Andreotti's party for failing to stop the investigation and the maxi-trial and gained more protection for the Mob.

In December 1987, 344 (72%) of the Mafiosi were found guilty. In 1988, the pool of Mafia-investigating judges was dismantled, and the Parliament passed changes to the criminal code which limited the powers of remaining investigating judges. On 20 September 1988, a tap on a telephone in the Cafe Giardano in Brooklyn recorded a conversation between a heroin-dealer, Joe Gambino, and an anonymous hood just back from Palermo. The dialogue, in Sicilian, indicates that the Mafia sees the function of the US adversary system as being to anally penetrate police:

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

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

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

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

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

Falcone and Judge Paolo Borsellino knew that seriously investigating the Mafia would result in their murders, and they were assassinated in 1992. Their heroism is a reproach to common law academics, prosecutors and judges who are silent in the face of their system's protection of criminals. Procedures in Germany and France at least provide the basis for a truth-seeking system

1. German and French civil procedure

Modern German civil procedure is similar to that used in Britain before lawyers began to get control of the process in the 15th century. The following relies largely on Professor John Langbein's *The German Advantage in Civil Procedure* (1985).

Litigation in Germany begins with a lawyer making a complaint which lays out the key facts, a legal theory, and asks for a remedy. Supporting documents are attached or indicated, and witnesses identified. The defendant does the same. Discovery is virtually non-existent; the judge examines the material and sends for public records and any other documents he needs. He now has the beginning of a

dossier. All subsequent evidence-gathering and submissions go into the dossier. It is continuously open to inspection by the lawyers.

US trial lawyers coach witnesses relentlessly. German lawyers rarely speak to witnesses outside the court. To do so is a serious ethical breach and self-defeating: judges doubt the reliability of witnesses who have discussed the case with lawyers or have been seen consorting with them.

There are no adversary system 'saxophones', i.e. 'expert' witnesses on whom lawyers who hire them play tunes. If there is a technical problem, the judge, in consultation with the lawyers, selects an expert or experts and defines their role.

The judge sits without a jury and does not conceal evidence from himself. He, rather than lawyers, mainly gathers and evaluates evidence over a series of hearings. There is no distinction between pre-trial and trial, between discovering evidence and presenting it. The German approach is called the 'conference method'; the tone is that of a routine business meeting. This lessens tension and theatrics and encourages compromise and settlement. The fact that the loser pays encourages settlement before judgment.

The judge may be able to suggest compromise and resolution in discussions with the lawyers and their clients. If the parties persist, the judge acts as examiner-in-chief of the witnesses. Lawyers for either party can then ask additional questions, but Professor Langbein says that in Germany 'counsel are not prominent as examiners'. He says the judge

ranges over the entire case, 'constantly looking for the jugular - for the issue of law or fact that might dispose of the case'.

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

The lawyers can comment orally or in writing when the judge has heard witnesses or procured other evidence, and can suggest further proofs or advance legal theories. Professor Langbein says:

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

Justice Russell Fox wrote in *Justice in the 21st Century*:

> In a civil action [in the adversary system] a large part of the cost is incurred in the pre-trial phase. This comprises pleadings, court directions, compulsory conferences, discovery and interrogatories, and other matters as the case requires … The whole operation is costly to the parties and to the government as well.

He contrasted that with a civil matter in France, where, he said:

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

After the lawyers and the reporting judge have done the preliminary work, the French system can then dispose of a civil case in a few hours. *Three Rivers District Council v Bank of England* took 10 years. The action, brought by liquidators of the Bank of Credit and Commerce International (BCCI), reminded some of *Jarndyce v Jarndyce.* BCCI, founded in Pakistan in 1973, was involved in bribing, money laundering, supporting terrorism, arms trafficking, selling nuclear technology, tax evasion, smuggling, illegally

buying banks and land, and illegal immigration. When it was closed in 1991, at least US$13 billion of assets had disappeared.

In 1995, the liquidators of BCCI claimed £850 million in compensation from the Bank of England for alleged errors and omissions as a regulatory body. The trial was delayed for nine years by arguments over discovery in the Court to Appeal (twice) and in the House of Lords (once). The trial began in January 2004. The opening speech by Gordon Pollock QC, for Three Rivers, took 80 sitting days; the opening speech by Nicholas Stadlen QC, for the Bank of England, took 119 sitting days. Stadlen's speech, which ended in May 2005, was thought to be the longest in British legal history, but *Jennens* was safe; the liquidators dropped the action in November 2005.

The time and money wasted on pleadings and discovery tends to exclude from civil justice most except wealthy corporations and the rich. The rapidity of European civil litigation gives the poor and middling at least some access.

2. Criminal procedure in France

French pre-trial filters (see below, Two systems compared) show how the innocent can be protected without concealing evidence. Moreover, police are less likely to fabricate because they know evidence will not be hidden, and because, in serious cases, they are supervised by a trained investigating judge (*juge d'instruction*).

Law professor Gordon van Kessel, of UC Hastings College of the Law, San Francisco, observed in *Adversary Excesses in the American Criminal Trial* (*Notre Dame Law Review*, 1992):

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

At the pre-trial stage, an overworked *juge d'instruction* reconstructs the crime, stages a confrontation between suspect and victim or relatives, and builds up a dossier of all relevant evidence for and against the suspect. Despite a right of silence, the suspect generally accepts that he is a proper source of information.

The dossier is made available to the suspect's lawyer in case he can show the truth lies elsewhere. If the lawyer can show there is considerable doubt, that is the end of it.

At the trial, the jurors, if any, sit on the bench with the judge or judges. Guilty pleas are not accepted; judge and jurors are obliged to find the truth for themselves. The accused in not on oath. His life, character and previous convictions are presented. He has a right of silence, but adverse inferences can be drawn if he refuses to give evidence.

The presiding judge uses the dossier to question as many witnesses as necessary for 'the

manifestation of the truth'. Witnesses can tell the whole truth by giving their evidence as a narrative rather than by Yes-No answers. Lawyers for prosecution and defence can question witnesses but in some jurisdictions they are not allowed to cross-examine directly lest they pollute the truth; they can ask questions only through the judge.

Common law jurors find the formula, beyond reasonable doubt, negative and confusing; French jurors understand their formula. Bron McKillop, an Australian authority on the investigative system, says there is probably no real difference between 'beyond reasonable doubt' and the European 'conviction of guilt', what the French call *conviction intime* and Germans call *freie uberzeugung*.

A doubt must be resolved in favour of the accused. Judge(s) and jurors reach the verdict and penalty together and give their reasons. The results automatically go to appeal courts for review. Prosecution as well as defence can formally appeal against not guilty verdicts; there is no double-jeopardy rule.

The dossier helps the appellate court to scrutinise the lower court's reasoning, application of the law and findings of fact. A flaw is that witnesses' trial evidence is not reviewed because it is not recorded in the dossier.

Bron McKillop notes (*Review of Convictions after Jury Trials: The New French Jury Court of Appeal, The Sydney Law Review*, Lawbook Co., June 2006) that since 2001 a jury verdict of guilty in France can be appealed to a court of appeal consisting of three

judges and 12 lay jurors. He wrote of this logical development:

> This may seem strange to anglophones but it shows a faith in the jury court as the ultimate arbiter of guilt in serious criminal cases, without the control of judicial review.

3. The two systems compared

Professor David Luban was plainly correct in saying that every argument for the adversary system fails, but he was not correct in saying that change is not worthwhile because 'the available alternatives are not demonstrably better'. A pro-truth and hence moral system in which trained judges gather and present facts must be superior to an anti-truth and hence immoral system in which trained liars gather and present 'facts'.

The adversary system is inaccurate for innocent and guilty alike, but Justice James Burchett, of the Australian Federal Court, said in 1996:

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

The superiority of the investigative system can be demonstrated mathematically in terms of accuracy and cost.

First, accuracy for the innocent. David Rose noted in *In the Name of the Law: The Collapse of Criminal Justice* that one of the first acts of the 1991-

93 Runciman inquiry into the British criminal system 'was to order research into two nearby jurisdictions which broadly follow inquisitorial principles, France and Germany.' That research resulted in *A Report on the Administration of Criminal Justice in the Pre-Trial phase in France and Germany*, by Professor Leonard Leigh and Lucia Zedner (Her Majesty's Stationery Office, 1992). Rose reported: '[They] reached several immediately striking conclusions':

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

Further, Professor Leigh and Lucia Zedner said:

> The low acquittal rates in France and Germany and the apparent paucity of cases of unjust convictions are the product of the care taken in the initial stages of the criminal process. A series of pre-trial filters also ensures that the innocent are rarely charged, let alone convicted … At the end of the *instruction* [investigation] the accused's lawyer will be given an opportunity to examine the dossier and to make representations before the prosecutor decides whether or not the matter should proceed further. If the prosecutor, on receipt of the dossier from the examining magistrate, believes that the case should proceed, he will transfer the file to the *chambre*

d'accusation. This court then assesses the correctness of the decision and thus serves as a further filter in the system. It may order that the case proceed, that it be dropped, that the charges be re-assessed … This court also sits in appeal on refusals of pre-trial liberty and on refusals by the examining magistrate to order investigations into matters suggested by the defence.

Doubtful cases have thus been filtered out at the pre-trial stage, but French and German courts err on the side of caution. They give a further benefit of the doubt to 5% of those who face court. Japanese and Indonesian courts may seem not cautious enough; they give the benefit of the doubt to only 1% of those who get to court.

Second, accuracy for victims. As Professor Alan Dershowitz suggests, 99% of accused are guilty. French and German systems convict 95%. Our system convicts fewer than 50% - 16% in India- because of the 24 anti-truth mechanisms, including evidence concealed first by prosecutors and then by judges.

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

The Hannes case offers a useful contrast between the length and cost of criminal trials in the two systems. Simon Gautier Hannes was an executive director of Macquarie Bank, a Sydney investment bank. He earned about A$2 million a year in salary and bonuses. In 1996, Macquarie Bank was advising Thomas Nationwide Transport (TNT) in connection with a takeover bid by a Dutch company, KPN.

Australian banks must report cash transactions of $10,000 or more. Hannes went to 15 banks on Monday, 9 September 1996. At some banks, he got bank cheques of about $9000. At others he withdrew cash from his own accounts. He then put $90,000 into a new account at stockbrokers Ord Minnett in the name of M. Booth.

On Tuesday, 17 September, 1996, an Ord Minnett broker was instructed by telephone to invest M. Booth's $90,000 in options over shares in TNT. When KPN's takeover bid became public on Wednesday, 2 October, M. Booth made a profit of $2 million.

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

Hannes endured a committal hearing, a 55-day trial over 10 months (guilty), a successful appeal,

and a 75-day re-trial over 11 months (guilty). He was fined $100,000 and sent to prison for 2 ½ years. Elisabeth Sexton reported in *The Sydney Morning Herald* (20 November 2002) that Hannes had spent $3.1 million on legal costs which sometimes reached $13,000 a day. His various court outings cost taxpayers at least $2 million.

Bron McKillop, author of *Anatomy of a French Murder Case* (Hawkins, 1997), lectures each year in France and Germany. Given that Hannes' trials took 130 days, I asked him how the French system would have dealt with Hannes. He replied:

> The investigator (judge, prosecutor or police) would have interrogated Hannes and required 'X' and M. Booth to present themselves for interrogation, failing which the appropriate adverse inference would have been drawn by the investigator, and by the trial court. All the financial transactions would have been established in detail in the dossier. These matters would have been taken on board through the dossier at the trial, confirmed by oral evidence of the material witnesses and probably also through the interrogation of Hannes by the presiding judge. The trial would probably have lasted a day or so, a week tops, with Hanne almost certainly convicted.

The case for change to some improved version of the truth-seeking system is unanswerable.

4. How to get justice

Justice Russell Fox said: 'The public estimate must be correct, that justice marches with the truth.' Once

it is accepted that the public knows best, it is a matter of working out how best to direct everything to finding the truth.

It is not impossible. Common lawyers already use an investigative system – usually quite badly of course – in various inquiries, including inquests.

A system in which trained judges search for the truth will require more judges and fewer lawyers. In 1992, France (pop. 60 million) had 20,000 lawyers while Washington DC (pop. 500,000) had 45,000 lawyers.

In 1983, West Germany had 17,000 judges in a population of 61 million; roughly one judge for 3600 people. In 1997, Australia had 863 judicial officers (including magistrates) in a population of 18,500,000: one judge for every 21,436.

Investigative systems thus need roughly six times as many judges as an adversary system. Common law countries which change to a truth-seeking system would thus need roughly the following numbers of trained judges: India: 280,000, US: 77,000, United Kingdom: 17,000, South Africa: 13,000, Canada: 8900, Australia: 5000, New Zealand: 1100, Ireland: 1100.

Trial lawyers may hope governments would not ask taxpayers to pay for the training and upkeep of the extra judges, but reducing the number of lawyers reduces hidden costs. Justice Russell Fox quotes a 1989 report to the US Congress:

Excessive litigation has an adverse effect on economic growth, not only in direct costs but in the way the tort