

*To Paul, Suzy, Anna, Martha,
Nigel and Joseph*

Evidence, Advocacy and Ethical Practice

A Criminal Trial Commentary

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Introduction

It is a testament to the conservative nature and slow pace of legal change that traces of the medieval trial remain today. Witnesses still swear an oath (or its substitute); superior court trial judges wear red robes reminiscent of the ecclesiastical origins of adjudication; and trial by jury can be traced back to the Middle Ages. Pleadings have similarly ancient origins. The spectacle of decision-making, the ritual and the methods used by courts to exert authority and claim legitimacy are laid bare by history. History enables us to understand better our own trial procedures and practices by showing how and why legal traditions developed. This chapter introduces the reader to an historical overview of the criminal trial with emphasis on its adversarial structure and the goals of adjudication.

At times in this chapter we shall make use of a schema for discussing different legal systems which was devised by the influential German social theorist, Max Weber.¹ Weber compared the legal thinking manifested in different legal orders in two ways. He considered the extent to which the processes of law finding and fact finding were *formal* and the extent to which these processes were *rational*. The different ways in which Weber used these categories is at times confusing but the basic comparisons which he had in mind are clear enough.

In societies where legal thought relies upon such practices as oracles, revelation or ordeals then such thinking can be described as *formal and irrational*. It is formal because it will invariably use ritual and rigorously formal procedures (an oracle will only respond if it is approached in the correct way). Such an approach is indifferent to the factual basis of the claims and this makes it appear from our perspective to be irrational. In legal thinking which is *substantively irrational* decisions are based upon considerations of ethics or politics or are emotional responses based on feelings of justice. Such thinking is irrational in the sense that the decisions are not a product of reason, they are specific and create no precedent. Reasons are not given in a form which can be generalised and applied in later cases. Weber suggests that such institutions as the English Justice of the Peace or the jury or the Islamic khadi exemplify this type of legal thinking.

In a legal system based upon rational practices, law finding and fact finding are a matter of the conscious following of general principles.² These are *rational* because once the *substantive* value orientation is chosen everything else follows rationally. Legal thinking of this type draws on general principles which may be ethical, religious, political or expedient but are not specifically legal. *Formal rational* legal thought also takes into account only the general features of each case but here legal thinking is based upon abstract legal rules drawn from an autonomous legal system. With this last category Weber had in mind the civilian legal system of the late nineteenth century.

It will be noticed that the notion 'formal' is used in two senses by Weber. It refers to the extent to which the legal order makes use of procedures and rituals, but it can also refer to law's autonomy or self-sufficiency (ie the extent to which the legal order has separated itself out from other cultural spheres). It is this second understanding of formal which distinguishes the fourth type of legal thinking (formal rational) from the third (substantive rational).

These four categories were presented by Weber as ideal types. There was no claim that these models actually exist or have existed in their pure form. In fact empirical research was expected to reveal that legal systems often exhibit a combination of different types of legal thinking. On the other hand, Weber used these categories more ambitiously. He argued that there had been an historical development in the way in

which we think about law. Modern legal systems tend to rely on formal rational legal thinking while earlier legal thinking was said to be based on procedures which were much more irrational. These procedures were irrational. They were not irrational because they were arbitrary, for they were often predictable, within limits, and the point of the contrast between rational and irrational was not that these earlier procedures were unconcerned with the truth. In their own way they were. Pre-modern procedures were irrational for Weber, because they showed little concern for the factual claims of the parties or because no reasons were given for legal decisions. The history of adjudication was, for Weber, the history of the development of rigorous procedures of proof — procedures which were dependent on both the establishment of facts and upon legal argument justified publicly by way of 'legal logic'.³

The common law in Weber's view was in some ways a rational legal order. Decision making was carried out in a manner which was sufficiently calculable, at least when it was compared to, say, primitive law. However, when contrasted with the civilian tradition the common law had many features which were irrational. It relied too much on lay Justices of the Peace and juries and upon case law, analogies and fictions:

From such practices and attitudes no rational system of law could emerge. Not even a rationalisation of the law as such because the concepts thus formed are constructed in relation to the material, and concretely experiential events of everyday life, are distinguished from each other by external criteria, and extended in their scope, as new needs arise, by means of the techniques just mentioned. They are not 'general concepts' which would be formed by abstraction from concreteness or by logical interpretation of meaning or by generalisation and subsumption; nor were these concepts apt to be used in syllogistically applicable norms. In the purely empirical conduct of legal practice and legal training one always moves from the particular to the particular but never tries to move from the particular to general propositions in order to be able subsequently to deduce from them the norms for new particular cases. This reasoning is tied to the word, the word which is turned around and around, interpreted and stretched in order to adapt it to varying needs, and, to the extent that one has to go beyond, recourse is had to 'analogies' or technical fictions No rational legal training or theory can arise in such a situation.⁴

Twining⁵ has listed the main epistemological and logical assumptions which underlie the elements of an idealised form of common law rationalist adjudication which seeks to produce 'rectitude of decision'. This 'rational core' is represented by Twining thus:⁶

1. *Epistemological assumptions*

(a) Events and states of affairs occur and have an existence independently of human observation; true statements are statements which correspond with facts, ie real events and states of affairs in the external world.

(b) Present knowledge about past events is in principle possible; in this context, 'knowledge' means warranted beliefs that satisfy specified standards of proof relating to the truth of statements about facts in the real world.

1. Rheinstein, M (ed), *Max Weber on Law in Economy and Society*, Harv Univ Press, US, 1954, esp at pp 61ff, 73f, 76-82, 224-32, 349-56; Kronman AT, *Max Weber*, 1983, Edward Arnold (Pub) UK, provides an instructive discussion of Weber's sociology of law. See also, Trubek, DM, *Max Weber on Law and the Rise of Capitalism*, 3 Wisc LR 720 (1972).

2. *Substantive rational* thought can be found in patrimonial States or in theocracies.

3. Rheinstein, M (ed), *op cit*, note 1, p 64.

4. *Id*, p 201f.

5. These are drawn from mainstream evidence theorists from the eighteenth and nineteenth centuries onwards. Twining, W, *Theories of Evidence: Bentham and Wigmore*, Weidenfeld & Nicolson, 1985, UK.

6. Twining, W, *ibid*, pp 13-14.

(c) Present knowledge about past events is typically based upon incomplete evidence; it follows from this that establishing the truth about alleged past events is typically a matter of probabilities or likelihoods falling short of complete certainty.

(d) Judgements about the probable truth of allegations about past events must, generally speaking, be based on the available 'stock of knowledge' about the common course of events in the external world. In any given society at a particular time, the 'stock of knowledge' includes, in a descending scale of probability, generalisations accepted by the scientific community as established, the opinions of experts and 'common-sense' generalisations based on the experience of members of society.

2. Assumptions about fact-finding in adjudication

(a) It is a necessary condition for implementation of substantive laws that the truth of allegations about particular past events, 'the facts in issue' in a case, be established on the basis of *relevant* evidence presented to the decider.

(b) The implementation of substantive laws by the determination of the truth about allegations of fact on the basis of evidence is a necessary condition of achieving expetive justice, ie justice under the law.

(c) Given that decisions about the truth of allegations of fact typically take place in conditions of uncertainty (see 1c above) justice under the law has to be satisfied with standards of proof falling short of absolute certainty.

(d) Rectitude of decision (ie the correct application of valid substantive laws to facts established as true) is an important social value. There is room for disagreement about the priority that should be accorded to rectitude of decision when there is a potential conflict with other values such as the security of the state, the protection of family relationships, procedural fairness, and so on. How far particular institutions, rules, procedures, techniques and practices are estimated to maximise accuracy in fact-determination is one important criterion for evaluating them: but other criteria of evaluation are also applicable, such as speed, cheapness, procedural fairness, humanness, public confidence and the avoidance of vexation to participants. The relevant priorities to be given to these various criteria are also a matter of contention.

3. Reasoning in adjudication

(a) A method of adjudicative fact-finding is 'rational' if, and only if, judgements about the probable truth of allegations about the facts in issue are based on inferences from relevant evidence presented to the decision-maker.

(b) The validity of inferences from evidence is governed by the principles of logic, the characteristic mode of reasoning appropriate to forming and justifying judgements of probability about alleged facts is induction, with deduction playing a secondary role. It is a matter of contention whether all reasoning about probabilities is in principle mathematical or whether some probability judgements in forensic contexts are in principle non-mathematical (Baconian).

(c) The application of the principles of induction to present evidence makes it possible to assign a probable truth value to a present proposition about a past event.

According to Twining the model below epitomises the kind of rational fact-finding which the adversarial common law system strives to achieve.⁷

7. Twining, W, *ibid*, pp 15-16.

A rationalist model of adjudication

A. Prescriptive

- The direct end
- of adjective law
- is rectitude of decision through correct application
- of valid substantive laws
- deemed to be consonant with utility (or otherwise good)
- and through accurate determination
- of the true past facts
- material to
- precisely specified allegations expressed in categories defined in advance by law, ie facts in issue,
- proved to specified standards of probability or likelihood
- on the basis of the careful
- and rational
- weighing of
- evidence
- which is both relevant
- and reliable
- presented (in a form designed to bring out truth and discover untruth)
- to a supposedly competent
- and impartial
- decision-maker
- with adequate safeguards against corruption
- and mistake
- and adequate provision for review and appeal.

B. Descriptive

- Generally speaking this objective is largely achieved
- in a consistent
- fair
- and predictable manner.

The goals of adjudication

A primary goal of any adjudication system is to resolve conflict. However, it is not enough merely to resolve conflict. After all, a dispute could be resolved by any arbitrary measure, such as the toss of a coin. The history of criminal trials below shows that a legal system 'works' when it is considered legitimate by the community it serves. A system is workable when individuals feel confident to take their disputes to court and are willing to accept the court's verdict and generally believe that the system provides justice according to law.⁸ Legitimacy may derive from a number of factors, for example, belief in the truth or the humanity or the equity or the divine underpinnings of the adjudication process or a mixture of all these variables.

In the Middle Ages the acceptance of a Christian world view helped to sustain the legal system. In modern times, popular acceptance of common law criminal trials is based on a general belief that curial 'truth-seeking' has both intellectual integrity and humanity.

8. The adjudication system should also define, interpret, or confirm rules (the law) for future conflict resolution. Sward, EE, *Values, Ideology and the Evolution of the Adversary System*, 64 *Indiana LJ* 301 at pp 304-6 (1989).

The strictest form of [the 'fair decision'] trial theory holds that trials are not a good way to discover the truth, because the truth of what actually happened is probably unknowable. In a criminal trial situation, nonetheless, there is a dispute between the State and an individual that needs to be resolved. The best we can do is arrange a criminal dispute resolution procedure that is at least fair to both the State and the individual. The procedural elements of party control, party commitment to winning, and jury fact determination are viewed as conducive to fairness because they lead to a potentially equal contest before an unbiased decision-maker.⁹

The intellectual integrity of the legal process enhances belief in the 'truth-seeking' goal of the legal system, and humanity represents the incorporation of legal procedures which are fair to the accused.¹⁰ Effective, acceptable common law adjudication therefore requires that conflicts be resolved with (at least) the appearance of rational decision-making and fairness. Before embarking on our historical survey we look at each of these attributes separately.

The best way of getting at the truth

The English say that the best way of getting at the truth is to have each party dig for the facts that help it; between them they will bring all to light. The inquisitor works on his own but has in the end to say who wins and who loses. ... [I]t can also be argued that two prejudiced searchers starting from opposite ends of the field will between them be less likely to miss anything than the impartial searcher starting in the middle.¹¹

The Anglo-Australian adjudication system is generally termed an adversarial or accusatory system. In its pure form an adversarial system should be structured as a party process in which equally positioned parties to the dispute prepare and present their cases before the tribunal which then determines the outcome. In the adversarial model the parties establish the text of their dispute, delineate the parameters of their contest (through pleadings), and make submissions to secure their desired outcomes. The responsibility to collect, prepare and present evidence rests with the parties — in criminal cases, in theory at least, it rests more heavily on the prosecution. The accusatory model seeks a solution to the dispute by enabling the litigants to pursue their own self-interest.¹² As in Lord Devlin's assertion above, the classic confident formulation concerning adversarial justice predicts that the self-interested parties, between them will bring to light all the facts relevant to the case. Ultimately, the adjudication is entirely dependent on the material the parties present in their cases.¹³ In the adversarial or accusatory model the adjudicator is an umpire who knows nothing of the case until the trial unfolds. The judge's role is to ensure that the parties abide by the rules

and in non-jury cases to make the ultimate decision. The judge is not involved in the preparation of the case, nor does s/he have any prior knowledge of the content of the evidence. The court is obliged to act upon presented evidence and is not entitled to make its own enquiries or otherwise act on its own knowledge¹⁴ in reaching decisions. Evidence is presented orally and tested by direct questioning. The procedural rules and the rules concerning the admission of evidence are formal, complex and restrictive.

Most evidence scholars are aspirational rationalists who remain optimistic that reform can make the common law fairer, more consistent and more predictable. Complacent rationalists believe the system already works that way. The struggle to increase the rationalist base of the common law has been achieved through legal codification and reform.

Fairness at its minimum dictates that a fair trial should not convict the innocent nor acquit the guilty.¹⁵ To assist the goal of preventing wrongful convictions, evidence which might prejudice the accused is excluded from the court. Prejudice in this sense refers to the qualities of the evidence which may incline the tribunal to judge the accused on a basis unassociated with the charge (for example, his/her criminal record, violent or mean propensity). Such information may distract the dispassionate pursuit of 'truth-finding'. For a similar reason unreliable evidence or influences that may prejudice jury deliberations¹⁶ are controlled by the law.¹⁷ Such controls facilitate the intellectual determination of 'truth' and thus enhance the likelihood of a fair determination.

As Twining notes, the common law does not focus only on the rectitude or accuracy of the decision. It permits additional non-adjudicative values to be factored into the criminal trial such as the prominence given in the criminal justice system, in rhetoric at least, to the individual, to individual rights and to civil liberties¹⁸ (such as the right to privacy, the right to liberty and the privilege against self-incrimination) and gives a broad compass to the common law notion of fairness.

The common law requirement that a trial be fair has been debated in the High Court of Australia. In *Dietrich* the appellant claimed successfully that his trial was unfair because he was without legal representation. The majority judgments in the High Court were underpinned by the acknowledgment that, in a trial concerning serious charges, the defendant without counsel was unlikely to be able to participate on an equal footing to his opponent in the curial contest. The commitment to fairness in the trial process was discussed by Gaudron J at some length.¹⁹

9. Goodpaster, G, *On the Theory of American Adversary Criminal Trial*, 78 *Jnl Crim Law & Criminology* 118 at p 125 (1987).

10. Nesson, C, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 *Harv LR* 1357 (1985). See Chapter 3 where this issue is developed with specific reference to verdicts.

11. Devlin, P, *The Judge*, OUP, UK, 1979, pp 60-1.

12. Sward, EE, *op cit*, note 8, p 313.

13. Subject to the power to take judicial notice of a limited amount of additional information. Note also that the dominance of parties in the fact-finding process also reinforces the sense of fairness in the adjudication generally.

14. Unless the topic is one appropriate to judicial notice. See Chapter 3.

15. Dworkin, R, *A Matter of Principle*, Oxford, Clarendon, 1986, p 72.

16. See Chapter 3.

17. Control may take the form of exclusion as of right, discretionary exclusion, or judicial warning.

18. *Williams v R* (1986) 161 CLR 278 (liberty); *George v Rockett* (1990) 170 CLR 104 (privacy); *Plenty v Dillon* (1991) 171 CLR 635 (privacy); *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 (self-incrimination).

19. *Dietrich v R* (1992) 177 CLR 292 at 362-3 per Gaudron J.

It is fundamental to our system of criminal justice that a person should not be convicted of an offence save after a fair trial according to law. The expression 'fair trial according to law' is not a tautology. In most cases a trial is fair if conducted according to law, and unfair if not. If our legal processes were perfect that would be so in every case. But the law recognises that sometimes, despite the best efforts of all concerned, a trial may be unfair even though conducted strictly in accordance with law. Thus, the overriding qualification and universal criterion of fairness!

The fundamental requirement that a trial be fair ... is not one that impinges on the substantive law governing the matter in issue. It may impinge on evidentiary and procedural rules; it may bear on when and where a trial should be held; in exceptional cases it may bear on whether a trial should be held at all. Speaking generally, the notion of 'fairness' is one that accepts that, sometimes, the rules governing practice, procedure and evidence must be tempered by reason and commonsense to accommodate the special case that has arisen because, otherwise, prejudice or unfairness might result. Thus, in some cases, the requirement results in the exclusion of admissible evidence because its reception would be unfair to the accused in that it might place him at risk of being improperly convicted, either because its weight and credibility cannot be effectively tested or because it has more prejudicial than probative value and so may be misused by the jury. In other cases, the procedures may be modified, for example, to allow evidence to be given through an interpreter, or to allow for special directions to counteract the effect of pre-trial publicity or even something said or done in the trial itself. Sometimes the venue may be changed to counteract some perceived difficulty in obtaining a fair trial in the area in which the offence was committed; in other cases proceedings may be adjourned, for example, to enable evidence to be checked or to allow for pre-trial publicity to abate. The examples are not exhaustive. They are, however, sufficient to show that the requirement of fairness is, and, in various different contexts, has been recognised as, independent from and additional to the requirement that a trial be conducted in accordance with law.

The requirement of fairness is not only independent, it is intrinsic and inherent. According to our legal theory and subject to statutory provisions or other considerations bearing on the powers of an inferior court or a court of limited jurisdiction, the power to prevent injustice in legal proceedings is necessary and, for that reason, there inheres in the courts such powers as are necessary to ensure that justice is done in every case. Thus, every judge in every criminal trial has all powers necessary or expedient to prevent unfairness in the trial. Of course, particular powers serving the same end may be conferred by statute or confirmed by rules of court.

The notion of a fair trial and the inherent powers which exist to serve that end do not permit of 'idiosyncratic notions of what is fair and just' any more than do other general concepts which carry broad powers or remedies in their train. But what is fair very often depends on the circumstances of the particular case. Moreover, notions of fairness are inevitably bound up with prevailing social values. It is because of these matters that the inherent powers of a court to prevent injustice are not confined within closed categories. And it is because of those same matters that, save where clear categories have emerged, the inquiry as to what is fair must be particular and individual. And, just as what might be fair in one case might be unfair in another, so too what is considered fair at one time may, quite properly, be adjudged unfair at another.

At common law a fair trial is commonly associated with specific attributes. Thus, from *Dietrich v R*²⁰ we see that in certain serious cases legal representation is likely to be considered a precondition for a fair trial. Further, what judges do, and what they do not do, may threaten the fairness of a trial. However, the common law in Australia does not link the fairness of a trial to bare preconditions. All questions of unfairness must be determined applying the criteria relevant to appellate court intervention:

[A]ppellate courts in this country do not interfere with convictions entered at trial purely on the basis that there was unfairness to the accused in the conduct of the trial. The appellate jurisdiction in criminal matters depends upon a conclusion that there was a 'miscarriage of justice' such that the applicant "has thereby lost 'a chance which was fairly open to him of being acquitted' ... or a real chance of acquittal"²¹

The criminal trial as a formal and irrational process

Ecclesiastical justice

In medieval Europe parties were chiefly responsible for commencing litigation and for defining the issues for trial through pleadings.²² Julius Stone²³ has provided an example of the process:

Suppose John had duly accused Hubert before witnesses of bewitching him (a wrong for which, if proved, Hubert must, by the Salic Law [Tit XiX, 2 Henderson, *Historical Documents of the Middle Ages*, 180] pay John 63 shillings). The proceedings before the court duly assembled would be for John to make his accusation with a meticulous rectitude of form and gesture, and for Hubert to reply, denying the charge. Assuming they successfully avoided errors in form, and did not stammer (for stammering would have been immediately fatal to the stammerer's case), the issue was then before the court for judgment.

The court²⁴ heard no evidence, merely the claims of the parties. The court's judgment did not resolve the dispute but was a declaration of the precise mode by which the truth of the parties' claims should be revealed. Judgment determined which party should bear the burden of proof and the form such proof should take. Proof was determined by divine intervention supporting one of the parties, who was then deemed to have the just and truthful cause. There were gradations of proof from a simple oath without compurgators²⁵ through to ordeals weighted

20. (1992) 177 CLR 292. Note that in Victoria the legislature responded quickly after *Dietrich* to empower courts to order the Legal Aid Commission of Victoria to provide assistance to an unrepresented accused on any conditions specified by the court. The court can adjourn the trial until such assistance has been provided: s 360A *Crimes Act* 1958 (Vic).

21. (1992) 177 CLR 292 at 310-11 per Mason CJ and McHugh J, quoting from Brennan, Dawson and Toohey JJ in *Wilde v R* (1988) 164 CLR 365 at 371-2. See also Drummond J in *Bush v R* (1993) 115 ALR 654 at 657.

22. Pollock, F & Maitland, F, *History of English Law*, Vol II, 2nd ed, Cambridge Univ Press, 1923, pp 604-5.

23. Stone, J, (revised by WAN Wells) in *Evidence: Its History and Policies*, Butterworths, Aust, 1991, p 3.

24. These early courts were not, in our sense, courts at all but rather 'general assemblies of the people for general governmental purposes', which included deciding cases: Stone, J, *ibid*.

25. Oath-helpers who were prepared to swear that the party's oath was unperjured.

heavily against the accused. All forms of proof required an oath to invoke the judgment of God. The trial setting was overwhelmingly ecclesiastical in character. The parties and the court relied on the clergy to invoke God's power and interpret 'His' signs. Divine justice of this order was not limited to England, as it was common throughout Europe, including Ireland. It formed part of the legal tradition from as early as 500 AD, and enjoyed a heyday of four centuries from 800–1200 and, according to Bartlett, there was even a case of ordeal by burning coulter recorded in Naples in 1811 (for suspected marital infidelity).²⁶

The medieval oath, the ordeal and trial by battle were, in Weber's terms, irrational. They relied on means which were outside the control of human intellect and the 'magical' element of the form of adjudication required reliance on formalism. Pleading was formal and complex. Pleading helped determine the burden and mode of proof and was thus the focal point of the process. As a consequence, failure to conform to the precise requirements could be fatal to the party's case. For example, the oath was an exhortation to God requiring precision and formality and, as Stone noted, was 'awful in its invocations'. As Weber notes 'unless the relevant question has been stated in the formal and correct manner, the magical technique cannot provide the right answer'.²⁷

Wager of law depended solely on oaths by the litigant and his 'sutors' who swore to the truth of his story. These oath-takers were like modern day witnesses in that they supported a party. However, the medieval oath was not a narration of facts like modern witness testimony. Judgment calling for the party to take an oath, with or without the support of compurgators, created indirect divine revelation of guilt — one awaited the wrath of God in response to a 'bad' oath. If no such sign appeared, then the oath was good and the party's position was vindicated. As long as the party could find the requisite number of compurgators, oath-taking favoured the party required to take the oath. The number of compurgators depended on a number of considerations. The gravity of the matter in issue was the most important consideration. The credibility of oaths was rated according to the status of the oath-taker and the nature of the oath. Highly rated oaths invoked greater degrees of ghastly harm to befall the oath-taker than lesser oaths.²⁸ Oaths made on the bones of saints were particularly binding. As oath-takers, pillars of society rated higher than peasants. Windeyer cites the value of earls as that of six churls.²⁹ The English rated higher than the Welsh, and so on. Stone suggests the following example from the *John v Hubert* case mentioned above:

Whatever places of torment are assigned by the sages ... to the murderer of women and children, to him who betrays a friend, and to an ungrateful man, those shall by thy portion, if thou speakest falsely. The reward of all meritorious deeds which thou, good man, has done since thy birth, shall become the share of the dogs if in the speech though departest from the truth. *The Laws of Manu*, (1886), Ch VIII 89–90, transl Butler, p 253).³⁰

26. Bartlett, R, *Trial By Fire and Water: The Medieval Judicial Ordeal*, Clarendon Press, Oxford, 1986, p 10. See pp 4–12 generally.

27. Quoted by Kronman, AT, *op cit*, note 1, p 80.

28. See Stone, J, *op cit*, note 23, pp 4–5.

29. Windeyer, WJV, *Lectures on Legal History*, Law Book Co, 2nd ed, Aust, 1957, p 13.

30. Stone, J, *op cit*, note 23, p 4.

In *trial by ordeal*, the party given the burden of proof was required to swear an oath and then submit to a test:

O God, the just judge, who are the author of peace and give fair judgement, we humbly pray you to deign to bless and sanctify their fiery iron, which is used in the just examination of doubtful issues. If this man is innocent of the charge from which he seeks to clear himself, he will take this fiery iron in his hand and appear unharmed; if he is guilty, let your most just power declare that truth in him, so that wickedness may not conquer justice but falsehood always be overcome by the truth. Through Christ.³¹

Religious ritual and incantations and public spectacle dominated proceedings. A three-day fast might precede the ordeal. The ordeal of the boiling water proceeded after a church service and a blessing of the cauldron of boiling water. The accused, dressed in holy vestments, was required to extract with his bare hand a stone (or another object, such as a ring) from beneath the boiling water. His hand was then wrapped up, the wrapping being sealed by the judge, and guilt or innocence was ascertained three days later by inspection of the hand.³² In each case the ordeals were largely weighted against the party submitting to them. The nature of most ordeals meant that the most probable consequence of submitting to this form of proof would be a finding of guilt.³³ Walking over a heated ploughshare almost certainly would cause festering sores — a sure 'divine' sign of guilt.³⁴ As any party would have appreciated at the time, the mode of proof actually predetermined guilt or innocence.

The ordeal was not the first choice of proof but the last resort. It was the more arduous form of proof. It was used for persistent offenders, those accused of heinous crimes, such as poisoning, and those who were unable to marshal the correct number of compurgators.³⁵ Persistent offenders were required to submit to the ordeal because no longer was their own oath reliable. They had forfeited their oath-worthiness by past misdeeds. The 'foreigner or the friendless man' was required to submit to oath. The ranking of Welsh oath-takers as fractional to those of English reflects this scepticism of the stranger. Similarly, one sees status and reputation being taken into account in gradations of ordeals — a triple ordeal for someone with a bad reputation compared to a simple ordeal

31. Zeumer, K (ed) *Formulae Merovingici et Carolini aevi*, MGH, Hanover, 1886, pp 700–1 quoted by Bartlett, R, *op cit*, note 26, p 1.

32. Stone, J, *op cit*, note 23, p 6.

33. See Poole, AL, *Domesday Book to Magna Carta 1087–1216*, 2nd ed, Clarendon Press, Oxford, UK, 1955 p 402: 'The trussed victim was lowered into a pool of water solemnly hallowed by the church. If he sank, he was innocent; if he floated on the surface, he was guilty, for the consecrated element would not receive a sinful body ... It is remarkable that apparently large numbers failed to surmount this primitive test'.

34. This would signify condemnation from on high. The weighting was not always so obvious. For instance, the ordeal by Psalter where a psalm book was suspended before the party. God's judgment was revealed by the direction the book revolved. If it followed the course of the sun, then the party was innocent. Otherwise guilt was proven. See Stone, J, *op cit*, note 23, pp 6–7.

35. Presumably 'outsiders' to the upstanding community.

which would be deemed appropriate where this bad repute was mitigated by the oath of his lord and two other thegns.³⁶

Another consideration in choosing between trial by wager (oath) and trial by ordeal was the availability of human or documentary proof. If a crime or a transaction had taken place in public then the accused could defend him/herself with the support of oath-takers. However, crimes which were not visible such as stealth-murder or theft-by-night would be determined by ordeal because the absence of reliable evidence would leave no other option. However, if the party bearing the burden of proof could summon sufficient 'oath-worthy' witnesses to establish 'certain proof', the ordeal would not apply.³⁷ Nevertheless sometimes where 'doubtful issues' remained the ordeal would determine them:

Since we have heard that sorcerers and witches are rising up in many parts of our kingdom, whose magic has killed and injured many men, and since, as the holy men of God have written, it is the king's duty to rid the land of the impious and not to permit witches and sorcerers to live, we command that the courts should take great pains in their counties to search out and seize such people ... if the suspects cannot be proved guilty by trustworthy witnesses, let them be tried by the ordeal, and thus through that ordeal either freed or condemned.³⁸

In trial by *battle*, adversaries were set to battle. Trial by battle existed in Continental Europe from c 500 AD. However, it was unknown in England prior to the Conquest. In thirteenth century England battle was employed for appeals of felony (where one person accused another of a serious crime) and cases initiated by writ of right (civil determinations of property ownership). It was the right of a free man to elect between trial by jury and trial by battle. According to Stone,³⁹ trial by battle with its warrior connotations was the most esteemed mode of proof. This esteem did not necessarily make the battle a display of manly courage and physical prowess. Bartlett refers to biting and gouging as common-place and his recounting of a trial by battle fought in Flanders in 1127 shows the battle to be a 'no holds barred' bitter struggle to the end:

... Herman the Iron fell prostrate on the ground, and Guy was lying on top of him smashing the knight's face and eyes with his iron gauntlets. But Herman, prostrate, little by little regained his strength from the coolness of the earth ... and by cleverly lying quiet made Guy believe he was certain of victory. Meanwhile, gently moving his hand down to the lower edge of the cuirass where Guy was not protected, Herman seized him by the testicles, and summoning all his strength for the brief space of one moment, he hurled Guy from him; by this tearing motion all the lower parts of the body were broken so that Guy ... gave up, crying out that he was conquered and dying.⁴⁰

36. See Bartlett, R, *op cit*, note 26, p 31. Bartlett at p 32 cites authority indicating that the ordeal was specified as the only kind of proof for dealings between the English and the Welsh.

37. Bartlett, R, *op cit*, note 26, p 33.

38. Bartlett, R, *op cit*, note 26.

39. Stone, J, *op cit*, note 23, p 7. See also Poole, AL, *op cit*, note 33, p 396 who states that 'approvers', men who turned king's evidence in return for their freedom, were more common battle participants than the upper-class litigant. Bartlett, R, *op cit*, note 26, p 110 who suggests that the prestige of the judicial duel arose later in the Middle Ages.

40. Bartlett, R, *op cit*, note 26, p 111 quoting from Ross, JB, *The Murder of Charles the Good*, NY 1967, pp 212-13.

Witnesses, or a third party (for example, one who had vouched for the item in question) might be challenged by battle. Again, the adversaries swore an oath and the winner of the battle was deemed to have proved his case. The regulation of the use of particular weapons and the assistance of champions varied according to both time and place. In England, women, the very young or old, clerics and Jews, generally were excused from personally participating in battle and frequently were able to use champions.⁴¹

Secular justice

The thirteenth century saw the phasing out of unilateral ordeals.⁴² Hyams attributes social change from small communities to larger political units as instrumental in reducing the utility of ordeals. Scepticism of and discontentment with ordeals certainly grew.⁴³ Bartlett cites an Icelandic case where an ordeal by hot iron ended with allegations that the priest who had made the decision had been bribed. Chaucer's description in the *Prologue* of the friar and other clerics illustrates the anti-clerical cynicism of the time:

... his tippet was ay farsed ful of knyves and pynnes, for to yeven faire wyves ... [and] [h]e knew the tavernes wel in every toun; and everich hostiler and tappestere'. [His tippet was stuffed full of knives; and pins, to give to fair maids ... and he knew the taverns well in every town; and every innkeeper and barmaid too].⁴⁴

The clergy's public image made for a difficult authority role.⁴⁵ Additionally, if ecclesiastical adjudication had dispensed impartial or fair judgments and sentences, divine proof may have lasted longer. However, it did not. The vagaries of such judgments became notorious. The system was open to manipulation. The ploughshare or cauldron of water might be barely heated or the combatants unevenly matched.⁴⁶ In response to the perception that parties of particularly bad character were escaping their 'just deserts', rulers sometimes intervened to outlaw the accused even if s/he had survived the ordeal. On these occasions local inhabitants stood witness against the 'criminal'.⁴⁷ Increasingly in the late Middle Ages criminal prosecutions came to be seen as a public matter.

Bartlett attributes this discontent to disaffection from within the church. Various canonists and popes challenged ordeals for being

41. Bartlett, R, *op cit*, note 26, pp 111-12.

42. Trial by battle lasted longer and was not formally abolished by statute in England until 1819: Stat. 59 Geo III, cap 46. See Bartlett, R, *op cit*, note 26, p 120.

43. See Bartlett, R, *op cit* note 26, pp 39-41 for an example of a disputed ordeal in France in 1167 and another, apparently of the same period, in Iceland. See also pp 71-3 showing that ordeals had been subject to criticism and scepticism from early times.

44. Chaucer, G, *General Prologue, from Canterbury Tales*, (ed Cawley, AC), JM Dent & Sons, 1976 (repr), p 9.

45. See Hibbert, C, *The English: A Social History 1066-1945*, Paladin Grafton Books, 1988, UK, pp 39-51. See also Bartlett, R, *op cit*, note 26, pp 40-1.

46. See Stone, J, *op cit* note 23, pp 4-5; Bartlett, R, *op cit* note 26, p 41, quoting another authority: 'The king is crafty and deceitful It will be easy for him to falsify the ordeal'.

47. See generally, *Methods of Proof in Western Medieval World*, in Van Caenegem, RC, *Legal History: A European Perspective*, Hambledon Press, UK, 1991; Poole, AL, *op cit*, note 33, p 402.

without biblical sanction, not part of Roman law and 'tempting God' improperly. The Lateran Council of 1215 condemned clerical involvement in unilateral ordeals. 'The decision of the canonists and popes of the twelfth and early thirteenth centuries determined that the ordeal would be 'irrational'. They did not abandon it because it was irrational; it became irrational because they abandoned it'.⁴⁸ In England the abolition of trial by ordeal was recognised in a royal ordinance in 1219.⁴⁹ Though trial by ordeal lasted longer on the continent, the royal abolition seems to have brought trial by ordeal to an end in England.

It was clear that intractable cases needed a replacement form of trial. In England trial by jury filled the gap. Juries had functioned since Anglo-Saxon times and they provided a ready foundation for a secular judicial system. As Stone notes 'the jury ... did not burst all at once upon the English mind'.⁵⁰ In early times juries were a group with local and direct knowledge of the dispute. Juries of presentment existed in the Middle Ages to indict (accuse) felons. There were no trial juries until the early thirteenth century.⁵¹ At this time the option developed of permitting the indicted felon to choose between trial by ordeal or trial by jury (known as putting oneself on the country). Many features of the English adversarial system were well established by the thirteenth century. Medieval witness/jurors filled new functions which ultimately required new rules of conduct for the trial. The testing of evidence became important. Over time the jury changed to conform to the modern jury, which determined guilt by observing witnesses who presented to the tribunal the relevant facts as evidence. The presentation of facts was overseen in a courtroom and controlled by a judge. These changes ultimately closed jury deliberations and turned the process of judgment into a secret process protected from outside scrutiny. Jury deliberations had all the inscrutability of the ordeal and jury trials were seen as a 'newer sort of ordeal'.⁵² As with God's judgment, one could not question or test the reasons for jury verdicts.

Primitive or magical forms of adjudication [that is, those using oracles to deliver judgment] are not subject to intellectual control. The judgment of an oracle, unaccompanied by supporting reasons, is a fateful decree which men, with their limited powers of comprehension, must accept but can never understand. Only when human beings assume the role played by divine powers in all oracular forms of law-making and begin giving reasons for their decisions — thereby transforming legal judgments into human artifacts — can the adjudicatory process itself be subjected to intellectual control and in this sense rationalised.⁵³

The jury verdict gained (and continues to derive) its authority as an oracular-like pronouncement and not from reason. In medieval times

48. Bartlett, R, *op cit*, note 26, p 86. See generally pp 81–90.

49. *Patent rolls of the Reign of Henry III, 1216–32*, 2 vols, HMSO, 1901–13, I, p 186, cited by Bartlett, R, *op cit*, note 26, p 127.

50. Stone, J, *op cit*, note 23. See also Poole, AL, *op cit*, note 33, p 403; in Eastern Europe the process was slower, see, *Methods of Proof in Western Medieval World*, in Van Caenegem, RC, *op cit*, note 47.

51. Bartlett, R, *op cit*, note 26, pp 138–9.

52. Bartlett, R, *op cit*, note 26, p 139.

53. Weber, M, *Economy and Society*, p 787, quoted by Kronman, AT, *op cit*, note 1, p 169.

divine authority was sufficient justification for unreasoned and unjustifiable decisions. Juries do not, of course, have divine powers. The jury receives instruction from the trial judge. It hears the evidence, adjudges the witnesses and delivers the verdict with the full panoply of formality of the common law trial. As the common law trial became an information-gathering process there arose a need to regulate witnesses and evidence. Hence new evidentiary principles and a philosophy of proof began to grow. These were set down by the appellate courts for trial judges to administer. Although the common law may have grown in a haphazard manner with a limited systematic structure, *stare decisis* gave it an overall predictability and stability. The formality of the common law trial, although in Weberian terms associated with primitive adjudication, helped maintain the illusion of fair and impartial justice.

Jury trials developed in England and Denmark. However, most European countries were to follow the Roman law non-adversarial path. Inquisitorial techniques developed in Continental Europe which made the judge the active participant in the trial and the accuser no longer centrally positioned to litigate the matter. According to Bartlett, juries and torture became the new ordeals because they were instrumental in resolving the difficult cases. Torture fitted easily into the Romano-canonical system of proof. The Romano-canonical system⁵⁴ could solve the easy cases of overt crime where witnesses were available to prove guilt. However, in cases of covert crime,⁵⁵ the system encouraged the extraction of confessions to prove guilt. Roman law prescribed torture as a crime detection measure and inquisitorial procedure lent itself to probing and torturing suspects. Torture was also employed most commonly against 'unrespectable persons of the lower orders' (*persone leves et viles*).⁵⁶ Like ordeals, torture was the proof of last resort and, also like ordeals, torture could be adjusted so that the process itself produced proof of guilt. On the continent torture superseded the ordeal as the common mechanism to determine the 'invisible' crimes of witchcraft and treason.⁵⁷ In England, however, torture was utilised to a limited extent only. An indicted suspect who refused 'to put oneself on the country' could be subjected to *la peine forte et dure* — torture designed to pressure him to plead before a jury.⁵⁸

The development of the modern common law

Western medieval adjudication is an obvious starting point for taking up Weber's typologies because the medieval legal system has a number of features which could be described as irrational. During the Middle Ages England and continental Europe had similar legal systems in the sense that both were based on divine justice. The church dominated the

54. See the basic rules of full proof below.

55. Langbein, JH, *Torture and the Law of Proof*, Chicago, 1977, p 7.

56. Bartlett, R, *op cit*, note 26, p 142 quoting from the code issued by Frederick II of Sicily.

57. For the extent to which torture was employed in England see Langbein, JH, *op cit*, note 55; Heath, J, *Torture and English Law*, Connecticut, 1982.

58. In England adherence to customary law meant that there was no Romano-canonical base or inquisitorial judge for torture to flourish as it did on the continent: Bartlett, R, *op cit*, note 26, p 143.

judicial process. 'Truth' was revealed by divine intervention. The shift away from divine adjudication around the thirteenth century, however, marked a dividing of the ways. Civil law followed the Romano-canonical pathway, creating a secular form of law that was highly rationalist in that it fitted within the claim that past events could be ascertained in a 'scientific' or intellectual manner. The English common law was relatively untouched by the influences of Roman law. The English Bar apprenticeship method of legal education did not produce such a systematic and logical legal system, instead the system was hailed for its flexibility and practicality.

In Continental Europe, Roman law had been systematically studied in universities and there was a large legally trained bureaucracy, schooled in complex, logical and theoretical techniques. As a consequence, Roman law was influential when new legal structures were developed in the late Middle Ages. An example of this highly theoretical approach was the development of a system of fractional proofs to quantify evidence:

The basic rules [were] as follows:

- (a) Full proof always requires judgment.
- (b) Less than full proof never admits judgment.
- (c) The best full proof was two credible witnesses. The concurrence of their testimony was conclusive for guilt or innocence.
- (d) One witness, however credible, constituted only a half-proof and could never of itself suffice for judgment.
- (e) Such half-proof might, however, be sufficient if another half-proof could be supplied. The following counted as a half-proof each:
 - (i) confessions extracted by torture — hence the rule that torture could be applied if there was a half-proof;
 - (ii) entries by tradesmen in their books;
 - (iii) an oath of sincerity and truth specially administered to the party;
 - (iv) rumour or reputation confirmatory of the half proof.
- (f) Any two half-proofs make a full proof.
- (g) Other factors might be invested with the value of a quarter proof, or an eighth proof, two and four of which respectively were equivalent to a half-proof.⁵⁹

Where the prosecution sought to rely on weak evidence it had to be supported by other evidence to obtain sufficient proof for conviction. If the additional evidence was also weak, then there needed to be a sufficient agglomeration of items of evidence to add up to 'full-proof'. In all, the system acknowledged the frailty of some prosecution evidence (for example, confessions extracted by torture) and provided systematic compensation for these weaknesses. Post-medieval civil law provides a valuable analytical foil for our historical study.

The case-by-case development of the English common law relied on a debate format in the adjudicative process.⁶⁰ In England the legal profession was well-positioned to be involved in changes in curial structure. Even in the twelfth and thirteenth centuries England had a

59. *Continental Law of Evidence to the End of the Nineteenth Century* in Stone, J, *op cit*, note 23, pp 13-14.

60. Sward, EE, *op cit*, note 8, p 323.

legal profession termed pleaders and attorneys⁶¹ available to assist litigants from the pleading stage. By the end of the thirteenth century there was a modicum of party control over the litigation process, particularly in the substance of pleadings.⁶² 'With the power of adversaries to control the conduct of litigation'⁶³ partisan witnesses were introduced into the forum and the opposing party gained the right to cross-examine them.

The movement away from 'divine' adjudication meant that the oath lost its pivotal role as a form of proof. The witness oath took on its modern form. Testimony still gained validity through the swearing of the oath, but the oath was not the sole test of truthfulness. The old authority of the oath and the new claims for adversarial testing of evidence are illustrated in the changing rationale for the rule against hearsay.⁶⁴ On one view the hearsay rule was developed to exclude out-of-court statements because they were generally *unsworn*. The other view on the origins of the hearsay rule was a belief that the truth of statements could be tested adequately only by *cross-examination*. In the 1790 case, *R v Eriswell (The Inhabitants)*⁶⁵ the issue in the case concerned the requirement for the hearsay rule — was it needed because the evidence was not presented under oath or because of the need to cross-examine the maker of statements? The court could not agree on the matter. The old value ascribed to the oath held, even at a time when the adversarial system was well established.

Credibility (that is, the reliability) of witnesses has been a central tenet of the common law rationalist tradition. Shapiro suggests⁶⁶ that the Protestant ethos of scrutinising the New Testament heavily influenced the treatment of witness testimony. 'The tracts and sermons, particularly of Restoration Anglicans, abound in references to credible and incredible witnesses and the reasonableness of believing witness testimony'. The credibility of witnesses became assessable, not by the kind of technical formulae applied to medieval oaths, but by jury determination of the

61. Holdsworth, *History of English Law* Vol VI, p 433, 1966 reprint, UK.

62. Sward, EE, *op cit*, note 8, p 323.

63. Morgan, EM, *Hearsay Dangers and the Application of the Hearsay Concept* (1948) 62 *Harv LR* 177 at p 183.

64. Morgan, EM, *id*, pp 180-4. Morgan's view is that it was the adversarial nature of trials that spawned the hearsay rule. He supports this view by reference to the non-adversarial system on the Continent where there was negligible partisan cross-examination of witnesses and the judge rather than the parties dominates the proceedings. According to Morgan the *sine qua non* of admissible testimony in the common law was the opportunity given to the adversary to test the reliability of evidence. In support he cites two seventeenth century cases. See also Landsman, S, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 *Cornell LR* pp 497, 561-4 (1990); Stone, J, *op cit*, note 23, pp 307-8. Stone draws heavily on Wigmore but (p 314) disagrees with Wigmore on the importance of cross-examination in the development of the hearsay rule. Oddly enough, it is the inability to test the veracity of an out-of-court statement rather than its reliability *per se* which is typically given as the rationale for the hearsay rule. See, for example, Lord Normand in *Teper v R* [1952] AC 480; *R v Blastland* [1986] AC 41.

65. (1790) 3 TR 707; 100 ER 815.

66. Shapiro, BJ, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence*, Univ of Cal Press, US, 1991, p 194.

weight to be given to each witness's testimony.⁶⁷ Over time the common law focused on cross-examination⁶⁸ as the crucial truth-finding device in the adversarial system. The reliance on oral presentation of evidence and the focus on demeanour as an indicator of credibility reflect the received wisdom that witnesses' testimony could be best evaluated by observing the witness under cross-examination.

The medieval system of grading oath-takers had no direct analogy in this later period in that no witness was (expressly) worth more than another because of his/her status. There was no 'mathematical' grading nor was there a two witness requirement akin to the medieval Continental system of 'full proof'.⁶⁹ There was, however, grading of witnesses into those who were competent and those who were incompetent to testify. Many categories of witnesses were assessed as too unreliable (or incredible) to testify. These categories included convicts, parties to the case,⁷⁰ interested persons,⁷¹ a party's spouse and non-Christians. Indeed, Shapiro notes that in a small community a significant portion of the population would have been disentitled to testify under these competency restrictions.⁷²

From the irrational to the rational?

Stone refers to the transition from ecclesiastical to secular trials as a move from the irrational to the rational mode of adjudication.⁷³ In one sense Stone was correct. In the secular trial the parties presented their case to a tribunal which determined the verdict using intellectual reasoning rather than divine portent. However, divine adjudication was a rational method of dispute resolution for its time. It was predicated on a world view which held that truth was revealed rather than logically deduced or empirically verified. For their time these early trials were effective and legitimate tools of adjudication⁷⁴ and were used to resolve an array of

67. The literature on witness credibility studies is voluminous and generally critical of assumptions underpinning credibility assessments of witnesses in the trial process: see, for example, Eggleston, R, *Evidence, Proof and Probability*, Weidenfeld & Nicolson, UK, 2nd ed, 1983, Chapter 14 in particular; Re, L, *Oral v Written Evidence: The Myth of the Impressive Witness*, (1983) 57 ALJ 679.

68. Despite modern evidence suggesting that cross-examination is not necessarily likely to enhance the reliability of recollection: see Australian Law Reform Commission, Interim Report, No 26, *Evidence*, AGPS, 1985 Vol 1, para 666. See Re, L, *ibid*. On advocacy techniques which further undercut the truth-seeking credentials of cross-examination, see Brennan, M & R, *Strange Language: Child Victims Under Cross Examination*, Charles Sturt Univ-Riverina, 3rd ed, 1988. See generally Chapter 6.

69. See the quotation from Stone, J, at note 59. The 'two witness' rule developed as a statutory requirement in the sixteenth and seventeenth centuries for treason and blasphemy, see Shapiro, BJ, *op cit*, note 66, p 192.

70. A party's lack of capacity related also to the privilege against self-incrimination.

71. More precisely, those persons with a pecuniary of proprietary interest in the outcome of the trial.

72. See Shapiro, BJ, *op cit*, note 66, pp 188-9.

73. Though Stone notes that medieval adjudication may have appeared irrational, it was not wholly so, see: Stone, J, *op cit*, note 23; Colman RV, *Reason and Unreason in Early Medieval Law*, 4 *Jnl Interdisciplinary History* 571 (1974)

74. See Brown, P, *Society and the Supernatural: A Medieval Change*, *Daedalus* pp 104, 137 (1975); Hyams, P, *Trial by Ordeal: The Key to Proof in the Early Common Law* in Arnold MS et al (eds), *On the Laws and Customs of England: Essays in Honour of Samuel E Thorne*, Chapel Hill, 1981, pp 90, 115.

disputes from the common spread of crimes, to heresy, paternity and sexual misconduct. The modes of proof may not have assisted a discovery of 'truth' in the intellectual sense but the decision-making was formalised and definitive. In its own context, divine adjudication made sense, and was legitimate. It operated when all litigation, including criminal proceedings were viewed as a private quarrel, the dispensation of divine justice prevented the parties taking the law into their own hands⁷⁵ and as such served the role of maintaining a level of harmony and control over the community. On Brown's analysis 'the ordeal was "an instrument of consensus" in a world of "small face-to-face groups"'. It was slow, flexible, therapeutic — it 'applied a discreet massage to the ruffled feelings of the group' and was 'reassuring and peace-creating'.⁷⁶ There is no doubt that this form of adjudication served political goals. Further, it solved intractable cases. Additionally, the final verdict may have been divine, but the choice of proof reflected human decision-making. Intellectual considerations had an important *underlying* impact in the choice of proof.

One must be careful not to overstate the differences between ecclesiastical and secular trial systems. Hay's study of eighteenth century criminal trials pointed to similarities between such secular trials and the old ecclesiastical adjudication system. If aspects of the ecclesiastical trial appeared arbitrary, so too did aspects of the secular trial.

In its ritual, its judgments and its channelling of emotion the criminal law echoed many of the most powerful psychic components of religion. The judge might ... emulate the priest in his role of human agent, helpless but submissive before the demands of his deity [the Law]. But the judge could play the role of deity as well, both the god of wrath and the merciful arbiter of men's fates. ... The judges' paternal concern for their prisoners was remarked upon by foreign visitors, and deepened the analogy with the Christian God of justice and mercy.

Indeed, the justice system seemed to replace the Church. Secular sermons from the criminal trial replaced the fire and brimstone of the pulpit. As Hay remarks, '[t]oo many Englishmen had forgotten the smell of brimstone, and the clergy — lazy, absentee and dominated by material ambition — were not the men to remind them'.⁷⁷

Not only was systematic and comprehensive treatment of the law prevented by the craftlike specialisation of [lawyers in England], but legal practice did not aim at a rational system but rather at a practically useful scheme of contracts and actions, oriented towards the interests of clients in typically recurrent situations ... [T]he concepts thus formed are constructed in relation to concrete events of everyday life, are distinguished from each other by external criteria, and extended in their scope, as new needs arise [by means of procedural fictions].⁷⁸

75. Stone, J, *op cit*, note 23.

76. Bartlett, R, *op cit*, note 26, p 35 quoting Brown, P, *op cit*, note 74, pp 135-8.

77. Hay, D, *Property, Authority and the Criminal Law* from Hay, D, Linebaugh, P, Rule, JG, Thompson EP, and Winslow, C, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*, Allen Lane, UK, 1975, pp 29-30.

78. Kronman, AT, *op cit*, note 1, p 121.

As Kronman⁷⁹ points out, serving clients' needs may have made the law adaptable to the practical demands of commerce, and thus from Weber's perspective, fit for the emergence of capitalism, but it certainly did not encourage the kind of abstract legal reflection found in civil legal systems. Logical consistency based on abstract theoretical analysis of the Roman law and the Continental style of inquisitorial adjudication never gained a foothold in England. Indeed the traditional reliance on juries, in one form or another, obviated such a need.

If the common law which Hay⁸⁰ described, Weber analysed and Bentham sought to reform, was not systematic, when, if ever, did it become so? The eighteenth and nineteenth centuries marked the time of the English treatise writers. There was a strong desire to provide a systematised exposition of the common law. Hale, Blackstone, Gilbert, Bentham, Stephen and Best all attempted to draw some coherence out of the ad hoc collection of legal rules.

Legal education in England may have been a professional pursuit rather than an intellectual one. Even so, its legal principles were not intellectually barren. During the formative growth period of evidence law jurists drew on intellectual and philosophical thoughts of the day to develop a reasoned approach to legal issues of proof, procedure and substantive law. One of the political movements was the broad democratic trend which highlighted individuality. This trend was traceable at least back to Magna Carta in 1215. As Ellen Sward noted: 'The critical principle for adversarial adjudication is the principle of individual autonomy ... Without a democratic ideal that honoured the dignity and autonomy of the individual, the adversary system could not have worked'.⁸¹

It is clear from Shapiro⁸² seventeenth century philosophy dominated the formulation of a jurisprudence of proof. The development of scientific method exerted a significant influence in this respect. Scientific method assisted in demonstrating how to reason from physical evidence and advanced the perception that through reason a probability or a certainty of truth could be discovered. The notion that truth was discoverable through reason is quite different from the ancient, irrational modes of proof in which there was no requirement to evaluate factual evidence, only to comply with formalities which would properly invoke God's judgment.⁸³ The philosophical and scientific community in seventeenth century England comprised Protestant theologians, philosophers, historians, scientists, judges and lawyers. They created an intellectual environment from which legal evidentiary principles and rules were drawn. Such theorists were concerned to organise and systemise (all) knowledge and to define degrees of probability and certainty. In science, statements were structured as probabilistic hypotheses and in law, scales of reliability and probable truth were developed. Knowledge was said to be based on physical certainty (that is, it was immediately observable) or

79. Kronman, AT, *ibid.*

80. Hay, D, *op cit*, note 77.

81. Sward, EE, *op cit*, note 8, p 324.

82. Shapiro, BJ, *Probability and Certainty in Seventeenth-Century England*, Princeton Univ Press, 1983, USA, Chapter 1.

83. Sward, EE, *op cit*, note 8, pp 304-6.

on mathematical demonstration (that is, on logic), or on what Shapiro⁸⁴ terms 'moral certainty':

Although moral certainties did not depend on evidence that compelled assent, they might be so clear that everyone 'whose judgment is free from prejudice will consent to them. And though there be no natural necessity, that things be so, and they cannot possibly be otherwise ... yet may they be so certain as not to admit of any reasonable doubt concerning them'. Moral certainty could thus 'be styled' indubitable. The reasonable man will not require demonstration or proofs that 'exclude all Dubiosity, and compel assent,' but will accept moral and physical proofs that are the best that may be gained. One could thus gain a 'competent certitude where demonstration is impossible'.⁸⁵

By the late seventeenth century juries were directed⁸⁶ to weigh the credibility of witnesses and to determine the verdict on an intellectual evaluation of the evidence. Purely emotive or intuitive moral outcomes were rejected. English Protestant casuist writings⁸⁷ heavily influenced the development of legal proof. In these writings conscience was equated with reasoning and understanding. Philosophical thought in the seventeenth century considered the requisite standard of belief for establishing a satisfied conscience and standards of certainty which were sufficient to justify persuasion: conscience could be concerned with *reasonable doubts*, but not with excessive doubt.⁸⁸ According to Shapiro:

The recorded cases after c 1668 exhibit sufficient repetition to suggest contemporary use. A number of phrases appear repeatedly in judicial charges. The first is, 'if you believe', the second, 'if you are satisfied or not satisfied with the evidence.' A third was 'satisfied conscience'. Verdicts were to be based on 'belief', or 'satisfied conscience', and were to be arrived at after evaluation of the evidence.⁸⁹

John Locke's⁹⁰ *Essay Concerning the Human Understanding*, which exposits these concerns, heavily influenced the evidence law treatise tradition. By the mid-eighteenth century the prosecution case had to be 'so strong, so convincing, ... that Presumption will rise to a Conviction; there will not remain the least Doubt of it'.⁹¹ Shapiro attributes the emphasis on doubt to the growing participation of defence counsel in the trial process.

Whereas intellectual analysis was important for common law treatise writers,⁹² the environment in which the law was administered shows a significantly different picture and was important in moulding popular perceptions of justice. Hay's account, *Property, Authority and the Criminal*

84. Shapiro, BJ, *op cit*, note 66, p 8.

85. *Ibid.*, quoting in part from John Wilkins, *Of the Principles and Duties of Natural Religion*, London, 1675, pp 7-8.

86. Shapiro, BJ, *op cit*, note 66, pp 10-12.

87. Shapiro, BJ, *op cit*, note 82 referring to William Perkins, *Discourse of Conscience* (1596) and *Whole Treatise of the Cases of Conscience*.

88. Shapiro, BJ, *op cit*, note 66.

89. Shapiro, BJ, *op cit*, note 66, p 13.

90. John Locke's views are described by Shapiro as the most influential on the early legal treatise writers who drew on the then current epistemological formulations to establish standards of proof.

91. Shapiro, BJ, *op cit*, note 66, p 21, quoting from *The Genuine Trial of Swann*, London, 1752, p 4.

92. See Twining, W, *op cit*, note 5.

*Law*⁹³ shows that the philosophical and democratic traditions of the common law were deftly mixed with spectacle, ritual, apparent impartiality and the appearance of clemency. There was a popular belief that the criminal justice system was just, impartial and compassionate. Hay describes the eighteenth century assizes with the court arriving in a provincial centre as 'a formidable spectacle ... the most visible and elaborate manifestation of state power to be seen in the countryside, apart from the presence of the regiment'.⁹⁴ The Weberian view that there is a link between formal ritual and lack of rationality gains full support from Hay. This was orchestrated justice for public consumption. The English trials were not private determinations of right and wrong — they were a display, an extravaganza involving many of the local populace:

The town was crowded, not only with barristers and jurors, but with the cream of county society, attending the assize ball and county meetings, which were often held in the same week. Tradesmen and labourers journeyed in to enjoy the spectacle, meet friends, attend the court and watch the executions. And the court arrived in town with traditional, and calculated, panoply: 'The judges', wrote a French observer,

'upon their approach are received by the sheriff, and often by a great part of the wealthiest inhabitants of the county; the latter come in person to meet them, or send their carriages, with their richest liveries, to serve as an escort, and increase the splendour of the occasion.

They enter the town with bells ringing and trumpets playing, preceded by the sheriff's men, to the number of twelve or twenty, in full dress, armed with javelins. The trumpeters and javelin-men remain in attendance on them during the time of their stay, and escort them every day to the assize-hall, and back again to their apartments.'

In the court room the judges' every action was governed by the importance of spectacle. Blackstone asserted that 'the novelty and very parade of ... [their] appearance have no small influence upon the multitude': scarlet robes lined with ermine and full-bottomed wigs in the seventeenth-century style, which evoked scorn from Hogarth but awe from ordinary men. The powers of light and darkness were summoned into the court with the black cap which was donned to pronounce sentence of death, and the spotless white gloves worn at the end of a 'maiden assize' when no prisoners were to be left for execution.

Within this elaborate ritual of the irrational, judge and counsel displayed their learning with an eloquence that often rivalled that of leading statesmen. There was an acute consciousness that the courts were platforms for addressing 'the multitude'. Two stages in the proceedings especially were tests of the rhetorical power of the bench. The first, the charge to the grand jury, was ostensibly directed to the country gentry. Judges gave close attention to content and to delivery. Frequently charges were a statement of central policy, as well as a summary of the state of the law and the duties of gentlemen. Earlier in the century they castigated Jacobitism; and in the 1720s the judges used them to denounce 'unfounded and seditious' criticisms of government policy on the South Sea Bubble. Tone was important: before he went on circuit in 1754, Sir Dudley Ryder reminded himself, 'When I would speak to [the] Grand Jury I should mean to persuade them to do their duty, I should therefore speak to them as I would to a number of my tenants whom I would instruct and persuade, and therefore make them fully acquainted with everything necessary to that end, or as I would to my son.' The flavour of

93. Hay, D, *op cit*, note 77, p 17.

94. Hay, D, *op cit*, note 77, p 27.

paternalism was important, for usually the charge was also directed at the wider audience in the court room. It was often a secular sermon on the goodness of whichever Hanoverian chanced to be on the throne, the virtues of authority and obedience, the fitness of the social order.⁹⁵

In a manner that was not dissimilar from the ecclesiastical trial, emotion rather than intellect provided the authority in the law:

The aim was to move the court, to impress the onlookers by work and gesture, to fuse terror and argument into the amalgam of legitimate power in their minds. For execution was a fate decreed not by men, but by God and Justice. The judge might deepen the effect when visibly moved himself. In 1754 at Chelmsford the Chief Justice condemned a girl to hanging and dissection for murdering her baby. He pressured the jury to bring in a simple verdict of guilty (at first they found her insane); but having exacted justice, he then expressed helplessness of men before it: 'Before I pronounced the sentence', he confided in his diary, 'I made a very proper speech extempore and pronounced it with dignity, in which I was so affected that the tears were gushing out several times against my will. It was discerned by all the company — which was large — and a lady gave me her handkerchief dipped in lavender water to help me'.⁹⁶

Extreme judicial solicitude for the rights of the accused mitigated, and often camouflaged, a legal order that gave little in the way of actual rights to the accused (for example, there was no legal counsel for defendants charged with a felony) and a criminal law that was harsh and unforgiving. The compassion from the bench was a striking contrast to this legal order. The bench not only expressed merciful concern but it also created exacting demands upon the prosecution. A minor error, a name or date, if the accused was described as a farmer instead of a yeoman on the indictment and the prosecution could founder. This might have been viewed as the arbitrary dispensation of justice, but instead it was seen to be benevolent. The formality masked the irrationality — or at least permitted the trial system to be seen as independent from the judiciary and as beneficial to the common person:

The punctilious attention to forms, the dispassionate and legalistic exchanges between counsel and the judge, argued that those administering and using the laws submitted to its rules. The law thereby became something more than the creature of a ruling class — it became a power with its own claims, higher than those of prosecutor, lawyers, and even the great scarlet-robed assize judge himself. To them, too, the law was *The Law*.⁹⁷

Thus omnipotence and inflexibility in 'The Law' permitted the personal discretions of those in authority to seem like gifts. For example, character testimonials took on great importance. They might induce a jury to acquit. If not, they might induce a judge to pass a lesser sentence or recommend a pardon. These testimonials were best received if they came from men of property or position. Hence those in authority who were powerless against 'The Law', could significantly influence discretionary justice. Discretionary justice through pardons was also a highly prominent feature of eighteenth century justice. Approximately half of those condemned to death during the eighteenth century received

95. Hay, D, *op cit*, note 77, pp 27–8.

96. Hay, D, *op cit*, note 77, p 29.

97. Hay, D, *op cit*, note 77, p 33.

conditional or unconditional pardons — mostly suffering transportation to the colonies or imprisonment.⁹⁸

A trial judge could recommend a pardon, but generally would do so only if it accorded with the views of the local worthies. In relation to pardons the moral claim of need was less compelling than that of respectability. Hay states that only two of the hundreds of petitions for pardons in 1787 pleaded poverty and distress. The overwhelming majority pleaded character: 'his parents are respectable persons in Denbighshire'; his father is 'a respectable farmer'; his brother is 'a builder of character and eminence in London'.⁹⁹ These 'gifts' reinforced an ideology of mercy yet reflected class favouritism and influence:

The pardon ... put the principal instrument of legal terror — the gallows — directly in the hands of those who held power. In this it was simply the clearest example of the prevailing custom at all levels of criminal justice. Here was the peculiar genius of the law. It allowed the rulers of England to make the courts a selective instrument of class justice, yet simultaneously to proclaim the law's incorruptible impartiality, and absolute determinacy. Their political and social power was reinforced daily by bonds of obligation on one side and condescension on the other, as prosecutors, gentlemen and peers decided to invoke the law or agreed to show mercy. Discretion allowed a prosecutor to terrorise the petty thief and then command his gratitude, or at least the approval of his neighbourhood as a man of compassion.¹⁰⁰

This secret deception was perpetuated by the reinforcement of a sense of popular justice. Better to use discretion than to expose the authority of the law to ridicule or close scrutiny. Not only was popular outrage limited, but where it might arise, the possibility of it being ventilated was minimised by punishing contempt of court severely. As Hay showed, the ruling class controlled the law. Despite the harshness and apparent arbitrariness of the criminal law its intellectual poverty and lack of system did not raise the ire of the English.

Eighteenth-century 'justice' was not ... nonsense. It remained a powerful and evocative word, even if it bore a much more limited meaning than a twentieth century (or seventeenth-century) egalitarian would give it. ... [I]t would be wrong to suggest that the law had to be wholly consistent to persuade men of its legitimacy. 'Justice', in the sense of rational, bureaucratic decisions made in the common interest, is a peculiarly modern conception. It was gaining ground in the eighteenth century. Most reformers worked to bring about such law, and of all such schemes Jeremy Bentham's was the logical conclusion. Yet his plan for a criminal code that was precise, consistent and wholly enforced was alien to the thought of most eighteenth-century Englishmen. They tended to think of justice in personal terms, and were more struck by understanding of individual cases than by the delights of abstract schemes. Where authority is embodied in direct personal relationships, men will often accept power, even enormous, despotic power, when it comes from the 'good King', the father of his people, who tempers justice with mercy. A form of this powerful psychic configuration was one of the most distinctive aspects of the unreformed criminal law. Bentham could not understand it, but it was the

98. Hay, D, *op cit*, note 77, p 43.

99. Hay, D, *op cit*, note 77, p 44.

100. Hay, D, *op cit*, note 77, p 48.

law's greatest strength as an ideological system, especially among the poor, and in the countryside.¹⁰¹

Continental and common law models compared

Historically the adversarial trial has been highly ritualised. The oral tradition and the formal, stylised unfolding of the parties case before the court perpetuates this ritualism. The modern adversarial system also evolved to incorporate a jury system in which amateur decision-makers gave specific decisions or verdicts. Amateur decision-making is counter-balanced, or perhaps disguised by the complexity, and formalism of the adversarial trial process. The modern criminal trial continues to exhibit some formal and irrational attributes from its past. Modern day commentators deplore the arcane ritual, the adversarial battle mode and the class-based manipulation of the legal system. Such features are said to obscure the search for 'truth'. The remaining sections of this chapter explore the potential for reform. One obvious model for reform is the ostensibly coherent, professional and sophisticated continental non-adversarial legal structure. Increasingly reformers look to the non-adversarial systems for inspiration as to alternative, better modes of adjudication.

A common theme for debate in both common law and civilian law is the extent to which one system should adopt the procedures and structure of the other. Pure adversarial or inquisitorial systems¹⁰² do not exist today in any country. Incremental reforms in law and procedure have effected significant modifications to the two models of adjudication.¹⁰³ The result is that common law countries such as Australia have an adversarial or accusatorial system which has some non-adversarial influences, while the civil law countries have adjudication structures which tend towards the non-adversarial tradition but have adversarial components as well.¹⁰⁴ Inevitably this analysis takes up the claims made for the adversarial justice model — its truth finding capacity, its democratic fairness, and its wider social goals.

The relative merits and deficiencies of the civil and adversarial systems have been much extolled and debated.¹⁰⁵ The adversarial system

101. Hay, D, *op cit*, note 77, p 39.

102. We prefer the terminology of 'non-adversarial' to 'inquisitorial' to describe the system of adjudication which gives a diminished role to the parties because the term 'inquisition' connotes the old style inquisition practices.

103. As Huber points out, many of the major European criminal law systems (Portugal, Italy, Switzerland, Austria, Spain, Poland and several of the republics of the former USSR) have undertaken significant reform initiatives: Huber, B, *The Office of the State Prosecutor in Europe: An Overview*, (1992) 63 *International Rev of Penal Law* 557.

104. Van Kessel, G, *Adversary Excesses in American Criminal Trial*, 67 *Notre Dame LR* 403 at p 417 (1992); Certoma, GL, *The Accusatory System v The Inquisitorial System: Procedural Truth v Fact*, (1982) 56 *ALJ* 288.

105. Damaska, MH, *Presentation of Evidence and Fact Finding Precision*, 123 *Univ Pa LR* 1083 at pp 1088-90 (1975); Langbein, JH, *The German Advantage in Civil Procedure*, 52 *Univ Chic LR* 823 (1985); Thompson, RS, *Decision, Disciplined Inferences and the Adversary Process*, 13 *Cardozo LR* 725 (1991); Devlin, P, *op cit*, note 11.

has been lauded as the best system for arriving at the truth of the case.¹⁰⁶ However, it has just as frequently been decried as a system in which the battle obscures the search for truth.¹⁰⁷ Present day ideologists for the adversary system postulate the model as the best system for achieving 'corrective justice', arguing that with its individualist party focus, it ostensibly protects individual dignity and autonomy.¹⁰⁸

The major explanations of adversary trial are that its purpose is truth-finding; that it leads to fair decisions; that it protects the people from oppression or potential oppression by government; that, as a stalemate system, it is conducive to bargaining; and that finally it is a process designed to produce publicly acceptable conclusions which project substantive legal norms, whether or not those conclusions are grounded in true facts.¹⁰⁹

This text is not concerned to determine which system is the better, the fairer or more reliable one. As one commentator noted concerning the merits of the two systems:

In terms of the fundamental differences between the two systems, surely there is nothing sinister or presumptively unfair in a procedure which depends upon an 'inquiry' into the facts by a neutral and informed judge rather than upon presentation of evidence by interested 'advocates' to an unprepared fact finder.¹¹⁰

The contrast between English common law and the continental civil law appears stark. Not only does the order, system and theoretical rigour of the latter highlight the individualised *ad hoc* collection of legal principles that make up the common law, but the two systems have a different procedural structure. The common law is adversarial in nature, civil law is not. Its procedure is often described as inquisitorial. Lord Devlin described the differences between the two systems in the following terms,

The essential difference between the two systems — there are many incidental ones — is apparent from their names: the one is a trial of strength and the other is an inquiry. The question in the first is: are the shoulders of the party upon whom is laid the burden of proof, the plaintiff or the prosecution as the case may be, strong enough to carry and discharge it? In the second the question is: what is the truth of the matter?¹¹¹

The non-adversarial model gives the fact-finder an active role in pre-trial and trial proceedings.¹¹² In this model the judge has primary responsibility for initiating an investigation, collecting and presenting the evidence and conducting the trial. The non-adversarial system is

106. Luban, D (ed) *The Good Lawyer: Lawyer's Roles and Lawyers Ethics*, Rowman & Allanheld, 1984; Goodpaster, G, *op cit*, note 9; *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 231 per Simon LJ.

107. Frankel, ME, *Partisan Justice*, 7, (1978); Frankel, ME, *The Search for Truth: An Umpireal View*, 123 *Univ Pa LR* 1031 at p 1036 (1975); Freedman, MH, *Judge Frankel's Search for Truth*, 123 *Univ Pa LR* 1060 (1975).

108. Landsman, S, *The Adversary System: A Description and Defence*, America Enterprise, Washington, 1984, pp 48–51.

109. Goodpaster, G, *op cit*, note 9, p 121.

110. Van Kessel, G, *op cit*, note 104, p 417.

111. Devlin, P, *op cit*, note 11, p 54.

112. Brouwer, GEP *Inquisitorial and Adversary Procedures — A Comparative Analysis*, (1981) 55 *ALJ* 207; Certoma, GL, *The Non-Adversarial Administrative Process and the Immigration Review Tribunal*, (1993) 4 *Public LR* 4.

characterised by its activist judges, who are familiar with the facts of the case and who call and question witnesses. As Leroy Certoma has observed:

This does not compromise the neutral role of the judge who is only concerned with the collection of all of the relevant and significant evidence irrespective of whether it is in favour of or against either party. Moreover, the judicial investigation of the facts does not replace but merely supplements and integrates the evidence produced by the parties who remain free to tender any relevant and significant evidence.¹¹³

Civil law strives towards a decision based on a full judicial investigation. In much the same manner as the adversarial model takes its shape from a contest or dispute, the non-adversarial model is cast in the form of a judicial inquiry. Even so, the non-adversarial process contains appropriate procedural guarantees of fairness including, for the accused, a right of access to all the evidence in the case, the right to present a case or to refrain from giving evidence.¹¹⁴

Adversarial ideology confidently asserts that the truth emerges when each party assiduously, but it seems, not necessarily dispassionately pursues its own case. This theory of advocacy, has been described as an 'invisible hand' theory of competition:

It holds that the advocate who zealously attempts to obtain the best possible result for her client inadvertently, but inevitably, serves system purposes she neither cares about nor directly seeks to advance. Presumably, this is because she directly competes against an equally able and committed attorney whose aims directly oppose her own. Their respective efforts to maximize the interests of their sides lead to the best system results, although neither attorney tries directly to achieve them.¹¹⁵

The observations of Justices Deane and Dawson in the High Court case of *Jamieson & Brugmans v R*¹¹⁶ give support to criticism that adversarial justice does not endeavour sincerely to seek out 'truth' in the manner described by Lord Devlin above.¹¹⁷ Instead, say the critics, it seeks only to construct an approximation of 'truth'. *Jamieson & Brugmans v R* concerned the status of statements made in a party's pleadings. Pleadings, of course, form the foundation for argument and the admission of evidence in the courtroom. Thus, the pleadings are significant as the basis upon which the verdict, or the 'legal truth' is constructed. In *Jamieson & Brugmans* false representations in a statement of claim for damages for personal injury gave rise to a criminal prosecution for obtaining by deception. Jamieson had claimed damages from the Government Insurance Office stating in her pleadings that she was the passenger in a vehicle involved in a motor vehicle accident. In fact this was not true, she was the driver. Deane and Dawson, JJ allowed the appeal and quashed the indictment.¹¹⁸ They based their judgment on the nature of pleadings:

113. Certoma, GL, *id*, p 7.

114. Certoma, GL, *ibid*.

115. Goodpaster, G, *The Adversary System, Advocacy and Effective Assistance of Counsel in Criminal Cases*, 14 *NY Uni Rev Law & Social Change* 59 at p 86 (1986).

116. (1993) 116 *ALR* 193 (HCA).

117. Devlin, P, *op cit*, note 11.

118. Deane and Dawson, JJ in a joint judgment combined with Gaudron J to form the majority opinion.

Indeed, to characterise the factual assertions in a plaintiff's unverified pleading as positive representations of the truth of their content would be to misunderstand or ignore the traditional nature and function of a declaration, statement of claim or bill. *The traditional nature of such an unverified pleading was not that of a representation or warranty of the objective accuracy of the assertions of fact which it contained.* It was that of a written identification and communication of the extent of the plaintiff's claim. Its traditional function was not an evidentiary one. It was to identify the issues of fact which would, in the absence of admissions, arise for determination at the trial by defining the outer limits within which the plaintiff's case would be confined. [The Justices then quoted from Baron Parke in *Boileau v Rutlin* (1848) 2 Ex 665 at 680-1; [154 ER 657 at 663] and then continued.] In that regard, one need do no more than disinter the skeletons of the unexaminable brothers-in-law Doe and Roe, or that of their distant cousin Goodtitle, to demonstrate that the development of both the common law and the jurisdiction of common law courts was, to a significant extent, dependent upon practices and fictions which were completely inconsistent with the proposition that the plaintiff in a common law action personally warranted ... the accuracy of the various assertions of fact contained in her initiating process or pleading.¹¹⁹

If objective accuracy of factual assertions is not a prerequisite at the beginning of the adjudication process, then it is tempting to be cynical about the end result of the process. Claims that the 'invisible hand' of competition works as a rational 'truth finding' mechanism are simply conjecture. They cannot be tested. They rely on faith in the process.

A comparison of the features of the adversarial and non-adversarial models of adjudication is given in an excellent study of the 1989 reforms to Italian criminal procedure by Pizzi and Marafioti. These reforms grafted adversarial features onto the previously non-adversarial trial system. Pizzi and Marafioti use the Italian and American legal systems to exemplify the two adjudicatory models.

The Civil Law Paradigm WT Pizzi & L Marafioti¹²⁰

To appreciate the effect of switching from a civil law trial system to a more adversarial trial system, it is important to understand some of the fundamental differences between the two paradigmatic systems.

As an initial matter, the central issue in a civil law trial is very different from the central issue in an adversarial trial. In an adversarial trial, the central determination is whether the prosecution can prove the defendant's guilt beyond a reasonable doubt. If the prosecutor fails to meet this burden, whether because of negligence or simply a lack of evidence, the rules of the adversarial system dictate that the prosecution loses. The judge in the adversarial system is kept largely unfamiliar with the pretrial file in an effort to preserve neutrality. Once at trial, the judge plays only a passive role in the development of evidence.

Judges are far more active trial participants in civil law systems. The judge, rather than the parties, is responsible for developing the evidence at trial, calling and questioning witnesses himself. To aid in his investigation, the

judge has access to the pretrial file prior to the trial's commencement. The involvement of the public prosecutor and defense attorney is generally limited to asking occasional follow-up questions or suggesting other lines of inquiry. As the name implies, the inquisitorial system places primary responsibility for developing the facts in the hands of the judge.

Because the civil law system places singular importance on ascertaining the truth at trial, it erects few evidentiary barriers that restrict the information the judge can consider in determining guilt. Continental systems of criminal justice have no equivalent of the Federal Rules of Evidence, since fixed evidentiary rules might lead to the exclusion of important probative evidence. Constitutional exclusionary rules, such as those that have been read into the Fourth Amendment, similarly are anathema. In contrast, the US system of criminal justice frequently subordinates the finding of truth to the protection of constitutional rights. Exclusion is used to deter improper police conduct and protect the rights of citizens, despite the potential effect on the outcome of certain trials.

Defendant participation also differs greatly under the two systems. The trial in a civil law system usually begins with an examination of the defendant by the judge, exploring the defendant's background as well as his knowledge of, or participation in, the alleged crime. Questions are frequently directed to the defendant throughout the remainder of the trial. While the defendant has the right to refuse to answer any questions, such refusals are exceptional; the presumption in civil law systems is that the defendant should cooperate with the trial judge and answer questions completely. The defendant's cooperation is also encouraged by the fact that his sentence, as well as his guilt, is determined at a single trial. A defendant who wishes to offer evidence of mitigating circumstances thus must speak at trial in order to place such evidence before the court. Since pretrial investigations usually are quite thorough, and since most defendants also cooperate with the pretrial investigation, the inquisitorial system presents less potential for evidentiary surprises than a criminal trial in the United States. A complete file, which includes statements from all potential witnesses, is assembled in advance of trial and made available to the defense.

The system creates a danger that the judge who has already studied the case file will come to the trial convinced of the defendant's guilt or innocence. The civil law system tries to protect against prejudiced judges in two ways. First, in all but the most minor cases only one member of the panel of judges who tries a case will have examined the file. This collegial approach to decision-making counterbalances at least some of the inherent dangers of the inquisitorial system.

Second, in contrast to the US system, the trial does not result in a simple verdict of guilty or not guilty. Instead, the court prepares a written judgment that summarises the evidence developed at trial, the conclusions drawn from the evidence, and any legal issues that arose during the trial. Because a civil law trial determines both guilt and sentencing, if the defendant is found guilty the judgment will also state the sentence and why the court considered this sentence appropriate.

Forcing the fact-finder to justify its conclusions facilitates the appeals process. The civil law system accords a verdict none of the finality given a jury verdict in a common law system. Extremely broad rights of appeal are extended to both parties after a trial. The parties can appeal the judgment's factual conclusions as fully and easily as its legal conclusions. The parties may even introduce new evidence on appeal if the appellate court deems it necessary. Not even an acquittal is final: the prosecutor may appeal if he believes that the trial court mistakenly reached a judgment of not guilty. The trial is viewed as simply one step in a process that will lead to the resolution

119. *Jamieson & Brugmans v R* (1993) 116 ALR 193 (HCA) pp 195-6. Emphasis added.

120. *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation* 17 *Yale Jnl of Int Law*, 1, at pp 22-3 (1992).

of the criminal charges — it is not the 'all or nothing' struggle that it often seems to be in the US system.

A concomitant of the civil law system's strong commitment is discovering the truth at trial is an emphasis on uniformity. The US system relies on lay juries, believing that they serve as a valuable check on the criminal justice system. Civil law systems, on the other hand, strongly disfavor lay juries because they introduce uncontrolled and unreviewable decision-making into the system. Obviously, the civil law system finds jury nullification and inconsistent verdicts unacceptable, although they are generally accepted in common law systems.

If lay jurors are used at all in civil law systems, they serve on hybrid panels alongside professional judges. These panels permit judges to benefit from the experience of laypersons while maintaining control over the development of evidence and the application of law. Since professional judges are always involved in the deliberations, there is no need for a lengthy set of jury instructions. Any legal advice needed during the deliberations of a mixed jury is provided by one of the participating professional judges. Like all-judge panels, mixed juries are expected to set forth the verdict in a thorough written judgment.

The civil law emphasis on uniform results manifests itself in a strong aversion to prosecutorial discretion. The civil law system has no counterpart to the broad prosecutorial discretion existing in the United States. The very notion that a prosecutor would have any leeway in choosing whether to file a criminal charge is alien to the civil law ethos. Instead, prosecutors must file criminal charges whenever the evidence indicates that the suspect has violated the law. If, for example, some evidence indicated that a suspect committed a serious crime, but the prosecutor believed that there were reasons for not prosecuting the case, the prosecutor would be expected to file a formal criminal charge and seek dismissal of the charge by a judge, who has the authority to review the prosecutor's decision.

Consequently, a system of plea bargaining like that existing in the United States is viewed as fundamentally inconsistent with the sacrosanct civil law values of uniformity and truth. While the US system has come to accept the practice of plea bargaining, seemingly motivated by the belief that half a loaf is better than none, civil law systems have made no such compromise. Indeed, so inflexible is the civil law's commitment to its principles that, even where a defendant has fully admitted his guilt and offered a detailed confession, the law still requires a full trial. The court, not the defendant, determines guilt.

There are clear differences in philosophy and structure and in the rational assumptions of common law and the civilian system. However, both share the same broad goals of adjudication, accommodated in albeit different structures. The common law shows none of the coherence, symmetry and orderliness that is said to mark the ideals of civilian law, but it is not without order. The modern law dealing with unreliable prosecution evidence (which encompasses corroboration law) is a case in point. In Anglo-Australian jurisprudence, although the 'proof-value' of prosecution evidence is not put in mathematical terms¹²¹ it must still conform to certain precepts. The prosecution case:

- must satisfy a recognised standard of sufficiency (beyond reasonable doubt instead of 'full-proof') to justify State condemnation and punishment; and

121. That is, a reference to the medieval system of fractional proofs discussed earlier in the chapter.

- might utilise unreliable techniques or sources (for example, the use of informers today; the use of ordeals in medieval times);
- but in such instances, parts of the case have a danger of being inherently weak,
- in which case they require supplement, support or verification (the common law uses corroborative evidence and/or judicial warnings, not additional fractions of proof); and
- these supplements and support might be flawed also;¹²² but,
- they will be considered sufficient to convict only if the sum of the parts reaches a beyond reasonable doubt¹²³ standard of proof.

Legal doctrine guides each of these steps. They do not operate in isolation from principle. However, *stare decisis* does not provide a code and more often, legislation tends to address specific needs rather than codify principles.

Modern advocacy practice and rationality

The adversary system is often compared to a battle or sporting contest in which the advocates are the players and the judge is referee or umpire. Just as trial by battle was legitimated by a faith that God would cause right to prevail, the adversary system is underpinned by a faith in its 'battle' process. The lawyers as players, are key participants in the adversarial process, and the generally accepted theory of advocacy requires lawyers to zealously and singlemindedly serve the interests of their clients and obtain for the client the best possible result. In the criminal context, the best possible result for defence lawyers is the client's acquittal; the next best is the client's conviction for the least serious crime and the least punishment meted out for that offence.¹²⁴ Trial lawyers emphasise that it is not their job to pursue the truth.¹²⁵ Indeed a trial advocate may not want the 'true' facts to come out at all in the trial. If the facts must surface, the lawyer's task is to put a gloss on the facts so that the facts are seen to be favourable to the client. Lawyers pursue not the truth, but the 'process from which the truth emerges'.¹²⁶

No doubt the parties in an adversarial contest are motivated to seek out the facts of their case. However a party may uncover relevant facts

122. See Chapters 7 and 8 for a discussion of judicial warnings and judicial discretions.

123. See *Chamberlain v R* (1984) 153 CLR 521 and *Shepherd v R* (1990) 170 CLR 573 for a discussion of proof in cases relying substantially on circumstantial evidence and the relationship of the ultimate standard of proof and 'intermediate facts which constitute indispensable links in a chain of reasoning towards an inference of guilt', (p 579 per Dawson, J).

124. Goodpaster, G, *loc cit*, note 115.

125. Haar, C, quoted in *The Boston Phoenix* 15/1/74 at 20 quoted in Simon, WH, *The Ideology of Advocacy*, 29 *Wisc LR* 30 at p 61 (1978). Frank Galbally, the well known criminal advocate, for example, has stated: 'I consciously avoid asking my client if he has committed the crime ... I may well have a belief or a very good suspicion that he is guilty, but the moment the advocate sets himself up as the judge he is putting himself in a completely false role. He is adopting the role of the judge and is usurping that role' in Beecker, E, *A Question of Conscience, The Age* (Melbourne), 13 May, 1978, p 17, cited in Disney J et al, *Lawyers*, Law Book Co, 1986, p 905.

126. Haar, C, *id.*

and choose not to reveal them to each other or to the court.¹²⁷ Similarly, cross-examination may be 'the greatest legal engine ever invented for the discovery of truth'¹²⁸ but in practice it can be an occasion for 'bullying and other truth-defeating stratagems, it is frequently the source of fresh distortion when brought to bear against truthful testimony'.¹²⁹ When cross-examination is not overbearing it may be ineffective to expose the reality hidden by skilful lawyers who have prepared the witness to adopt a certain demeanour or style in court or to emphasise or down-play aspects of their testimony.

As stated earlier, the adversarial setting of party participation and attention to individual rights is supposed to create a great sense of fairness for participants and observers. They are more disposed to accept the trial outcome in an adversarial setting.¹³⁰ Again the claim is not proven. Indeed commentators on the trial process point out that there is considerable public dissatisfaction with the trial system, particularly from those litigants who have had first hand experience with the courts.¹³¹ According to Sarat and Felstiner's survey of lawyer/client interactions the litigant's belief in the fairness, impartiality and legitimacy of common law adjudication is often shattered by cynical advice from lawyers on how the litigant should cultivate idiosyncratic curial approval — an example of which follows:

Lawyer: But you sit there somewhat respectful. Do the same thing in this courtroom, okay? Hands in front of you are just fine, or on the table just fine. I don't care, but don't cross your legs.

...

Client: (Sits up very straight)

Lawyer: That's alright. You look nice and neat and scared that way, that's okay. But sit up with your arms and hands in front of you; I don't care where they go, but in front of you, and without the crossed legs. Okay? And then one other thing I ask of you. Don't go like this (puts head on his desk) ... No matter how tired you are tomorrow morning I want you to look pretty alert. It's best if you can just remember to keep your hands on the table or in your lap, and you'll be all set. Okay? Why? Why am I asking you to do this? Only because the judge will be looking at you. Okay? And he's going to make a decision, a fairly important one, and I don't want that decision to be influenced just by the way you sit.

Client: Like, he don't care.

Lawyer: Well, he might, if he doesn't like you. Okay? And even if he doesn't like you but you look concerned and you're interested, he'll probably go your way anyway. Okay. Judges are people, and well, I'll tell you, we might as well play the odds rather than have some surprises develop just because the judge doesn't like the way you're sitting. Okay?

127. See Klonoff, H & Colby, PL, *Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials*, Charlottesville: The Mitchie Co, 1990 and similar literature on the fight-to-win ethos of some trial tacticians. See also Saks, MJ, *Flying Blind in the Courtroom: 'Trying Cases Without Knowing What Works or Why'*, 101 *Yale LJ* 1177 (1992).

128. Wigmore, JH, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed, Vol 5, p 29, Boston, Little Brown & Co, 1940.

129. Langbein, J, *op cit*, note 105, p 833.

130. Damaska, MH, *Presentation of Evidence and Fact-finding Precision*, note 105.

131. Simon, WH, *op cit*, note 125.

Client: Some would do that?
Lawyer: Yup, some do.¹³²

In the following extract William Simon attributes litigant dissatisfaction to the alien and elaborate ritualism of the trial orchestrated not to celebrate the client's rights but the lawyer's status.

The Ideology of Advocacy: Procedural Justice and Professional Ethics by WH Simon¹³³

In a limited sense, the trial is a ritual in which ideals are affirmed and celebrated. But it is not the ordinary citizen who participates in the celebration or who experiences the affirmation of trust, equality, and individual dignity. The litigants are not the subject of the ceremony, but rather the pretext for it.

Most litigants find the trial a completely irrational and oppressive experience. Far from seeing his dignity affirmed, the litigant is more likely to feel it is being assaulted. Far from celebrating mutual trust, the average litigant feels that he is involved 'either in achieving or in checkmating chicanery ...'. Far from feeling engaged in a contest of equals, he is constantly reminded of his inferiority.

In fact, the celebration of trust, equality, and individual dignity in the judicial proceeding is done exclusively by, and for, the lawyers. The only manifestation of trust which occurs in the judicial proceeding is the willingness of the lawyers (and the judge) to rely on each other's professional honour. This willingness stands in sharp contrast to their attitude toward the litigants and the general public. The lawyer often unflinchingly mouths his client's lies, but he holds himself and his legal brethren to a higher moral standard than that which he expects and encourages in ordinary citizens. Thus, in litigation, a critical moral distinction is drawn between statements of the client or of witnesses repeated by the lawyer, which are regarded with extreme skepticism, and statements backed by the lawyer's professional honour, on which other lawyers willingly rely.

The elaborate patterns of courtesy and respect of the trial are entirely for the lawyer's benefit. In the courtroom, a place of special prominence from which laymen are excluded is reserved for the lawyers. Though the lawyer openly heaps contempt on the opposing party, he calls the opposing counsel a brother, refers to him with elegant courtesy, and criticises him only with gentle circumlocution. The judge refers to the lawyer by titles such as counselor or officer of the court. Even where the judge must reprimand the lawyer, he honours him by assuming him to be bound by a code which the client is assumed to be incapable of understanding.

It may seem peculiar that the lawyer should routinely yield to the judge obsequies which, in almost any other sphere of life, would seem intolerably degrading. Yet, this exaggerated deference is really part of the ceremonial patterns which confirm the lawyer's distinctive dignity. The formal courtesy which the judge returns to the lawyer is all the more satisfying as coming from so exalted a source. As the European aristocracies confirmed their moral distinctiveness from the common people with elaborate ceremonies of deference for, and professions of loyalty to, the king, so the lawyer confirms his moral distinctiveness in acknowledging the judge as *primus inter pares*. ...

132. Sarat, A & Felstiner, LF, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 *Yale LJ* 1663 at p 1677 (1989). The Sarat and Felstiner study was of matrimonial litigants but it has a direct analogy in criminal matters as well.

133. 29 *Wisc LR* 30 at pp 96-9 (1978).

The ritual incarnation of social values is accomplished by the lawyers and by the judge without any help from the litigants. It is the lawyers who perform the ceremony. It is they who assert rights and see their assertions recognised by the judge. They set the rhythm of the proceeding. In alternating turns, each shapes the trial, partly in accordance with his own itinerary and partly in response to his adversary's. Out of this interplay of performances, a sense of resolution or wholeness may emerge and be crystallised and confirmed by the judge. To be sure, he gives judgment only to one side, but he expresses his conclusions in the terms established by both.

Throughout all this, the litigant, if he is well advised, will sit mutely and foolishly. If he should attempt to assert his individual dignity by speaking out, the judge will admonish him to let his lawyer do the talking.

...

Usually, the client will hesitate to do anything without furtive, whispering conferences with his lawyer. He will have to rise and sit awkwardly in accordance with the unfamiliar etiquette of the court. The physical design of the courtroom, and particularly the bench where the judge sits, will intimidate him. Unaccustomed to striking the proper balance between sycophancy and assertiveness, he will stammer when addressing the judge.

The client's only opportunity to tell his own story is to take the stand. Yet, if he does so, his testimony will be rigidly controlled by the lawyers and the judge in accordance with a complicated body of rules which make no sense to him. He will be repeatedly interrupted, and he will be prohibited from saying much of what he wishes to say. But even the opportunity to make this expurgated, truncated personal statement can be had only at great cost. The litigant must submit to a cross-examination in which he is forced to respond, in accordance with a highly restrictive and peculiar logic and an oppressive etiquette, to a series of questions designed to distort his position and perhaps also to abuse him personally. Testifying in an adversary proceeding is a humiliating experience. Witnesses are expected to tolerate abuse, condescension, and authoritarian discipline of a sort they would never willingly submit to in private life.

Except for such brief and unsatisfying participation, the litigant will be an alien spectator at his own trial. The language of the trial will be largely foreign to him. It is not himself whom he will see represented, but a puppet manipulated by his lawyer in the character of 'plaintiff', or 'defendant'. His lawyer will have dressed and groomed him in a manner calculated to please the trier. He will have drilled him in detail on how to behave throughout the proceeding so as to present an image consistent with the legal position the lawyer has taken.

...

The litigant is not the beneficiary of the trial, but the victim of it. His dignity and autonomy are sacrificed in order that his lawyer's may be celebrated. ...

As William Simon points out, the stylised aggression of adversary advocacy 'well serves the task of conflict sublimation'. As he argues:

Adversary advocacy does not accomplish miracles. The typical losing party does not leave the trial with the feeling that, although the ends which he brought to the trial have been thwarted, he can still take satisfaction in the fact that he was given a 'fair (that is, procedurally correct or elaborate) trial'. He is not likely to feel that his day in court was an adequate substitute for the substantive benefit he did not get.¹³⁴

134. WH Simon, *op cit*, note 125, p 125.

However, for the trial to work to sublimate conflict, 'it is not necessary that the litigant be satisfied, but merely that his energies and expectations be redirected. The goal of stability may even be well served when the litigant is left bewildered and exhausted, even though unhappy'.¹³⁵

If in fact the trial does not work to make the litigant feel s/he has had a 'fair go', what is its purpose? For some theorists of the adversary system, the rationale has shifted. The trial is said to produce, not the appearance of fairness but the illusion of harmony. This change in emphasis is reflected in the changing metaphors for the trial — from the trial as 'game' to the trial as 'confidence game'. In various contexts the trial is now compared to a piece of theatre — a distinct change of political viewpoint. The sporting view of justice compares the judge to a cricket umpire,¹³⁶ a football referee¹³⁷ or Caesar at a gladiatorial encounter who keeps the game fair.¹³⁸ The metaphors used evoke teams of equal strength playing according to clearly defined rules of fair play. Goodrich uses the theatrical metaphor to emphasise ritual, orchestration, a predetermined conclusion and pretence. Goodrich describes twentieth century criminal trial procedure in terms reminiscent of Hay's description of eighteenth century English justice:

The strategic organising principle of the courtroom is a didactic one. It is that of the visibility of justice rather than of its audibility. The ritual character of proceedings in court have, first, an obvious material character in the higher courts in the form of the ceremonial dress of legal participants, in judicial robes and wigs, barristerial gowns and wigs, the use of royal red and emblazoned royal arms on and frequently also above the judicial seat or throne. To the aged pomp of the furniture and scale of the courtroom can be added the not altogether incidental features of procedure and address. The 'court' is silent and rises to its feet upon the entry of the judge. The judge is addressed never by name but either in metonymic form as 'the court' or 'bench' or sacrally as 'your honour', 'your lordship' or 'your worship'. It is not a human being, in other words, that sits when the court returns to their seats but rather justice (*ius*) and law (*lex*) that take their place at the pinnacle of a strictly ordered hierarchical space, surrounded by a veritable debauch of symbols of majesty and order. The sitting is accompanied by a strictly controlled order and tone of speech: speakers are called upon to speak and cannot do so volitionally, nor is it in general possible to interrupt that order and decorum. The court must remain silent and indeed obedient to procedure, with stringent sanctions attaching to the common law offence of 'contempt in the face of the court' which punishes any who 'scandalise' the court in *praesentia* ...¹³⁹

135. WH Simon, *op cit*, note 125, pp 125–6. Bankowski, Z & Mungham, G, *Images of Law*, Routledge & Kegan Paul, UK, 1976; Ball, MS, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 *Stan LR* 81 (1975); Simonett, JE, *The Trial as One of the Performing Arts* 52 *ABAJ* 1145 (1966).

136. *Jones v The National Coal Board* (1957) 2 *QB* 55 at 63 per Lord Denning.

137. '... I regard myself as a referee. I can blow my judicial whistle when the ball goes out of play; but when the game restarts I must neither take part in it nor tell the players how to play: Lawton, LJ, *Laker Airways Ltd v Dept of Trade*, (1977) 2 *All ER* 182 at 208.

138. '[The judge who] descends into the arena ... is liable to have his vision clouded by the dust of the conflict': *Jones v The National Coal Board* (1957) 2 *QB* 55 at 63 per Lord Denning quoting Lord Greene from *Yuill v Yuill* [1945] *P* 15 at 20; [1945] 1 *All ER* 183 at 189.

139. Goodrich, P, *Languages of Law: From Logics of Memory to Nomadic Masks*, Law in Context, Weidenfeld & Nicholson, UK, 1990, p 191.

If adversarial justice needs partisan 'searchers' to search out the whole field of facts, it also needs coercive discovery¹⁴⁰ techniques to ensure that this material is disclosed in the trial proceedings. If it needs rigorous cross-examination to expose the frailties of each side's case, it also needs judges actively participating to control adversary excesses and a modification of complex rules of evidence encouraging all parties to contribute to the search for truth.¹⁴¹

Transplanting legal procedure in a different culture

As mentioned above, reforms to the adversarial system often entail borrowing from the non-adversarial tradition. For example, there have been repeated calls for, and changes effected, so as to empower and activate judges to manage the trial process, particularly apparent in civil matters. Another example of incremental reform in adversarial law and procedure has been the adoption of the non-adversarial mechanism of discovery. Again, this is most apparent in relation to civil actions.¹⁴² Discovery was first introduced in nineteenth century English equity procedures.¹⁴³ As Ellen Sward notes in her study of the evolution of the adversarial system, that discovery attempts to overcome the inequality of information which can undermine adversarial fact-finding. It 'works some changes in both party control and judicial passivity':

[It] was designed to operate independently of the judge to the extent possible. With rare exceptions, no judicial order is required to conduct discovery. The parties involve the judge only when they have a dispute over discovery. Thus, the traditional roles of the parties and the judge are preserved. On the other hand, the parties are required, under threat of sanctions that could include loss of the case or contempt, to turn over facts in their possession to their opponent in the litigation. The party, then, loses some control over what he does with the information he has. Most litigants engage in considerable negotiation over discovery disputes in hopes of avoiding a trip before the judge; this negotiation can restore some of that lost control.¹⁴⁴

Just as adversarial reformers have been attracted to inquisitorial techniques, reformers from non-adversarial systems have been attracted to adversarial techniques and structural changes which are expected to enhance the efficiency and efficacy of their legal systems. A notable

140. Discovery is the generic term for those procedures whereby parties obtain information from an opponent in litigation.

141. Van Kessel, G, *op cit*, note 104, p 409.

142. In criminal prosecutions there is no bipartisan discovery process but the prosecution is ethically obliged to disclose limited aspects of its case to the defence. See Chapter 4. When this takes place it means that the parties share the State's fact-finding resources. The defence can have great difficulty searching its portion of the 'field'. The defence has no police officers to speak to bystanders or other potential witnesses, nor forensic laboratories to test material obtained at the scene of the crime. It needs access to the fruits of the State's search. The defence has no obligation to disclose its case or information about its case to the prosecution. Generally, the filing of an alibi notice in court is the only requirement on the defence to reveal its case. However, there are a legion of defence claims that the prosecution has inadequately disclosed information.

143. Millar, RW, *The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure*, 32 *Illinois LR* 261 at pp 261-76 (1937).

144. Sward, EE, *op cit*, note 8, p 328.

example concerns the Italian criminal procedure which in 1989 was transformed by a new Code of Criminal Procedure based on significant aspects of an adversarial model. The Italian Code kept many features of the previous non-adversarial system but the new trial system was set to encourage oral not written proof. The Code was designed to give the parties, not the judge, primary control over the investigation and presentation of cases. According to Pizzi and Marafioti,¹⁴⁵ the architects of the Code hoped that this move would yield a more efficient criminal justice system and reduce the backlog of cases. The changes were considered imperative in the Italian system. They reflected a move away from a focus on closed and secret pre-trial examinations to an emphasis on an efficient and open criminal justice system.

Under the new procedure the judge does not to receive the entire case dossier but must rely upon opening statements and lawyer's presentation of evidence for knowledge of the case. Classical aspects of the adversarial system adopted by the Italian Criminal Code included the prosecution (as opposed to the judge) dominating the pre-trial investigation stage, an *in camera* preliminary hearing which was similar in form to a paper committal proceeding, though with a much lower standard of persuasion on the prosecution for the case to be set for trial. The trial itself followed the structure of an adversarial trial but the traditionally active role for the civil law defendant (in person) was retained. The extensive appellate rights in the civil law system generated a similarly extensive array of rights in the new system. Perhaps the most extraordinary right from the common lawyer's point of view is the right for a defendant to appeal against a 'weak' acquittal and seek a 'stronger' one. There are five different kinds of acquittals ranging from: no crime was committed; there was a crime, but the defendant did not commit it; the defendant was innocent because there was insufficient evidence that the defendant committed the crime; there was no crime because the defendant's actions were justified (for example, necessity); or the case could not be determined because of a procedural fault.

The intuitive appeal of a 'different' system must be examined in the legal, political, cultural and philosophical traditions upon which a justice system is founded. In Italy the criminal justice system has had adversarial inspired reforms located in a legal system schooled in non-adversarial traditions and values. Pizzi and Marafioti's study indicate that even though the new Italian Criminal Code has been operational only for a few years, its participants are having to adjust the values of a civilian legal tradition to values which derive from a tradition of party-dominated criminal trials. Traditional non-adversarial values and mores which are antithetical to the dynamics of an adversarial structure have created stress in the grafting of a new order onto the old. Two particular features of the Italian reforms illustrate this point. First, according to Pizzi and Marafioti, the insufficiently battle-like attributes of a passive defence Bar and the public prosecution service (*pubblico ministero*) make the parties in criminal prosecutions ill-suited to the adversarial contest.

145. Pizzi, WI & Marafioti, L, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 *Yale Jnl of Int Law* 1 (1992). Much of the following discussion draws on this article.

They are neither blooded for battle nor motivated to seek an efficient resolution of minor criminal cases.¹⁴⁶ The second illustration relates to the impact of plea bargaining in the reconstructed Italian criminal justice system. As presented by Pizzi and Marafioti, the Italian system seems to have been attracted to the rump¹⁴⁷ end of the adversarial system. For example, a version¹⁴⁸ of plea bargaining had been put at the forefront of its new structure. Plea bargaining was introduced to deal with the backlog of cases. A significant impetus for the reforms was the desire to create greater 'efficiency' in the criminal justice system by offering a form of plea bargaining. Pizzi and Marafioti note that in the US the utility of plea bargaining depends on a value system which embraces compromise and expediency. However in the civil law tradition the desire for uniformity, certainty and accuracy make plea bargaining intrinsically unacceptable.¹⁴⁹ Another major feature distinguishing the 'old' Italian criminal justice system from the common law system is the attitude to prosecutorial discretion. Traditionally civilian law distrusts prosecutorial discretion. The common law not only accepts prosecutorial discretion, but protects it. The discretion to drop charges, reduce charges or refrain from challenging a particular sentence option is integral to informal plea bargaining. Distrust of unfettered prosecutorial decisions has created a plea bargaining framework in the new Italian Code which allows the judge to agree to the bargain should the prosecutor refuse. Further the Italian judge in the new plea bargaining provisions of the Code determines the correct sentence for the defendant and then cuts that sentence by one-third. In other words, the judge gives the defendant a sentence that is inappropriately light for the crime. In a system that places a high value on precision the reluctance of civil law to embrace plea bargaining is unsurprising.¹⁵⁰

Just as the Italian experiment suffers difficulties in grafting adversarial features onto a civil system, our modifications of the adversarial approach can likewise encounter difficulties. The Continental system strikes a balance of forces different to our own.¹⁵¹ Any borrowing of non-adversary features must take into account the effect on that balance or the reform may actually add new problems to the adversary system. Thus the non-adversarial mechanism of disclosure has been used by

146. Pizzi, WT & Marafioti, L, *id*, 31 at p 33. For an excellent and comprehensive survey of prosecution systems in Europe, see Huber, B, *The Office of the State Prosecutor in Europe: An Overview*, (1992) 63 *International Rev of Penal Law*, 557.

147. See Boland, B & Forst, B, *Prosecutors Don't Always Aim to Pleas*, 49 *Fed Probation* 10 at pp 13-14 (1985); Pizzi, W, *Batson v Kentucky: Curing the Disease But Killing the Patient*, 1987 *Sup Ct Rev* 97.

148. But with some significant differences and safeguards, see Pizzi, WT & Marafioti, L, *op cit*, note 145, 22-3.

149. Pizzi, WT & Marafioti, L, *op cit*, note 145, p 32. The illustration used by Pizzi and Marafioti is the tendency for the prosecutor to veto the defendant's election to have a *giudizio abbreviato* (summary trial). The *giudizio abbreviato* shares features in common with plea negotiation in that in return for an expedited hearing the defendant gains the benefit of a lighter maximum sentence and is tried only on the material contained in the investigative file.

150. Pizzi, WT & Marafioti, L, *op cit*, note 145, p 34.

151. For example, the powers of the continental prosecutors may be limited but they have the greater advantage of liberal rules of evidence: Van Kessel, G, *op cit*, note 104, p 403.

battle-inculcated lawyers as another tactical, adversarial tool. Lawyers may use discovery offensively to delay or harass their opponents. Fact finding, especially when it involves complex litigation is expensive and time-consuming. Lawyers in civil matters use discovery (and many other pre-trial techniques) to tactical advantage to deplete the opposing party of resources or energy to continue the 'battle'.¹⁵² The legal issues in dispute can be obscured by this power play. Not only are these acts costly, time-consuming and often unfair to the parties, they are antithetical to the ideals of the adversarial justice system. In these instances the legal system ceases to be a medium for resolving disputes in a just and equitable manner. Instead it becomes a vehicle for oppressing the weaker party. Referring to judicial activism, Judge Frankel, of the US judiciary and no supporter of adversary excesses, cautions that as a participant, the intervening judge 'is likely to impair the adversary process as frequently as he improves it'.¹⁵³

The judge views the case from the peak of Olympian ignorance. His intrusions will in too many cases result from partial or skewed insights. He may expose the secrets one side chooses to keep while never becoming aware of the other's. He runs a good chance of pursuing inspirations that better informed counsel have considered, explored, and abandoned after fuller study. He risks at a minimum the supplying of more confusion than guidance by his sporadic intrusions ... Without an investigative file, the American Trial judge is a blind and blundering intruder, acting in spasms as sudden flashes of seeming light may lead or mislead him at odd times.¹⁵⁴

The way ahead for the adversarial and continental systems is not to mimic the other. Instead each should adapt its own mode. Non-adversarial models of justice direct our attention to strengthening the power of judges and reducing the manipulative power of lawyers. However, the Italian experience indicates that cultural mores (legal and otherwise) create expectations and assumptions which are difficult to shift.

Conclusion

History shows that adjudication based on divine intervention fulfilled the broad political goals of the legal system — and appeared to be popularly accepted. When divine adjudication was abandoned, the English populace accepted a secular criminal justice system which now appears both arbitrary and harsh. The 'irrational' aspects of trials today tend to be associated with ceremony and ritual of a more sophisticated order than medieval ordeals and wagers. Judicial 'sermons' are significantly more understated than those described by Hay in eighteenth century England. Even so, Simon shows that subtle courtroom power-plays operate between the various trial 'players' — judge, counsel, accused and witnesses. These work to coerce the powerless to conform to the rules of a highly formalised adjudication. The unsuccessful litigant may not value common law adjudication, but as long as there is

152. On the US experience, see Sward, EE, *op cit*, note 8, 329; Shapiro, D, *Some Problems of Discovery in an Adversary System*, 63 *Minn LR* 1055 (1979).

153. Frankel, ME, *op cit*, note 107, p 1045.

154. Frankel, ME, *op cit*, note 107, p 1042.

sufficient popular acceptance of the legal system individual disaffection will not undermine it.

Earlier methods of choosing evidence, evaluating it, and reaching a determination may seem primitive. Yet when our criminal justice system is critically examined it too rests on unsophisticated assumptions and employs counter-intuitive practices. Witness testimony is controlled and ordered by partisan lawyers who seek to suppress information undesirable to their cause; witnesses do not narrate their information, the tribunal receives information in a question and answer format that is highly formalised. Issues are not isolated, ordered and addressed in a manner that enhances cognitive understanding. Instead, the concept of burden of proof dominates trial format. *All* the prosecution evidence on all issues must be adduced before the defence counters on *all* issues. Then the jury (or judge as tribunal of fact) must evaluate all the evidence on all the issues. Procedural law needs to acknowledge that many criminal trial practices can be improved by implementing insights derived from non-law disciplines such as psychology and sociology. However, in keeping with the inherent conservatism of the legal process, there has been resistance to change, even where new techniques might aid the rationalist imperative.¹⁵⁵

The common law promises fair and accurate adjudication, party participation and democracy in law. All theorists are agreed that the system fails to deliver completely on such promises. Cynics see a legal system which exerts social and political control and maintains the status quo. To them it offers little else. The naïfs are optimists. They see the goals of accuracy, democracy and fairness as realisable and look to modify the system to achieve these ends. 'Irrational' spectacle and show fulfil important functions from either perspective.

Systematic reappraisal and codification of criminal law, police powers, evidence law in Australia (and England) mark the close of the twentieth century.¹⁵⁶ Decisions from the High Court of Australia, whilst also effecting judicial reform of a functional nature,¹⁵⁷ underscore the important rhetorical, and sometimes real role, given to the observance of human rights and the protection of civil liberties.¹⁵⁸ There is academic and some limited professional interest in the insights which disciplines such as psychology, sociology and political science can offer the legal system. The question remains whether such matters give real cause for optimism.

The following chapters detail the role of trial participants. The purpose of these chapters is to explain the law and practice as it affects each of them in the trial. However, as each chapter shows, no participant is

155. The example canvassed in more detail in Chapter 8 concerns refusing to permit psychologists to testify on the unreliability of identification evidence.

156. See *Evidence Act 1994* (Cth), *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1993* (Cth).

157. For example, in the hearsay area, see *Walton v R* (1989) 166 CLR 283; *R v Benz* (1989) 168 CLR 110; *Pollitt v R* (1992) 174 CLR 558.

158. *Williams v R* (1986) 161 CLR 278 (liberty); *George v Rockett* (1990) 170 CLR 104 (privacy); *Plenty v Dillon* (1991) 171 CLR 635 (privacy); *Dietrich v R* (1992) 177 CLR 292 (right to legal representation in serious cases); *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 (discussion on the importance to individuals of the privilege against self-incrimination).

all-powerless or all-powerful on all occasions. The jury may seem powerless to draw out the information it considers important, but legal rules cannot prevent jurors considering 'irrelevant' issues, gazing across the courtroom and making judgments about the accused, the lawyers or any supporters in the public gallery. The Judge may have few controls over what information the parties proffer to the court, but s/he can make rulings, give judicial directions and sum up the case in a manner that persuades the fact-finding tribunal more powerfully than conventional items of evidence. The lawyer may seem to dominate the spotlight of the trial but his/her presentation of the case can be constrained by evidential and ethical rules, thwarted by the judge, disbelieved by the jury and unassisted by the client. The power plays vary in each case. The shifting dynamics is what makes for continuing intellectual interest in the adversarial trial process.

NOTES AND QUESTIONS

1. What, if anything, does an historical analysis of procedural law tell us about current criminal trial practices?

2. Consider Stone's description of the following ordeal:

With due adjurations and gestures, a piece of barley bread weighing about an ounce, and a similar piece of cheese (variety unknown) were placed in the party's mouth. If he swallowed them without difficulty his innocence was proved; so, if he choked or vomited blood, was his guilt.¹⁵⁹

Is this 'test of nerves' a forerunner to demeanour assessment? See Chapter 6 generally on witness credibility and demeanour.

3. We have noted that to be legitimate a modern legal system must show that its processes of law finding and fact finding are both intellectually rigorous and fair to the parties. Discuss some of the ways in which the common law legal system promotes its procedure as rigorous and fair.

4. The modern system of criminal justice does not treat the criminal trial as final. Subject to certain significant limitations, litigants may have adverse determinations reviewed on appeal. Do you think an unsuccessful litigant would feel less aggrieved knowing that his/her case may be reviewable by a hierarchy of superior courts composed of eminent judges than an unsuccessful medieval litigant who received no reasons and had no appeal from the revelation of God's will?

Does (or did) it matter how the litigant feels (or felt)?

5. See *R v Robinson*, *The Times*, 25/11/93 (CA) where the Court considered whether an educational psychologist could be called to testify for the prosecution on the suggestibility of the complainant in an indecent assault prosecution. The Court of Appeal ruled against the psychologist testifying, citing Canadian authority that 'oath-helping' might be reminiscent of procedural methods at the time of the Norman Conquest but it no longer had a role today. Compare and contrast oath-helping

159. Stone, J, *op cit*, note 23, p 8.

with the German procedure which uses an expert oath-taker to assist the court in assessing the credibility of some witnesses discussed in Chapter 6.

6. If Australia was to reform its legal system by adopting a non-adversarial model that made:

- (i) the judge responsible for supervising the investigatory stage of a criminal trial,
- (ii) the police/prosecutor responsible for compiling a dossier that was directed to a balanced compilation of material containing matters exonerating or mitigating the defendant's culpability as well as data supporting the prosecution brief, and
- (iii) the defence a relatively passive participant in the process,

which aspect of this non-adversarial structure would have greatest difficulty freeing itself of its traditional mores and fitting into the new regime?

In considering this question it is well to note the advantages of the adversarial system in which judges can rely on the parties to bring the questions and the answers to the courtroom. Contrast this with the non-adversarial system which requires judicial research, support and investigation powers to search out the case and the solution. Consider too, the cultural assumptions of adversarially-trained judges adapting to a non-adversarial system. Will they be disinclined to believe a party who does not robustly argue a case?

7. Pizzi and Marafioti appear to commend the adoption of a more aggressive prosecution service in Italy as a necessary feature for promoting efficiency (particularly in relation to plea bargaining). Yet many of the miscarriages of justice in the Anglo-Australian legal systems are attributable to an overzealous attitude by the prosecution to obtaining a conviction. Does this suggest that efficiency and accuracy are mutually exclusive?

Interesting case studies of compromises are mentioned in Pizzi, W T & Marafioti, L, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 *Yale Jnl of Int Law* 1, 37, ff 187 & 188 (1992) referring to Schulhofer, S J, *Is Plea Bargaining Inevitable?* 97 *Harv L Rev* 1037 (1984) and Graham, K & Letwin, L, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 *UCLA Rev* 916 (1971). See also Dwyer, J *Overcoming the Adversarial Bias in Tribunal Procedures*, 20 *Fed LR* 252 (1991).

8. 'The [adversary] system rests upon an assumption of genuine conflict between the contending parties. In Skolnick's words (1967, p 52): 'The most striking example of an institution based upon conflict is the sporting event. Not only are most sporting events zero-sum games in which one player must lose and the other win; even more fundamental is the condition that each player should try to win ... Otherwise, the (contest) is not considered genuine. Procedure is as important as outcome'. With the adversary system, however, the notion of the 'zero-sum game' applies only to the fortunes of defendants. Lawyers working in the legal contexts ... seldom 'lose'. The

primary concern cutting across all courtroom exchanges is that of preserving intact informal social relations and obligations. These are more important to him than most clients, for they help determine his economic terms of work'.

Does this quotation from Bankowski & Mungham¹⁶⁰ suggest that Pizzi and Marafioti's observations on the difficulty of fitting an adversarial framework into a non-adversarial culture are wrongly premised on a view that the adversarial framework 'works' in an 'adversarial' culture?

FURTHER READING

- Abel-Smith, B & Stevens, R, *Lawyers and the Courts: A Sociological Study of the English System, 1750-1965*, Heinemann, 1967, UK.
- Amodio, E & Selvaggi, E, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 *Temp L Rev* 1211 (1989).
- Ball, MS, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater* 28, *Stan LR* 81 (1975).
- Bankowski, Z & Mungham, G, *Images of Law*, Routledge & Kegan Paul, UK, 1976.
- Brown, P, *Society and the Supernatural: A Medieval Change*, *Daedalus* 104 (1975).
- Brouwer, GEP, *Inquisitorial and Adversary Procedures — A Comparative Analysis*, 55 *ALJ* 207 (1981).
- Carlen, P, *Magistrates' Justice*, M Robertson, London, 1976.
- Certoma, GL, *The Accusatory System v The Inquisitorial System: Procedural Truth v Fact*, (1982) 56 *ALJ* 288.
- Certoma, GL, *The Non-Adversarial Administrative Process and the Immigration Review Tribunal*, (1993) 4 *Pub LR* 3 at p 7.
- Damaska, M, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 *University of Pennsylvania L Rev* 506 (1973).
- Devlin, P, *The Judge*, OUP, UK, 1979.
- Disney, J et al *Lawyers*, 2nd ed, Law Book Company, Australia, 1986.
- Fassler, LJ, *Note, The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, 29 *Colum J Transnat'l L* 245 (1991).
- Friesen, E et al, *Managing the Courts*, Bobbs-Merrill, NY, 1971.
- Goodpaster, G, *On the Theory of American Adversary Criminal Trial*, 78 *Jnl Crim Law & Criminology* 118 (1987).
- Harding, A., *A Social History of English Law*, Penguin, UK, 1966.
- Hay, D *Property, Authority and the Criminal Law*, from Hay, D, Linebaugh, P, Rule, JG, Thompson EP, and Winslow, C, *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*, Allen Lane, UK, 1975.
- Hibbert, C, *The English: A Social History 1066-1945*, Paladin Grafton Books, UK, 1988.
- Hyams, P, *Trial by Ordeal: The Key to Proof in the Early Common Law*, in Arnold MS et al (eds), *On the Laws and Customs of England: Essays in Honor of Samuel E Thorne*, Chapel Hill, 1981.

160. Bankowski, Z & Mungham, G, *op cit*, note 135, p 102.

- Huber, B, *The Office of the State Prosecutor in Europe: An Overview*, 63 *International Rev of Penal Law* 557 (1992).
- Landsman, S, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 *Cornell L Rev* 497 (1990).
- Jung, H, *Criminal Justice — A European Perspective*, [1993] *Crim LR* 237.
- Kronman AT, *Max Weber*, Edward Arnold (Pub), UK, 1983.
- Langbein, JH, *Torture and the Law of Proof*, Chicago, 1977.
- Langbein, JH, *The German Advantage in Civil Procedure*, 52 *Univ Chic LR* 823 (1985).
- Leigh, LH & Zedner, L, *A Report on the Administration of Criminal Justice in the Pre-Trial Phase in France and Germany*, Research Study No 1, Royal Commission on Criminal Justice, HMSO, UK, 1992.
- Lensing, H, *Notes on Criminal Procedure in the Netherlands*, [1992] *Crim LR* 623.
- Luban, D, (ed) *The Good Lawyer: Lawyer's Roles and Lawyer's Ethics*, Rowman & Allenheld, 1983.
- Miller, JJ, *Note, Plea Bargaining and Its Italian Analogues Under the New Italian Criminal Procedure Code and in the US: Toward a New Understanding of Comparative Criminal Procedure*, 22 *NYU J Int'l L & Pol* 215 (1990).
- Osner, N, Quinn, A & Crown, G, *Criminal Justice Systems in Other Jurisdictions*, Royal Commission on Criminal Justice, HMSO, UK, 1993.
- Pizzi, WT & Marafioti, L, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 *Yale Jnl of Int Law* 1, at pp 35-7 (1992).
- Pollock, F & Maitland, FW *The History of English Law Before the Time of Edward I*, 2nd ed, 1968.
- Poole, AL, *Domesday Book to Magna Carta 1087-1216*, 2nd ed, Clarendon Press, Oxford, UK, 1955, p 402.
- Prest, W (ed), *Lawyers in Early Modern Europe and America*, Croom Helm, 1981.
- Rheinstein, M (ed), *Max Weber on Law in Economy and Society*, Har Univ Press, US, 1954.
- Scott, IR, *Is Court Control the Key to Reduction in Delays?* (1983) 57 *ALJ* 16.
- Shapiro, B, *Probability and Certainty in Seventeenth Century England: A Study of the Relationships between Natural Science, Religion, History, Law and Literature*, Princeton, 1983.
- Shapiro, BJ, *Beyond Reasonable Doubt and Probable Cause: Historical Perspectives on the Anglo-American Law of Evidence*, Uni of Cal Press, USA, 1991.
- Simonett, JE, *The Trial as One of the Performing Arts*, 52 *ABAJ* 1145 (1966).
- Solomon, M & Somerlot, DK, *Caseflow Management in the Trial Court*, 2nd ed, ABA, Chicago, 1988.
- Stone, J, (Revised by WAN Wells) in *Evidence: Its History and Policies*, Butterworths, Aust, 1991.
- Sward, EE, *Values, Ideology and the Evolution of the Adversary System*, 64 *Indiana LJ* 301 (1989).
- Thompson, RS, *Decision, Disciplined Inferences and the Adversary Process*, 13 *Cardozo LR* 725 (1991).
- Trubek, DM, *Max Weber on Law and the Rise of Capitalism*, 3 *Wisc LR* 720 (1972).

- Twining, W, *Theories of Evidence: Bentham and Wigmore*, Weidenfeld & Nicolson, UK, 1985.
- Van Caenegem, RC, *Legal History: A European Perspective*, Hambledon Press, UK, 1991.
- Van Kessel, G, *Adversary Excesses in American Criminal Trial*, 67 *Notre Dame LR* 403 (1992).