from dangers of confusion and prejudice. They represented the judges' evaluation of the mental calibre of the jury. To some extent this evaluation was excessively low, and presented unnecessary obstacles for the free exercise of their common sense.

But Stone and Wells said 'these rules are today applied to all trials, whether before a jury or before a judge alone'. That either means that judges are as unintelligent as they believe jurors to be, or there is some other reason, e.g. to make it relatively easy for lawyers to get rich criminals off. In 1794, Edmund Burke, who trained as a lawyer, said the rules of evidence were of 'so small a compass that a parrot he had known might get them by rote in one half-hour and repeat them in five minutes'. The cartel invented most of the rules and other anti-truth devices, including a discretion to conceal ALL evidence, after judges gave lawyers control of the criminal process soon after 1800. Two hundred years later, police are beginning to demand that they be allowed to protect the community properly. Ian Blair, Deputy Commissioner of London's Metropolitan Police (Scotland Yard), said in May 2003:

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

Even judges are beginning to say trials should be fair. Chief Justice David Malcolm, of Western Australia, said in 1999: 'Historically, the concept of a fair trial has applied [only] to the accused. In my view, that concept needs to be changed - a trial should be fair not only to the accused but also to the victim and the prosecution.' But fairness requires a search for truth, and that requires the abolition of the adversary system and its anti-truth devices.

iii. 26 Anti-truth Devices

1. Precedent

Precedent is hearsay, which is usually not admitted at trial because the original speaker is not available for cross-examination which might show he was wrong, confused or had a hidden agenda. Nonetheless, *stare decisis* (the decision stands) means abiding by precedent, i.e. judges are bound by the assertions of untrained and possibly corrupt judges. Precedent thus locks all manner of injustice into the system. Significantly, it is only since the lawyer-judge cartel invented the criminal adversary system that judges have been bound by precedent Professor Plucknett wrote:

… even as late as the days of Baron Parke [1782-1868; Court of Exchequer 1834, created baron 1856] … it was possible for that very learned judge to ignore decisions of the House of Lords … The 19th century produced the

changes which were necessary for the establishment of the rigid … theory as it exists today.

The cartel claims that abiding by precedent provides certainty and predictability, but in reality it enables members to riffle through precedents until they find one that suits their agenda.

2. The Accusatorial (PROVE IT!) System

Part 2 of this book, How It Happened, notes that the accusatorial system still used in Britain and its former colonies is a relic of the Dark Ages, which technically began in 476 AD. In that system, one side made an accusation and the other said: Prove it! It was never an investigation into the truth: the 'proof' involved such mumbo jumbo as throwing a suspect witch into a river, and a hidden and inscrutable 'judge', the deity, supplied the verdict on the basis of whether she sank or floated.

In the modern version, the adversary system, prosecutors are required to prove the case after much relevant and compelling evidence is concealed. This reaches its logical conclusion when a judge conceals ALL the evidence and then invites a bemused prosecutor to prove it.

That happened in a Melbourne case in which the Australian National Crime Authority (NCA), which investigated white and blue collar organised crime, accused John Dorman Elliott, Kenneth Biggins, and Peter Scanlon were accused of stealing $66 million from a brewery they controlled. Robert Richter QC appeared for Elliott. After six months of argument (without a jury being empanelled) about what evidence would be concealed, Justice Frank Hollis Rivers Vincent said in effect he was going to suppress the evidence of 130-odd witnesses, and declared the accused not guilty when the prosecutor offered no other evidence.

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

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

That may be, but it was a Dark Ages system which - to continue Mr Elliott's typically delicate metaphor - raped and pillaged the body politic. The Victorian appeal court later said Vincent was wrong to conceal the evidence, but the horse had bolted: Elliott, Biggins and Scanlon could never be retried, because the common law says wrong not guilty verdicts can never be wrong (see Double Jeopardy below).

3. Client-Lawyer Secrecy

How long do you think the big-shot mobsters would last if the lawyers didn't show them how to operate?

- Philip Marlowe, *The Long Goodbye*, 1953

The privilege of client-lawyer secrecy protects rich criminals but not the possibly innocent. The argument for secrecy made by Sir James Knight-Bruce, chief judge in bankruptcy, in *Pearse v Pearse* (1846) begins with a lie and does not improve. He said:

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

The privilege first appeared in *Berd v Lovelace* (1577), a century after judges began to give lawyers control of the civil process. Perhaps indulging a taste for irony, Justice Michael Kirby, of the Australian High Court, said in *Propend* (1997): 'Early cases suggested that it [the privilege] belonged to a solicitor and derived from his honour as a "professional man and a gentleman".'

Rich criminals got a nasty surprise in 1743 when, as noted in the section on ethics, James Giffard, a Dublin solicitor but no gentleman, revealed that he had conspired with an organised criminal, the Earl of Anglesea, to procure a judicial murder. Fortunately, Justice Sir Francis Buller suddenly discovered in *Wilson v Rastall* (1792) that the privilege actually belongs to the client, not the lawyer. Rich criminals could continue to conspire with lawyers safe in the knowledge that their crimes were safe from meanly prying eyes.

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

As for the possibly innocent, a judge sent me the Australian High Court judgment in *Carter* (1995) with an instruction: 'Read this and weep.' Louis James Carter, a Brisbane accountant charged with fraud, said certain documents covered by the privilege would prove his innocence. Should judges opt for justice or law? The voices of infallibility went for law, by the usual narrow margin. Justices Mary Gaudron and John Toohey said Carter should have the documents. Chief Justice Sir Gerry Brennan, Justice Michael McHugh and a rather apologetic Justice Sir Billy Deane said he should not. Carter got four years.

4. Concocting a Defence: The Lecture

Judge (1957-59) John D. Voelker (1903-91), of the Michigan Supreme Court, published *Anatomy of Murder* (1958) under the pen name Robert Traver. It was inspired by a case in which Voelker defended the accused. Fred D. Shapiro has a quote from the book in *OxfordLQ*:

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

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

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

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

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

'Morally, perhaps, but not legally.'

Biegler told his client a murderer might not be guilty if he was temporarily mad, and to go back to his cell and think about it. The client took the hint, and got off.

In 1993, Lorena Bobbitt successfully pleaded temporary insanity to a charge of slicing off her husband's penis while he was asleep.

5. Concocting a Defence: The Theory of the Case

The theory of the case is a device by which lawyers say it wasn't our client, therefore it must be some other person or thing. Professor David Luban wrote in *Lawyers and Justice*:

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

The theory of the case may have the merit of spinning the case out and creating a 'reasonable' doubt. A Sydney lawyer, John Dobies, derided what he called the polar bear defence, which sounds like the sodomised parrot defence. He said that if the body of a murdered man had scratches on it, the theory of the case might be that a polar bear did it. The lawyers would then have to hire witnesses expert on the incidence of polar bears in Sydney, and witnesses who would say they saw a polar bear that day.

6. Delay

Peter Faris QC, former head of Australia's National Crime Authority (NCA), told the 6th International Criminal Law Congress in Melbourne in 1996:

> Excellent books have been written discussing criminal defences. In my view, the major criminal defences, in order of importance, are as follows: 1. Delay. 2.Confusion. 3. Allegations of conspiracy by the police and prosecuting authorities to conceal and tamper with the evidence, thus raising a reasonable doubt. 4. Defences set out in the excellent books.

Benefits of delay include: witnesses forget evidence or die; prosecutors tire; the cost of prosecution becomes prohibitive. Lawyers supervised the NCA's investigations into suspected organised crime, as in the Elliott case noted above. It began in 1989; charges alleging theft of $66 million were laid in 1993; the case collapsed when the judge wrongly concealed the evidence of some 130 witnesses in 1996.The NCA lawyers' dismay at the experience was recorded by its oversight body, the Parliamentary Joint Committee (PJC), in its *Third Evaluation of the* NCA (1998). The PJC reported that Greg Melick, a barrister member of the NCA, said:

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

7. Separate trials

Lawyers for several defendants can get separate trials because some evidence against one is different from that against others. And a lawyer for a person charged with several similar crimes can get a separate trial on each because all the evidence might reveal a devastating pattern. Natasha Wallace reported in *The Sydney Morning Herald* of 2 July 2004:

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

One can only wonder what Judge Latham thought of presiding at the eight trials.

8. Shifting the Goalposts

Defence lawyers naturally try to shift the goalposts from their client to the victim, police, prosecutors, or the media. Lawyer/reporter Jeffrey Toobin gives a stark example in what is generally thought to be the best account of the Simpson case, *The Run of His Life: The People v. O.J.. Simpson* Touchstone 1997).

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

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

9. Diminished Responsibility

In most crimes, the prosecution has to prove both a wrongful act (*actus reus*) and a wrongful intent (*mens rea*). It is not a crime to think about murder and

not do it, nor is it a crime to commit murder if you were mad at the time. The latter derives from a House of Lords opinion in *M'Naghten* (1843). Diminished responsibility is a relatively recent wrinkle on *M'Naghten*. In the 1960s, lawyers began to persuade judges that if the accused was a little bit mad, he might only be a little bit guilty; trials tended to become contests between paid psychiatrists.

Judge Burton Katz is not impressed. He wrote in *Justice Overruled: Unmasking the Criminal Justice System* (Warner, 1997):

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

Judge Katz may be getting dangerously close to common sense. The Katz Test may be applied to two cases. In 1978, Dan White, who had been sacked from the San Francisco public service, procured a gun; climbed through a basement window in the City Hall to evade metal detectors; evaded Mayor George Moscone's bodyguards; killed Moscone with four shots; reloaded; went to the office of another official, Harvey Milk, and killed him with five shots. White was charged with first degree (premeditated), murder.

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

Helen Garner reported in *Joe Cinque's Consolation: A True Story of Death, Grief and the Law* (Picador, 2004) that in September 1997, Anu Singh, 25, a self-obsessed drama queen and final year law student in Canberra, Australia, got advice on how to inject an overdose of heroin. During the night of Saturday, 25 October 1997, she put a knockout drug, Rohypnol, in the coffee of her amiable boy friend, Joe Cinque, 26, a civil engineer. At about 3 am on the Sunday, she injected heroin into his comatose body but he failed to die. She went out, bought more heroin and injected him again at about 10 am. He died about 2 pm. She was charged with murder.

In April 1998, Justice Ken Crispin, sitting without a jury, agreed with psychiatrists who said Singh's responsibility was diminished because she was somewhat mentally disturbed. He found she was not guilty of murder but guilty of manslaughter and gave her a minimum of four years, backdated to the date of her incarceration, October 26, 1997. Anu Singh passed her law finals in prison, and was out in October 2001. A glittering

career was predicted: robbing a human being of his life is the cruellest action; adversarial cross-examination is the Theatre of Cruelty.

Noting 'the ugly divide between morals and the law', Garner asked whether 'the moral failure of the law' gives judges an 'icy chill'? As noted, the law has no moral compass because it does not seek the truth, but moral failure does not appear to chill judges; if it did, they would, like Judge Katz, try to do something about it.

10. The Abuse/Self Abuse Excuse

Lyle and Erik Menendez, of Hollywood, planned their parents' murders and claimed that years of verbal, physical, and sexual abuse made them fear they were going to be killed. A psychiatric witness offered research on snails to support her claim that fear had 're-wired' Erik's brain. In 1993, jurors were divided; some felt they were guilty only of manslaughter. At the second trial in 1996, much of the abuse evidence was ruled irrelevant, but a claim that Erik suffered from Post Traumatic Stress Disorder (PTSD) was admitted. It was asserted that PTSD prevented him from formulating thoughts necessary for premeditated murder, but both were found guilty of murder.

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

11. Privilege Against Self-Incrimination/Right of Silence

Sir Harry Gibbs, Chief Justice of the Australian High Court, defined the privilege against self-incrimination - of which the right of silence is a part - in *Sorby v The Commonwealth* (1983). Quoting *Lamb v Munster* (1882), he said a suspect cannot be compelled 'to answer any question, or to produce any document or thing, if to do so "may tend to bring him into the peril and possibility of being convicted as a criminal".'

The privilege provides confirmation, is such were needed, of the thesis that the law is a get-the-guilty-off game. Cambridge law professor Glanville Williams said in *The Proof of Guilt: A Study of the English Criminal Trial* (Stevens, 1963): ' … immunity from being questioned is a rule which by its nature can protect the guilty only. It is not a rule that may operate to acquit some guilty for fear of convicting some innocent.' US Chief Justice (1953-69) Earl Warren (or his law clerk – it is believed that clerks write Supreme Court opinions) thus spoke truer than he knew when he said in *Miranda v Arizona* (1966) that the privilege is 'the essential mainstay of our adversary system'.

The correct formulation of suspects' duty is attributed to St. John Chrysostom (c. 347-407), a Syrian lawyer and Archbishop of Constantinople.

He said no one has to volunteer guilt, but if accused, he must show his innocence, if he can. That became canon law. Justice Ken Marks, of the Victorian Supreme Court, quoted the canon law in '*Thinking up' about the right of silence and unsworn statements* (*Victorian Law Institute Journal*, 1984). In Latin, it reads: *Licet nemo tenetur seipsum prodere, tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare*, i.e. Although no one is compelled to accuse himself, yet one accused by rumour is compelled to present himself to show his innocence if he can and to clear himself.

The modern privilege is based on a 16th perversion of canon law which was exhumed by Blackstone, entombed in the US Constitution, and imposed on the system after lawyers got control of the process. Thus:

Chief Justice Sir James Dyer, president of the Court of Common Pleas, turned canon law on its head in 1568; he extracted *nemo tenetur seipsum prodere* - no one is compelled to accuse himself - and used it to free a suspect. Judges ignored Dyer for 200 years; but Blackstone wrote in 1765: 'At the common law, *nemo tenebatur prodere seipsum*.' (No-one was compelled to accuse himself.). That was not the common law at all, Yale professor John Langbein's research on the period 1660-1800 showed there was not 'a single case in which an accused refused to speak on asserted grounds of privilege, or in which he makes the least allusion to a privilege against self-incrimination'.

Jeremy Bentham observed (in 1827) that the privilege was irrational and was perpetuated only by those 'duped and corrupted by English lawyers', i.e. Blackstone. One dupe was James Madison; his Fifth Amendment (1791) to the US Constitution states: ' … nor shall be compelled in any criminal case to be a witness against himself.'

The privilege certainly gets the guilty off. Law lecturer David Dixon, of the University of NSW, said in 1997 that about half those who stayed silent were convicted. Since 99% of accused are guilty, it appears that the privilege alone gets 50% of serious criminals off. Alun Jones QC said: 'I am told that over half of all defendants in America decline to give evidence.'

Justice Lionel Murphy, of the Australian High Court, was charged with perverting justice. He gave evidence, was seen to be shifty and evasive and was found guilty, but got a retrial on a technicality, refused to give evidence, and got off in 1986. O.J. Simpson got off two murder charges largely because of race, but staying silent was useful; he had to speak at his civil trial in 1996, was seen to be shifty, evasive and contradictory, and was found responsible for the murders.

As a matter of human dignity, suspects can remain silent if they choose, but (except in the UK since 1994) guilt cannot be inferred from their silence Justice Geoffrey Davies, of the Queensland Court of Appeal, pointed out in "*The Prohibition Against Adverse Inferences from Silence: A Rule without a Reason?*" (Part 1, *Australian Law Journal*, 2000):

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

Immunity from adverse inference from silence became a rule of law in the second half of the 20th century. The Australian High Court edged towards removing the immunity in *Weissensteiner v Her Majesty* (1993), and England abolished it in 1994, but it was largely restored by the Commonwealth and NSW *Evidence Acts* of 1995. Section 20 (2) of the NSW Act says judges - but not prosecutors - can comment on an accused's refusal to speak, but cannot suggest it was because he was guilty.

12. Extension of Presumption of Innocence.

The presumption of innocence is a legal fiction; if taken literally, no criminal would be charged. The reality is a presumption of agnosticism: the suspect/accused may be innocent, or he may not. Stone and Wells note in *Evidence*: 'The presumption of innocence is entirely flexible. If the omission to do an act would be illegal, the law presumes that it was done; if the doing of it would be illegal, the law presumes that it was not done.' There are also presumptions of guilt in libel and contempt and, in some jurisdictions, goods in custody. If, for instance, police find 10 kilos of heroin in the trunk of a man's car, he is presumed guilty unless he can prove it is not his.

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

The latter has spawned another legal fiction: repeat offenders, e.g. rapists, are presumed to be first offenders even if they have been found guilty of several previous rapes. The House of Lords birched Lord Chief Justice Rayner Goddard for saying of pattern evidence (*R v Sims*, 1946): 'If one starts with the general proposition that all evidence that is logically probative is admissible unless excluded [by a specific rule], then evidence of this kind does not have to seek a justification.' Their lordships said (*R v Hall*, 1952) he was wrong because his proposition tended to subvert the presumption of innocence. Lord Goddard might have replied that probative evidence tends to subvert the presumption of innocence, but had to toe their line.

13. Preliminary (Committal) Hearings

In theory, preliminary hearings exist to allow a minor judicial officer to decide whether the evidence is sufficient to commit an accused for trial. This

presumes that all District Attorneys and Directors of Prosecutions are incompetent. The reality is that preliminary hearings enable lawyers to increase their business, to concoct a false defence; to 'destroy' prosecution witnesses out of the sight of jurors, and hence to encourage them not to subject themselves to cross-examination at trial.

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

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

14. Cross-Examination - General

Is it not true that last night you committed sodomy on a parrot?

- Irving Younger

Younger's technique goes back to the Sophists, but the modern format of cross-examination is a product of lawyers' takeover of the civil process beginning about 1460. Sir Thomas Smith (1513-77) noted in *De Republica Anglorum* (published 1583) a jury trial which had 'not only the examination but also the cross-examination of witnesses in the presence of the judge, the parties, their counsel and the jury'.

John Henry Wigmore (1863-1943), dean of the law school at Northwestern University, Evanston, Illinois, said in *A Treatise on the System of Evidence in Trials at Common* Law (1904) that cross-examination is 'beyond any doubt the greatest legal engine ever invented for the discovery of truth'. That is true, but it has little meaning; defence lawyers do not seek the truth, and their clients can avoid cross-examination by remaining silent.

Professor John Langbein said 'cross-examination ... is often an engine of oppression and obfuscation, deliberately employed to defeat the truth'. Justice Russell Fox said: ' … a clever cross-examiner can make even the most reliable testimony look questionable, and can so confuse the context that an understanding of the answers becomes blurred.'

Defence cross-examiners aim to create a 'reasonable' doubt in the mind of at least one juror. Techniques include shifting the blame, lying to witnesses, interminably asking the same question with slight variations to

trick them into answering Yes when they mean No; and use of verbal thuggery to intimidate and 'destroy' them.

Because 99% of clients are guilty, defence lawyers fear the truth. Irving Younger's 10 Commandments of Cross-Examination include: 'Never ask a question to which you don't already know the answer.' Even Atticus Finch (*To Kill A Mockingbird*, 1960), who put thousands of young idealists into the wrong trade, said:

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

OxfordLQ notes a passage in lawyer-novelist Erle Stanley Gardner's *The Case of the Queenly Contestant* (1967). [Perry] Mason: 'The purpose of cross-examination is to find out whether a witness is telling the truth.' Lovett laughed sarcastically. "That's the line they try to teach you in the lawbooks and in the colleges. Actually, when you come right down to it, you know and I know, Mason, that the object of cross-examination is first to find out to your own satisfaction if a witness is telling the truth, then you go on to the next step – which is to try and confuse the witness so that any testimony the witness has given is open to doubt".'

Defence cross-examination is inevitably anti-truth, anti-fairness, anti-justice, and anti-morality. By contrast, in the pro-truth investigative system, a trained judge questions witnesses in a neutral way and does not allow lawyers to confuse the issue.

15. Cross-Examination: Sex Crimes Against Girls and Women

A 1993 British Home Office study showed that 99% of rapists escape justice. The NSW Bureau of Crime Statistics and Research estimated that 12,000 NSW women were victims of a sexual or indecent assault in 2003, but only 2707 reported the crime to police; 858 were charged; and 361 were found guilty. The conviction rate is 3% in terms of estimated victims, partly because brutal and pornographic cross-examination deters victims from testifying. Dr S. Caroline Taylor, author of *Court-Licensed Abuse*, Peter Lang, 2004), told *The Sydney Morning Herald*'s Edmund Tadros on 9 December 2004:

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

'Belinda', 22, the victim in one of four cases in *Court-Licensed Abuse*, said: 'I know it's part of [the lawyer's] tactics but you don't need to keep asking the same question. That's one of the most confusing parts, where they keep asking the same question and they're rewording it to try and slip you up.'

Dr Taylor said: 'What the defence barrister wants to do is continually shock and confront [the complainant] to affect the quality of her evidence. A standard tactic … is to attack complainants with such ferocity at a committal hearing that they are too afraid to go to trial.' Tadros quoted Stephen Odgers, chairman of the NSW Bar Association criminal law committee, as saying:

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

16. Cross-examination: Sex Crimes Against Children

In a 1999 report by the Australian Broadcasting Corporation's *Four Corners* on sex crimes against children, reporter Peter George noted a case in which a mother heard her five-year-old son crying in a lodger's room. The boy came out with his shorts in his hand and told her what happened. She called police and semen was found in his anal passage. There was thus a witness, an immediate complaint, and evidence corroborating the boy and his mother, but the verdict was not guilty.

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

Have you ever seen this done before? - No.

Have you ever been in the house when your mother's done this? - No.

Are you sure? – Yes …

You didn't tell the other policewoman the first time, did you? - No.

No. That's because it didn't happen, isn't it, John? - It did happen. …

Well why are you crying if the story is true, John? - Cos you said it isn't. …

John, you know what telling lies means, don't you? And that's what you're doing today, isn't it? - I'm not telling lies ...

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

The trial verdict was not guilty.

Dr Taylor told Tadros: 'If people knew that kids as young as seven have been asked whether they fingered their own vagina, they would ask, "What is going on here"?' Not surprisingly, an Australian study found that lawyers and judges whose children had been sexually violated would not allow them to suffer the second trauma of cross-examination.

17. Cross-examination: Yes-No Answers

The oath imposed on witnesses is a legal fiction; the whole truth cannot be told through Yes-No answers, e.g. Have you stopped beating your wife? But Irving Younger said: 'Never permit the witness to explain his or her answers.' Insistence on yes-no answers allows lawyers to cross-examine to oblige witnesses to agree with things they do not believe.

18. Cross-examination: Theft by Extortion

Fear of barbaric cross-examination induces women not to report rape, or, having reported it, not to proceed from preliminary hearing to trial. Cross-examination of that sort is thus a form of blackmail, i.e. theft by extortion: it robs victims of justice.

19. Rule Against Secondhand Evidence (Hearsay)

If the rule against hearsay is valid, no history prior to say, 1900, would be accepted; the law says such evidence is inadmissible because the original speaker is not available for cross-examination. O.J. Simpson (who did not make himself so available) was alleged to have cut the throat of his former wife, Nicole. At his trial in January 1996, Judge Lance Ito concealed hearsay evidence of diary entries in which she said she was afraid Simpson might kill her. He also concealed evidence that she rang a refuge five days before her death and said she was afraid because Simpson was stalking her. Ito said:

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

In *Howzat?* (*London Review of Books*, 25 September 2003), Lord Justice Stephen Sedley said the English and US criminal process is still caught up 'in the absurdities of the rule against hearsay evidence … which even lawyers have difficulty in understanding and applying. (Is it permissible to testify that when the accused ran off, someone shouted "Stop thief!" and so on.)'

In the investigative system, hearsay evidence is weighed, not concealed. That was also the common law rule until lawyers got control of

the process. Professor Julius Stone and former Justice W.A.N. Wells said in *Evidence: Its History and Policies*:

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

One exception to the rule is for statements made by people who know they are dying. A sailor named Riley was stabbed on an Australian navy vessel in March 1942. Before he died, he told a doctor that Acting Leading Stoker A.R. Gordon and Stoker E.J. Elias did it, but that was held to be inadmissible hearsay, because the doctor did not tell Riley he was about to die.

20. Rule to Conceal Evidence of a Pattern of Criminal Behaviour

The rule against evidence of a pattern of criminal behaviour, aka the rule against similar facts, obliges prosecutors to falsely imply to jurors that the accused is a first offender. In a 2003 theft case, an incompetent Welsh thief was found not guilty after his 247 previous convictions for theft were concealed from the jury. The rule is thus unfairly biased in favour of lawyers for repeat criminals, e.g. sexual predators and organised criminals, pin-striped and otherwise. Oliver Cyriax, a lawyer, wrote in *The Penguin Encyclopedia of Crime* (Penguin 1996):

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

The rule is a relatively recent concoction. Prosecutors could produce evidence of other crimes which might show 'that the accused is a person likely to have committed the offence for which he is being tried' until Lord Chancellor Farrer Herschell (1837-99) ruled otherwise in *Makin v Attorney-General of NSW* (1894). *Makin* established that judges must conceal pattern evidence unless to do so would be 'an affront to common sense', but common sense is a stranger to the system. Dr John Forbes, of the University of Queensland, noted in *Similar Facts* (Law Book Company, 1987) that New Zealand appellate judges said in *R v Hall* (1887):

> Viewed in the light of science or common sense … the common law must often result in what the public may regard as a failure of justice. That is really not our concern.

The US has an exception to the rule for organised criminals in the Mafia, the courts, and Wall Street. After Joe Valachi, a hitter in the Genovese family, explained the structure of the Mafia to a Senate committee in 1963, Senator John McClellan's legislation aimed at organised criminals was in hand in 1968 when Richard Nixon became President with a policy against organised crime. It was passed in 1970 as the Organized Crime Control Act, Title IX of which is called Racketeer-Influenced and Corrupt Organisations, or RICO for short. Since RICO made it harder for lawyers to get rich criminals off, I asked its architect, law professor Bob Blakey, now of Notre Dame, in 2001 how he got it past the American Bar Association. He replied:

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

RICO's effect on the Mob confirmed that the rule against pattern evidence perverts justice on a huge scale. From 1981 to 1992, RICO put away 23 previously untouched Mafia bosses throughout the US, including heads of the five New York families: Frank (Funzi) Tieri and Anthony (Fat Tony) Salerno (Genovese family), Anthony (Tony Ducks) Corallo and Vittorio Amuso (Lucchese), Carmine (The Snake) Persico and Vicorio Orena (Colombo), John Gotti (Gambino). Vincente (Chin) Gigante (Genovese family) was convicted in 1997. RICO was also used from 1984 to 1994 to gaol 20 Chicago judges for extorting bribes and 50 lawyers for paying them.

In 1994, US federal rules of evidence were revised to allow the use of prior alleged acts in federal sex cases, and a few states, including California, Indiana, Illinois and Missouri adopted similar rules.

In 2004, British Home Secretary David Blunkett, announced a plan to give judges a discretion to let jurors hear of an accused's previous convictions. He said: 'These reforms put victims at the heart of the justice system. Trials should be a search for the truth [!] and juries should be trusted with all the relevant evidence to help them to reach proper and fair decisions.' If the British Government really believed that, they would abolish the other anti-truth devices. In any event, it is unwise to give judges a discretion; as lawyers, they believed that farness means concealing evidence.

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

21. Rule to Conceal Evidence Said to Have Been Improperly Gained

Common law countries vary on concealing evidence said to have been gained improperly. England tends to let the evidence in if it is reliable, and Canadian and Australian judges are supposed to admit it if it is reliable and the alleged offence is worse than the investigators' alleged improper behaviour. In the US, where it is called the exclusionary rule – as if it is the only rule for concealing evidence - *Mapp v Ohio* (Supreme Court 1961) obliges judges to conceal ALL such evidence. Circumstantial evidence suggests that the Chicago Mob effectively appointed *Mapp*'s architect, Justice Tom Clark.

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

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

22. The *Christie* Discretion to Conceal ALL Evidence.

The *Christie* discretion is a piece of metaphysical claptrap expounded by Lord Reading and other law lords in *Rex v Christie* (House of Lords, 1914). It expanded a general discretion to conceal some evidence on the ground of 'fairness' to a discretion to conceal ALL evidence, however damning. Stone and Wells said in *Evidence* that the evidence so concealed 'must be of comparatively little probative weight [and] this slight relevance must be accompanied by a great potentiality for prejudice'.

The judge could thus not consider the prejudicial effect unless he had first decided that the evidence only slightly (?) tended to prove guilt. Perhaps the required ratio was 10% probative and 90% likely to convict. In practice, however, it seems likely that some judges, subconsciously or otherwise, first note that the evidence is likely to cause a guilty verdict, and then decide it is only slightly probative. Even if he is plainly wrong, the prosecutor cannot get a second opinion from a higher court: the judge's opinion concerns facts and appeal courts deal only with law.

The authority on the discretion, Dr John Forbes, of the University of Queensland, noted in *Evidence in Queensland* (The Law Book Company, 1992):

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

Dr Forbes said the '*Christie* discretion may contain "a large subjective element' [*R v Sang*, 1980], and its operation may sometimes be 'whimsical or idiosyncratic' [S*elvey v DPP, 1970*]. Judge Brian Boulton revealed in 1992 that Judge John Helman, head of the Queensland District Court, had admitted that if different judges applied the discretion to the same evidence the result might be 'chaos'.

The District Court, popularly known as the Dizzo, was the scene of the trial, mentioned in the Preface, of Sir (as he then was) Terence Lewis, who contrived to be at once a major organised criminal and Queensland Police Commissioner. The prosecutor, Bob Mulholland QC, said some of the evidence excluded under the discretion was 'incapable of being categorised as of slight or trifling weight'. Among that evidence was a tape of a phone calls between Sir Terence's bagman, Jack Herbert, and another accomplice, Barry MacNamara, in which they fret that Sir Terence had stiffed them and a John Garde of $1,000 – $333.33 each – from the proceeds of a $25,000 bribe extorted from Jack Rooklyn, a Sydney yachtsman and organised criminal.

MacNamara said: 'Oh, I think it is a shitty trick, you know, I really do … And to think, for a fuckin' shitty thousand dollars … I think it's a very bad act.' Later, he said John [Garde] 'took it badly … he's going to give that bloke [Lewis] a grand light this month', but Herbert cautioned: 'Terry loves this stuff'; he might be a bit upset if I did it back to him'. Judge Tony Healy told John Jerrard, for Sir Terence, that 'the conversation tends to suggest … that your client is a person who is capable of ratting on his friends … It would be very prejudicial to him to let it in, so I am excluding it'.

The probative/prejudicial ratio in the *Christie* discretion was changed dramatically by the Australian and NSW *Evidence Act* 1995. Section 137 of the NSW version states: 'In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.' On a scale of 100, the ratio thus went from, say, 5/95 to 49/51; the gap was reduced from 90 to virtually zero.

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

23. Reasonable Doubt (for a Reasonable Price)

After the right of silence, the formula for the standard of proof, beyond reasonable doubt, is the single most effective device for getting rich criminals off: because jurors do not know what the formula means, and,

because of the curse of precedent, judges are not allowed to tell them it simply means what the French formula says: are you intimately (thoroughly) convinced?

The Anglo-American formula, and judges' refusal to explain it, is thus a major player in the get-the-guilty-off game which followed the handover of the criminal process to lawyers. Yale law professor John Langbein wrote in *The Historical Origins of the Privilege Against Self-Incrimination at Common Law* (Michigan Law Review, March 1994):

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

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

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

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

> Very few people who've come up in the criminal courts when I've been trying them have not been guilty, but a lot of them have got off' because jurors' common sense falters in the face of warnings about reasonable doubt. I've often felt my heart sink when I know a bloke's probably guilty, to have to give all these warnings and I'm afraid the jury will heed them. And they often do.

Justice Christopher Wright, of the Tasmanian Supreme Court, said in 2000: 'Too often unsure jurors will shelter behind the standard of proof beyond reasonable doubt, making it the safe option ... I am fully convinced that juries return a wrong verdict in about 25% of all cases.'

Unlike the US, it is a crime in NSW to seek information from jurors. John Laws, a Sydney broadcaster, was given a suspended sentence of 15 months for asking a juror why she apologised to the widow of Angelo Cusumano for the not guilty verdict of a man charged with murdering her husband. The juror had said:

To me there was absolutely no doubt. To one other juror there was absolutely no doubt. People confessed on the jury that in their hearts they felt - but that it hadn't been proven ... I said ... please let us bring in an undecided verdict, and they said, absolutely not, it hadn't been proven ... And I fought for three days ... but I was too weak ... My heart goes out to Mrs Cusumano and those children.

In a case of alleged insider trading noted in Section 3, the defence was that the accused, Hannes, did not buy certain shares; a Mr X did. Hannes did not produce Mr X, but his lawyers argued that the prosecution could not prove beyond reasonable doubt that Mr X did not exist.

24. Inscrutable Jurors

Professor John Langbein quotes a German legal maxim, *Ohne Begrundung kein Urtre,* without a statement of reasons, there can be no valid judgment. Since common law jurors have never had to give reasons, the system has thus been open to corruption since it was invented in 1166, e.g. Rodney King, O.J. Simpson, Michael Jackson, and a man tried for heifer-rustling at Dubbo, NSW. Melbourne barrister Aubrey Gillespie-Jones reported the Dubbo verdict in *The Lawyer Who Laughed* (Century Hutchinson, 1978):

Judge's Associate: Do you find the accused guilty or not guilty of cattle-stealing?

Foreman: Not guilty, if he returns the cows.

Judge: You swore you would try the issue between our Sovereign Lady the Queen and the accused, and find a true verdict according to the evidence. Go out and reconsider your verdict.

Associate: Have you decided on your verdict?

Foreman: Yes, we have. We find the accused not guilty, and he doesn't have to return the cows.

Professor Mark Findlay, of Sydney University, did a study of jurors for the Australian Institute of Judicial Administration. In *Jury Management in NSW* (1994), he reported that he had access to a diary kept by a woman juror during a long trial. On the first day, a majority decided that the accused must be guilty because he wore an earring; he looked too glitzy; he was ugly and hence probably bad; and his lawyer looked positively evil. During the trial, the majority, led by a handsome banker, 'only listened to evidence or argument which reinforced their conclusion of guilt'. The woman was bullied and ostracised, described as a 'pinko lezzo', and threatened with being put on a hit list if she went against a guilty verdict. The verdict was eventually decided by a golf appointment. On the last day, the banker, expecting an early result, arranged to play golf, but 'when it became clear that [the woman and another juror] were not going to go along with a guilty verdict', he 'changed his mind and was followed by the rest'.

25. Rule Against Double Jeopardy for Those Found Not Guilty

In the adversary system, double jeopardy means no acquitted person can be tried twice for the same crime, although more than 50% of acquittals are wrong, Some are obviously perverse, e.g. O.J. Simpson, and in some the judge wrongly concealed evidence e.g. Elliott, Biggins and Scanlon noted above. Nor can acquitted criminals be retried when new and compelling evidence, e.g. DNA (deoxyribonucleic acid), emerges. Justice perverted in favour of criminals must stay perverted forever. On the other hand, 1% of guilty verdicts are wrong and can properly be appealed and the case retried.

Double jeopardy goes back to ancient Greece, but the Anglo-American version derives from confusion or worse over an event at the very beginning of the common law. In 1164, Henry II wanted his courts to re-try 'criminous clerks' who had already been found guilty and punished by church courts, but Archbishop Thomas a Becket insisted that no man should be punished twice for the same offence.

That those previously found **guilty** (*autrefois convict*) and punished should not be tried twice for the same offence seems fair. However, judges who, at best, could not think straight, later purported to believe it also meant that those found **not guilty** (*autrefois acquit*).should not be tried twice.

Needless to say, Blackstone parroted that ancient nonsense in 1765. He said 'no man is to be brought into jeopardy of his life, more than once, for the same offence', and that was fatally echoed in the fifth amendment to the US Constitution in 1791: ' … nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.'

When Britain finally and retrospectively abolished double jeopardy for those acquitted of major crimes from Monday April 4, 2005, the National Crime Faculty calculated that 35 persons acquitted of murder could be re-investigated and new charges brought. The Bar Council and so-called civil liberties groups opposed the legislation, but a Home Office spokesman stated the obvious:

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

The truth-based investigative system naturally allows not guilty as well as guilty verdicts to be appealed and, if necessary, retried.

26. Plea-Bargaining: A Step Towards Abolishing Trials Altogether

Professor John Langbein wrote in *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*: ' ... when our criminal

procedural system crumbled in the twentieth century under caseload pressures, our response was to dispense with trial altogether, transforming the pre-trial process into our notarial plea bargaining system.'

Caseloads may be a factor, but plea-bargaining, notably the US, is an admission that the anti-truth devices make it difficult to get convictions. Prosecutors thus offer major criminals a no-risk bargain: accept a large fine or a few years in prison against the possibility of going to prison forever.

iv. Legal Aid

If the anti-truth devices make the adversary system a fraud on the community, the fraud is compounded by obliging the community to pay lawyers to obscure the truth, get criminals off, and generally pervert justice. Legal aid should only be paid to lawyer to help the system find the truth.

h. Perversions of Justice Against the Innocent

Under our system of justice, it is better that 10 guilty men go free than that one innocent man be convicted.

- W. Blackstone 1765

The reality is that at least one innocent person is found guilty, and more than 50 criminals go free, but lawyers endlessly regurgitate Blackstone. He said those words when lawyers were at last finding money in criminal work. When judges gave them final control of the criminal process some 40 years later, Blackstone's words gave the cartel an excuse to start inventing the get-the-rich-off devices noted above, and the bar was shortly raised tenfold; law professor Thomas Starkie KC, of Cambridge, said in 1824:

The maxim of the law … is that it is better that 99 … offenders shall escape than that one innocent man be condemned.

The adversary system's win-at-all-costs culture gets the worst of both worlds; many criminals get off, and some innocent, particularly the unrich, suffer perversions of justice. It is estimated that at least 1% of British prison inmates are innocent, i.e. 700 of 70,000 in 2002. In Australia, at least 235 of 23,555 inmates in 2003 were probably innocent. In the US it is estimated that upwards of 5% are innocent, i.e. perhaps 105,000.of 2.1 million in 2004.

1. The US

The number of innocent inmates clearly make it too risky for guilty verdict to proceed to execution. As noted above, 12 of 285 (4.2%) on Death Row in Illinois were found to have been wrongly convicted. If the same percentage applied in Texas, six of the 152 executed during the term of Governor George Bush on the advice of Alberto Gonzales were probably innocent.

The US Bureau of Justice Statistics (BJS) says 3859 people were executed between 1930 and 1972. If 4% were not guilty, the state wrongly killed 154, including Bruno Hauptmann, who was convicted in 1936 on fabricated evidence for allegedly kidnapping Colonel Lindbergh's baby.

The Supreme Court voted 5-4 to abolish the death penalty in *Furman v Georgia* (1972). Justices Potter Stewart, Byron White, William Douglas, William Brennan, and Thurgood Marshall outvoted Chief Justice Warren Burger and Justices Harry Blackmun, Lewis Powell and William Hubbs Rehnquist. But four years later, Stewart and White switched sides and Douglas had been replaced by John Paul Stevens. In *Gregg v Georgia* (1976), Burger, Stewart, White, Powell, Blackmun, Rehnquist, and Stevens outvoted Brennan and Marshall to restore executions. Marshall dissented in every such case until he retired in 1991. Relatives of those wrongly killed from 1976 were no doubt gratified when Blackmun (1908-99, Justice 1970-94) admitted in 1994 that he had been wrong about the death penalty.

From 1976 to 2004, there were 944 executions; 37 may have been innocent. In May 2001, after a spate of forced releases from Death Row, *Time* reported that 20 of the 38 States with death penalties were considering moratoriums on executions. At the end of 2003, there were 3374 on Death Row in 37 States and the federal system; 134 may have been innocent.

2. Britain

Timothy Evans was wrongly hanged for murder in 1950 and pardoned in 1966. Uproar followed the hangings of Derek Bentley in 1953 and James Hanratty in 1962. It was fortunate for Irish suspected of terror that England abolished executions in 1965. In 1974, detectives tortured the Birmingham Six to get false confessions to murder. In 1980, Lord (Alf) Denning (1899-1999, Master of the Rolls 1962-82) heard the Six's civil action alleging assault by police. He said:

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

The Six continued to seek justice. In 1988, Lord Denning turned Blackstone and Starkie on their heads. He said:

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

In 1991, Appeal Court Justices Lloyd, Mustill and Farquharson acquitted and freed the Six, after 16 years in prison. Viscount Runciman was then asked to investigate the possibility of change to a pro-truth system. Research for the inquiry showed that perversions suffered by the Birmingham Six and the Guildford Four were unlikely to occur in France and Germany, but most involved in the inquiry were lawyers, and its report recommended persisting with the anti-truth system.

The inquiry did recommend that a body be set up to investigate possible perversions against the innocent (but not those in favour of the guilty). The Criminal Cases Review Commission (CCRC) began work in 1998 with eight non-lawyers and six lawyers as Commissioners. It has a staff of 100 and they use the European system to investigate the truth; a Commissioner, Dr James MacKeith, a forensic psychiatrist, told me they accept all available evidence.

The CCRC sends its recommendations to a non-truth body, the Court of Criminal Appeal, for final decision. The court has agreed with the CCRC in 70% of cases. To 31 March 2005, the CCRC had received 7602 applications and had referred 271 cases to the appeal court. The court had heard 216 cases and had quashed 151 convictions and upheld 65 convictions. Some results:

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

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

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

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

William Gorman and Patrick McKinney. Convicted of terrorism 1980 and given indefinite sentences. Convictions quashed 1999 because

Electrostatic Document Analysis (ESDA) of police interview notes showed significant rewriting of pages.

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

3. Australia.

Ronald Ryan was the last man hanged in Australia. I happened to be an official witness at the execution in Melbourne in 1967, and received his letter from the grave. He said he was not guilty of intent, and I am inclined to believe him; manslaughter and a prison term would have been appropriate.

A dingo (a wild dog) killed Mrs Lindy Chamberlain's baby daughter, Azaria, but the mother was found guilty of murder in Darwin in 1982. An inquiry found the truth and the conviction was quashed in 1988.

i. Presumption of Guilt: Unfair Bias Against Accused

a. Contempt by publication.

A law of contempt by publication does not exist in the European system because it does not conceal evidence, and barely exists in the US because the First Amendment protects the right to know. It only exists in other common law countries because the cartel concealed evidence after lawyers got control of the criminal process early in the 19th century. Prior to that, judges admitted most relevant evidence and informally advised jurors on weight. That was no longer possible after the adversary process isolated judges from jurors.

The alleged crime concerns publication of evidence which may be concealed from jurors, e.g. the accused's pattern of crime, at a trial which is imminent or proceeding, and so may prevent a 'fair' trial. It is offensive to staples of the common law: the necessity for the alleged offender to have a guilty mind, the presumption of innocence, and trial by jury. It presumes accused are guilty even though their action was inadvertent, and accused are not allowed trial by jury, possibly because jurors might refuse to convict.

A Sydney case illustrates how unfair and unjust the law can be. A lawyer, Christopher Murphy, unaware that a trial was proceeding, mentioned the accused's convictions in a newspaper article in 1993. The judge aborted the trial; Murphy and the organ were charged with contempt; three appellate judges found them guilty in 1994. However, the judges were unaware that the same man was again on trial, and his convictions were mentioned at the contempt trial and reported in the Press. A judge then aborted his second trial. The judges and the media were not charged with contempt, but in February 1995 the judges confirmed the original guilty verdicts on Murphy and the organ, and ordered the organ to pay the prosecution costs as well as

their own. This effective penalty, estimated to be A$120,000, was enough to cripple a small newspaper.

b. Contempt by Affront

The law of contempt by affront originated in mediaeval superstition: an inscrutable deity appointed the monarch; the monarch appointed the judge; an affront to the beak was thus an affront to the deity and the monarch.

Justice Sir John Eardley Wilmot (1709-1792) said (R v Almon, 1765) contempt law was necessary to keep 'a blaze of glory' around the courts. Translation: it deterred pamphleteers from reporting that most judges were corrupt. Wilmot said it was 'immemorial usage and practice' for judges to give contempt verdicts. His opinion was never delivered, but it is still the leading authority for trial without jury in Australian affront cases.

The first US Chief Justice (1789-95), John Jay, told jurors in *Georgia v Brailsford* (1794) they "have … a right … to judge the law as well as the fact in controversy". Judges don't give them a chance to judge the law of affront.

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

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

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

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

However, over three cases, *Tisdall* (1983), *Warner* (1987) and *Goodwin* (1990), law reinstated the common law rule that the private right of revenge takes precedence over the public right to information.

Although judicial work is the most error-riddled industry there is, some judges insist on being treated as if enveloped in a Christ-like blaze of glory. When Malcolm Turnbull (BCL Oxon) referred to judges by surname only in 1977, 'Justice' Harry (a profit is a loss)

Gibbs warned him that he 'felt it was a contempt of court to refer to a judge other than as "Mr Justice Bloggs'." Turnbull in effect told him to grow up.

j. Defence of the Criminal Adversary System

Defences of the criminal adversary system come down to assertions that it protects citizens' 'rights' and protects them from oppression by the leviathan state. Professor Stephan Landsman said in *Readings on Adversarial Justice*: *The American Approach to Adjudication*: 'For centuries adversarial courts have served as a counterbalance to official tyranny and have worked to broaden the scope of individual rights.'

The oppression argument tends to collapse in the face of oppression on a vast scale by the adversary system itself. Its unfairness oppresses victims of crime; cruelty in cross-examination oppresses witnesses in general and women and children in particular; negligence law oppresses doctors, accountants, teachers, local councils, and business and manufacturing shareholders; interminable pleadings and discovery oppress litigants; unfair libel and contempt laws oppress citizens, journalists and media shareholders.

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

> There are four standard arguments on behalf of the adversary system. These are (1) that it is the best way to find the truth; (2) that it is the best way to ensure that all parties' rights are protected; (3) that it is part of our tradition and culture; and (4) ... the adversary system is the way clients participate in the litigation process.

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

> A common-law country should retain the adversary system because: (1) it needs some procedural system; (2) the available alternatives aren't demonstrably better than the adversary system; and (3) the adversary system is the system in place. This is the pragmatic justification for the adversary system. It is logically weak but practically strong.

That argument also fails. An available alternative, the European investigative system, which seeks the truth and is controlled by trained judges is

necessarily better than a system which does not seek the truth and is controlled by trained liars.

k. Conclusion

The foregoing leads to hard questions which all affected by the adversary system, including judges, lawyers (academic and practising), litigants, police, and those obliged to fund it, would do well to consider.

What exactly did Don Vito mean when he said a lawyer can steal more than a thousand men with guns? Did he mean they steal money from clients by spun-out pleadings and discovery, and steal justice from victims and the community?

The *Macquarie* says 'corrupt' comes from the Latin *corruptus*, broken in pieces. Definitions include: destroyed, dishonest, without integrity, debased in character, perverted, tainted, made bad by errors. If Justice Fox is right in saying that justice is fairness, fairness is truth, and morality comes from a search for truth, is the adversary system effectively a corrupt form of justice?

Is it effectively a criminal enterprise? Organised crime is systematic criminal activity for money or power; a criminal enterprise is the vehicle through which the activity is conducted. Lawyers habitually engage in practices normally regarded as criminal, e.g. perverting justice, and get money for it.

However, they would say they are compelled by the system, a good thing in itself, to do what they do, and hence cannot have the necessary *mens rea* (guilty mind). Further, 'enterprise' suggests active participation. Perhaps a passive usage would be more appropriate, e.g. the system can IN EFFECT amount to a criminal enterprise, but participants are not necessarily guilty.

It may not be relevant to that particular point, but the adversary system does get the accolade from an organisation which IS a criminal enterprise, the Sicilian Mafia. It is noted in Section 3 that the Mafia's response to 475 members being put on trial by investigating magistrates in 1986 was to 'persuade' the Italian parliament to change to a more adversarial system in 1988.

A tap on a Brooklyn telephone recorded US gangsters' joy on behalf of their Sicilian colleagues. A heroin dealer, Joe Gambino, said: 'Oh, so it's like here, in America?'

The other man, just back from Sicily, said: 'No, it's better, much better.'

Material in Part 2 shows that the common law had a long tradition of trickle down extortion, and that it still has pockets of judicial extortion; in the last 20 years, 70 Chicago judges and lawyers went to prison for that sort of criminal enterprise.

2. How It Happened

a. What Law Schools Don't Teach

Justice Russell Fox said understanding facts depends heavily on context. Justice Ron Sackville, of the Australian Federal Court, said 'great care must be taken to understand the social and historical context in which a legal system has developed'. In 1993, the Runciman inquiry gave this as the reason for rejecting truth for the second time in eight centuries.

> Every system is the product of a distinctive history and culture, and the more different the history and culture from our own, the greater must be the danger that an attempted transplant must fail.

The common law's history, culture and context can be stated briefly. For 700 years from the Dark Ages, England and Europe used the same anti-truth accusatorial (PROVE IT!) system. They diverged at a time when the master of Europe happened to be an upright churchman, and England was run by organised criminals. After 1215, Europe changed to a pro-truth investigative (WHAT HAPPENED?) system, but England rejected that system and persisted with the accusatorial system. The adversary system is a lawyer-run variant of the PROVE IT! system.

Europe has thus had a pro-truth culture for 800 years; England – and its colonies – has had an anti-truth culture for some 1500 years. Viscount Runciman was right; changing to a pro-truth system would be difficult for lawyers: it would deprive them money.

1. Trial by Ordeal; Verdict by Inscrutable Deity

Historian Michael Woodiwiss has made much history and journalism obsolete. In *Organized Crime and American Power: A History* (University of Toronto Press, 2001), he defined organised crime as 'systematic criminal activity for money or power'. He says we should look beyond the Mafia to the 'powerful and respectable' because 'organised criminal enterprise was deeply embedded in the machinery of law and government from at least the time of the Roman empire'.

The West Roman Empire collapsed under the weight of its corruption in 476. In the Dark Ages (c.476 – c.750) and for much of the Middle Ages (c.750-1453), the legal system in western Europe and England regressed from truth-based roman law to an anti-truth accusatorial system

called the Judgment of God (*judicium dei*). A accused B; B said: 'Prove it.' The verdict was supposed to be revealed by an inscrutable deity.

Trials took several forms. The wager of law was the equivalent of modern self-regulation. The accused swore he was innocent, and was presumed to be telling the truth if the deity did not strike him with lightning. Trial by ordeal included walking on hot ploughshares, carrying a hot iron for nine feet, and taking a stone out of boiling water. An 'expert' inspected the damage three days later and interpreted the deity's verdict. Accused clerics had to swallow the 'cursed morsel', a feather concealed in piece of food. If he choked, it was presumed that the deity had judged him to be guilty.

In 'swimming a witch' (trial by cold water) the suspect was trussed and thrown in to a stretch of water blessed by a priest. If she sank, she was not a witch because the blessed water hard received her. If she floated, she was a witch because the water had rejected her. She was fished out and hanged or burned at the stake. Alleged witches were swum and hanged in England in 1647, and 20 were hanged in Salem, Massachusetts, in 1692.

The Church opposed the Judgment of God from the time of Agobard, Bishop of Lyons (d. 840), on the ground that it was improper to tempt the deity. Pope Stephen VI tried to stop the practice in 877, but the spectacle was too exciting to be successfully proscribed. After 1066, the Normans introduced to England another spectacle, trial by combat, also known as the judicial duel, wager of battle, and trial by battle. Accuser and accused swore before a judicial officer they were telling the truth and then fought a duel. The winner got the verdict; the loser, if still alive, was hanged. Trial by battle was last demanded by a murderer, Abraham Thornton, in 1817. He got the verdict when his accuser declined to take part in the duel.

2. Origin of the Common Law in a Culture of Trickle-Down Extortion

England was always as corrupt as any country in Europe, if not more so, and incomparably the best at calling it something else: bribes and/or extortions become gifts, presents, favours, patronage, *doucers*, commissions, gratuities, honoraria, unofficial taxes. In a former colony, the US, bribes are referred to as juice in California, ice in Florida, grease in New York. Corruption and racket are likewise euphemisms for organised crime.

Michael Woodiwiss notes that in 1930 Raymond Moley said Europe's medieval feudal system was 'a good deal of a [protection] racket': lords extorted goods and services from peasants in return for 'protection against other plundering lords and vagabonds'. He says 'William of Normandy did most to establish such a system in early Britain'.

Richard Condon said modern man thinks money brings power, but medieval man knew power brought money. William I (1027-87) and his son, William II (c.1056-1100), had the standard medieval mind. After William I's 6500 mercenaries defeated King Harold's 7000 troops at Hastings in 1066,

William franchised 90% of the country to 300 of his favourites and established a property system based on trickle-down extortion.

The 300 ‘magnates’, or ‘great men of the realm’ were part-time judges and full-time organised criminals: they franchised land to freemen and extorted goods and services from them; they extorted from merchants travelling through their land; and they ‘sometimes led or employed bands of brigands to plunder towns and villages’. Freemen in turn franchised land to its original owners and extorted from them.

The British Empire was to a degree a criminal enterprise based on theft of land and, later, human beings. The empire dates from 1072, when William compelled the Scottish King, Malcolm III, to do him homage. It expanded to South Wales in 1079, to Ireland in 1172, and to Virginia in 1607. The empire then developed a triangular trade in goods and slaves between Africa, America and England

London’s population was between 14,000 and 18,000 when King (1087-1100) William II institutionalised trickle-down extortion in the trade of authority. Professor John Gillingham, a mediaevalist at the London School of Economics, said in *The Oxford History of Britain vol II The Middle Ages* (OUP1992) that William put every public office, from Chancellor down, on sale. The buyer in turn extorted bribes from those who had to deal with the office. As head of the royal secretariat, the Chancery, the Chancellor was a sort of mediaeval Prime Minister. It was in the context of this culture of systemic corruption that the common law is generally understood to have begun in the reign of King Henry II (1154-89).

The jury system was invented in 1166. When a crime was reported, 12 neighbours had to use their local knowledge to suggest a suspect (possibly including an enemy). The suspect was still tried by ordeal, and the verdict was still believed to come from an inscrutable deity.

Professor Theodore Plucknett said professional, i.e. paid, lawyers first appeared in a new court (later called the Court of Common Pleas) set up by Henry II in 1178 to deal with civil litigation. Law professor J.H. Baker, of Cambridge, says in *An Introduction to English Legal History* (Butterworths, third edition 1990) that professional judges had appeared by 1200. London’s population was then 20,000-25,000. The courts sat in Westminster Hall of Westminster Palace; lawyers had their own pillars at which they met clients.

3. The Lawyer-Judge Cartel

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.

- Adam Smith, *The Wealth of Nations, 1776*

Professor J. H. Baker said: 'England possessed from an early date a bench and bar united by their membership of a common profession.' The Chicago economist and appellate judge, Richard Posner, wrote in *Overcoming Law*:

> The legal profession in its traditional form is a cartel of providers of services related to society's laws … Should we be surprised to find that self-interest has played as big a role in legal thought as in medical thought? …The history of the legal profession is to a great extent, and despite noisy and incessant protestation and apologetics, the history of all branches of the profession, including the professoriat and the judiciary, to secure a lustrous place in the financial and social-status sun.

Leaving on one side the fact that the common law professoriat did not begin until Blackstone procured Oxford's first Vinerian chair in 1758, Judge Posner's observation suggests that the common law has always been a business. He said the US cartel began to implode about 1960 through pressure of competition.

4. A 13th Century Tax Evasion Scheme: *Magna Carta*

Magna Carta is invoked to support all manner of legal claims, but it was essentially an attempt by magnates to evade taxation and to dilute the power of the monarch. Scutage was a tax in lieu of military service. When King (1199-1216) John insisted that the tax be paid by magnates who had refused service in France, they gathered in force outside London (pop. c 25,000) in June 1215 to demand, at sword-point, that John sign a charter. Some sections, with comments.

Section 21: 'Earls and barons shall not be amerced [fined] except through their peers.' Peers were unlikely to order each other to pay scutage

Section 39: 'No freeman shall be … imprisoned … except by the lawful judgment of his peers or by the law of the land'. Freemen owned freehold land and were one level below the magnates.

Section 40: 'To no one will we sell, to no one will we refuse or delay, right or justice'. That seems to confirm that justice could be bought.

To gain time, John signed the charter and, as a vassal of Pope Innocent III, appealed to Rome. The Pontiff annulled the charter in August 1215 on the ground that John had signed under duress and without his (Innocent's) consent. The Great Charter was thus in force for nine weeks.

5. England Rejects Truth

A church conference in Rome in November 1215 agreed to end clerical participation in trial by ordeal and to use a truth-based system based on the old roman law to investigate alleged clerical misbehaviour. European courts

then changed from the accusatorial system to an investigative (inquisitorial) system, but England hesitated. When King John died in October 1216, his successor, Henry III, was nine; the decision on the system was left to the judges, which effectively meant the cartel, then consisting of a dozen or so lawyers and judges. In 1219, they accepted that trial by ordeal had to end, but rejected the investigative system, and persisted with an accusatorial system.

One reason was ethnocentrism, defined as 'the belief in the inherent superiority of one's own group and culture accompanied by a feeling of contempt for other groups and cultures'. Law professor Richard Jackson, of Cambridge, said in *The Machinery of Justice in England* (Cambridge University Press, seventh edition 1977) that a cause of the rejection was 'an insular dislike of things foreign'.

Another reason was the defective jury system. Professor Theodore Plucknett said it was 'just a newer sort of ordeal ... the jury states a simple verdict of guilty or not guilty and the court accepts it, as unquestionably as it used to accept the pronouncements of the hot iron or the cold water'. Professor Jackson said: 'Jury trial simply replaced trial by ordeal, the verdict of the jury having the same finality and the same inscrutability as the Judgment of God.'

A result of the rejection of truth was that the British Empire – then consisting of England, Scotland, Wales and Ireland - had a system which preferred procedure to truth, form to substance, 'rights' to justice, and appearance and legal fictions to reality. In the Middle Ages, for example, if a man paid a debt but did not make sure the bond was cancelled, it was no defence to prove he had repaid; the bond was held to be incontrovertible evidence that he still owed the money.

The rejection of truth also facilitated corruption; it is easier to pervert justice for money if the system does not require truth. In the following centuries, British judges tended to extort to get the money, while European judges tended to torture to get the truth.

6. Judicial Extortion in the Late Middle Ages

Westminster Palace was the centre of power and money in the later Middle Ages. The king lived there; the magnates sat in the House of Lords; the cartel operated in Westminster Hall; lawyers, who like to hear their voices and to protect the system which get them money, migrated to the Commons. Simon de Montfort invented the Commons in 1265 during the Barons' War of 1264-68, another failed attempt by magnates to usurp the monarch's power; it took lawyers another four centuries to achieve that.

Professor John Gillingham said William II's system of 'patronage', i.e. trickle-down extortion, was still operating in the reign of Edward I (1272-1307), when London had a population of some 35,000. Lawyers could thus

still buy the office of judge, and those who did had an incentive to convict; they got a share of the fines they imposed.

Judges were accused of murder, sorcery and corruption in 1289. The Chief Justice of Common Pleas fled the country, and seven judges were dismissed, including Ralph de Hengham, Chief Justice of the King's Bench (criminal trials). In 1301 de Hengham was appointed Chief Justice of Common Pleas, presumably by paying Edward I. Venality means open to bribery. A poem from the early 1300s was titled *Song on the Venality of the Judges*. Another, *The Simonie*, from about 1321, has a poor man standing outside the court while a rich man bearing gifts is welcomed inside.

By 1300, the lawyer-judge cartel had been formalised as the Order of Serjeants-at-Law, aka the Order of the Coif. It was originally an order of ecclesiastic lawyers; the coif, a piece of silk worn on the head, represented the clerical tonsure. Professor Theodore Plucknett said that by 1300 the Serjeants were 'a close guild in complete control of the legal profession'. Fewer than 1000 were appointed Serjeants over the next 550 years. Some US law schools still award an Order of the Coif to bright students. Professor J. H. Baker says 'ministers sold the coif for bribes' in the 17th century', but it was worth buying three centuries earlier. Professor Plucknett says Serjeants' wealth in the 14th century 'must have been enormous'; on appointment, they had to hold feasts 'comparable to a king's coronation, and to distribute liveries and gold rings in profusion'. By 1340, with London's population at 40-000-50,000, Serjeants had acquired a monopoly of work in the common law courts, a monopoly of appointment as judges, and a monopoly of legal education. Professor Plucknett said:

> … the middle of the fourteenth century coincides with Parliament's first assertions of its powers … and the dominant interest in it were the common lawyers … bench, bar and Parliament, therefore, were alike under the influence of the conservative professionalised lawyer.

English-speaking citizens are thus said to have enjoyed government of, by and for serial liars for 650 years. In the 1380s, Richard II made the royal secretariat, the Chancery, a court. It purported to be a court of equity (fairness) to provide a remedy for the rigidities and injustices of the common law courts, but the Chancellor was its judge and jury; and the Chancery Court inevitably became as corrupt as the other courts. Professor Baker says 'already by 1393 there were complaints of its abuse'.

Professor Plucknett says that in the Middle Ages Serjeants, i.e. the inner cartel, lived together during term time in the Serjeants' Inns, 'and discussed their cases informally together simply as Serjeants, without distinction between those on the bench and those at the bar'. He says that by 1400 the 'judges and Serjeants together' were deciding difficult cases in the Exchequer Chamber, and, presumably, dividing the extortions.

London Lickpenny (c.1400-1450) is a poem about a poor ploughman from Kent. He seeks justice in Westminster Hall but, lacking money, can find no justice in the King's Bench, the Common Pleas, or the Chancery Court. Dissatisfaction with the legal system was a reason for Jack Cade's revolt in 1450. He briefly had control of London, and according to Shakespeare's *Henry VI Part II* (1594), agreed with Dick the Butcher's final solution: 'Let's kill all the lawyers', but was himself killed.

7. Judges Give Lawyers Control of the Civil Process

We know a lot about the Wars of the Roses (1455-87). They were skirmishes between gangs of organised criminals in the houses of Lancaster (red rose) and York (white rose) for power and money, i.e. control of the monarchy. Actual fighting totalled only three months and did not unduly trouble citizens, but there were 17 melees, and the crown changed hands five times: Henry VI, Edward IV, Henry VI, Edward IV, Richard III, Henry VII.

The civil adversary system began in the same period as the Wars of the Roses, but we don't know much about it, possibly because members of the cartel was at pains to cover their tracks. Yale professor John Langbein wrote in *The Origins of Adversary Criminal Trial* (Oxford, 2004):

> … we know relatively little about the conduct of civil trials before the 19th century. The law reports tell us about pleading, about decisions on issues of law, and about the post-verdict review of trial outcomes, but they do not tell us much about how civil trials actually transpired.

The few academics who are interested in the origin of the adversary system usually date it from the 18th century, when lawyers began to get control of criminal evidence, but lawyers actually began to get control of civil evidence in the 15th century. It can safely be assumed that the motive, as well as the effect, was to get control of the money. Professor Stephan Landsman wrote in *Readings on Adversarial Justice*:

> … adversarial process was in the interest of lawyers as a group. It created ever more work for attorneys, as increasing numbers of potential clients sought legal advice.

But why did judges give up their power to control the process? Jurist Brett Dawson believes it may have been for reasons no more sinister than sloth; 'they went on the bench to retire'. On the other hand, it may be that, like the Pontiff, the Mafia and corrupt detectives, the cartel thought in centuries: with control of the process, lawyers could sharply increase their profits and retire more comfortably to the bench. At all events, the vehicle for the civil handover was the method of pleading. Much of the following data comes

from Nicholas Mullany's 1998 paper, *Pleadings – Sacrificing the Sacrosanct*, for the WA Law Reform Commission.

Written pleadings are now the first step in the civil process. In the 15th century, when barristers pled orally before a judge, pleadings were the second last step. Cambridge law professor Frederick Maitland said the barristers and the judge 'licked the plea into shape', presumably in an hour or so. Oxford law professor Sir William Holdsworth described the process:

> … the debate between opposing counsel, [was] carried on subject to the advice or the ruling of the judge … Suggested pleas will, after a little discussion, be seen to be untenable; a proposition to demur will, after a few remarks by the judge, be obviously the wrong move. The counsel feel their way towards an issue which each can accept and allow to be enrolled. If the issue was a question of fact, the matter was then ready to go before a jury.

Professor Holdsworth said the first record of a paper (written) pleading was in 1460. Sir John Prisot, Chief Justice (1449-60) of the Common Pleas saw that written pleadings would make it easier for lawyers to lie. He said:

> It is not the practice to put in such papers when the party is represented by counsel without pleading them at the bar openly; for if this be allowed we shall have several such papers in time to come which will come in under a cloak, and matter which a man's counsel will not plead [openly] can be said to be suspicious.

Professor J.H. Baker said it was more than a century before judges accepted written pleadings only, but 'by Charles I's time [1625-49]' oral pleadings were 'a thing of the past'. Sir John Prisot's suspicion proved correct; US law professor E.R. Sunderland wrote in 1937:

> The great weakness of pleading as a means for developing and presenting issues of fact for trial lay in its total lack of any means for testing the factual basis for pleaders' allegations and denials. They might rest upon the soundest evidence, or they might rest upon nothing at all. The parties [lawyers] could assert or deny whatever they chose. But whether the pleadings represented fact or fancy was something with which the rules of pleading had nothing to do.

That means that lawyers have been able to lie in pleadings for five centuries, and judges have never found a way to stop them.

8. Judicial Extortion 1485-1810

When the Wars of the Roses ended in 1485, the last man standing was the Lancastrian Henry Tudor, who became Henry VII. The CDNB says he 'practised much extortion', but that was the point of the wars. In *Judicial Ethics in Australia* (Law Book Company, second edition 1997), Justice

James Thomas, of the Queensland appeal court, said of the Tudor period (1485-1603):

> With few exceptions, all officials (including judges) were … corrupt. [Cardinal] Wolsey [Lord Chancellor 1525-29] received gifts and in turn bribed others … In those days [judges] considered it proper to receive gifts or bribes from one or both parties and yet thought they could still render justice.

Justice Thomas noted that in 1554 the Count of Egmont bribed Britain's entire Royal Council and reported to Philip of Spain that 'more could be done with money in England than anywhere in the world'. Britain invaded America in 1607 and added theft of human beings from West Africa to theft of land. British justice also continued to be effectively a criminal enterprise, at least for some. Sir John Evelyn, the diarist, recorded admissions by four senior members of the cartel, including Lord Chancellor (1685-89) George Jeffreys, on 26 November 1686:

> I din'd at my L. Chancelors, where being 3 other Serjants at Law, after dinner being cherefull and free, they told their severall stories, how long they had detained their clients in tedious processes, by their tricks, as if so many highway thieves should have met and discovered the severall purses they had taken. But God is not mocked.

Two years later, lawyers got control of the political process by overthrowing King James II and installing their own Dutch king. Professor Plucknett said: 'It was the common lawyers who were mainly instrumental in making parliamentary supremacy [over the monarch] a fact'. John Locke (1632-1704), a Whig conspirator, justified the lawyers' treason in *Two Treatises of Government* (1690). The second, which continues to have a profound effect in the US, said citizens have certain natural rights, including a sacred right to property, and that governments which do not protect those rights can legitimately be overthrown. Since no government can protect every right, including the right not to be lied to, he supplied a pretext for any usurpation.

The 1688 revolution was called 'glorious', presumably because organised criminals in the Whig oligarchy rightly anticipated making glorious sums over the next century. In *English Society in the Eighteenth Century* (Penguin, 1982), historian Roy Porter noted how they operated:

> Offices could be traded … Many offices further allowed the incumbent to take commissions from contractors, to accept *doucers,* and handle astronomical sums of public money, with which they would play the Exchange privately for the duration … The Paymaster Generalship made the fortunes of Marlborough, Cadogan, Amherst, Sir Robert Walpole, Bubb Dodington, Henry Fox, James Brydges and others. Brydges [first Duke of Chandos] cleared £600,000 [c. £60 million today] from his tenure of office between 1705 and 1713.

The Duke of Newcastle, the oligarchy's bagman 1724-62, was himself Prime Minister 1754-56 and 1757-62. Walpole, Prime Minister 1721-42, said of parliamentarians: 'All these men have their price.' Most judges were former Whig politicians. Justice James Thomas wrote:

> An analysis of appointments between 1714 and 1760 shows that approximately 77 per cent of the Chief Justices and senior appointees to the Bench were members of Parliament … For the majority of this period, one or other of Robert Walpole and the Duke of Newcastle was involved in nearly all senior judicial appointments and many of the junior ones.

The head of the corrupt Chancery Court, Lord Chancellor (1718-25) Macclesfield, a former Whig politician, continued England's 600-year-old tradition of trickle-down extortion. He usually extorted £5000 [c. £500,000 today] from barristers who sought appointment as Masters in Chancery in order to extort more directly from litigants. A barrister, Francis Elde, had to use a clothesbasket to convey the bribe to Lord Macclesfield and his bagman, Master Peter Cottingham.

Justice Thomas said William Murray, Lord Mansfield (1705-93) was 'another senior judge of this period who was trained in the service of the Whig oligarchy and continued to be closely involved in government after he was elevated to the bench'. In 1756, Murray became a Serjeant and Lord Chief Justice and continued to sit in corrupt Cabinets, where he favoured coercing American colonists, until 1774, and he remained an active politician until 1784. Judges were still extorting bribes from barristers in return for legal office in 1810.

9. Judges Give Lawyers Control of the Criminal Process

Lawyers did not appear in the criminal courts until the 18th century; there was no money in it: wealthy and respectable organised criminals were not normally accused. Jeremy Bentham said 'plunderable matter was seldom to be found' in the purses of accused; Professor Stephan Landsman said: 'Not even the judges, who received sizable fees in civil litigation, could hope to profit from the criminal docket.' Prosecutions were private; those in court were judge, jurors, accuser, accused and their witnesses; trials were nasty, brutish and short.

England's trade in goods and slaves in the 17th century sharply increased its wealth and population. London's population almost tripled, from some 200,000 in 1600, to 350,000-400,000.in 1650, to 575,000-600,000 in 1700. Unrespectable organised crime followed; after 600 years, lawyers began to discover a tender care for the 'rights' of accused. Lawyers began to appear in criminal courts after a 1692 Act and the Treason Act of 1696.

The 1692 Act offered a reward of £40 (c. £4000 today) for information leading to the conviction of highway robbers and other thieves. An organised criminal from the lower orders, Jonathan Wild (1682?-1725), had a gang of thieves, took his share of the proceeds, and informed on them for the reward. Wild was hanged in 1725, but lives on in representations of Prime Minister Sir Robert Walpole in John Gay's *Beggars' Opera* (1728), Henry Fielding's *The History of Jonathan Wild the Great* (1743), and *The Threepenny Opera*, by Kurt Weill and Bertolt Brecht in 1928.

Defence lawyers found that the truth engine easily exposed lying informants like Wild, but did not appear in great numbers until much later in the 18th century. Research on Old Bailey trials by Professor John M. Beattie, of the University of Toronto, showed that defence lawyers appeared in 2.1% of trials in the 1770s, 20.2% in 1786, and 36.6% in 1795. By the first decade of the 19th century, judges had given lawyers control of the process, and could indulge their taste for sloth in the criminal courts, but had to stay awake long enough to agree to the anti-truth devices which make it quite easy for their former colleagues to get rich criminals off.

10. Judicial Extortion in the US and Other Former Colonies

Historian Michael Woodiwiss said: ' … the US legal and criminal justice systems were set up in ways that showed a great deal of latitude to certain kinds of organised criminal activity.' Those largely responsible were John Locke, Blackstone, James Madison, Alexander Hamilton, and John Marshall.

US law professor Darien McWhirter's *The Legal 100: A Ranking of the Individuals Who Have Most Influenced the Law* (Citadel, 1998) says: 'Locke … laid the philosophical foundation for the legal and governmental system that developed in the United States.' In 1692, Locke said people have certain natural rights, including a sacred right to property. 'People' was not interpreted to mean Indians, Negroes, or women. In 1791, Blackstone persuaded Madison to incorporate English common law, and what that entailed, in the Bill of Rights. *The Legal 100* says Alexander Hamilton was:

> America's first great business lawyer … he saw, as few did at the time, the connection between banking, industry, and national power. The statutes he drafted and the institutions he created launched America on course toward becoming the world's greatest industrial power.

Hamilton thus believed that the business of America is business. He also believed that government by an oligarchy of rich businessmen was the best way to enable business to build a great and powerful country. Perhaps inspired by Britain's shamelessly corrupt Whig oligarchy, he advised a constitutional convention in 1787:

> All communities divide themselves into the few and the many. The first are the rich and the well-born, the other the mass of the people … The people are turbulent and changing; they seldom judge or determine right. Give therefore to the first class a distinct permanent share in government … Nothing but a permanent body can check the imprudence of democracy.

Oligarchy, was institutionalised by Article II Section 2 of the Constitution ratified in 1789. It says the President, 'with the advice and consent of the Senate, shall appoint … public ministers', including members of the Cabinet. clever businessmen can thus shuffle round a revolving door of business and government for decades. In 2005, Donald Rumsfeld, 73, had been on the shuffle for 48 years, former President G.H.W. Bush, 81, for 39,and Richard (Dick) Cheney, 64, for 36. For example, when President Gerald Ford gave Thojib Soeharto the all clear to unlawfully use US weapons in his invasion of East Timor in 1975, Rumsfeld was Secretary for Defense, as he was in 2005, and Cheney was Ford's chief of staff, i. e. gatekeeper. *OxfordSC* reported:

> In 1794, after notorious bribery involving virtually every member of the Georgia legislature, two US Senators, and many state and federal judges [including Supreme Court Justice James Wilson], the Georgia legislature authorized the sale of 35 million acres in the Yazoo area (present-day Alabama and Mississippi) to four land companies for 1.5 cents an acre. The land companies on-sold millions of acres.

The corrupt Georgia politicians were voted out in 1796; the new legislature rescinded the Yazoo grant and invalidated all property sales from it. Investors procured an advisory opinion from Alexander Hamilton. He told them what they wanted to hear: the cancellation was unconstitutional. A collusive test case, *Fletcher v Peck*, ground through the courts.

President John Adams appointed Hamilton's protégé, John Marshall (1755-1835), a former land speculator, Chief Justice in stacking the courts at "midnight" of the day he was to retire, 20 January 1801. In Marshall's period (1801-35), the cartel was akin to the Serjeants in the 14th century. In a case of judicial extortion, *US v Murphy* (1985), Judge Frank Easterbrook noted:

> When John Marshall was the Chief Justice, the Justices and many of the lawyers who practiced in the Supreme Court lived in the same boarding house and took their meals together.

Chambers Biographical Dictionary (Larousse, sixth edition 1997) says Marshall 'is the single most influential figure in US legal history … His most important decision was in the case of *Marbury v Madison* (1803), which established the principle of judicial review, asserting the Court's authority to determine the constitutionality of legislation.' Marshall thus made untrained and unelected Humpties supreme over Congress.

Hamilton, lawyer and gentleman, aimed high in a duel in 1804; Aaron Burr, lawyer, aimed at his stomach. Hamilton died but his Yazoo opinion lived. Article II Section 4 of the Constitution says bribery is sufficiently heinous to warrant removal of the President, and *OxfordSC* says that in *Fletcher v Peck* (1810) the Contracts Clause of the Constitution appeared to be on Georgia's side. But Marshall dutifully parroted Hamilton's line that the Yazoo cancellation was unconstitutional. He upheld the corrupt grants, voided the legislation which cured them, and even said: 'It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state.' Marshall thus effectively defined the business of America as a business in which fraud, bribery, extortion, force etc. are acceptable, even necessary, tools.

Fletcher v Peck was a useful precedent for pin-striped organised criminals. Historian Gustavus Myers said it was 'the first of a long line of court decisions 'validating grants and franchises of all kinds secured by bribery and fraud'. Michael Woodiwiss says that in the later 19th century success in business went to those 'best able to bribe, blackmail, extort, exploit, and intimidate'. The great disclosure journalist, Ida Tarbell, reported in 1904 that John D. Rockefeller's Standard Oil became dominant by 'force and fraud', and that similar methods were 'employed by all sorts of businessmen, from corner grocers up to bankers. If exposed, they are excused on the ground that this is business'. Or 'bidness', as Mafiosi call it.

A century after Marshall, the New York culture barely distinguished between organised crime in the judiciary, politics and on the streets. In *Damon Runyon* (Ticknor and Fields, 1991), Jimmy Breslin said that in the 1920s Tammany boss Jimmy Hines, a business partner of another organised criminal, Arthur (Dutch Schultz) Flegenheimer, extorted $10,000 (perhaps $200,000 today) from lawyers who wanted to be Criminal Court judges so they could extort in turn from bootleggers and other organised criminals.

A lawyer named Macrery paid the $10,000 and Hines procured a five-year appointment. Later, Judge Macrery told Hines: 'I only pay once', but shortly died of alcoholic poisoning. When a Tammany lawyer put it about that Macrery had been beaten to death and sought an investigation, Judge George Ewald's wife went to Hines's waiting room and announced: 'I am here to pay the ten thousand dollars now. It is not time yet, but I would rather pay it now than have my husband killed later on.' Hines told Runyon at Lindy's delicatessen:

> All I know is that calling for an investigation was a great move. I never had to ask anybody for a dollar after that. So I wasn't an extortionist any more. I didn't have to extort nobody. People gave me gifts.

Cook County (2003 est. pop. 5.35 million), Illinois, includes Chicago (2000 census 2.9 million). Respectable organised criminals on the bench and at the bar have probably infested the county's court system since Cook Country was created in 1831. Carl Sifakis notes the Guzik Scale of buying judges in *The Mafia Encyclopedia* (Checkmark, second edition 1999). It was devised by Jake (Greasy Thumb) Guzik (1887-1956), a fixer for the Chicago Mob. (His figures should be multiplied by perhaps 20). He said:

> You buy a judge by weight, like iron in a junkyard. A justice of the peace or a magistrate can be had for a five-dollar bill. In municipal courts he will cost you ten. In circuit or superior courts he wants fifteen. The state appellate court or the state supreme court is on a par with the federal courts. By the time a judge reaches such courts he is middle-aged, thick around the middle, fat between the ears. He's heavy. You can't buy a federal judge for less than a twenty-dollar bill.

Sifakis records a definition of justice supplied by another fixer for the Chicago Mob, Murray (The Camel) Humphreys (1899-1965): 'The difference between guilt and innocence in any court is who gets to the judge first with the most.'

The American Bar Association rated the Cook County Circuit Court as the best court system in a major US city. In 1980, the Justice Department and the FBI began an investigation into the system. From 1984 to 1994, the FBI's Operation *Greylord* and the following Operation *Gambat* used the RICO legislation to put away 20 judges, 50 lawyers, and sundry police and court officials for extortion and bribery. Judge Thomas J. Maloney was even convicted of taking bribes in three murder cases.

Three San Diego judges, G. Dennis Adams, Michael Greer, and Judge of the Year James A. Malkus, took bribes from Lawyer of the Year Patrick Frega. In return they coached him on how to run his cases, pressured opposing lawyers to settle, and assigned his cases to 'friendly' judges. They all went to prison in 2000. Jurist Walter Olson observed:

> To paraphrase Oscar Wilde: losing one local judge in a corruption scandal is a misfortune. Losing two looks rather like carelessness. Losing three suggests a pattern.

In England, where William II instituted a culture of public sector organised crime in the 11th century, it was idle to suppose that it stopped in the 20th. In *Cockburn Sums Up* (Quartet, 1981), Claud Cockburn recalled the naïveté of Kingsley Martin, editor of *The New Statesman* in the 1930s. He wrote:

> I would mention … that, obviously, the explanation for this or that turn of events was that this or that official, this or that political leader, had been richly bribed by this or that interested party. Kingsley would look at me with his kindly indulgent smile which held at the same time a touch of pity for my continental-type ignorance of what is done and what is not done in England.

Cockburn said of the 1960s and 1970s:

> There was nothing astonishing in the extent and blatancy of the corruption which are no greater in Britain than in France or the United States. What truly astonished me was the extent to which the British Establishment, including the corrupters and the corrupted, have, despite all, managed to keep alive for public circulation the legend that that sort of thing does not happen in England: or that when it happens it is an unusual phenomenon, swiftly dealt with and eliminated the moment there is any evidence of its existence.

Geoffrey Robertson QC wrote in *The Justice Game* in 1998: '[Britain] clings to the illusion that it has the least corrupt Parliament in the world. '

Alarmingly, the Chief Justice of India, Sam Bharucha, said in 2001:

> … more than 80 per cent of the Judges in this country, across the board, are honest and incorruptible. It is that smaller percentage that brings the entire judiciary into disrepute.

In Australia, Chief Justice Sir Garfield Barwick was accused in 1980 of not disclosing his interest in companies before the court, an offence carrying a maximum prison sentence of two years. Barwick said, but not on oath, that he was the best judge of his impartiality, and was not charged.

Justice Lionel Murphy, also of the High Court, was charged in 1985 with attempting to pervert justice on behalf of a lawyer, Morgan Ryan. Justice Murphy was found guilty, got a re-trial, and was acquitted. An inquiry by three retired judges found 14 instances of his possible criminal behaviour, but he died in 1986 and the inquiry papers were sealed until 2016.

FBI boss J. Edgar Hoover accepted Mafia bribes in the form of tips on fixed horse races through a cut-out, reporter Walter Winchell, but a corrupt NSW Chief Magistrate, Murray Farquhar, regularly got similar tips directly from an organised criminal, George Freeman. Farquhar was imprisoned in 1985 for fixing a case of theft of $55,000.

b. Conclusion

Corruption among judges and lawyers does not necessarily mean a legal system is wrong, but the history of the common law and the adversary system does not inspire confidence.

English common law began in the 12th century in a culture of universal extortion. A cartel of lawyers and judges rejected truth early in the 13th century. That error was compounded when judges, many of them corrupt, began to let lawyers (described as serial liars who believe ethics is an English county) take control of the civil process in the 15th century, and of the criminal process in the 18th.

The cartel has since invented some 26 anti-truth devices which encourage rich criminals to pay lawyers. Extortion from litigants, clients and opponents still exists

3. The Solution

The adversary system's perverts justice every day because of three basic reasons: it does not seek the truth; lawyers control the process; and a cartel of lawyers-and untrained judges has overall control.

All three can be corrected by: training judges separately from lawyers in techniques of searching for the truth. The anti-truth devices can then be abolished by putting jurors on the bench with the judge, and having the judges advise them on the weight to be given evidence, e.g. hearsay. In other pro-truth procedures, the judge will question witnesses in a neutral way, and allow them to tell the whole truth by giving evidence as a narrative; lawyers will not be allowed to use cross-examination to obscure the truth; and judge and jurors will give reasons for their verdict and penalty.

The solutions are more or less the way the investigative system works for 1,600,000,000 people in European countries, their former colonies and Japan and South Korea. It protects the innocent better than the adversary system, and puts away 90% of the 99% of accused who are guilty in serious criminal cases, against the adversary system's fewer than 50%.

Implementation would not be difficult; some common law countries already use the European system – not very well - to investigate the truth at inquests and commissions of inquiry.

The European system has a presumption of innocence for suspects, but one of the most effective lies put out by common lawyers in law schools and elsewhere is that it has a presumption of guilt

a. Origin of the Investigative (Inquisitorial) System

Roman law at least nominally sought the truth and was controlled by judges, but it was not codified and the *Columbia* says much of it was 'confused, contradictory or redundant'. And corrupt. Justinian (482-565), Emperor of the East Roman (Byzantine) empire from 527, had Tribonian and a committee of legal academics and advocates codify roman law. Their *Corpus Juris Civilis* was completed by 535 and remained in use in the Byzantine Empire until Constantinople (formerly Byzantium) fell to the (Turkish) Ottoman Empire in 1453. As noted above, law in West Europe and Britain regressed into superstition after the fall of West Roman Empire in 476, but a

digest of Justinian's Code was discovered in Italy about 1070, and scholars at the University of Bologna began to study the Code.

Lotario de' Conte di Segni, son of Count Trasimund of Segni and nephew of Pope Clement III, was born in 1160 or 1161. After early education in Rome, he studied theology at the University of Paris and jurisprudence at the University of Bologna. Pope Gregory VIII ordained him sub-deacon in 1187, Pope Clement III created him Cardinal in 1190, and after the death of Pope Celestine III, the cardinals elected him Pope on 8 January 1198. Justice Ken Marks wrote in *'Thinking up' about the right of silence* (1984) that he had 'devised inquisitional techniques [for investigating alleged clerical misbehaviour].in a series of decrees beginning in 1189-90'. Professor Richard Jackson wrote in *The Machinery of Justice in England* (seventh edition 1977):

> [The] technique was to send a trusted person along to inquire into the allegations. This founded the inquisitorial concept of a trial, whereby the judge is expected to find out for himself what has happened, and he will do this by examining all persons, including the accused or suspected person, who may be able to enlighten him.

As Pope, Innocent was zealous in repressing simony, i.e. selling ecclesiastical office, the clerical equivalent of systemic trickle-down extortion in England's trade of authority. His term (1198-1216) was the high point of the papacy's temporal power: he had authority over Sicily, was virtual lord of Christian Spain, Scandinavia, Hungary, and the Latin East. He was in a position to order the election of Frederick II as German king, and became overlord of England and Ireland.

On 19 April 1213, Innocent issued a papal Bull inviting spiritual and temporal princes to attend an ecumenical council in Rome in November 1215, a lead-time that ensured maximum attendance. Justice Ken Marks said the 'glittering' event was attended by ambassadors from King John of England, Frederick II, king of the Holy Roman Empire, the Latin Emperor of Constantinople, King Philip II of France, and the kings of Aragon, Hungary, Cyprus, and Jerusalem, along with 71 archbishops, 412 bishops, and 900 abbots and priors.

The council is called the Fourth Lateran Council because it was the fourth held at the Lateran Basilica. It began on 11 November 1215, and Innocent's 70 canons (decrees) were approved by the end of the month. In terms of the future of European law, Canons 8 and 18 were the key decrees.

Canon 8 confirmed Innocent's system of investigating misbehaviour. It said superiors must 'carefully inquire into the truth' of the allegations. The suspect was to be allowed to defend himself in the presence of 'the seniors of the church so that if they prove to be true, the guilty party may be duly punished without the superior being both accuser and judge in the matter'.

Canon 18 effectively ended trial by ordeal; it banned 'any blessing' by clerics to 'judicial tests or ordeals by hot or cold water or hot iron'.

Temporal courts in Europe shortly adopted Innocent's investigative system but the English lawyer-judge cartel persisted with the accusatorial system. Professor George Dargo, of the New England School of Law, said in OxfordSC that the civil law, i.e. the European investigative system, 'is the most widespread and important legal tradition in the modern world'. The man who invented the system, Innocent, is not in *The Legal 100*, but novelists Erle Stanley Gardner and John Mortimer are.

b. Judicial Torture in Europe

European trials had a number of odious features. Some were secret; some suspects had to defend themselves without knowing the allegations; truth-seeking judges soon fell into anti-truth error. There were no jurors, and it was recognised that judicial power carried the risk of oppression. The result was an impossibly high standard of proof: judges could convict only on the basis of two eyewitnesses or a confession. That eliminated circumstantial evidence; two eyewitnesses were rare; criminals might not dutifully confess.

Judges wrongly believed torture might produce truth, but suspects were given a modicum of protection. Torture could only be used where there was one reputable eyewitness or compelling circumstantial evidence' it was permitted only to elicit facts, not a confession; and the judge was not to suggest the answer he wanted. In practice, however, the torture rules were as futile as ethics rules later promulgated by Anglo-American bar associations. As a method of finding the truth, torture is notoriously unreliable: the tortured are likely to confess to anything, e.g. the Birmingham Six. Professor Langbein noted in *The Origins of Adversary Criminal Trial*:

> … efforts at surrounding coercion with safeguard proved illusory. In case after case, the true culprit was ultimately discovered after the innocent person had confessed under torture and been convicted and executed … but long into the eighteenth century the law of torture remained a defining feature of the Continental tradition in criminal procedure.

Judicial torture in Europe enabled common lawyers to claim that their corrupt Dark Ages system was better. Hypocrisy, ethnocentrism and self-deception induced a contempt for the European system which persists to this day; they still slyly hint that it is akin to the Spanish Inquisition. Professor Langbein said that from the time of the Henry VIII's Reformation (1534):

> … disdain for Continental criminal procedure became enmeshed in English hostility to the leading Continental regimes – the papacy, the French, and the Spaniards. At least from the time of Foxe's *Book of Martyrs* (1563) the Spanish Inquisition was held up for particular vilification … English writers from [Sir

John] Fortescue [1394?-1476?; his *De Laudibus Legum Angliae* was first printed 1537] to Sir Thomas Smith [1513-77] to Blackstone [1723-80] extolled the superiority of England's torture-free procedure.

Johann Graefe's *Tribunal Reformation* (1624) spurred opposition to torture, and the European Enlightenment ended it. Frederick the Great abolished torture in Prussia in 1754. An Italian lawyer, Cesare Beccaria, argued in *An Essay on Crimes and Punishments* (1764), which was translated into 22 languages, that torture punished the innocent and should not be necessary to prove guilt. Judicial torture was abolished in Italy in 1786, in France in 1789, and in Russia in 1801.

c. Bonaparte Reforms the Investigative System

Revolutionary France proposed a fair society and new laws based on rational principles in 1789. Jean Jacques Cambacéres spent the next decade grappling with a code of laws but all drafts were rejected. The issue was decided by another accident of history, this time in north Italy.

On Saturday 12 June 1800, an Austrian General, Michael von Melas, defeated First Consul Bonaparte at the Battle of Marengo. Rumours shortly reached Paris that Bonaparte was probably dead and certainly finished, but he had sent a message to General Louis Desaix, whom he had unwisely sent to block Melas's presumed retreat to Genoa: 'For God's sake, come back, if still you can.' On his arrival, Desaix breezily advised Bonaparte: 'This battle is completely lost, but it is only two o'clock; there is time to win another.' Desaix led the charge and was killed, but the day was won by his infantry, François Kellerman's cavalry, and Auguste Marmont's artillery. To distinguish it from the earlier battle, this is known as the Battle of Chicken Marengo from the recipe invented by Bonaparte's cook, Dunand, from the materials to hand, a chicken, tomatoes, mushrooms, eggs, and prawns.

Bonaparte hastily showed himself in Paris, falsely claimed credit for the victory, and applied his intellect and energy to drafting a code of civil law. He said he wanted everyone to be able to read and understand the code and so know their duty. He set up a committee of four lawyers, of whom the most significant were Jean-Étienne-Marie Portalis, nearly blind, 54, and François-Denis Tronchet, 73, in August. They met in Tronchet's house, and had a draft printed by 1 January 1801. Judges added their comments and the draft was discussed clause-by-clause at more than 90 meetings of the Council of State (*Conseil d'Etat*) between July and December 1801.

Bonaparte prepared by reading law books, and chaired more than half the meetings. A member of the Council, Antoine Clair Thibaudeau, said Bonaparte 'took a very active part in the debates, beginning, sustaining, directing, and reanimating them by turns'. General Marmont, 26, hero of Marengo, attended a number of sessions. He said Napoleon was:

… silent at first, until members had put forward their opinions, he would then begin to speak, and often presented the question from an entirely different point of view. He commanded no eloquence, but had a flowing delivery, a compelling logic, and a forcible manner of objection. He was extremely fertile in ideas, and his speech gave evidence of a wealth of expression which I have experienced in no one else. His extraordinary intellect shone out in these debates, where so many topics were entirely foreign to him.

Bonaparte himself said:

In these discussions I have sometimes said things which a quarter of an hour later I have found were all wrong. I have no wish to pass for being worth more than I really am … Tronchet, I admire your intelligence and the strength of your memory. For a man of your age, it is exceptional and deserves to be pointed out. Portalis, you would be the greatest of speakers if you only knew when to stop … Cambacéres, I sometimes suspect you of behaving like a talented lawyer who can defend a case or reject an idea without the slightest reference to his own personal feelings.

Portalis presented the first eight articles of the Code to the Tribunate on 24 November 1801, but it was rejected it 65-13. Napoleon withdrew the draft on 3 January 1802 and had obstructive Tribunes removed. The 36 sections of the Civil Code were enacted, one after the other, from March 1803 through to March 1804. In all, the code had 2281 clauses.

Other codes produced at Bonaparte's instigation were the *Code de Procedure Civile* (1806), *Code de Commerce* (1807), *Code d'Instruction Criminelle* (Code of Criminal Investigation 1808), Code Penal (1810). Along with the Civil Code, they are regarded as the Napoleonic Code. The Criminal Code invented the *juge d'instruction* (examining magistrate) and reinforced the objective, 'the manifestation of the truth'

Bonaparte said: 'My glory is not to have won forty battles, for Waterloo's defeat will blot out the memory of as many victories. But nothing can blot out my Civil Code. That will live eternally.' Yale law professor Morris L. Cohen wrote in *Law: The Art of Justice* (Levin, 1992):

The Napoleon codification successfully achieved a number of goals. The law was to be accessible to all, uniform throughout France and based on democratic principles and economic liberalism. The code is still considered a masterpiece of French prose, and has been called the greatest book of French literature by the poet Paul Valery. The Civil Code was supposed to have been read regularly by the novelist Stendahl as a stylistic model for his own writing. It was quickly translated into many languages and its popularity spread throughout Europe. Similar codes were enacted in most of the countries of the world which were not under the common law system. What had started as a French achievement became a model for a worldwide legal revolution.

d. Flaws in the Investigative System

The European system is by no means perfect. In France, investigating magistrates have the power to keep suspects to hand for weeks or months for further questioning as more evidence comes in. This can be seen as a 'softening-up' process.

Nor would it be helpful to borrow much from the current Italian system. Italy has moved to a more adversarial system in order to help organised criminals escape justice. Alexander Stille explained how it happened in *Excellent Cadavers: The Mafia and the Death of the First Italian Republic* (Pantheon, 1995). Judge Giovanni Falcone put 475 Mafiosi on trial in Palermo in February 1986. It was still proceeding when national elections were held in June 1987. The Mafia, virtually the criminal wing of Giulio Andreotti's Christian Democrat party, punished the party for failing to stop the investigations: votes were transferred to other parties on condition that the judges were emasculated and the law changed.

In December 1987, 344 Mafiosi were found guilty. In 1988, the pool of judges investigating the Mafia was dismantled, and the Italian Parliament passed changes to the criminal code which limited the power of investigating judges. On 20 September 1988, a tap on a telephone in the Cafe Giardano in Brooklyn recorded a conversation between a heroin-dealer, Joe Gambino, and an anonymous hood just back from Palermo. The dialogue, in Sicilian, suggests that in their view the function of the adversary system is to anally penetrate judges and police:

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

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

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

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

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

Judge Falcone and his colleague, Judge Paolo Borsellino, knew they would be killed for seriously investigating the Mafia, and they were assassinated in 1992. Their heroism is a reproach to the poltroonery of common law judges who remain silent in the face of the adversary system's manifest lack of justice, fairness, truth, and morality.

e. The Two Systems Compared

Professor David Luban, of Georgetown University, would be the Red Rum of common law ethicists except that he sails into the last fence. As noted above, he says all arguments in favour of the adversary system fail, but change is not worth the trouble because 'the available alternatives aren't demonstrably better than the adversary system'. Leaving on one side the fact that a pro-truth and hence moral system in which trained judges gather and present facts is likely to be better than an anti-truth and hence immoral system in which serial liars gather and present 'facts', the superiority of the investigative system can be demonstrated mathematically in terms of accuracy of verdict and cost. First, accuracy. Justice James Burchett, of the Australian Federal Court, said in 1996:

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

France and Germany convict 90% of the 99% of accused who are guilty - the 99% rate in Japan and Indonesia is too high – while the adversary process convicts fewer than 50%, but up to 50 in every thousand prisoners are innocent. David Rose noted in his book, *In the Name of the Law: The Collapse of Criminal Justice* (Jonathan Cape, 1996), that one of the first acts of the 1991-93 Runciman inquiry into the criminal system 'was to order research into two nearby jurisdictions which broadly follow inquisitorial principles, France and Germany.' The research resulted in *A Report on the Administration of Criminal Justice in the Pre-Trial phase in France and Germany*, by Professor Leonard Leigh and Lucia Zedner (Her Majesty's Stationery Office, 1992). Rose reported: '[They] reached several immediately striking conclusions':

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

Leigh and Zedner said: 'The low acquittal rates in France and Germany and the apparent paucity of cases of unjust convictions are the product of the care taken in the initial stages of the criminal process.' A series of pre-trial filters also ensures that the innocent are rarely charged, let alone convicted. Leigh and Zedner wrote: