

# SERIAL LIARS

## How Lawyers Get the Money and Get the Criminals Off

Why the Lawyer-Run Adversary System Is Immoral,  
How it Happened, and the Solution



‘Like sharks smell blood,  
lawyers smell money.’

- Law professor John Banzhaf

‘A lawyer with a briefcase can  
steal more than a thousand  
men with guns.’

- Don Vito Corleone,  
*The Godfather*

## Evan Whitton

author of *Trial by Voodoo*, *The Cartel: Lawyers*,  
and *Their Nine Magic Tricks*

‘Evan Whitton knows more about the law than most lawyers.’

- Peter Breen, lawyer and MP

Evan Whitton received the Walkley Award for National Journalism five times and was Journalist of the Year 1983 for ‘courage and innovation’ in reporting a corruption inquiry. He was editor of *The National Times*, Chief Reporter and European Correspondent for *The Sydney Morning Herald*, and Reader in Journalism at the University of Queensland. He is now a columnist on the online legal journal, *Justinian*. [www.justinian.com.au](http://www.justinian.com.au)

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- Dr Edward de Bono.

# **Serial Liars**

**How Lawyers Get the Money  
And Get the Criminals Off**

**Evan Whitton**

**Lulu  
2005**

## **For dearest Noela, without whom not a word of this would have been written**

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# Abbreviations

**Butterworths.** Butterworths Concise Australian Legal Dictionary (Butterworths 1997)

**CDNB.** The three-volume Concise Dictionary of National Biography (OUP 1992).

**Columbia.** The Columbia Encyclopedia (Columbia University Press, fifth edition 1993).

**Macquarie.** The Macquarie Dictionary (Macquarie Library, 1985)

**NSW.** New South Wales, a state of Australia. The capital, Sydney, has a population of 4.5 million.

**OxfordSC.** The Oxford Companion to the Supreme Court of the United States ed. Kermit L Hall (OUP 1992).

**OxfordLQ.** The Oxford Dictionary of American Legal Quotations ed. Fred Shapiro (OUP 1993)

**WA** Western Australia, a state of Australia.

## Preface

*Lawyers might accurately be described as serial liars because they repeatedly try to induce others to believe in the truth of propositions, or in the validity of arguments, that they believe to be false.*

- Arthur Applbaum, Professor of Ethics, Harvard, 1995

Everything turns on truth. Justice Russell Fox says justice means fairness; fairness means truth; truth means what the public think it means, reality, and the search for truth gives a justice system its necessary moral dimension, otherwise the winner is merely the one with the most resources.

The lawyer-run Anglo-American adversary system does not search for the truth; 99% of accused are guilty, but in serious cases more than half get off. Legal academics are partly to blame; they teach what the law is, not what it should be, or where it came from. A few do say it is a bad system. Thane Rosenbaum says it is immoral; David Luban says it is grotesque; James Elkins says its philosophy of cruelty makes lawyers malevolent; John Langbein says it is inferior to the judge-run European investigative system.

Intellectual torpor is reinforced by habituation through film and television. I periodically slept in those windowless rooms for 27 years before it occurred to me to ask the obvious question: where did this madness come from? And then only because of a rare opportunity to observe at first hand how the west's two systems dealt with the same organised criminal, Sir (as he then was) Terence Lewis, Police Commissioner of Queensland.

In 1988, Gerald Fitzgerald QC used the European investigative system to show beyond the slightest doubt that Sir Terence had achieved Level Five (the highest) on Professor Alfred McCoy's Corruption Scale: he franchised organised crime and extorted bribes from the franchisees. But at his 1991 trial under the adversary system, Judge Tony Healy felt obliged to conceal so much evidence that he had to tell the jurors there was no reliable evidence [left], and that it would be dangerous to find him guilty.

Excuse me?

As it happened, the jurors had more sense than the system; they found Sir Terence guilty on all 14 counts of corruption, but it took them five days. Judge Healy promptly gave him the maximum, 14 years, and Her Majesty admitted him to an ancient and exclusive club: he became only the 14<sup>th</sup> knight since the 14<sup>th</sup> century to be stripped of the accolade.

What I have learned can be summarised shortly. The European process is controlled by trained judges and is largely about truth; the Anglo-American process is controlled by trained lawyers and is largely about money.

Dickens said: ‘The one great principle of the English law is to make business for itself.’ The common law has been a business since paid lawyers and judges first appeared late in the 12<sup>th</sup> century in a culture of trickle-down extortion in the public sector, and formed a cartel to maximise profits and protect their interests.

European countries which, along with England, had used an anti-truth accusatorial (Prove it!) system from the Dark Ages, changed to a pro-truth investigative (What happened?) system early in the 13<sup>th</sup> century, but the cartel persisted with the anti-truth system, either through bottomless stupidity or because corruption is easier if truth is not required.

The adversary system is a variation of the Prove it! system. Possibly for reasons no more sinister than sloth, judges began to allow lawyers to take control of the evidence - and hence of the process, and hence of the money - about 1460. The model for Dickens’ *Jarndyce v Jarndyce* began in the perennially corrupt Chancery Court in the 18<sup>th</sup> century and did not end until lawyers had ‘devoured’ the entire estate in the 20<sup>th</sup>. A civil case in France takes a total of about a day.

There was no money in criminal work; lawyers did not get control of the criminal process until early in the 19<sup>th</sup> century. The cartel then progressively invented some 26 anti-truth devices which make it fairly easy to get rich criminals off. The devices are said to make trials fair and protect the innocent, but the result of the system’s emphasis on winning is that as many as 50 prisoners in every 1000 are innocent.

The solution is plainly some improved version of the What happened? system. It has no anti-truth devices; puts away 90% of accused, and protects the innocent better than the adversary system. It is already used in common law countries when it is necessary to find the truth. In the circumstances, this book may be a tiny bit critical of common lawyers, including judges and academics, but it is mostly out of their own mouths. The aim is not to exhaust the subject or the reader, but to help the baffled to understand why the system daily defies truth, fairness, justice, and morality, and to encourage change to a moral system. That will happen when lawyers in legislatures learn to fear outraged voters.

**Notes.** Some of the material originally appeared in Richard Ackland’s online legal journal, *Justinian* ([www.justinian.com.au](http://www.justinian.com.au)). The book is a template for a documentary on the two systems, *Serial Liars: The Musical*, e.g. *O the shark has pretty teeth, dear* (Weill), *And now I’m a judge/And a good judge too* (Gilbert & Sullivan), *Judges of the Secret Court* (Berlioz), *Anything Goes* (Porter), *Smoke Gets in Your Eyes* (Harbach/Kern), *All We Are Saying/Is Give Truth a Chance* (not quite Lennon.)

- Evan Whitton, Sydney 2005.

# 1. Why the Adversary System Is Immoral

## a. What is Justice?

The feather in the cap of Maat, Egyptian goddess of justice from c. 2700 BC, symbolised justice, truth, righteousness (morality). Nearly 5000 years later, Judge Harold Rothwax, of the New York State Supreme Court, wrote in *Guilty: The Collapse of Criminal Justice* (Random House, 1996): ‘Without truth there can be no justice.’ Russell Fox QC, former Justice of the Australian Federal Court, wrote in *Justice in the 21<sup>st</sup> Century* (Cavendish 2000):

... in legal procedure the meaning which approximates most closely to it [justice] is “fairness” ... truth can be taken to mean the reality of what happened and is happening. That is what the ordinary person understands by the word, and the undoubted view of the general public is that the findings of a court, human error aside, represent the truth in this sense.

Law professor Michael Asimow, of the University of California at Los Angeles (UCLA), wrote in *Nova Law Review* (Winter 2000): ‘[The] general public and lawyers differ about whether justice means truth or justice means process.’ That means a robust 0.2% believe justice is adversarial process and a minuscule 99.8% believe it is truth. Harvard law professor and criminal lawyer Alan Dershowitz wrote in *The Best Defense* (Vintage, 1982):

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

Lord Chancellor Kilmuir gallantly tried to make the case for process 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.

Forty years later, Justice Fox demolished Viscount 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. On the other hand, there must be a standard, and the public estimate must be correct, that justice marches with the truth. Only in this way does the concept present a moral face, as distinct from one where the winner is the person with the greatest resources and best advocacy.

Justice Fox continued: ‘This is the view taken on the continent and in other countries, where the whole system of justice proceeds on the footing that the truth is to be ascertained. Hence the investigational, or inquisitorial, approach of the French, which even provides that, the true facts having been found by a judicial officer, their presentation is not to be polluted by the parties.’

Everything – justice, fairness, morality - thus turns on a search for truth, but Judge Rothwax wrote: ‘Our system is a carefully crafted maze, constructed of elaborate and impenetrable barriers to the truth.’ The barriers include four major rules for concealing relevant evidence and at least 22 other anti-truth devices.

Amazingly, some lawyers and judges claim that the system DOES search for the truth. Justice (1958-81) Potter Stewart said in *Tehan v Shott* (Wednesday 19 January 1966) that ‘the basic purpose of a trial is the determination of truth’. He was speaking, presumably with a straight face, for the US Supreme Court. Such assertions are seriously misinformed at best, and deliberately false at worst.

Professor Thane Rosenbaum is a novelist and former corporate lawyer who teaches law at Fordham, the Jesuit university in New York. He agrees with Justice Fox and the Europeans that a justice system must have a moral centre and that it comes from the search for truth. He also agrees that the adversary system is not a moral system because it does not search for the truth. He wrote in *The Myth of Moral Justice: Why Our Legal System Fails to Do What's Right* (HarperCollins, 2005):

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

Judges and lawyers are morally reviled in part because the adversary system obliges them to say things they know are not true. Professor Rosenbaum suggests a formula that will at least relieve judges of the hypocrisy required by the system. He said there is nothing to stop them saying, for example:

I am required by law to do what I must do today, even though I realize that it will strike some, including me, as immoral ... Neither can I pretend that the result is just, because I know it is not. Nonetheless, I am bound to apply the law

in this way, which will paradoxically produce both the correct legal result and the wrong moral outcome.

As a tiny step in the direction of a moral system, I offered (*Justinian* 28 June 2005) a small cash prize for the first judge to utter Professor Rosenbaum's formula. At this writing (October 2005) there had been no takers. What this says about common law judges hardly bears contemplation

## **b. What is the Adversary System?**

The adversary system is an accusatorial (PROVE IT!) system in which trial lawyers, described as serial liars, control the evidence - and hence the process and hence the money - and an untrained judge controls the courtroom. At least one side is lying. Justice Russell Fox wrote in *Justice in the 21<sup>st</sup> Century*:

... there is many a crack in the image of the ideal [of justice]. Mostly these arise from the practice of leaving the practitioner in charge of the collection and presentation of the evidence, which means that the judge may only hear incomplete or inaccurate or unreliable evidence; some of what is relevant may be deliberately withheld. Cross-examination may help the elucidation of the truth, but it may also obscure the truth, and quite often is designed to that end.

Chief Judge Richard Posner, of Chicago, put it more bluntly in *Overcoming Law* (Harvard UP, 1995). He described 'adversarial procedure' as 'contests of liars'. However, lawyers attempt to justify the adversary process by quoting Lord Chancellor Eldon. He said in *ex parte Lloyd* (1822):

Truth is best discovered by powerful statements on both sides of the question.

That is a double lie. Eldon falsely implies that the system seeks the truth, and law professor David Luban, of Georgetown University, Washington, says in *Lawyers and Justice: An Ethical Study* (Princeton UP 1988): 'No trial lawyer seriously believes that the best way to get at the truth is through the clash of opposing points of view.'

There is an echo of Lord Eldon in a statement by Professor Monroe Freedman, now of Hofstra University, New York, in *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions* (Michigan Law Review, 1966):

The attorney is indeed an officer of the court, and he 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. It is essential to the effective functioning of this system that each adversary have, in the words of Canon 15 [of the 1908 Canon of Ethics], 'entire devotion to the

interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability'. (Exclamation marks added.)

Professor Freedman's argument for the adversary system is thus based on error: lawyers do not participate in a search for the truth, and the best way of finding truth is not through a clash of conflicting views.

A. P. Herbert (1890-1971) was called to the Bar in the Inner Temple in 1918, but never practised, possibly because he feared he could not keep a straight face. In *Why Is the House of Lords?* (Punch 1933), his Master of the Rolls admits (*Board of Inland Revenue v Haddock*) that error and injustice are built in to the adversary system:

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

### c. The Adversary Culture: *Cherchez la Monnaie*

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

The American public says lawyers are greedy, manipulative, corrupt and do a poor job of policing themselves ... Specifically, respondents said that lawyers: are more interested in winning than seeing that justice is served (74%); spend too much time finding technicalities to get criminals off (73%); are more interested in making money than serving clients (69%) ... A respondent said: '[Lawyers] get into a courtroom, and they are like sharks. They want that money.'

#### 1. Herpetoids of the Law

Billy Flynn, the 'greasy Mick lawyer' in *Chicago*, reminded film critic Joel Siegel of an old joke: 'It's only the 99 percent of lawyers who give the rest a bad name.'

In fact, the dubious reputation comes largely from the 40 percent who are trial lawyers, i.e. (in some jurisdiction) most barristers and some 30 percent of solicitors. The type has had a bad name since the Sophists showed how to 'make the worst appear the better reason' 2500 years ago, and were denounced by Socrates for moral bankruptcy.

Billy Flynn called lying tap-dancing. The reptiles of the press, as journalists are known in England, are also seen to be economical with the

truth. By analogy, trial lawyers - present company of course excepted - may be termed the herpetoids of the law. The other 60 percent can presumably be really nice people who never lie, but why they stoically endure opprobrium by association is curious.

The adversary anti-truth culture is unique among justice systems. Lawyers collect and present 'facts', some probably true, and they decide who will give evidence, what they will say, and how long the process will last, with the meter running. Untrained former lawyers called judges control the courtroom, and try to stay awake.

Lord Chancellor (1938-39) Frederick Maugham said: 'Lawyers are the custodians of civilisation, than which there can be no higher or nobler duty', but business economist James R. Forcier said in *Judicial Excess: The Political Economy of the American Legal System* (University Press of America, 1994):

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

Japan uses the European system.

The custodians of civilisation can resist change to a moral system because they have all bases covered: bench, bar, parliament, legal education. Lawyers have been heavily over-represented since about 1350. They are 0.2% of the population, but in Australia's 1998 Cabinet, 63% were lawyers, including a master of the slippery utterance, Prime Minister John (Jackie the Lackey) Howard. Forcier noted lawyers' power in the US:

As a nation, we have allowed attorneys as a group to evolve ... to a huge technocratic class, specialized along profit-making lines and dedicated to preserving and promoting its own interests ... the legal industry has imposed itself into all spheres of American economic life. through the vehicles of legislation, litigation, and regulation ... Lawyers comprise Congress' largest occupational group: 239 members are attorneys.

## 2. A Feeding Frenzy of Lawyers

The avarice exhibited by Larsen E. Pettifogger (*The Kingdom of Id*) has a long history. Henry Brinkelow (d. 1546) said: 'The lawyer can not vnderstood the matter tyl he fele his mony.' *The Sporting Magazine* reported in 1794: 'A water lawyer, or in plainer terms a shark, was caught last month near Workington.'

Lawyer Arthur Train wrote in *The Confessions of Artemus Quibble* 77 (1924): 'There are three golden rules in the profession ... the first ...

thoroughly terrify your client. Second, find out how much money he has and where it is. Third, get it.' Judge John Voelker (*Anatomy of a Murder*, 1958) had lawyer Paul Biegler echo the Mafia motto, 'Get the money, and trust no-one.' Law professor John Banzhaf, of George Washington University, Washington, DC, said in 2002: 'Like sharks smell blood, lawyers smell money.'

Johnnie Cochran knew O.J. Simpson was guilty of murder, but took US\$500,000 to pervert justice on his behalf. At Cochran's funeral in April 2005, Simpson said: 'I thought he represented the best of Los Angeles, and certainly the best in what our adversarial legal system was about.' Robert Blake, a US actor found not guilty of murdering his wife, said in March 2005: 'You're innocent until proven broke.' He said he had spent US\$10 million on his defence.

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

### 3. Serial Liars

A public relations agent is said to be a paid liar. Edward von Kloberg III, who lied on behalf of Saddam Hussein, Nicolae Ceausescu, the Burmese junta, and General Mobutu of Zaire, said the PR man's role is no different from a lawyer's.

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

Harvard ethics professor Arthur Applbaum said (*Professional Detachment: The Executioner of Paris*, Harvard Law Review, 1995):

Lawyers might accurately be described as serial liars because they repeatedly try to induce others to believe in the truth of propositions, or in the validity of arguments, that they believe to be false.

Lawyers replied that what they do is zealous advocacy sanctioned by the system. Professor Applbaum said in *Ethics for Adversaries* (Princeton University Press, 2000), that Charles-Henri Sanson, the Executioner of Paris, was sanctioned by the system, but he was still a serial killer. At the height of the terror in 1793 he cut the heads off 300 men and women in three days. His

son, Gabriel, an apprentice serial killer, slipped in the blood, fell off the guillotine, and was himself killed. That seems fair.

Professor Applbaum also demolished two of lawyers' favourite assertions. He said:

... 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, 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).

Lawyers lie to keep criminals out of prison, but express outrage when police lie to put them in. Irving Younger, inventor of the sodomised parrot defence, complained (*The Perjury Routine*, *The Nation*, 3 May 1967) that judges do not assume that 'the arresting officers are committing perjury'. He asked:

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

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

[Taking] zealotry to its adversarial limits (all the while promoting the adversarial system as a system of justice) poses a serious moral problem. Basically, we need to admit that there is occasion for shame in our profession. It would be overly dramatic to say that it is a surplus of shame that is driving lawyers from the profession, but something is.

Professor Elkins noted that a 1988 American Bar Association poll showed that '41% of a representative sample of lawyers would choose another profession if they had to make the choice again' and that 'alcoholism among lawyers is almost twice as high as for the general population'. An Australian survey in 2004 for an Australian Young Lawyers' body found almost half of the respondents did not see themselves practising law in five years' time.

Professor Applbaum might also have noted that the Executioner of Paris did not invent the system which sanctioned his ghastly work, but lawyers did invent the adversary system and its ethics which sanctions theirs.

#### 4. Immoral Ethics in an Immoral System

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

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

Lawyers tend to believe that ethics is a county in south-east England, home of the succulent Colchester oyster. Law professor Lester Brickman, of New York’s Cardozo School of Law, wrote in 1997: ‘When the ethics rules are written by those whose financial interests are at stake, no one can doubt the outcome.’

Ethics and morals are synonymous, but adversarial ethics are client-based rather than morality-based. Law professor Charles Wolfram, of Cornell University, New York, wrote in *Modern Legal Ethics* (West, 1986):

[The lawyer’s role is] institutionally schizophrenic . . . a lawyer’s objective within the system is to achieve a result favourable to the lawyer’s client, possibly despite justice, the law and the facts

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

Their ethics permit other activities which would be criminal as well as immoral in people other than lawyers. For example, Henry Brougham (1778-1868) in effect claimed that lawyers can have a ‘sacred duty’ to resort to blackmail, which is the crime of theft by extortion. Brougham, whose hugely fertile brain invented *The Edinburgh Review* (1802), London University (1828), a single-steed, four-wheel conveyance (1829), and Cannes (1834), informed their lordships: in 1820:

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

That sounds good, if a little overripe, and Professor Dershowitz mentions it approvingly in *The Best Defense*, but law professor Franklin Strier, of California State University, indicates in *Reconstructing Justice: An Agenda for Trial Reform* (University of Chicago Press, 1994) that Lord Brougham - as he became when appointed Lord Chancellor in 1830 - later admitted it was blackmail.

The words were a threat, in code, to George IV that unless he dropped his action to divorce Queen Caroline, he would reveal that the king had secretly married a Catholic, Mrs Maria Fitzherbert. Since the *Act of Settlement* (1701) said a king who married a Catholic must be treated 'as if he were naturally dead', the disclosure would inevitably rob His Most Sacred Majesty of the crown, the palaces, and the money. That was an offer George could not refuse. Today, unscrupulous lawyers routinely use blackmail in negligence and libel cases.

Whatever it takes also includes conspiracy to murder, according to a Dublin lawyer, James Giffard, in 1743. In *Lawyers and Justice*, Professor David Luban relates The Case of the Wicked Uncle. The uncle, the Earl of Anglesea, was an organised criminal; in 1727, he used bribery to steal vast estates in Ireland and the title of Lord Latham from his nephew, James Annesley, 12, and had the boy kidnapped and sent into slavery in America. When Annesley escaped and returned to Dublin in 1741, the earl offered Giffard, £10,000 (c. £1 million today) to get him hanged, otherwise, he said, he would have 'to quit this kingdom ... and let Jemmy have his right'. Giffard accepted and prosecuted Annesley for murder, but an Old Bailey jury found him not guilty, and the conspiracy emerged when Giffard sued Anglesea for his unpaid bill of £800 (c. £80,000 today).

Armed with that information, Annesley sued to be declared the rightful Lord Latham, and hence the rightful owner of the estates. The trial began in the Dublin Court of Exchequer on 11 November 1743 and ran for a then record 15 days. When Annesley called Giffard as a witness, Anglesea's new lawyers adopted a strategy that could only hope to work in a system to which reality is a stranger. They argued on the one hand that the attempt to kill Annesley was a perfectly proper legal proceeding, and on the other that it was so wicked that no one could believe the Earl would be party to it. One of Anglesea's lawyers put the second argument to Giffard:

Did you suppose from thence that he [Anglesea] would dispose of that £10,000 in any shape to bring about the death of the plaintiff? - I did.

Did you not apprehend that to be a most wicked crime? - I did.

If so, how could you ... engage in that project, without making any objection to it? - I may as well ask you, how you came to be engaged for the defendant in this suit?

Giffard was saying it was ethically proper for both lawyers to commit crimes, Giffard by conspiring to murder, the other by seeking to pervert justice in the matter of the title and the estates. Annesley won the

verdict but the earl's lawyers procured a writ of error to set it aside, and Annesley had no money to pursue his claim in the House of Lords. Anglesea continued in possession of the title and estates until he died in 1761, a year after Annesley. As Justice Sir James Mathew (1830-1908) observed: 'Justice is open to all, like the Ritz Hotel.'

Professor Luban said 'the standard conception [of lawyers' ethics] simply amounts to an institutionalised immunity from the requirements of conscience, and that UCLA law professor Murray Schwartz was criticising their ethics when he wrote in *The Professionalism and Accountability of Lawyers* (California Law Review, 1978):

When acting as an advocate for a client, a lawyer ... is neither legally, professionally, nor morally accountable for the means used or the ends achieved.

I mentioned that to Dr Elizabeth O'Brien, a Sydney psychiatrist. She said: 'That sounds like psychopathy.' Psychopaths have no conscience.

How do lawyers, sane or psychopathic, justify being unaccountable for what amounts to criminal activity? Their argument essentially is that the adversary system is the best system of justice and it demands advocacy even as zealous as that. Or, the end justifies the means, the end being the best result for the client. The argument collapses in the face of the fact that an anti-truth (and hence immoral) process run by serial liars cannot possibly be a good system of justice, let alone the best.

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

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

Again, the argument essentially is that the adversary system is a good thing in itself and requires that sort of advocacy. Professor Luban quoted professor Schwartz's response to that kind of argument:

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

But on the analyses of Justice Russell Fox and professor Thane Rosenbaum, the system IS immoral because it does not seek the truth. It follows that the justification for lawyers' claim of non-accountability disappears.

Professor Freedman's three hardest questions, with his answers in brackets, were:

Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth? [Yes]

Is it proper to put a witness on the stand when you know he will commit perjury? [Yes]

Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury? [Yes]

Professor Luban noted that professor Freedman 'later reversed himself [in *Lawyers' Ethics in an Adversary System*, Bobbs-Merrill, 1975] on the third issue – though a recent study of white-collar defense lawyers indicates that it is Freedman's original advice that is typically followed.' (See below, *Concocting a Defence: The Lecture*.) Professor Luban continued:

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

In short, even if a client privately admits he is guilty of rape, his lawyer is still ethically obliged to let him go in the box and falsely deny it on oath, and to back up that lie by cross-examining the girl about her sex life to falsely suggest she consented. The technique, at once brutal and pornographic, confirms professor James Elkins reference to lawyers' 'professional malevolence'.

Sydney lawyer John Marsden said in *I Am What I Am* (Viking, 2004) that he was ethically obliged to use the consent defence to get Ivan Milat off rape charges in 1974.

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

In 1996, Milat was found guilty of murdering seven backpackers in circumstances similar to the cases of alleged rape in 1974.

A Sydney barrister, Stuart Littlemore QC, stated client-based ethics accurately when interviewed on television by Andrew Denton in October 1995.

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

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

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

Littlemore: 'Not at all.'

## 5. Zealous Prosecutors

If it is ethically proper for defence lawyers to lie to keep criminals out of prison, it should be ethically proper for detectives and prosecutors to lie to put them in. But not all are guilty; Mike Mansfield QC noted in *Presumed Guilty: The British Legal System Exposed* (Heinemann, 1993) that studies by English probation officers found that '500 or more' prisoners had been wrongly convicted, i.e. a minimum of 1% in a prison population which was then 50,000.

C. Ronald Huff, Ayre Rattner and Edward Sagarin estimated in *Convicted But Innocent, Wrongful Conviction and Public Policy* (Sage 1996), that .5% (approximately 10,000) of all convictions per year in the United States are wrong. *The Chicago Tribune's* Ken Armstrong and Steve Mills confirmed their estimate in 1999. They said 12 of 285 (4.2%) or prisoners on the Illinois Death Row since 1977 had been 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'.

In February 2004, Claire Cooper, of California's *The Sacramento Bee*, noted cases in which prosecutors behaved like defence lawyers, but appellate judges did not know what to do about it.

She said prosecutors in Solano County, California, 'in two trials identified both Jonathan Shaw and Mango Watts as the single robber who held a gun to a restaurant manager's head'. Three judges said the prosecutions were 'something between stunningly dishonorable and outright deplorable', but 'said they were powerless to reopen the case because the US Supreme Court has "never directly addressed the issue of whether due process permits two persons to be convicted for a crime that only one committed".'

## 6. Untrained Judges/The Humpty Option

Non-judges who persistently make mistakes are sacked, but it is difficult to get rid of judges who are persistently wrong. The public knows that justice is often a stranger to the system; Australia probably reflects the common law world in that only 15% have great confidence in judges, according to a 2003 report by the Sydney *Sun-Herald* of market researcher Quantum's annual Australia Scan survey. The survey questioned 2000 people on institutions in which they had great confidence. Nonetheless, senior judges call themselves 'Justice', and the convention is followed in this book although it would be more realistic to use a neutral prefix, e.g. Benchperson.

A US judge, Curtis Bok, said in 1941: 'It has been said that a judge is a member of the Bar who once knew a Governor.' The lawyer-judge cartel still exists because judges are not trained separately from lawyers; they are lawyers one day and judges the next. Does that mean they suddenly stop lying and perverting justice? Professor Dershowitz wrote in 1982:

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

Abimbola A. Olowofoyeku, now a law professor at the University of Brunei, pointed out in *Suing Judges: a Study of Judicial Immunity* (Oxford, The Clarendon Press, 1993):

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

The Humpty Option derives from Lewis Carroll's *Through the Looking Glass, and What Alice Found There* (1871):

'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean -- neither more nor less.'

'The question is,' said Alice, 'whether you *can* make words mean so many different things.'

‘The question is,’ said Humpty Dumpty, ‘which is to be master -- that’s all.’

Chief Justice (1969-86) Warren Burger knew that Supreme Court judges are Humpties. Bob Woodward and Scott Armstrong reported in *The Brethren: Inside the Supreme Court* (Coronet, 1979) that Burger advised his colleague, Justice (1955-71) John Marshall Harlin II: ‘We are the Supreme Court, and we can do what we want.’ In *Bush v Gore* (Monday, December 13, 2000), five Humpties on the court - William Hubbs Rehnquist, Antonin Scalia, Clarrie Thomas, Sandra Day O’Connor, and Anthony Kennedy - effectively claimed that democracy means you don’t count all the votes. A dissenter, Justice John Paul Stevens observed:

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

Scalia himself in effect accused some colleagues of exercising the Humpty option in *McCreary County, Kentucky et al v ACLU* (2005). He said: ‘Nothing stands behind the court’s assertion that governmental affirmation of the society’s belief in God is unconstitutional except the court’s own say-so.’

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

In 1974, it was an iron rule of British justice that accused were presumed innocent until proved Irish. Justice Sir Nigel Cyprian Bridge told the Birmingham Six jury: ‘... I am of the opinion, not shared by all my brothers on the bench, that if a judge has formed a clear view it is much better to let the jury see that.’ He summed up for a conviction. Mike Mansfield QC noted his technique in *Presumed Guilty*:

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

In June 1979, Justice Sir Joseph Cantley presided at a case in which a barrister/politician, the Rt Hon Jeremy Thorpe, was accused of conspiring to have Andrew Gino Newton murder Thorpe’s former lover, Norman Scott. A few days later, at the Secret Policeman’s Ball for Amnesty International, Peter Cook, who had said: ‘I could have been a judge, but I never had the Latin’, detonated a parody of the summing-up he called *Entirely a Matter for You*, which is judgespeak for ‘entirely a matter for yours truly’:

We have heard for example from a Mr Bex Bissell [Peter Bessell was the chief prosecution witness], a man who by his own admission is a liar, a humbug, a hypocrite, a vagabond, a loathsome spotted reptile and a self-confessed chicken-strangler. You may choose if you wish to believe the transparent tissue of odious lies which streamed on and on from his disgusting, reedy, slaverling lips. That is

entirely a matter for you ... We have been forced to listen to the whinings of Mr Norman St John Scott, a scrounger, a parasite, a pervert, a worm, a self-confessed player of the pink oboe, a man, who by his own admission, chews pillows ... On the evidence of the so-called hitman, Mr Olivia Newton John, I would prefer to draw a discreet veil. He is a piece of slimy refuse, unable to carry out the simplest murder plot ... You are now to retire, as indeed should I, carefully to consider your verdict of Not Guilty.

In a 1987 libel case, Lord (as he later became) Jeffrey Archer, falsely denied resorting to a dwarfish prostitute, Monica Coghlan. Justice Sir Bernard Caulfield seemed entranced by the icy charm of Mrs Mary Archer, who had stood by her man. He said in his charge to the jury:

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

The jury gave Archer £500,000, and Caulfield added costs of £700,000. In 2001, Lord Archer got four years for perjury at the trial.

## 7. The Moral Failure of Law Schools

Intellectual torpor (IT) is good; it avoids straining the brain's muscles, if any. As noted in the Preface, I pursued a policy of masterly torpidity on the law for 27 years. Judges and working lawyers are also entitled to a spot in the IT Hall of Fame, but they have an excuse, however feeble: they were taught by legal academics who in turn have an excuse for the IT they acquired from the founder of their trade, a mountebank named Blackstone, the notion that the law is so nearly perfect that there is no point in examining it for possible flaws or even where it came from.

This head in the sand attitude is known as ostrichism, legal positivism, and internalism. *Butterworths* says of positivism: 'Laws are considered in the context of the legal system of which they form a part, without drawing any conclusions about their essential justness or merit.'

*Pace* Blackstone, legal positivism is plainly a copout/dereliction of duty; medical academics seek a cure for cancer, legal academics should seek a cure for the cancer in the legal system and in law schools. For example, law professor Nancy Lee Firak, of Northern Kentucky University, wrote in '*Ethical Fictions as Ethical Foundations*': *Justifying Professional Ethics* (Osgoode Hall Law Journal, 1986): 'Lawyers are trained to cast the facts of a single event in several different (even contradictory) forms and are then taught how to argue that each form accurately represents reality.' In short,

how to lie. Law schools thus have no moral centre, and are properly termed trade or technical schools.

Common law trade schools are relatively recent; barristers controlled legal education from the 13<sup>th</sup> century to the 18<sup>th</sup>. What they taught can be seen from Sir Thomas Erskine May's assessment of the system at the start of the 19<sup>th</sup> century in *Constitutional History of England 1760-1860* (1861-63):

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

William Blackstone (1723-80) was the first and most influential academic. A fat, near-sighted former barrister - by definition a serial liar – with a grating voice, he began lecturing on the common law at Oxford in 1753. Jeremy Bentham discerned the intellectual sloth in his ‘spirit of obsequious quietism’ which ‘scarce ever let him recognise a difference’ between what the law is and what it should be.

Law professor Theodore Plucknett (1897-1965), of Harvard (1921-31) and the London School of Economics (1931-61) is equally damning. In *A Concise History of the Common Law* (first edition Lawyers' Cooperative Publishing Company, 1929; fifth edition Butterworths 1956), he said Blackstone lacked ‘excessive learning’; that he regarded ‘legal history as an object of “temperate curiosity” rather than exact scholarship’; that his ‘equipment in jurisprudence was also somewhat slender’; and that he was led ‘to tolerate’ the system by a ‘romantic fancy’ which compared ‘it to a picturesque old Gothic castle’. Nonetheless, his *Commentaries on the Laws of England* (4 vols. 1765-69), described by Bentham as ‘ignorance on stilts’, procured for Blackstone a fortune in sales in Britain and America and appointment as a judge in 1770.

When the American colonies broke with England in 1776, William Jefferson and other lawyers favoured changing to the pro-truth European system, but the *Commentaries* fatally persuaded James Madison to persist with the common law. Madison was not a lawyer but he read law books and in 1791 was largely responsible for the first eight amendments to the Constitution which are generally taken to be the Bill of Rights. Madison locked the common law – but not necessarily the adversary system – into the US system via Amendment VII: ‘... no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.’ Two centuries later, the malign effects of that amendment are daily visible, not least in the O.J. Simpson debacle.

Law professor James Elkins, of the University of West Virginia, blames a couple of Harvard types, Christopher Columbus Langdell and

Oliver Wendell Holmes Jr for making legal immorality respectable. Harvard is a seat of learning founded in 1737 by descendants of deranged English Puritans who believed an inscrutable deity was the supreme civil ruler. Today, Harvard's legal trade school, founded 1817, stands foursquare for artifice, chicanery and greed, as does its business school.

Langdell, dean of the law school 1875-95, invented the case, or Socratic, method of teaching law. In *The Moral Failure of Law Schools* (*Troika*, November-December 1996), Professor Alan Hirsch, visiting professor of Constitutional Law at Williams College, Massachusetts, in 2005, explained how the method corrupts young law students and destroys their idealism. He wrote:

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

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

Holmes (1841-1935) became a Humpty on the Supreme Court at 61, and stuck like a limpet until his colleagues persuaded him to go at 90. He wrote in *The Path of the Law* (1897): 'For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether.' The gain is to the profits of morally unaccountable trial lawyers.

## 8. The Law As a Game

The view that justice is a game recurs in the literature. Geoffrey Robertson QC, author of *The Justice Game* (Random House, 1998), was asked in 1998: 'Should justice be a game?'

He replied: 'Should it? No. Is it? Yes. We can't avoid the fact that the adversary system ... does make justice a game.'

US jurist John Henry Wigmore (1863-1943) referred to 'the game of litigation'. Judge Learned Hand (1872-1961) recalled that he once said to the

anti-moral Justice Oliver Wendell Holmes Jnr: ‘Well, sir, goodbye. Do justice!’

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

In *We, the Jury* (Basic Books 1994), Jeffrey Abramson, a lawyer and Professor of Politics at Brandeis University, Massachusetts, quoted Stephen Adler, of *The Wall Street Journal*, as reporting that jury consultants openly admit that:

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

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

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

Justice may be a game, but the playing field is not level; later sections note that the game is rigged in ways which get money for lawyers: aspects of civil law are unfairly biased in favour of plaintiffs; criminal law is unfairly biased in favour of defendants.

## 9. The Law As a Business

Some lawyers claim the law is a profession, but it has been a business since lawyers and judges formed a cartel to maximise their profits more than 800 years ago. Edward Jacob KC (d. 1841), editor of *Chancery Reports*, certainly saw it as a business. Nicholas Mullany, a Perth barrister, noted in *Pleadings – Sacrificing the Sacrosanct* (West Australian Law Reform Commission, 1998) that Lord Justice Sir William James said in *Hall v Eve* (1877):

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

Charles Dickens, who had worked in a law firm, wrote in Chapter XXXIX of *Bleak House* (1852-53):

The one great principle of the English law is to make business for itself [i.e. lawyers]. There is no other principle distinctly, certainly and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.

Max Weber (1864-1920), the German polymath who taught law, political economy, economics, and sociology, noted in 1915 the ferocity with which the lawyer-judge cartel used its power to maintain the Dickens Principle:

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

Lawyers are beginning to admit that the law is a business. In *Greed on Trial* (*The Atlantic Monthly*, June 2004), Alex Beam quoted Robert Popeo, a plaintiff's lawyer who was seeking an EXTRA US\$1.3 billion for starving tobacco lawyers, as saying: '... the law is an industry now, not a learned profession'. An editorial in *The Financial Times* of 16 June 2005, reported:

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

Professor David Luban has noted dire consequences:

[If a] lawyer is really just another businessman, [lawyers] lose whatever claim they have to the perquisites and immunities of the legal profession [including] such invaluable goodies as the attorney-client privilege.

## 10. Self-Deception/Rationalisation

In the face of a Niagara of evidence to the contrary, some common lawyers and judges actually believe the adversary system is the best possible system of justice. The explanation for this phenomenon may lie in observations by John Bryson and Bent Flyvbjerg. In 2001, Bryson, a barrister and author of *Evil Angels*, which concerned perversion of justice in the Lindy Chamberlain case, told Melbourne University's Postgraduate Law Students' Association in an address called *When the Rule of Law Meets the Real World*:

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.

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, rationalisations and lies 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.

Power invents its own reality and imposes it by constant repetition. In November 2002, *Time* essayists Nancy Gibbs and Michael Duffy quoted a former Clinton official as saying of people in the Bush-Cheney regime:

They just assert a reality and stick with it. They do it with tremendous discipline. They keep it simple and use the bully pulpit, and they say it again and again and again until people believe it.

Kurt Campbell, head of security studies at the Centre for Strategic and International Studies in Washington was quoted in *The Sydney Morning Herald* of 6 November 2004 as saying: ‘A lot of people who support the President are really not interested in the facts on the ground. There really is a faith-based belief in the President as a person and in his ability to remake reality.’

## **d. Getting the Money: The Civil Process**

### **1. The Law As a Casino**

Lord Justice Sir Frank McKinnon (1871-1946) said (*Salisbury v Gilmore*, 1942) that the law lords are ‘the voices of infallibility, by a narrow majority’. A London tax lawyer, David Goldberg QC, said in 1997:

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

Lawyers can thus urge clients to pay for another roll of the dice; they might win, however dubious their case. Oxford law professor Patrick Atiyah wrote

in *Justice and predictability in the common law* (NSW Law Journal 1992): ‘... less predictability in the law means more litigation.’ Harold Clough, a Perth contracting engineer and former President of the Australian Chamber of Commerce, said in 1998:

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

## 2. Spinning the Process Out

Litigation is like a cancer; it grows exponentially. Judge Learned Hand said in 1921: ‘I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.’

### i. Lawyer/Judge Procrastination

The record spin-out, *Jennens v Jennens*, began in the anciently corrupt Chancery Court in 1798, four years after the water lawyer was caught near Workington. *Jennens* concerned the estate of a loan shark named William Jennens, whose grandfather, Robert, had married twice and called boys from each marriage Robert. William Jennens plied his trade in London’s gambling dens. He was the richest commoner in England, worth £5 million, about £500 million today. Jennens, 98, unmarried, went to a solicitor to make a will, but forgot to take his spectacles, and the solicitor’s did not fit. He died a few days later, on Tuesday, June 19, 1798, the unsigned will still in his pocket, and £20,000 (about \$A6 million today) in cash in the house. Lawyers for alleged relatives flooded into the Chancery Court.

*Jennens v Jennens* was still going when Dickens was born in 1812, when he worked as a law clerk at Ellis & Blackmore in 1827-28, when he used it as the model for *Jarndyce v Jarndyce* in *Bleak House* in 1852-53, and when he died in 1870. It ended in 1915, 117 years after it began, but only because generations of water lawyers had ‘devoured’ the entire estate. *Jennens* had thus been on foot for 55 years when Dickens observed that the law exists to make business for lawyers.

It is noted in Part 3 that Justice Russell Fox said that in France – where trained judges control the litigation process – ‘the whole [civil] case may be disposed of in less than a day overall’.

## ii. Pleadings

Pleadings are supposed to narrow the issues, but are largely useless because in five centuries judges have never found a way to stop lawyers lying in paper pleadings. Speaking for the West Australian Law Reform Commission, Nicholas Mullany, said in *Pleadings – Sacrificing the Sacrosanct*:

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

Nonetheless, lawyers can exchange pleadings interminably in see-saw fashion: statement of claim, defence, reply, rejoinder, surrejoinder, rebutter, surrebutter, counter-claim, defence to counter claim, reply, etc.

Judicature Acts introduced by Lord Chancellor Selborne in 1873 and by Lord Chancellor Cairns in 1875 purported to reform pleadings, but Mullany said ‘they did not introduce a system which operated to define the issues in dispute between the parties’ A committee chaired by Lord Chief Justice Coleridge in 1881 ‘supposed’ from the statistics for more than 20,000 cases in 1879 that ‘pleadings were of little use’, but all attempts at reform have been sabotaged. Mullany quoted Peter Hayes QC, of Melbourne, as stating in a 1998 paper for the Law Institute of Victoria:

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

In 1998, the WA law reform commissioners – WA Bar Association President Wayne Martin QC, Professor (now Justice) Ralph Simmonds, and Crown Counsel (now DPP) Robert Cock QC – said:

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

They effectively recommended a return to pre-adversarial oral pleading, i.e. a procedure which ‘resembles most closely that prevailing in Germany’. They said the change could generally be made ‘without the assistance of the legislature’, but it still had not happened in 2005.

## iii. Discovery

Discovery is moving documents from one law office to another. A courier will do it for \$10. Lawyers for one client ask lawyers for the other to ‘discover’ and hand over documents which might help their side or hinder

the other's. The other side responds with lists of the documents they are prepared to reveal, those no longer available and why, and those they want to conceal grounds of privilege, e.g. client-lawyer secrecy. Justice Peter Heerey, of the Australian Federal Court, described the process in *Trade Practices Commission v Santos Limited and Sagasco Holdings Limited* (1993):

... a burgeoning army of lawyers were recruited into ... discovering, inspecting, filing, listing, copying, storing, carrying about and otherwise dealing with 100,000 documents ... [Junior lawyers] ensnared in the discovery process [said]: 'I have been Santossed.'

Discovery, originally a monopoly of equity lawyers, i.e. those who worked in the corrupt Chancery Court, was extended to common lawyers by the Common Law Procedure Act of 1854. A few words by Lord Justice (of appeal) William Baliol Brett (1815-99) in the so-called birdshit case, *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company* (1882) has made billions for lawyers. He said any document is discoverable if it **might**, directly or **indirectly**, lead to a 'train of inquiry' which **might** help the lawyer's case or damage his adversary's. (Emphasis added.)

The *Guano* precedent made discovery open-ended, but only a very few documents are relevant. Lord (as he now is) Steyn said in 1992:

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

Justice David Ipp, then of the WA Supreme Court, said in *Reforms to the Adversarial Process in Civil Litigation*, Part II (Australian Law Journal, 1995): '... the usual result is that the number of those documents that are critical to the result of the trial are substantially less than 50 [but] sometimes hundreds of thousands [are] discovered.' Or millions. *The Economist* reported in 1992 that discovery accounts for 60% of the time and money spent on US lawsuits, and that in 1988 a Louis Harris survey showed:

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

That indicates that nearly 50% of lawyers habitually use discovery to extort from their own clients.

### 3. Unfair Bias in Favour of Plaintiffs

Jurist Brett Dawson says aspects of civil law, notably in negligence and libel (outside the US), are unfairly biased in favour of plaintiffs' lawyers; the bias encourages people to sue, and the sued have to pay lawyers to defend them. The bias is compounded by the fact that in eight centuries jurors have never had to give reasons. They can thus award unjust sums to plaintiffs in the belief that they are redistributing wealth and punishing rich companies. In reality, they enrich lawyers and punish shareholders.

#### i. Negligence/Product Liability

*The simple fact is that no one can define negligence, nor in most cases is it possible to form an accurate view of the facts.*

- Justice Russell Fox, *Justice in the 21<sup>st</sup> Century*

Lord (James Richard) Atkin (1867-1944) had a dome as bald and conical as Humpty Dumpty's or M. Hercule Poirot's, and he was as capable of high octane drive as either. His definition of the undefinable in *Donoghue v Stevenson* (1932), a House of Lords appeal concerning an alleged (but unproved) snail in a bottle of Scottish ginger beer, contained three variations of the word 'reasonable' in a few lines. Lawyers rub their hands when they hear that word: it has as many meanings as there are human beings; they can argue that almost any act or omission is unreasonable. Lord Atkin thus made negligence law totally unpredictable and billions for lawyers. He said:

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

Lord Atkin did not say the 'neighbour' should exercise common sense and personal responsibility, e.g. in avoiding tobacco or a hole in the road. Justice Fox said Lord Atkin's 'principle'

sounded good and proved very durable ... in theory, one can talk in terms of "proximity" and "reasonable foreseeability", and "what a reasonable person would have done". In practice, these are but shibboleths which offer no obstacle to the inclination of judges and juries to provide compensation for the injured (or damaged) plaintiff ... Many are not worried by this phenomenon, recognising it as a convenient form of injury (and damage) insurance, and governments are saved the necessity of introducing a scheme to achieve a similar result. It is however a very expensive pseudo-scheme because to each claim are added legal

costs and these can be 30, 40 or 50% of the amount recovered, sometimes more. Eventually, the community at large, or a large percentage of it, bears the burden, and insurance companies (if they are cautious) and lawyers profit.

The US system does not always oblige losing litigants to pay the winner's costs; it allows lawyers to charge a contingency fee of up to 40% of the payout; and it allows jurors to make punitive awards. The annual Stella Awards for outrageous negligence verdicts honour Stella Liebeck, 79, who spilled coffee on her lap at McDonald's in 1992, and was initially awarded US\$2.86 million by the New Mexico District Court.

Florida plaintiff lawyers traditionally took 40% of the first \$1 million in medical liability payouts, 30% of the second \$1 million, and 20% of any higher amount, but in November 2004, 63% of Florida voters approved a legislative amendment which capped lawyers' fees at 30% of awards up to \$250,000 and 10% of amounts over \$250,000. The lawyers would thus get \$500,000 of a \$5 million payout, but Robert Montgomery, a West Palm Beach lawyer, complained: 'It's going to put us out of business', according to a report by [Jane Musgrave](#) in *The Palm Beach Post* of July 24, 2005. But, she noted: '... personal injury lawyers quickly found a way around the new limits: They simply ask clients to waive their constitutional right to larger shares of any malpractice award they might get.'

The US Surgeon-General warned against smoking in 1964. Richard Boeken, 57, smoked 40 Marlboro cigarettes a day and got cancer, but swore he did not know smoking was dangerous until 1994. In 2000, Los Angeles jurors ordered Philip Morris shareholders to pay him US\$3000 million, of which his lawyers presumably expected to get at least \$US1000 million. On appeal, the payout was reduced to US\$50 million.

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

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

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

That presumably also means that trial lawyers who do not take personal responsibility for doing what it takes to get the best result for the client are not fully human; do not lead an ethical life, do not participate in a just society; and prevent society from being ordered in a fair way.

Justice Russell Fox said his concern on negligence law was ‘the waste in cost involved, and court time, and damage to court integrity’. He noted that Justice Rae Else-Mitchell, of the NSW Supreme Court, said in 1972: ‘... the case for all claims arising out of motor vehicle and industrial accidents being decided on a no-fault basis by an administrative tribunal is unanswerable ... more people would be able to go to court and the taxpayer would be better off in the end.’

No-fault eliminates lawyers because there is nothing to argue about, and thus eliminates blackmail and increases the money available to care for victims. It also eliminates Santa Claus judges and jurors, but lawyers say it deprives individuals of basic common law rights. There is more money in rights than fairness.

## ii. Libel

Except in the US, libel law offends fairness and justice. Geoffrey Robertson QC wrote in *The Justice Game*:

London is the libel capital of the world because English law heavily favours plaintiffs ... So there have been celebrated cases where newspapers have published the truth, yet lost.

Sydney also claims the title. A US researcher, John Wicklein, reported in the *Columbia Journalism Review* (November/December 1991):

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

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

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

suffered material or financial loss ... Furthermore, a plaintiff is not required to establish that the defendant intended to harm his reputation ...

Libel law thus oppresses defendants (and the community) because it is unfairly biased in favour of plaintiffs by a string of false presumptions: appearance (reputation) is always to be preferred to reality (character); the private right to reputation is always to be preferred to the public right to information; a slur is always false; the author of a slur is always guilty; the subject of a slur is always innocent; a slur is always intentional and always causes damage.

The bias encourages ‘libel terrorism’ as practised by Robert Maxwell (1923-91), an organised criminal, asset stripper, newspaper proprietor, and megalomaniac. He won one libel action only, but London libel lawyer David Hooper wrote in *Reputations Under Fire: Winners and Losers in the Libel Business* (Little, Brown, 2000):

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

Another effect of the bias is that liars and their lawyers get money from honest soldiers for truth. A short list:

Politician Jack Profumo, who falsely denied that he and Christine Keeler jumped into Lord Astor’s swimming pool and engaged in carnal congress therein. Pianist Wladziu Valentino Liberace, who falsely swore he was heterosexual. Politicians Aneurin Bevan, Dick Crossman and Morgan Phillips, who falsely denied they were ‘pissed as newts’ at a conference of Italian Socialists in Venice. Lord (Bob) Boothby, who falsely denied he had a sexual relationship with an organised criminal, Ronnie Kray. Dr John Bodkin Adams, who falsely denied he was a serial killer of Eastbourne widows. Juni Morosi, a secretary, who falsely denied she had sex with the Deputy Prime Minister of Australia, Dr Jim Cairns. NSW Police Commissioner Fred Hanson, who falsely denied he was corrupt. Sir Les Thiess, an industrialist, who falsely denied he bribed Sir Johannes Bjelke-Petersen, Premier of Queensland.

Sir Robin Askin, Premier of NSW, falsely denied he was an organised criminal, and would probably have got money from a politician, John Hatton, but sadly died before the case got on.

In 2005, Australia’s first law officer, P. Ruddock, 61, had a plan to allow people to sue from the grave. In *Justinian*, I reminded him that Voltaire observed in 1785: ‘We owe respect to the living; to the dead we owe only

truth', and said that any such legislation would inevitably be dubbed the Askin/Murphy clause in honour of Askin and High Court Justice Lionel Murphy, who was also a criminal.

Libel law has protected powerful and respectable organised criminals for seven centuries. It began with Edward I's Statute of Westminster (1275), which invented the crime of *Scandalum Magnatum*, slandering the magnates, most of whom were robber barons, but truth, at least nominally, was a defence. The legislation was re-enacted in 1378 to include judges, prelates, and certain named officials, many of whom were corrupt.

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

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

A 'glorious' revolution in 1688 was followed by a century of rule by a corrupt Whig oligarchy, but the Whigs were tricked into allowing the Licensing Act to lapse in 1695, and modern journalism dates from the first appearance of Daniel Defoe's *The Review* on 19 February 1704.

Judges and politicians perceived that the Press would become a rival for power and a threat to corruption. Professor Plucknett noted that in 1704 Chief Justice Sir John Holt said 'it is very necessary for all governments that people should have a good opinion of it', and 'from this it seemed to follow that any publication which reflected upon the Government was criminal'.

To silence proprietors, the oligarchs resorted to secrecy – always the bottom line on corruption - taxation, libel law, and bribery. It became a crime to report parliamentary debates, and in 1712 *The Review* and other journals, including Addison and Steele's *The Spectator*, were taxed out of existence. But libel law has proved the most effective. Professor Plucknett said:

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

It was thus a crime to write the truth about corrupt politicians and judges, laws, and institutions such as Parliament and the courts which were run as criminal enterprises. To ensure conviction, judges gave the verdict; jurors' only role was to decide whether the accused had published the slur.

The Zenger case helped to make the US the only English-speaking country in which freedom of information is not a legal fiction. John Peter Zenger, proprietor of *The New York Weekly Journal*, criticised the New York colonial Governor, William Cosby, and was tried on a charge of seditious libel on 4 August 1735. His Philadelphia lawyer, Andrew Hamilton, admitted that Zenger had published the slurs, but argued that citizens should have a right to tell the truth about public officials, and offered to prove the slurs were true. The jurors insisted on finding Zenger not guilty. The verdict did not change the law, but it did diminish prosecutions for seditious libel, and helped to establish the notions that truth should be an absolute defence, and that jurors should give the verdict.

Lord Mansfield was a Whig politician who was ineffably obtuse on policy towards American colonists. In his other role, Lord Chief Justice (1757-88), he invented a lie: the greater the truth the greater the libel, i.e. the more corrupt a judge was, the greater the penalty for exposing him. Public outrage resulted in Charles James Fox's Libel Act (1792), which gave libel verdicts to jurors. Professor Plucknett said Fox's Act 'was passed in spite of the unanimous opinion given by the judges at the demand of the House of Lords', which suggests that judges greatly feared exposure.

James Madison's Amendment I (1791) to the US Constitution stated: 'Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.' But it was not until *New York Times v Sullivan* (1964) that the Supreme Court ruled, by a 9-0 vote, that the First Amendment implied freedom of information. For the court, Justice William Brennan said public officials could only win a libel case if they could show that the slur derived from 'actual malice', i.e. 'knowledge that the [material] was false', or from a 'reckless disregard of whether it was false or not'. Actual malice was later extended to cover public 'figures'.

In US libel law, the burden of proof is on the plaintiff, but in the rest of the English-speaking world it is on the defendant, and US judges have taken the view that US libel defendants cannot get justice in England. US courts usually enforce orders made by overseas courts except when based on laws 'repugnant' to US law. A Maryland court refused to enforce an English libel verdict in 1997 because, on fundamental issues of free speech and a free Press, England's law 'is totally different' from First Amendment principles 'in virtually every significant respect'.

#### **4. Blackmail - Theft by Extortion**

In negligence and libel cases, unscrupulous clients and lawyers get money by pitching worthless claims at a sum lower than the cost of litigation. They calculate that the target company will make a commercial decision to submit

to the extortion. Perth barrister Paul Mendelow noted in *Discovery: Should the Whistleblowers Stop the Train of Inquiry?* (WA Law Reform Commission, 1998): 'Parties may attempt to force favourable settlement by driving up costs [of discovery] beyond the value of the case.'

SLAPP (Strategic Lawsuits Against Public Participation) suits can amount to legal terrorism. Julian Petley noted in *Free Press* 108 (Jan/Feb 1999) that professors Penelope Canan and George Pring, of the University of Denver, invented the SLAPP acronym when they noticed 'that corporations were increasingly threatening individuals in the environment movement with actions for defamation, conspiracy, invasion of privacy, interference with business, etc'. Robert Maxwell used a SLAPP variation, libel terrorism, to rob the public of their right to information for 30 years before he jumped or fell off his boat and drowned in 1991.

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

## 5. Workplace disputes

The Manuel Test, 'a fair go all round', was enunciated by NSW Conciliation Commissioner Gilbert Manuel in a 1971 wrongful dismissal case. Jurist Walter K. Olson says workplace disputes take up roughly half the business of US civil courts, but juries do not as a rule adhere to the test.

Jerold Mackenzie, who worked at the Miller brewery in Milwaukee, related an incident from *Seinfeld*, a television comedy of manners, in 1993. The 'office scold' complained and Mackenzie was dismissed. Under the Manuel Test, he might have got six months' wages, perhaps \$US20,000, or been reinstated on condition that he apologise to the lady, and that she stop making a nuisance of herself. In *Mackenzie v Miller Brewing* (1997), Milwaukee jurors gave him US\$26.6 million. His San Francisco lawyers, Littler, Mendelson, presumably got at least US\$8 million.

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

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

## 6. Larceny by Trick – Tax Evasion

What, if anything, is the difference between tax avoidance, tax evasion, and larceny by trick? The brightest lawyers tend to specialise in advising rich clients how to avoid paying tax. In London, they can make £2 million a year; in Australia they can be elevated to the High Court.

Justice Russell Fox said the English legal system was originally designed to benefit landowners, and was ‘later adjusted to the requirements of the wealthy and the powerful’ In the 20<sup>th</sup> century, the House of Lords said the better people have a right not to pay tax, notably in a case involving the 2<sup>nd</sup> Duke of Westminster, Hugh Richard Grosvenor (1879-1953). He loved Hitler and hated Jews but had the saving grace of owning much of Mayfair and Belgravia. Lord Atkin said in *Inland Revenue Commissioners v Duke of Westminster* (1936):

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

Lord Jim did not disclose how the poor and humble might evade tax. Also in 1936, the Australian Parliament took the view that fairness requires all to pay their share of tax, and that evasion is larceny by trick, the victims being the Treasury and the pay-as-you-earners who must make up the difference. Section 260 of the Income Tax Assessment Act 1936 said every “arrangement” which has the effect, directly or indirectly, of “defeating, evading, or avoiding any duty or liability imposed on any person by this Act [shall] be absolutely void”.

The justice ‘game’ thus required tax lawyers to persuade appellate Humpties that ‘absolutely’ does not mean ‘absolutely’; there could be an exception that would open the floodgates. In *Keighery* (1957), the deeply sinister Sir Garfield Barwick QC so persuaded High Court Chief Justice Sir Owen Dixon and Justices Sir Dudley Williams, Sir Eddie McTiernan, Sir Frank Kitto, and Sir Alan Taylor. Only Justice Sir William Webb adhered to the Parliament’s instructions.

Barwick went into politics in 1958, but failed as Attorney-General and Foreign Minister, and in 1964 Prime Minister Robert Menzies QC, who contrived to get people killed in four wars which were of no concern to Australia – Europe, Korea, Malaya and Vietnam - gave Barwick a soft landing as Chief Justice of the High Court.

Don Vito Corleone presumably knew whereof he spoke when he said (*The Godfather*, 1969): ‘A lawyer with a briefcase can steal more than a thousand men with guns.’ But he failed to tell us how many thousand men

with guns could equal a judge with a gavel. Nor do we know how many trillions were pilfered as a result of such judgments as those by Justice Brett (discovery, 1882), Lord Atkin (negligence, 1932, tax evasion 1936), and Sir Garfield Barwick (tax evasion 1957-81). But we can quantify the amount of tax money ‘liberated’ from the Australian Treasury in the eight years after Barwick, Sir Victor Windeyer, Sir Harry Gibbs, and Sir William Owen finished off Section 260 in *Casuarina P/L v the Federal Commissioner of Taxation* (1970): it was \$A800 million, some A\$3 billion at 2005 rates.

David Marr noted in *Barwick* (Allen & Unwin, 1980) that *Casuarina* concerned “a wholly artificial scheme ... to avoid tax ... The *Casuarina* Case became the cornerstone of the tax avoidance industry ...” And in *Curran* (1974), Barwick, Sir Harry Gibbs, and Sir Douglas Menzies said a profit of \$2782 was a loss, for tax purposes, of \$186,046. The self-employed rushed into tax schemes based on *Curran*. Some tax scheme promoters who entered into the spirit of the Barwick court went to prison, but Barwick, Gibbs and Menzies were not charged.

John Ahern, a Brisbane accountant who went to prison, explained how *Curran* worked in *A Taxing Time* (A & B Management, 1990). A company has shares worth \$100. It issues 100,000 bonus shares at \$1 a share. The shares are now deemed to be worth \$100,100 but are actually worth about \$100. The shares are sold for, say, \$200, a profit of \$100, but Barwick, Menzies and Gibbs would say it is a loss of \$99,900.

In 1978, Treasurer John Howard resorted to retrospective legislation to get back some of the \$A800 million lost through *Curran* and similar schemes, and in 1981 he introduced Part IVA to the 1936 Act. The section again purported to bar ‘blatant, artificial or contrived arrangements’, but lawyers and Humpties can always defeat the English language. Professor Russell Mathews, an economist, said in 1980 that Australian wage/salary earners paid 81.2% of all income tax, and in 1985 he said:

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

Don Vito would understand. An Australian tax office survey in the early 90s found that ‘a significant segment of the *BRW* magazine’s Rich List claimed to have a taxable income below the minimum wage’. In 1999, Tax Commissioner Michael Carmody said tax schemes had caused ‘\$3.5 billion in claims and rising’. Brian Toohey reported in *The Australian Financial Review* of July 2-3, 2005:

When the Howard government was elected in 1996, the Income Tax Act was about 3000 pages. It is now estimated to be more than 10,000 pages, not counting the innumerable interpretative guidelines and rulings issued by the ATO ....”

Lord Atkin lives. *The Financial Times* reported in April 2004: ‘An international task force to combat tax avoidance is to be set up by the US, Australia, the UK and Canada. The task force, which is expected to be based in New York, will focus on tax avoidance schemes employed by business and take joint action against such schemes.’

The solution is simpler: legislation saying that minimisation, avoidance, evasion, or larceny by trick is forbidden, and that judges who find an exception to the rule will be instantly dismissed.

## 7. Class Actions

Thomas Pelham-Holles, first Duke of Newcastle upon Tyne, was the bagman for a corrupt Whig oligarchy for 38 years (1724-62). He found the work debilitating; he had to find ‘pasture enough for the beasts that they must feed’. Likewise the law. As more young beasts are beguiled by the prospect of huge emolument, new ways of satisfying their greed must be found.

In 1960, there were 213,000 lawyers in the US; in 1991 there were 772,000. As numbers grew, judges were asked to find more pasture. Walter K. Olson notes in *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* (Truman Talley Books St Martin's Press, 2003) that in the mid-1970s, proposals ‘that judges create some new right to sue’ were ‘all but ubiquitous’. One was deployed in *Class Actions: Let the People In*, by Beverly C. Moore and Fred Harris, in *Verdict on Lawyers* (Eds. Ralph Nader and Mark Green, Crowell 1976). Olson wrote:

Moore and Harris argued that courts should act to make it much easier for lawyers to file class-action suits against American business. [They had] a long list of the injuries, ailments, frustrations, and indignities of everyday life over which, in their opinion, the courts should permit class-action lawsuits. The list enumerated some 24 varieties of harm, paired in each case with the various businesses that could be sued over them. ‘Tooth decay ... Sugar industry (food manufacturers)’ was no. 15 ... By even a conservative reckoning, the items on the list would have led to the redistribution of well over \$1 trillion a year back in 1976, at a time when the gross national product (GNP) of the United States stood at \$1.8 trillion ... More than half the nation's GNP, in other words, would be routed through lawyers' offices. A lot of it would stay there ...

In class actions against companies, those involved are its executives, its shareholders, the alleged victims, and the lawyers. If the executives had guilty knowledge of harmful practice and/or products, they should be dealt with in the criminal courts. The Manuel Test, a fair go all round, should apply to the others.

Justice Russell Fox noted in *Justice in the 21<sup>st</sup> Century* how class actions relating to asbestos, tobacco, intra-uterine devices, breast implants, and the like should be handled and at minimum cost. He said:

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

The great Tobacco-Medicaid wheeze of the 1990s should dispel any doubt that the adversary system is largely about money. It can be considered in terms of the Manuel Test, a rule which - at least nominally - 'bars a lawyer from charging or collecting a clearly excessive fee', and the practice known as 'pay to play'. Olson said in pay-to-play elected officials farm out public legal work to law firms which have donated to their campaigns.' The practice is deplored - if no more - by the American Bar Association.

Most tobacco suits failed on the ground of personal responsibility because the Surgeon-General had warned in 1964 that smoking is a risk, but in 1993 a Mississippi lawyer, Mike Lewis, gave Mike Moore, the Mississippi (Democrat) Attorney-General, the idea of shifting the goalposts from individual sufferers to taxpayers who paid the Medicaid funds which cared for them. A private lawyer, Dickie Scruggs - surely a Dickens invention - had contributed to Moore's election campaign, but Moore invited him to research and develop a case.

In May 1994, Moore sought from tobacco companies \$940 million said to have been spent by Mississippi on people with tobacco-related illnesses. Moore and Scruggs, known as Mo and Scro, traversed the country in Scruggs's Lear Jet to persuade state attorneys-general to join the action. Most of those who joined gave the business to private lawyers 'who', Olson said, 'were often among their most important campaign donors' He said 'a pay-to-play scandal [was] waiting to happen'.

In at least one case, pay to play seems to have meant trickle-down extortion. Catherine Crier, a former Texas judge who became host of *Catherine Crier Live* on Court TV, wrote in *The Case Against Lawyers* (Broadway, 2002) that it was alleged in 1998 that Texas Attorney-General Dan Morales 'had solicited large sums' from five law firms he hired to do the tobacco work, and that lawyer Joe Jamail was quoted in *The Houston Chronicle* as saying: 'Morales solicited \$1 million from each of several lawyers he considered hiring.'

The success of the Mo and Scro tour increased the pressure on tobacco companies to cave in. In November 1998, they agreed to a Master Settlement Agreement (MSA) of US\$246 billion over several decades. Cigarette prices

shortly jumped by 45 cents a pack. In view of the millions they stood to gain, lawyers handsomely waived their usual contingency fee of 40% of the payout. Olson said the fees ranged from 3% to 25%. In 2003, Dan Morales was imprisoned for four years for fraudulently trying to get US\$520 million from the settlement for a lawyer friend, Marc Murr, who had done little or no work on the tobacco action.

Lawyer Robert A. Levy, author of *Shakedown: How Corporations, Government and Trial Lawyers Abuse the Judicial Process* (Cato Institute, 2004), noted in 1999: 'In Florida, judge Harold J. Cohen ... denounced the state's 25 percent contingency contract, observing that the fee, \$233 million per lawyer, 'shocks the conscience of the Court.' The average contingency fee worked out at about 8.8%. Levy told me in May 2005:

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

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

No win no fee sounds good, but what if you lose? In 2002, a judge obliged a tobacco company to pay a Melbourne cancer victim, Rolah McCabe, \$700,000, but the Victorian Court of Appeal reversed the decision, and the children of the now-dead Mrs McCabe became liable for fees estimated to be at least A\$4 million. And what if you win? A Queensland law firm, Baker and Johnson, whose logo is a charging two-horned rhinoceros, got \$5000 compensation for a woman's back injury. They kept the \$5000 and asked her for another \$7000.

## e. Keeping the Money: Lawyers' Immunity from Suit

*O, the moon shines tonight  
On Mrs Porter,  
And on her D'Orta*

- Cartel carousing shong (hic)

Lawyers' immunity from suit was invented by judges in the Court of Exchequer in 1860. Courtesy of jurist Brett Dawson, we can name the guilty men: chief exchequer baron Sir Jonathan Pollock (1783-1870) and barons Sir

William Watson (1796-1860) and Sir George Bramwell (1808-92). In *Swinfen v Lord Chelmsford* (1860), they were put to the exigency of protecting the money of a once – and, as it turned out, future – head of the judiciary who had clearly stiffed his client, Ms Patricia Swinfen.

Born Fred Thesiger, Lord Chelmsford (1794-1878) had a glittering career. He was a plucky little midshipmite, 13, at the Battle of Copenhagen, but, perhaps tiring, for the moment, of rum, sodomy and the lash, he got out at 17 and took to the bar and Tory politics. He rose to Solicitor General, Attorney General and, in 1858, to Lord Chancellor, but went out in 1859 with the 14th Earl of Derby's government. Down on his luck and with mouths to feed – his son, Alf, a future appellate judge, was still at Oxford – Lord Chelmsford had to resort to the bar. Finding himself double-booked, he took the time-honoured course of settling the action which promised the smaller fee, although Ms Swinfen had instructed him by telegram not to settle. A June 2004 editorial in FLAC (For Legally Abused Citizens) Australia noted how the Exchequer barons saved the noble lord's bacon:

The 'reasoning' of the court was: we can't find any case where a barrister has been successfully sued for negligence, so the law must be that one cannot sue barristers for negligence.

Such impeccable reasoning cannot possibly be controverted, and the notion that lawyers cannot be sued for court work still obtains in Australia, if in few other common law jurisdictions. Its most recent assertion – largely on the ground that there must be some finality in legal actions - was *D'Orta-Ekenaike v Victoria Legal Aid* (High Court, March 10, 2005). Those for were Chief Justice Murray Gleeson and Justices Michael McHugh, Bill Gummow, Ken Hayne, Dyson Hayden, and Ian Callinan. When the lone dissenter, Justice Michael Kirby, shortly had an emergency heart by-pass operation, the legal journal, *Justinian*, commented: 'It's sad to see that the only judge on the court with a heart is now having trouble with it.'

## f. Defence of the Civil Adversary System

Defenders of the civil system say its virtues include client control and neutral and passive judges. Professor Stephan Landsman wrote in a section called *Defense of the Adversarial Process* in his *Readings on Adversarial Justice: The American Approach to Adjudication* (West, 1988, sponsored by the American Bar Association):

The adversary process provides litigants with the means to control their lawsuits. The parties are pre-eminent in choosing the forum, designating the proofs, and running the process.

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

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

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

If resolving disputes is the objective, Confucius (551-479BC) invented a lawyer-free method at about the same time that the Sophists showed lawyers how to become serial liars. In the Confucian system, mediators decide cases pragmatically on the circumstances rather than by reference to an abstract system. Despite Mao Zedong, China’s system is still vaguely based on Confucian benevolence and reciprocity. In a population of 1200 million, there are said to be 800 qualified lawyers and 10 million mediators, not all, one trusts, members of the secret police.

Pro-rata, the US would have 180 lawyers, England 40 and Australia 12. London would have five lawyers, Washington two-fifths of a lawyer, and Canberra one-fifth of a lawyer. That sounds about right.

## **g. Getting the Guilty Off: The Criminal Process**

A legal system exists to protect the community from criminals, but crime increases as the risk of incarceration decreases. Brett Dawson advises:

Criminal law is a get-the-guilty-off game. The bias in favour of the accused encourages rich criminals to pay lawyers. If they did not have a good chance of getting off, they might plead guilty, get the discount, and save the money for when they get out.’

The richest are usually organised criminals, some powerful and respectable, some not. Dawson says getting an acquittal requires little skill; all you need to learn at law school is how to say ‘I object’. The heavy lifting is done by 26 (and counting) anti-truth devices most of which were concocted by the lawyer-judge cartel after judges allowed lawyers to take control of the criminal process early in the 19<sup>th</sup> century.

Some say the adversary system produces ‘procedural truth’, i.e. truth according to the procedure. But truth is what the public believes it is, reality,

and procedural truth is not reality, e.g. O.J. Moreover, Judge Richard Posner's observation that the procedure is a contest of liars indicates that the spiritual home of procedural truth is George Orwell's 'lies are truth' in 1984.

### **i. Conviction Rates**

In *The Best Defense*, Professor Alan Dershowitz said the first two rules of what he called 'the justice game' are:

Rule I: Almost all criminal defendants are, in fact, guilty. (Brett Dawson says 'almost all' means 99%.)

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

French and German courts convict 90% of accused, i.e. they properly give 10% the benefit of the doubt. But common law judges sitting without a jury conceal damning evidence from themselves and then acquit as many as 75% of accused they know are guilty. In *The Australian* of 27 August 1994, Janet Fife-Yeomans reported an extraordinary statistic:

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.

Does this mean jurors are twice as intelligent as judges? Or that some judges acquit in order to avoid the embarrassment of being overturned by a higher court? Estimates of conviction rates in the adversary system vary, but it is clear that at least 50% of 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 conviction rate for murder in NSW was 26.5% and 11.5% for rape. In 2004, NSW Bureau of Crime Statistics figures showed that the conviction rate in sexual assault cases in NSW was 19%.

*The Hindu* reported in September 2003 that Mallikarjun Kharge, Home Minister for the state of Karnataka, had urged the Indian Government to change to the European investigative system on the ground that the conviction rate in Karnataka was 28% and the national average was 16%.

The effectiveness of the two systems can be compared through the NSW Independent Commission Against Corruption (ICAC), which uses the European system to investigate public sector organised crime. In the period 1989-95, ICAC recommended that the Director of Public Prosecutions (DPP) charge 208 persons with corruption. At trials under the adversary system, 63 were found guilty, a conviction rate of 30.3%.

Inquests also use the European system, but much of the evidence they find will not be admitted at a later trial because of the adversary system's rules for concealing relevant evidence. The Victorian Coroner,

Graeme Johnstone, found that a detective, Denis Tanner, murdered his sister-in-law, but the DPP did not charge Tanner. Nor did the South Australian DPP charge an organised criminal, Dominic Perre, although a coroner found that Perre had murdered a detective by letter bomb.

*The Guinness Book of Records* listed Lionel Luckhoo (1914-97), of Guyana, as the world's most successful [defence] barrister; he won 245 murder cases in a row. If 99% of his clients were guilty, Luckhoo got 241 murderers off. He was knighted in 1966, presumably for services to perverting justice, and in 1980 declared himself 'Ambassador for God'.

## ii. Unfair Bias in Favour of Defence Lawyers/Criminals

Members of the lawyer-judge cartel often speak of the vital importance of a fair trial, but former prosecutor William T. Pizzi, now a law professor at the University of Colorado, says in *Trials Without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure, and What We Need to Do to Rebuild It* (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 like to come under attack – including not just prosecution witnesses, but the prosecutor personally as well as the judge.

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. As Justice Fox observed, the public believes that fairness means truth. So far from seeking the truth, the adversary system has some 26 anti-truth devices, including rules for concealing relevant evidence. The devices unfairly bias the law in favour of lawyers and their criminal clients, and against victims, detectives, prosecutors, witnesses, jurors, and the public.

Nonetheless, the cartel persists in claiming that concealing the truth makes trials fair because it protects accused from jurors. *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.' Professor Julius Stone QC and former Justice W.A.N. Wells put it more delicately in *Evidence: Its History and Policies* (Butterworths, 1991):

[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