

STRANDED BETWEEN PARTISANSHIP AND THE TRUTH? A COMPARATIVE ANALYSIS OF LEGAL ETHICS IN THE ADVERSARIAL AND INQUISITORIAL SYSTEMS OF JUSTICE

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[In an era of commonality and convergence among different legal systems, the study of comparative legal ethics is important in determining how we assess the merits of developments in our own legal system and profession. The contrast between legal ethics in the adversarial and inquisitorial systems of justice provides an illumination of the differing telos of each system. Whilst there is a significant degree of overlap in the ethical issues confronted by legal practitioners in each system, important differences, particularly in the criminal sphere, reveal very different ethical pressures on advocates. In confronting the danger of 'non-accountable partisanship', the common law practitioner should be aware of the merits and pitfalls of each system, lest calls for reform overlook the foundational differences between the systems themselves.]

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We will not at present inquire ... whether it be right that a man should, with a wig on his head, and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire; whether it be right that, not merely believing but knowing a statement to be true, he should do all that can be done by sophistry, by rhetoric, by solemn asseveration, by indignant exclamation, by gesture, by play of features, by terrifying one honest witness, by perplexing another, to cause a jury to think that statement false.¹

I INTRODUCTION

This article examines criminal and civil procedure in the inquisitorial and adversarial legal systems, in order to contrast both the abstract ethical foundations of those systems and the concrete responsibilities of those who practise within them. Whilst there is a significant degree of commonality between the two systems with regard to ethical considerations and concerns, particularly in civil matters, each presents distinctive ethical issues to the legal practitioner. We conclude that the adversarial system necessitates unambiguous and prominent ethical rules for legal professionals. This need is a direct product of what David Luban describes as the danger of ‘non-accountable partisanship’ and the consequent marginalisation of the ethical duty to the court.² In contrast, we argue that legal ethics in civil law countries are based on a different conception of the role and responsibility of the lawyer, whereby independence from both court and client is fundamental. The independence of legal practitioners from their clients in civil systems, and indeed the role of judges in such systems, cause ethical concerns to arise that are different from those commonly identified in the adversarial system.

After establishing the philosophical premises of this article, we consider criminal procedure in civil law countries, focusing primarily on the French experience. We outline the process of a French criminal trial, examine the ethical issues arising from this process and contrast the role of the French *avocat* with that of an Australian criminal law barrister. We then examine the similarities and differences between the process of civil litigation in each system, where commonalities are more readily evident. Finally, we conclude that whilst there is not as stark a clash between the systems as is sometimes assumed, Australian lawyers should not ignore the different approaches to legal ethics adopted in civil law countries. This is especially so given the recent calls for practitioners in common law jurisdictions to embrace ‘moral activism’ and the more judicially interventionist approach of the inquisitorial system. We call for a discourse

¹ Thomas Babington Macaulay, ‘Lord Bacon’ in Thomas Babington Macaulay (ed), *The Life and Works of Lord Macaulay* (1897) vol 6, 135, 163.

² David Luban, ‘Twenty Theses on Adversarial Ethics’ in Michael Lavarch and Helen Stacy (eds), *Beyond the Adversarial System* (1999) 134, 140.

which engages the Australian legal profession in broader ethical discussions that acknowledge not only the differing international approaches to the ethical requirements of legal practitioners, but also the ethical limitations of our own system. This is not to assert that we should sacrifice individual rights and procedural fairness on an altar of inquisitorial case management (as this debate is occasionally caricatured), but rather to contend that both systems reveal tensions deserving of illumination — especially given the relative dearth of comparative legal ethics scholarship in Australia.

However, before any conclusions may be reached, it is important to declare the theoretical premises of this article. Specifically, what do we mean by ‘legal ethics’, and what is the jurisprudential foundation of the distinction between adversarial and inquisitorial systems of justice?

A Legal Ethics

There can be little doubt that the term ‘legal ethics’ is more often employed in jurisprudential writing than it is defined or understood. G E Dal Pont notes that ‘the term “ethics” has many and varied connotations and no precise and unequivocal meaning’.³ Preferring the term ‘professional responsibility’ to what he perceives as the nebulous expression ‘legal ethics’, Dal Pont contends that:

it is common for the term ‘ethics’ to be used to distinguish those rules which are professionally binding on a lawyer (ethical rules) from those which are legally binding (legal rules). Such a practice is not commendable, for it conveys two incorrect impressions: *first*, that the ethical and legal rules are mutually exclusive and, *secondly*, that somehow legal rules are of greater importance than ethical rules.⁴

Dal Pont’s use of the term ‘professional responsibility’ could arguably constitute a semantic attempt to remedy what he perceives as the lack of primacy afforded to ethics in the legal profession. In isolation, it certainly draws the reader no closer to an understanding of what ‘ethical’ (or alternatively ‘responsible’) conduct entails for the legal professional. Indeed, it is one thing to prefer a conception of ‘responsibility’ over ‘ethics’ but, as Peter Cane asks, ‘[w]hat does it mean to say that we are responsible, and what are our responsibilities?’⁵

Dal Pont considers the philosophical tradition of ethical theory and contrasts teleological and deontological conceptions of ‘ethical’ conduct.⁶ Whilst teleology considers whether an action is ‘right’ by evaluating the consequences of the action (or inaction), deontology is instead concerned with whether the act or omission was ‘right’ in and of itself. These approaches are reflected in utilitarianism and natural law respectively. For the utilitarian, the question of whether a given action or omission is ‘ethical’ would depend on whether the said act or omission creates the greatest good for the greatest number; whilst for the natural lawyer, the question is whether the said act or omission offends against princi-

³ G E Dal Pont, *Lawyers’ Professional Responsibility in Australia and New Zealand* (2001) 3.

⁴ *Ibid* 4 (emphasis in original) (citations omitted).

⁵ Peter Cane, *Responsibility in Law and Morality* (2002) 279.

⁶ Dal Pont, above n 3, 4.

ples of our common humanity (or alternatively ‘God’s law’). Both approaches are reflected to some extent in rules of professional conduct, which demonstrate the moral tradition splintered between Bentham and Austin that informs ethical conduct in Western legal systems.

For the purposes of this article, the expression ‘legal ethics’ refers to a system of rules based on moral principles that directs the conduct of the legal profession. Such a system of rules seeks to provide ‘real-life’ guidance to lawyers who face ethical dilemmas in the concrete, day-to-day running of their practice, rather than in the abstract.⁷ However, legal ethics are more than an instruction manual for responsible conduct by legal professionals. Alongside the rule of law, legal ethics provide the rubric from which the law gains legitimacy as a ‘moral’ system.

In Victoria, the *Professional Conduct and Practice Rules 2005* (Vic)⁸ provide that, inter alia:

A practitioner must not, in the course of engaging in legal practice, engage in, or assist, conduct which is:

- (i) dishonest or otherwise discreditable to a practitioner;
- (ii) prejudicial to the administration of justice; or
- (iii) likely to diminish public confidence in the legal profession or in the administration of justice or otherwise bring the legal profession into disrepute.⁹

Under the heading, ‘Relations with Other Practitioners’, the general principle is provided that:

In all of their dealings with other practitioners, practitioners should act with honesty, fairness and courtesy, and adhere faithfully to their undertakings, in order to transact lawfully and competently the business which they undertake for their clients in a manner that is consistent with the public interest.¹⁰

The Law Institute of Victoria describes such professional ethics as embodying the tripartite duties of the legal practitioner: the duty to the law, the duty to the court, and the duty to the client.¹¹ In requiring the legal practitioner to advance the public interest, act with honesty and not defeat the ends of justice, such legal ethics reflect both teleological and deontological moral traditions.¹²

⁷ As noted by Luban, it must be acknowledged that ‘[i]n the overwhelming preponderance of cases, lawyers’ primary motivations derive from the fact that representing clients is their livelihood, not from their principled belief in the centrality of access to the law’: David Luban, ‘Partisanship, Betrayal and Autonomy in the Lawyer–Client Relationship: A Reply to Stephen Ellmann’ (1990) 90 *Columbia Law Review* 1004, 1008.

⁸ Section 64 of the *Legal Practice Act 1996* (Vic) provides the legislative foundation for the *Professional Conduct and Practice Rules 2005* (Vic). The *Legal Practice Act 1996* (Vic) will be repealed by the *Legal Profession Act 2004* (Vic) on or before 1 January 2006.

⁹ *Professional Conduct and Practice Rules 2005* (Vic) 9.

¹⁰ *Professional Conduct and Practice Rules 2005* (Vic) 32.

¹¹ Law Institute of Victoria, *Ethics* <<http://www.liv.asn.au/regulation/ethics/about/ethicsIntroduct.html>>.

¹² It is not difficult to formulate a specific scenario where a legal practitioner, acting dishonestly, could be motivated by trying to create the greatest good for the greatest number. The requirement of honesty is therefore a deontological restraint against utilitarian consequentialism. On the other hand, it could also be argued that tolerating any form of dishonesty in the legal profession

Much has been written about the difficulties of ethical conduct in the adversarial system, particularly due to the perceived conflict for the legal practitioner between the duty to the court on one hand, and the duty to the client on the other. Considerations of the 'public interest' add yet another complicated dimension to these duties. David Luban states that 'non-accountable partisanship' dominates the adversarial system. This is because lawyers advocate their clients' interests with the 'maximum zeal' permitted by law, and are morally responsible neither for the ends pursued by their client nor the means of pursuing those ends, provided both are lawful.¹³ Scholars such as Luban who criticise this non-accountability argue that, under an ethical framework of 'moral activism', lawyers should be made aware of, and held responsible for, both the moral agency they possess within the justice system and, accordingly, the consequences of their actions.

For critics of legal ethics in the adversarial system, one of the attractions of the inquisitorial system lies in the perceived primacy of truth and the moral activism of lawyers practising within it. It is to considering this professed divergence between legal systems that we now turn.

B *A Clash of Systems?*

It is often observed that the inquisitorial system has differing ethical standards and even a different *telos* to the adversarial system.¹⁴ J A Jolowicz identifies two ideas as central to the adversarial system:

First, that it is for the parties to define the subject matter of their dispute, ie, the substance of the action. Secondly, that it is for them and for them alone to determine the information on which the judge may base his decision.¹⁵

Jolowicz contrasts this position with the French experience, whereby the judge decides what are the relevant facts to be proved, examines the witnesses, and organises fact-finding procedures of his or her own accord.¹⁶ Jolowicz notes that this is conducted against the background of art 10 of the French *Code Civil*, whereby '[e]veryone is bound to co-operate with the administration of justice

weakens the legitimacy of the system itself, and so there are long-term consequences that undermine a short term gain in utility.

¹³ Luban, 'Twenty Theses on Adversarial Ethics', above n 2, 140.

¹⁴ We are mindful of the warning of Mirjan Damaška, that '[i]t would betray a great deal of innocence to assume that the genesis of procedural systems reduced essentially to a more or less consistent derivation from the tenets of prevailing political ideology.' Mirjan Damaška, 'Structures of Authority and Comparative Criminal Procedure' (1975) 84 *Yale Law Journal* 480, 529. However, it is hoped that in contrasting the role of the advocate in adversarial and inquisitorial systems of justice, we will be able to demonstrate not only the contrasting ethical pressures that bear on legal practitioners, but also expose some of the ideological differences that define the role of the advocate in each system. Damaška's article provides an intriguing historical analysis of the divide between what he describes as hierarchical (Continental) and coordinate (Anglo-American) models of authority, and attempts to ground this analysis in part by contrasting the liberal tradition in common law countries with the more 'paternalistic' models found in the Continental systems.

¹⁵ J A Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure' (2003) 52 *International and Comparative Law Quarterly* 281, 289.

¹⁶ *Ibid* 291.

with a view to revelation of the truth'.¹⁷ In advocating that the common law should adopt aspects of the inquisitorial system, particularly in relation to case management and the obligation to reveal the truth, Jolowicz contrasts the underlying principles of the French *Code Civil* with the statement of Lord Denning MR in *Air Canada v Secretary of State for Trade [No 2]*: 'when we speak of the due administration of justice this does not always mean ascertaining the truth of what happened.'¹⁸

Sir Anthony Mason has observed that:

The principal reason why the European system has attractions for some critics of the adversarial system is that control lies more in the hands of the judges and because the European courts are said to have as their object the investigation of the truth. Within the adversarial system, despite some statements to the contrary, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties.¹⁹

There is very little Australian scholarship on comparative legal ethics, although there is a growing interest in the subject in the United States.²⁰ This trend has been most evident in the context of the increasing presence of American law firms in European jurisdictions and the pressure toward ethical (or 'deontological') uniformity across the different European jurisdictions. To this end, the Council of the Bars and Law Societies of the European Union²¹ ('CCBE') has promulgated a *Code of Conduct for Lawyers in the European Community* ('CCBE Code').²²

We suggest that the contrast between the adversarial and inquisitorial systems raises two distinct types of ethical issues. First, there is the *narrow* question of how adequately legal practitioners from each system are able to comply — or indeed are willing to comply — with the contrasting ethical obligations mandated by their respective systems.²³ Secondly, there is the *broad* question of whether the systems themselves create ethical dilemmas for legal practitioners, and indeed whether or not the systems are internally consistent with regard to the ethical requirements of the professionals working within them. For example, if it is conceded that the adversarial system is less dedicated to discovering the truth

¹⁷ Ibid. See also *Loi No 72-626 du 5 juillet 1972 instituant un juge de l'exécution et relative à la réforme de la procédure civile*, art 12 (France).

¹⁸ [1983] 2 AC 394, 411.

¹⁹ Sir Anthony Mason, 'The Future of Adversarial Justice' (Paper presented at the 17th AIJA Annual Conference, Adelaide, 7 August 1999) 4 <<http://www.aija.org.au/online/mason.rtf>>.

²⁰ See, eg, Mary C Daly, 'The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century' (1998) 21 *Fordham International Law Journal* 1239; Geoffrey C Hazard Jr and Angelo Dondi, *Legal Ethics: A Comparative Study* (2004); Samuel J Levine, 'Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework' (2003) 77 *Tulane Law Review* 527.

²¹ This is the officially-recognised representative organisation for the legal profession in the European Union and the European Economic Area.

²² Although not yet universally binding on European lawyers, the CCBE Code (or at least its underlying principles) has been adopted to varying degrees by member states.

²³ For a detailed discussion of four particular and contrasting models of ethical conduct, see Christine Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30 *Monash University Law Review* 49.

than the inquisitorial system, how does this affect the legal practitioner's understanding of 'honesty' as a fundamental principle of adversarial legal ethics? Such an analysis must be mindful of Luban's warning that many lawyers will search for an *institutional excuse* in order to justify the (a)moral consequences of their actions as practitioners, and that indeed the rules of legal institutions may in fact actively encourage such moral ambivalence.²⁴

A proponent of the adversarial system might suggest that it promotes the search for truth by means of the thorough testing of evidence by a partisan examiner. For example, John Wigmore argued that cross-examination is 'the greatest legal engine ever invented for the discovery of truth'.²⁵ However, noting the inequality of resources and the variable quality of representation in the adversarial system, Luban responds to this position by contending that:

the adversarial system bears scant resemblance to this idealised, critical-rationalist, picture of scientific inquiry. Science doesn't, or at least shouldn't try to exclude probative evidence, discredit opposing testimony known to be truthful, fight efforts at discovery, use procedural devices to delay trial in hopes that opponents will run out of money or witnesses die or disappear, exploit the incompetence of opposing counsel, shield material facts from a tribunal based on privilege, or indulge in sophistry and rhetorical manipulation.²⁶

Nevertheless, stark contrasts between adversarial and inquisitorial systems are apt to mislead. Mirjan Damaška states that, '[w]hen the comparatist turns his view from the Continent to the English speaking world, he encounters contrasts so striking that the great diversity existing within each legal culture pales in significance.'²⁷ Whilst much can be learnt from the differences between the systems, and the contrasting ethical pressures such systems place upon legal practitioners, the 'clash of systems' should not be overstated. As Mason observes, there is a degree of 'commonality and convergence' between the two systems and

[i]t is a mistake to regard the two systems as static ... Today the European system ... places more emphasis on procedural fairness ... The adversarial system, by moving to case management, begins to resemble the European one in expecting the judge to exercise more control over the litigation. Nevertheless, the defining criterion that distinguishes the two systems is the greater emphasis on procedural fairness which is characteristic of the adversarial system. However, whether we should continue to place that greater emphasis on procedural fairness is a major question.²⁸

This convergence is reflected not merely in inquisitorial tribunals and Royal Commissions in common law jurisdictions, but also in the similarity of ethical problems faced by legal practitioners from each system. However, differences do

²⁴ Luban, 'Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship', above n 7, 1018.

²⁵ John Wigmore, *Evidence* (revised ed, 1974) vol 5, 32.

²⁶ Luban, 'Twenty Theses on Adversarial Ethics', above n 2, 144.

²⁷ Damaška, above n 14, 481.

²⁸ Mason, above n 19, 1.

exist, and it is only in discussing these differences that the impact of contrasting legal systems upon ethical conduct may be illuminated.

II CRIMINAL PROCEDURE

This section considers differences between the professional ethical obligations and standards required of lawyers involved in criminal trials in Australia and France. Many of these differences arise out of the contrasting philosophical foundations of each system. At base, we would suggest that French criminal procedure values more highly the community's gain through the proper conviction of those who are guilty of an offence, whereas Australian criminal procedure values above this the protection of the accused individual's autonomy. However, before we may consider these foundational differences and their ethical consequences, we must examine French criminal procedure itself.²⁹

A French Criminal Procedure

1 *Investigation, Committal Proceedings and Pre-Trial Procedure*

The initial investigation of a crime is carried out by the judicial police. A public prosecutor, a person whose standing is essentially judicial, supervises their work and decides whether charges will be pressed.³⁰ The prosecutor is the public party and it is his or her ethical duty to search for truth and act in the interests of law and justice.³¹ Ideally fair and objective, the prosecutor, like the judge, is obliged to investigate all aspects of the offence, including those suggesting innocence.³²

The right to silence does exist in the French system; however its exercise can give rise to an unfavourable inference against the accused, as he or she is regarded as a necessary source of information in revealing the truth.³³ The police may detain and interrogate a suspect after arrest on what is known as the *garde à vue*.³⁴ Until 2001, the police were not required to caution the accused that he or she was not required to answer their questions. The police are now required to do so under an amendment to art 63 of the *Code de Procédure Pénale*.³⁵ Since 1993, the defendant's right to legal counsel has arisen from the moment they are

²⁹ We assume that the reader has basic knowledge of Australian criminal procedure.

³⁰ *Code de Procédure Pénale*, arts 12, 31. See also Jean-Marc Baissus, 'Common v Continental: A Reaction to Mr Evan Whitton's 1998 Murdoch Law School Address' (1998) 5(4) *E Law — Murdoch University Electronic Journal of Law* [15]–[16] <http://www.murdoch.edu.au/elaw/issues/v5n4/baissus54_text.html>. Baissus is a former President of the Péronne *Tribunal de Grande Instance*.

³¹ *Code de Procédure Pénale*, art 31. See also Baissus, above n 30, [17].

³² Baissus, above n 30, [18].

³³ Article 353 of the *Code de Procédure Pénale* provides that the judge must 'seek in the sincerity of their conscience what impression has been made on their reason by the evidence'. Bron McKillop notes that this principle means that judges may draw adverse inferences from the silence of accused persons: Bron McKillop, *Anatomy of a French Murder Case* (1997) 90.

³⁴ *Code de Procédure Pénale*, art 63.

³⁵ *Loi No 2000-516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes*, art 5 (France). See also Bron McKillop, 'The Position of Accused Persons under the Common Law System in Australia (More Particularly in New South Wales) and the Civil Law System in France' (2003) 26 *University of New South Wales Law Journal* 515, 521.

detained. Since 2001, defendants may see their lawyer for a period not exceeding 30 minutes, and for the same period after 20 hours and 36 hours respectively of being detained.³⁶ The lawyer is not entitled to be present while the defendant is being interrogated, and is not entitled to see any records of the investigation to date. The lawyer is, however, entitled to be informed of the offence with which the defendant has been charged, and may present written observations which are attached to the proceedings.³⁷

The prosecution's role will differ depending on the seriousness of the crime alleged. Minor offences are investigated entirely by the prosecution and police. In such circumstances the prosecution will terminate the investigation either by citing the defendant to appear later in court, or by declining to institute proceedings.³⁸ Offences in this category include driving offences, frauds, and offences attracting less than two months' imprisonment or a fine.³⁹

For offences known as *délits* (liability for which is imprisonment for two months to five years) the prosecutor may nominate that the offences be investigated by an investigating judge (*juge d'instruction*). All crimes punishable by five years' imprisonment or more (flagrant offences or *délits flagrants*) must be investigated by an investigating judge.⁴⁰ *Délits* detected whilst being committed, or those that have recently been committed, are included in the category of *délits flagrants*.⁴¹

The investigating judge is completely independent and, like a prosecutor's, his or her ethical duty and professional responsibility is to search for the material truth. He or she must therefore seek to discover facts both for and against the accused.⁴² Since 2001, a party may only be heard, interrogated or confronted by an investigating judge (outside the *garde à vue*), in the presence of their *avocat*, or when their *avocat* has been duly called upon (unless the person waives this right).⁴³ Nonetheless, investigating judges have extensive powers and may:

- order searches of a premises and seizure of goods (arts 92–99-2);
- interrogate the suspect and witnesses (arts 114–19);
- arrange confrontations of witnesses with the defendant (art 120);
- prevent a person in pre-trial detention from communicating with others for a period of 10 days (art 145-4);
- arrange a visit to the crime scene (art 92);
- obtain experts' reports (arts 156–169-1);
- make enquiries into the financial, family or social situation of the defendant (para 6 of art 81);
- delegate the investigation to the judicial police (para 4 of art 81);

³⁶ *Code de Procédure Pénale*, art 63-4.

³⁷ *Code de Procédure Pénale*, art 63-4.

³⁸ *Code de Procédure Pénale* arts 40, 44.

³⁹ Bron McKillop, New South Wales Parliamentary Joint Committee on the Independent Commission against Corruption, *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison* (1994) 11.

⁴⁰ *Code de Procédure Pénale*, art 79.

⁴¹ *Code de Procédure Pénale*, art 53.

⁴² *Code de Procédure Pénale*, art 81.

⁴³ *Code de Procédure Pénale*, art 114.

- instruct the police in the gathering of further evidence (art 51);
- require an appropriate person to set up an interception device (art 100-3); and
- order medical or psychological examinations (para 8 of art 81).

The investigation is carried out in secret.⁴⁴ This is meant to enforce the presumption of innocence and protect the suspect from the public eye.⁴⁵ However, a prosecutor can, on his or her own motion or at the request of the parties, reveal details of a case where to do so is in the public interest.⁴⁶ Counsel for the accused has a right to inspect the *dossier* (the collection of documents which is the result of the investigation), but that right does not extend to the accused themselves.⁴⁷ Counsel may, however, request permission from the investigating judge to transmit copies of documents from the *dossier* to their client.⁴⁸ Since 1997, following the intervention of the European Court of Human Rights, self-represented defendants have had the right to inspect the *dossier*.⁴⁹ Each document must be kept confidential, unless it is an expert report released by the party for the needs of the defence.⁵⁰

In addition to his or her general powers of investigation, the investigating judge can exercise coercive powers during the pre-trial phase, and may order detention on remand, give restraining orders, or grant bail (along strict procedural lines).⁵¹ The investigating judge may dismiss the case if there is insufficient evidence.⁵²

Where an investigating judge considers that there are grounds for committing the accused to stand trial, he or she will refer the case to one of a number of courts or tribunals. At that point the involvement of the investigating judge ends.⁵³ Where the defendant has been charged with a *délit flagrant*, the matter will be referred to the *chambre d'accusation*, which will then decide whether the accused will stand trial in the *cour d'assises*.⁵⁴ Three judges constitute the *chambre d'accusation*, and the hearing before them involves only lawyers (unless the judges of the *chambre d'accusation* order the parties to appear in person).⁵⁵ If a defendant is ultimately committed to trial in the *cour d'assises*, a verdict will be reached in that court, which will be constituted by three professional judges (a presiding judge and two assessors)⁵⁶ and nine lay persons,

⁴⁴ *Code de Procédure Pénale*, art 11.

⁴⁵ Baissus, above n 30, [36].

⁴⁶ *Code de Procédure Pénale*, art 11.

⁴⁷ *Code de Procédure Pénale*, art 114 para 3.

⁴⁸ *Code de Procédure Pénale*, art 114 paras 5–9.

⁴⁹ *Foucher v France* (1997) II Eur Court HR 452. See also John Leubsdorf, *Man in His Original Dignity: Legal Ethics in France* (2001) 26.

⁵⁰ *Code de Procédure Pénale*, art 114 para 6.

⁵¹ *Code de Procédure Pénale*, arts 143-1–148-8.

⁵² *Code de Procédure Pénale*, art 177.

⁵³ Baissus, above n 30, [34].

⁵⁴ *Code de Procédure Pénale*, arts 212, 214.

⁵⁵ *Code de Procédure Pénale*, arts 191, 199.

⁵⁶ *Code de Procédure Pénale*, arts 243, 248.

known as *jurés*.⁵⁷ Where the defendant is charged with a *délit*, the investigating judge will refer the matter to the *tribunal correctionnel*.⁵⁸ The *tribunal correctionnel* hears and determines the charge against the defendant. It is normally made up of three judges, though a single judge may sit in less serious cases.⁵⁹

Once an accused is committed, preparation for the trial is overseen by a *juge de la mise en état* ('JME') (pre-trial judge).⁶⁰ The JME has powers similar to that of a Master in Australian courts, in that he or she sets down a schedule for the exchange of argument and determines the date of the trial.⁶¹ However, the JME may also ask questions of counsel, supervise discovery, hear the parties, and invite lawyers to answer questions on points of law and in relation to the facts which he or she deems necessary for the resolution of the case.⁶²

2 The Trial Stage

Whilst the adversarial criminal trial might be described as 'party-controlled', the civil law criminal trial is judge-controlled. It is largely based on the investigation as recorded in the *dossier*. The *dossier* shapes the trial and will also inform any appellate review of the trial court's decision.⁶³ Bron McKillop describes the following four parts of a French *dossier*:

- 1 *pièces de fond* — the record of the investigation into the offence, including the original police report, depositions of the accused and witnesses, reports of experts, results of searches and electronic surveillance;
- 2 *détention préventive* — a record of the accused's pre-trial detention, if any;
- 3 *renseignements et personnalité* — history and background of the accused, including prior convictions; and
- 4 *pièces de forme* — record of warrants, requisition orders and directives.⁶⁴

The following description of a French trial is derived from the separate works of Jean-Marc Baissus⁶⁵ and McKillop:⁶⁶

- After procedural objections are settled, the indictment is read out to the accused. The presiding judge will summarise the contents of the pre-trial *dossier*, and support this summary by asking questions of the accused. The accused does not plead, but is examined by the judge about his or her biographical details (including previous offences). The accused is likely to be questioned closely if he or she departs from their deposition in the *dossier*. The prosecutor and defence counsel may suggest questions to be put by the presiding judge or

⁵⁷ *Code de Procédure Pénale*, art 240.

⁵⁸ *Code de Procédure Pénale*, art 179 (although such matters may also progress through the *chambre d'accusation*: see art 213).

⁵⁹ *Code de Procédure Pénale*, art 398.

⁶⁰ *Nouveau Code de Procédure Civile*, art 763. See also *Décret no 2004-836 du 20 août 2004 portant modification de la procédure civile*, art 10 (France).

⁶¹ *Nouveau Code de Procédure Civile*, arts 763, 764. See also Baissus, above n 30, [41].

⁶² See *Nouveau Code de Procédure Civile*, arts 763, 765, 767.

⁶³ McKillop, *Inquisitorial Systems of Criminal Justice and the ICAC*, above n 39, 4.

⁶⁴ *Ibid.*

⁶⁵ Baissus, above n 30.

⁶⁶ McKillop, *Inquisitorial Systems of Criminal Justice and the ICAC*, above n 39, 12.

may be allowed to question the accused themselves.⁶⁷ Lay jurors and the assessors may only ask questions of the accused after asking the presiding judge for permission to speak.⁶⁸ The accused is not under oath when being questioned.

- After the accused has been questioned, the presiding judge calls any expert witnesses, police witnesses and finally lay witnesses. The witnesses first answer a number of questions regarding their personal details and their relationship with the accused, put to them by the presiding judge. They then make an uninterrupted statement. At the conclusion of the statement, the presiding judge may ask questions of the witnesses.⁶⁹ Whilst there is no formal cross-examination, counsel may suggest questions to be put by the presiding judge.
- After the evidence has been presented, the prosecutor addresses the court, and will usually ask for a specific punishment. Defence counsel then addresses the court. Both addresses will be wide-ranging and go beyond the oral evidence before the court. The accused has a right to the last word.⁷⁰

McKillop notes that whilst the presumption of innocence does exist in France, it is unlikely that an accused will be found not guilty at trial, because the evidence has already been considered and confirmed in the pre-trial processes. McKillop notes '[a]t a Continental criminal trial, particularly in France, one witnesses a demonstration of guilt rather than an inquiry into guilt'.⁷¹ The inquiry has taken place prior to the trial, in the preparation of the *dossier*, which will be read by the professional judges prior to the commencement of the trial.⁷²

3 *The Civil Party*

An important point of distinction between criminal trials in the inquisitorial and adversarial systems stems from the role of the victim. In France, a person who suffers harm or loss (which may be in a form as nebulous as 'moral prejudice') as a result of the criminal action of another may pursue a civil remedy by filing a complaint with the competent investigating judge.⁷³ Such a person is known as the *partie civile* (the 'civil party'). The civil party may also directly cite a perpetrator to appear before a competent court, or lodge an official complaint with the investigating judge.⁷⁴ A complaint made in this way will normally oblige the investigating judge to prosecute, and the process acts as a limitation upon the investigating judge's power to decline to do so.⁷⁵

Civil parties may be victims, relatives of homicide victims, or various associations registered to defend and assist particular interests or groups (for example,

⁶⁷ *Code de Procédure Pénale*, art 312.

⁶⁸ *Code de Procédure Pénale*, art 311.

⁶⁹ *Code de Procédure Pénale*, arts 331, 332.

⁷⁰ *Code de Procédure Pénale*, art 460.

⁷¹ McKillop, *Inquisitorial Systems of Criminal Justice and the ICAC*, above n 39, 7.

⁷² Damaška, above n 14, 507.

⁷³ *Code de Procédure Pénale*, arts 2, 85. See also McKillop, *Inquisitorial Systems of Criminal Justice and the ICAC*, above n 39, 13.

⁷⁴ *Code de Procédure Pénale*, arts 1, 53-1.

⁷⁵ *Code de Procédure Pénale*, arts 3, 85. See also McKillop, *Anatomy of a French Murder Case*, above n 33, 82-3.

abused children, animals, racial or ethnic groups, or the environment).⁷⁶ The rights of the civil party include:

- legal representation (legal aid may be available to them) (para 3 of art 33-1);
- asking questions of witnesses (with the leave of the court) (art 312);
- not giving evidence under oath — indeed they are forbidden to do so (art 335);
- addressing the court on the guilt of the accused and damages (art 346);
- requesting expert reports (arts 156, 167);
- summoning witnesses to appear before the court (art 281); and
- appealing to the *cour d'assises* or the *cour de cassation* against a judgment that is adverse to their civil interests (arts 380-2, 575).

This system gives victims of crime, and others, the ability to vent publicly their hurt, anger or other emotions about the accused's behaviour. It also allows for the fast and economical determination of claims for crimes compensation. If awarded, the compensation payment is made by a state fund, which will seek reimbursement from the accused.⁷⁷ The number of civil parties in an action against the accused can be numerous. For example, in the case study which makes up the content of McKillop's *Anatomy of a French Murder Case*, the accused faced 15 claimant relatives of the deceased, including the deceased's nine adult brothers and sisters, and long-estranged wife.⁷⁸ The system can result in unduly-prolonged criminal proceedings, greater complication of the prosecutor's task, and also create a risk of vexatious civil parties becoming involved in the proceedings. However, in circumstances where they request an investigating judge to prosecute, the civil party will usually need to provide a sum of money to cover the costs of the proceeding.⁷⁹ Moreover, a civil party may be sued by the accused, or fined by the court, if the accused is acquitted and the judge considers that the civil complaint was excessive or dilatory.⁸⁰

4 Evidence

In France, there are no rules of evidence as that phrase is understood in Australia. Any means of proof is accepted, so long as it has been open to challenge.⁸¹ The lack of rules of evidence is a reflection of the fact that the duty to collect evidence and 'search for the truth' is given to a qualified and impartial judge. Hearsay evidence is admissible.⁸²

Importantly, the evidence against an accused person in France includes evidence not only going to the crime, but also evidence concerning the life and personality of the accused, including prior convictions. In France, as elsewhere

⁷⁶ *Code de Procédure Pénale*, arts 2-1-2-20, 80-4.

⁷⁷ McKillop, *Anatomy of a French Murder Case*, above n 33, 64.

⁷⁸ *Ibid.*

⁷⁹ *Code de Procédure Pénale*, art 88.

⁸⁰ *Code de Procédure Pénale*, arts 91, 177-2.

⁸¹ Antoine Bullier, 'Evidence in French Criminal Procedure: A Short Note' (1999) 26(8) *Brief* 12, 13.

⁸² Baissus, above n 30, [55].

in Europe, 'it is the accused as a person who is judged, not only his or her crime'.⁸³ Expert evidence is given by court-appointed experts, who are paid by the state to maintain their independence.⁸⁴ Where a party is not satisfied with the expert's opinion, they are free to criticise it, and the court may appoint one or more additional experts.⁸⁵

A confession of guilt can constitute evidence of guilt, but it is not binding and is subject to evaluation by the judge. Therefore the judges may acquit an accused, even if he or she has confessed and has not retracted the confession.⁸⁶ The probative value of the confession depends on the 'inner belief' of the judge.⁸⁷

5 *Decision-Making*

After the trial is concluded, the judges will retire to consider their verdict. In the *cour d'assises*, the nine lay *jurés* will retire together with the three professional judges, and all consider the verdict together.⁸⁸ A finding of guilt requires a two-thirds majority of all the judges, and therefore the lay *jurés* united can outvote the professional judges.⁸⁹ In practice, however, this happens very rarely and in most cases the lay *jurés* are greatly influenced by the professional judges.⁹⁰

Consistent with the lack of strict rules of evidence in the French system is the prerogative of the judge to decide the kind of evidence he or she will accept or reject, and how each piece of evidence will be weighed. This principle is often referred to as the 'free assessment of evidence', and is seen as a corollary of the search for material truth.⁹¹ In deciding the merits, the judge relies only on his or her 'intimate conviction'⁹² or 'inner belief'.⁹³ However, this freedom is tempered by the fact that all judicial decisions must be accompanied by written reasons. The judge must indicate what evidence has been accepted, along with the probative value accorded to each piece of evidence. This process of reasoning

⁸³ McKillop, *Inquisitorial Systems of Criminal Justice and the ICAC*, above n 39, 2.

⁸⁴ *Code de Procédure Pénale*, art 156; Baissus, above n 30, [70]–[71].

⁸⁵ *Code de Procédure Pénale*, art 156; Baissus, above n 30, [72].

⁸⁶ *Code de Procédure Pénale*, art 428.

⁸⁷ *Code de Procédure Pénale*, art 353.

⁸⁸ *Code de Procédure Pénale*, art 355.

⁸⁹ *Code de Procédure Pénale*, art 359.

⁹⁰ Damaška, above n 14, 493.

⁹¹ Baissus, above n 30, [68].

⁹² *Ibid* [65].

⁹³ Bullier, above n 81, 14; *Code de Procédure Pénale*, art 353. It is probably worthwhile reproducing the text of this article in full in English:

The law does not ask the judges to account for the means by which they convinced themselves; it does not charge them with any rule from which they shall specifically derive the fullness and adequacy of evidence. It requires them to question themselves in silence and reflection and to seek in the sincerity of their conscience what impression has been made on their reason by the evidence brought against the accused and the arguments of his defence. The law asks them but this single question, which encloses the full scope of their duties: are you inwardly convinced?

Legifrance, *Code of Criminal Procedure* (2003) <http://www.legifrance.gouv.fr/html/codes_traduits_cpptextA.htm>.

means that the defence knows exactly the grounds upon which the decision was made.⁹⁴ This in turn facilitates appeals, upon which there are virtually no limits.⁹⁵

B *Philosophical Foundations of Inquisitorial and Adversarial Systems of Criminal Justice*

It is often asserted that the inquisitorial process is dedicated to the discovery of the truth — unlike its adversarial equivalent, which is described as a ‘game’ in which parties deliberately obscure the truth for tactical forensic advantage.⁹⁶ We suggest, however, that at some level both criminal justice systems are *designed* to uncover the truth — that is, they are both designed to reach the most accurate conclusion possible about the circumstances of the alleged offence. A more meaningful distinction between the systems is perhaps that the inquisitorial process places a higher value on the discovery of truth, whereas the adversarial process is only prepared to discover truth within strict evidential and procedural boundaries. Moreover, the inquisitorial system places the search for truth in the hands of an impartial investigator, whose duty it is to objectively discover facts. The adversarial system trusts the parties to properly and honestly present their side of the argument, and expects that the truth will emerge from robust presentation of each side’s case. In the case of the former system, the community gain through an accurate conviction of the guilty is paramount. However, in the case of the latter, this community interest is subservient to the insistence that such convictions must not be gained at the expense of individual liberties and dignity.

Many rules of procedure which we have explored above bring into focus the inquisitorial system’s favouring of truth over protection of the individual. For example, as explained above, an accused in the French system has quite limited access to a lawyer during any period of police detention, and no right to be accompanied by a lawyer whilst being interrogated during that detention. Lawyers are regarded in this context as obstacles to the discovery of the truth, and so are excluded very substantially from the investigation process — to which they only gained any access at all in 1897.⁹⁷ However, it should be noted that the diminished role of defence lawyers during the investigation is not consistent throughout civil law systems. In Spain, for example, the accused has the right to have a lawyer present during a police interview.⁹⁸

The willingness to admit all evidence, including that improperly obtained or normally excluded as prejudicial in adversarial systems, is obviously perceived as an important aspect of the search for truth in civil law systems. Common law systems regard excluding evidence of prior convictions and other exclusionary

⁹⁴ *Code de Procédure Pénale*, arts 376–80. See also Baissus, above n 30, [68].

⁹⁵ *Code de Procédure Pénale*, art 380-1. See also Baissus, above n 30, [68].

⁹⁶ See, eg, Evan Whitton, ‘Justice or Money? How to Save the Law from Contempt’ (1998) 5(4) *E Law — Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v5n4/whitton54.html>>.

⁹⁷ Leubsdorf, above n 49, 81–2.

⁹⁸ Maya Goldstein Bolocan (ed), Central European and Eurasian Law Initiative, *Professional Legal Ethics: A Comparative Perspective* (2002) 64 <http://www.abanet.org/ceeli/publications/concept_papers/proflegalethics/professional_legal_ethics_concept_paper.pdf>.

rules of evidence (for example those pertaining to hearsay, tendency and coincidence evidence) as protecting the accused from the prejudicial effect of such evidence. The exclusion of improperly or illegally obtained evidence is similarly based on grounds of public policy and protection of the accused. However, the broader French approach to the admission of evidence stems from a reliance upon the judge's ability to properly weigh the probative value of such evidence. Rules of evidence are regarded as resulting from an Anglo-Saxon distrust of a jury's ability to properly distinguish probative value from prejudicial effect. Without a jury, or where a jury is guided by three professional judges, such rules designed to exclude what is seen as relevant are rendered unnecessary, as proper judgements as to relevance and probative force are made and explained in written reasons.⁹⁹

Both these examples of procedural differences suggest that the judge-led inquisitorial procedure allows greater interference in the life of an individual accused of a crime. Perhaps this is because the procedure is seen as being impartial rather than aimed at securing a conviction — the parties therefore do not face each other in opposition. The adversarial system, in contrast, distrusts the exercise of state power and perceives an inherent unfairness in pitting it against the individual. Thus, it aims to err on the side of protecting the accused, adhering to the precept that it is better for the guilty to go free than for the innocent to be condemned.¹⁰⁰ These systematic differences have had significant consequences for the role of lawyers and thus the professional ethical standards which they must maintain.

C *Ethical Implications for Criminal Law Practitioners*

1 *Criminal Defence Counsel*

As pointed out by John Leubsdorf, criminal defence work is important to the bar's (and the wider legal profession's) theory of itself in most countries and legal systems.¹⁰¹ Criminal defence work gives rise to ethical dilemmas in the margins, bringing to light ethical conflicts which, to a lesser extent, pervade the practice of the profession as a whole. Moreover, the role of lawyers in defending those charged with contravening the rules laid down by society and the state brings into focus the ideal of lawyers' independence from other sites of power.

Whilst it is true that in both inquisitorial and adversarial systems criminal barristers¹⁰² consider themselves a shield for their client against the power of the state, practitioners in these two systems have strikingly different conceptions of their role and the way in which this protection is best achieved. The essential

⁹⁹ *Code de Procédure Pénale*, arts 376–80. See also Baissus, above n 30, [68].

¹⁰⁰ *R v Carroll* (2002) 213 CLR 635, 643–5 (Gleeson CJ and Hayne J).

¹⁰¹ Leubsdorf, above n 49, 81.

¹⁰² This part of the discussion will be limited, for the purposes of clarity and brevity, to the role of barristers. We note also that the following discussion will largely compare and contrast the ethical *ideals* of the two systems, to which there are limits in practice.

difference between them may be best illustrated by two similar, but fundamentally conflicting, stories. The first is adapted from John Phillips' *Advocacy with Honour*:

On a November evening in 1792, Thomas Erskine of Lincoln's Inn was walking home across Hampstead Heath after a day in the courts. Three days earlier, he had accepted a brief to defend the famous pamphleteer and agitator, Thomas Paine, who had been charged with treason following his publication of the second part of *The Rights of Man*.

Erskine was brought up short by his friend Lord Loughborough, who said 'Erskine, I have a message from the Prince of Wales himself. Your conduct is highly displeasing to the King.' Six years earlier, Erskine had been appointed Attorney-General to the Prince, a position which involved a handsome retainer and the prospect of high judicial appointment. Lord Loughborough continued 'You must not take Paine's brief.' Erskine, who personally disapproved of Paine's work, did not hesitate. 'But I have been retained', he said, 'and I will take it, by God!' He consequently later lost his position as Attorney-General.

In his defence of Paine, Erskine addressed the jury on the independence of the English Bar and said 'I will forever, at all hazards, assert the dignity and independence of the English Bar; without which, impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say, that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge and of the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgment; puts the heavy influence of perhaps mistaken opinion into the scale against the accused in whose favour the benevolent principles of English law makes all presumptions, and which commands the very judge to be his counsel.'¹⁰³

The second story comes from Leubsdorf's *Man in His Original Dignity: Legal Ethics in France*:

In 1894, when Alfred Dreyfus's brother asked Edgar Demange to undertake his brother's defence against espionage charges, Demange made a strange request: he wanted to study the merits of the case before deciding whether to take it. He warned that 'if my conscience forbids me from defending your brother ... my refusal will be known and discussed; I will be your brother's first judge.' Four years later, the Dreyfus family sought to add to the defence Fernand Labori, who made an even stranger request: not to be paid.¹⁰⁴

The stories illustrate two different principles at the base of each system's legal profession. The Anglo-Australian tradition sees it as a barrister's duty to 'fearlessly uphold the interests of his client without regard to unpleasant consequences either to himself or any other person.'¹⁰⁵ In contrast, the French *avocat*

is not a spokesman, a representative, an agent, a hired gun. He does not act for money. He is an independent person who lends his eloquence and credibility to someone in whose cause he believes, and who needs his help. He sometimes

¹⁰³ John Phillips, *Advocacy with Honour* (1985) 1–2, 17.

¹⁰⁴ Leubsdorf, above n 49, 14.

¹⁰⁵ Phillips, above n 103, 2.

vouches for clients by declaring his belief in their cause, which is precisely what a lawyer in the United States [or England or Australia] is not supposed to do ... Indeed, French authors speak of the love an *avocat* may feel for a client ... Such an *avocat* may continue to press the client's cause for years, even after the client dies, or again may quarrel and break up with the client, as happened with Labori and Dreyfus when Dreyfus accepted a Presidential pardon.¹⁰⁶

Before returning to the theme highlighted by these contrasting stories, we will briefly examine some of the other differences in the ethical codes of the French and Australian criminal bars. The ethical standards of the French Bar are expressed in terms of the ideals of delicacy, humanity, courtesy, confraternity, independence, moderation, dignity, disinterestedness and tact.¹⁰⁷ These are 'broad brush' ethical standards (indeed, virtues) that do not descend into detail as to their requirements and are couched explicitly in the language of deontological morality. However, some content may be given to a few of these virtues. Delicacy, for example, requires that *avocats* avoid conflicts of interest and adhere to proper standards of behaviour, even when acting outside their professional role. Moral sensitivity is required, not merely adherence to the standards of the written law.¹⁰⁸ Humanity, whilst difficult to define and almost impossible to enforce, requires the lawyer to be supporter and counsellor to their client. Leubsdorf reports the case of a judge telling an *avocat* in private that his role was 'not so much to defend [his client] as to console him.'¹⁰⁹ Whilst the ideal of courtesy may allow for 'ferocious language', such language should only be used in the spirit of confraternity.¹¹⁰

Traditionally, the role of the criminal *avocat*, as suggested above, is not to represent so much as to assist their client, by lending their support and eloquence to a cause in which the *avocat* believes. Consequently, *avocats* are not required to follow the instructions of their client and sometimes may not even seek such instructions.¹¹¹ For instance, in McKillop's example of a French murder case, the accused had, over the course of the investigation and trial, three lawyers. He was interviewed by only one of these, and then only twice for 10 minutes. At those meetings, the nature of the defence that the lawyer was going to put to the court was not discussed, and consequently the approach taken by the *avocat* came as a surprise to the accused on the day of the trial.¹¹²

This 'independence from the client' — one of the cornerstones of French legal ethics (along with independence from the court and other *avocats*) — has other important consequences. An *avocat* has no responsibility to accept a case; indeed, it is his or her duty to 'judge' his or her client before accepting the brief. Once the brief has been accepted, an *avocat* has no responsibility to continue to act for a client and may withdraw his or her services on proper notice.¹¹³ Whilst

¹⁰⁶ Leubsdorf, above n 49, 15.

¹⁰⁷ Ibid 39.

¹⁰⁸ Ibid 44.

¹⁰⁹ Ibid 83.

¹¹⁰ Ibid 45.

¹¹¹ Ibid 26.

¹¹² McKillop, *Anatomy of a French Murder Case*, above n 33, 63.

¹¹³ Leubsdorf, above n 49, 16.

a client is prevented from waiving the ‘professional secrecy’ which surrounds his or her communications with an *avocat*, the *avocat* has discretion to reveal to the court those secrets they perceive as advantageous to their client.¹¹⁴ The arguments made by an *avocat*, and the way in which he or she conducts the defence, are entirely the *avocat*’s own responsibility.¹¹⁵ This has important moral implications for a lawyer’s professional personality. A French lawyer cannot distance himself or herself from the broader social implications of what they say in support of their client and thus cannot avoid identification with the cause of their client.

As is apparent, the ethical requirement that a French *avocat* judge their client before agreeing to act is the polar opposite of the Anglo-Australian tradition of the ‘cab rank’ principle, which is designed to ensure fearless representation of any person in spite of perceptions of their character.¹¹⁶ The tripartite duties of barristers in our adversarial system — the duty to the client, to the court and to the law — are well known.¹¹⁷ A criminal barrister is required to accept any client who offers a proper professional fee, and he or she may only refuse a brief in cases of conflict of interest, lack of expertise or lack of time to adequately prepare the case.¹¹⁸ A barrister who is ‘generally available to accept a brief must not discriminate, in any way, for or against a client, or class of clients.’¹¹⁹ Once accepted, the brief may not be relinquished, ‘except in the most compelling circumstances, and then only if sufficient time remains for another barrister to master the case.’¹²⁰

It is, in part, this obligation — to do the best for your client, making arguments including those that are unpopular or odious — that leads to the dislike and distrust often expressed in relation to adversarial lawyers. Evan Whitton, an unapologetic critic of the adversarial system, suggests that this duty leads to the exculpation of the guilty through the use of games. He quotes Stuart Littlemore QC as saying ‘[y]ou really feel you’ve done something when you get the guilty off’,¹²¹ and Peter Faris QC as contributing:

¹¹⁴ Ibid 26–7.

¹¹⁵ Ibid 26.

¹¹⁶ *Victorian Bar Practice Rules 2004* (Vic) r 11.

¹¹⁷ These duties have counterparts in the French tripartite ‘independences’: independence from the court, from the client, and from other *avocats*.

¹¹⁸ *Victorian Bar Practice Rules 2004* (Vic) r 86.

¹¹⁹ *Victorian Bar Practice Rules 2004* (Vic) r 87. We note that this is an ideal. Undoubtedly, some barristers exercise greater control over the types of matters they accept. Nonetheless, the value of the rule is in no small part that it allows for a professional *justification* for representing people who might not be afforded representation if advocacy was understood as a personal endorsement of the client. Even David Luban — the champion of moral activism — perceives that non-accountable partisanship is most justified in the criminal defence paradigm, where ‘relatively powerless defendants confront the full weight of the State’: Luban, ‘Partisanship, Betrayal and Autonomy in the Lawyer–Client Relationship’, above n 7, 1019. The real question, of course, is whether outside of this sphere the cab rank rule should allow advocates to morally distance themselves from the consequences of the ends being pursued by their clients and their chosen means of achieving them: at 1019.

¹²⁰ *Victorian Bar Practice Rules 2004* (Vic) r 162.

¹²¹ Whitton, above n 96, [30].

In my view, the major criminal defences, in order of importance, are as follows: 1. Delay. 2. Confusion. 3. Allegations of conspiracy by the police and prosecuting authorities to conceal and tamper with the evidence, thus raising a reasonable doubt.¹²²

This invites the question of whether lawyers in adversarial systems, looking to the French example, should take on greater moral responsibility for the arguments they make and the way in which they defend their clients' interests. Should a lawyer decline to argue a particular defence — provocation, for example — if he or she finds it morally repugnant? Is the argument that the law's moral limits are defined by society's democratic processes insufficient to excuse a lawyer's exploitation of those limits? Do the practical realities of the adversarial system, including the cost of litigation and the inequality of representation, make it desirable for lawyers to exercise more of their own moral judgement? The answers to these questions are beyond the ambit of this article. We note, however, the call from commentators for lawyers to enter into moral discussions with their clients.¹²³

Ysaiah Ross calls for lawyers to accept a Sartrean model of their existential freedom, the application of which does not allow the avoidance of responsibility for the exercise of free will through claims of 'the client made me do it'.¹²⁴ Such an approach would require lawyers to decline work they perceived as immoral or socially unproductive, and is difficult to reconcile with the adversarial system's client-centric focus. To a large extent, however, even such commentary acknowledges that adopting a role as a 'non-accountable partisan', if ever justified, is most justified in the role of a criminal defence lawyer (and least justified in the role of the criminal prosecutor).¹²⁵ If the adversarial process aims to protect the dignity and autonomy of the accused by enabling them to retain control of their defence case and present it to the jury, then criminal lawyers are envisaged as essential in ensuring that this occurs. The role of the lawyer is to empower the accused by enabling them to effectively defend charges laid against them. The ideal is thus that lawyers are the device through which the adversarial system puts both parties on an equal footing before an impartial moderator, the judge and/or jury.¹²⁶ Nevertheless, the Australian legal reality, in which the quality of representation is so variable and the pressures of legal work and case management so intense, seems somewhat distant from this ideal.

We return to a consideration of the lawyer's moral responsibility for actions taken on behalf of a client when we examine the ethical obligations of those practising outside criminal areas.

¹²² Ibid.

¹²³ Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (3rd ed, 2001) 35.

¹²⁴ Ibid 45.

¹²⁵ Luban, 'Twenty Theses on Adversarial Ethics', above n 2, 141–2.

¹²⁶ G L Certoma, 'The Accusatory System v the Inquisitorial System: Procedural Truth v Fact?' (1982) 56 *Australian Law Journal* 288, 288.

2 Prosecutors

The stark contrast between the ethical duties of criminal defence *avocats* and their common law counterparts is not repeated when one looks to the ethical duties of prosecutors in each system. Whilst the *role* of prosecutors varies markedly between the systems, their ethical duties, adapted of course to their differing roles, are substantially similar. This makes sense — prosecutors in both systems are entrusted with considerable power and it is not in the community's interest for this power to go unchecked.

Civil law prosecutors are not *avocats*, but rather public servants who enjoy a professional and social status similar to that of judges.¹²⁷ Thus, French *avocats* involved in the criminal justice system only ever represent an accused, and those involved in the prosecution are always part of the hierarchy of the public service. French prosecutors have a much greater role in the investigation of a crime than their common law colleagues, but are also present and do participate in the trial. At the trial, they will be seated at a bench on the same level as the judiciary, and can suggest questions to be asked of witnesses. They have a right to challenge jurors up to a limit of four challenges (the accused has five challenges).¹²⁸ They may also 'cite' (call) witnesses.¹²⁹ They will request a sentence to be passed on the accused if he or she is found guilty. The duty to discover the truth extends to the trial, where the prosecutor may take action to ensure the court correctly understands the offence — for example, a prosecutor might correct a lawyer for the civil parties if they misstate some aspect of the circumstances of the offence.¹³⁰

Similarly, a Victorian prosecutor must

fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.¹³¹

Thus despite the regular portrayal of common law criminal trials in the popular media, the *ideal* is that prosecutors in the Australian system, as model litigants, also seek to ensure that the court arrives at the truth through examination of *all* the relevant evidence.

III CIVIL LITIGATION IN THE ADVERSARIAL AND INQUISITORIAL SYSTEMS

As noted earlier, it is often said that common law jurisdictions are 'adversarial' whilst civil law jurisdictions are 'inquisitorial'. Whilst this classification may be helpful in the abstract — especially in the case of criminal law as we have just seen — a closer inspection reveals significant overlap and common ground. This is particularly so when we talk of civil (as opposed to criminal) trials. In this

¹²⁷ McKillop, *Inquisitorial Systems of Criminal Justice and the ICAC*, above n 39, 1.

¹²⁸ *Code de Procédure Pénale*, arts 298, 299.

¹²⁹ *Code de Procédure Pénale*, art 324.

¹³⁰ McKillop, *Anatomy of a French Murder Case*, above n 33, 54.

¹³¹ *Victorian Bar Practice Rules 2004* (Vic) r 134.

section of the article, we refer to ‘Continental civil law’ so as to avoid cumbersome expressions such as ‘civil law civil litigation’.¹³²

In a speech focusing on civil litigation in Germany, Professor Hein Kötz contrasts the German civil law’s pursuit of *formelle Wahrheit* (‘formal truth’) with the German criminal law’s pursuit of *materielle Wahrheit* (‘material truth’).¹³³ Whilst the concept of material truth is analogous to that pursued by the French criminal law,¹³⁴ the concept of formal truth is far less absolute, and would indeed be familiar to common lawyers practising in the area of civil litigation.

In essence, a German court hearing a civil case tries to find what it ‘believes to be true having regard to the evidence *placed before it by the parties*’.¹³⁵ Kötz notes that the court is effectively constrained by the parties’ pleadings, identification of relevant factual matters and nomination of witnesses and the facts of which they purport to have knowledge. In similar fashion, Garry Downes QC, then a member of the International Court of Arbitration and now a Federal Court judge, observes that ‘[o]n paper the two systems [common law and Continental law], *when applied to civil rather than criminal proceedings*, look remarkably similar.’¹³⁶ Downes points out that in both systems, civil litigation is commenced by private litigants. For instance, in France the plaintiff institutes proceedings by filing a document known as an *assignation*.¹³⁷ The defendant is obliged to respond to the claim and the court is effectively confined to determining the case as presented by the parties. There is a process similar to, but less formal than, common law discovery. Downes claims that the essential point about Continental civil law is the importance of documentary evidence, with a correspondingly reduced emphasis on oral testimony.¹³⁸

This difference is apparent when considering the way in which matters proceed to adjudication in the two systems. In common law civil procedure, there is a relatively clear distinction between the interlocutory pre-trial stages on the one hand, and the trial-proper stages on the other. In contrast, Continental civil procedure is described by Downes as ‘ongoing and fluid’.¹³⁹ There is no discrete trial event at which the admissibility of evidence is determined, but rather a series of ‘conference-like’ hearings which proceed sporadically until such time

¹³² Of course, use of the term ‘Continental’ tends to obscure the fact that civil law systems are found in many countries outside Europe, throughout Latin America, Asia and Africa.

¹³³ Hein Kötz, ‘Civil Justice Systems in Europe and the United States’ (2003) 13 *Duke Journal of Comparative and International Law* 61, 67.

¹³⁴ See above Part II(A).

¹³⁵ Kötz, above n 133, 67 (emphasis added). See also J A Jolowicz, *On Civil Procedure* (2000) 195–202, where the position in France is discussed. Again, it is said that French courts are limited to deciding the case based on the factual matters put in issue by the parties.

¹³⁶ Garry Downes, ‘The Movement Away from Oral Evidence: How Will this Affect Advocates?’ in Charles Sampford, Sophie Blencowe and Suzanne Condlin (eds), *Educating Lawyers for a Less Adversarial System* (1999) 75, 77 (emphasis added). This observation is made specifically in relation to the French system, although Downes’ observations are presumably directed at Continental legal systems more generally. See also Jolowicz, *On Civil Procedure*, above n 135, 176, who notes that ‘it is for the parties, and for the parties alone, to fix the scope of their litigation by their allegations of fact.’ He adds that this is as much so in French law as in English law: at 177.

¹³⁷ Downes, above n 136, 77.

¹³⁸ *Ibid* 79–80

¹³⁹ *Ibid* 78. This is said to be probably due to the historical absence of juries in Continental civil litigation.

as the court file (known as the *dossier* in France) contains sufficient information to permit the court's adjudication. The *dossier* contains pleadings, reports, contemporary documents relating to the dispute, witness statements and extensive written submissions.¹⁴⁰ Indeed, Downes notes that the *dossier* is 'compiled in an adversarial manner' in the sense that it consists of evidence, contemporary documents and witness statements prepared by the opposing parties to the litigation.¹⁴¹

Given these apparently adversarial tendencies, how then is it that Continental civil law is described as inquisitorial? Kötz sees the answer as lying in the manner in which the court approaches and uses the parties' material. In Continental legal systems, lawyers do not elicit evidence from witnesses by way of questioning.¹⁴² Rather, the court plays an active role in the process of eliciting evidence from witnesses. It is essentially for the court to decide whether a particular witness needs to be called. If called, that witness will be questioned by the court, although the parties' lawyers may suggest questions to the judge or judges and assist in identifying lines of inquiry worth pursuing. Kötz observes that the questioning is not open-ended, but is instead confined to the facts that the particular witness has within his or her knowledge and for which that witness was named by one of the parties.¹⁴³ It follows that facts not in dispute between the parties are essentially beyond the court's control, and the court does not launch its own inquisitorial crusade into some higher truth beyond the parameters of what has been pleaded.

Despite the above limitations, which resemble the party-dependent nature of common law civil litigation, Continental courts have extensive power to call witnesses in the order they choose. This enables them to focus on specific issues in an efficient and logical order. There is no general rule that the plaintiff puts his or her case in full before the defence puts its case. Nor is there any specific burden of proof, as common lawyers understand that term. Rather, the court has significant leeway to 'range' over the whole case, identify particular issues that require greater focus and elucidation, and direct submissions and call witnesses accordingly. Where multiple defences are raised, for example, the court may choose to look at the most probable defence first (and accordingly will call any witnesses necessary to cast light on the facts relevant to that defence), postponing consideration of the other defences until it is clear that the first defence must fail.¹⁴⁴

Because the Continental civil trial is not a discrete and choreographed event, but rather a series of ongoing examinations which may take unpredictable turns, there is arguably less scope for the ethical dilemma of witness coaching to arise.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² At least within the court itself. Obviously, lawyers must elicit evidence from witnesses at some stage so as to prepare witness statements for the court file. Even so, the emphasis on documents prior to or contemporaneous with the dispute, as opposed to statements made to lawyers after the dispute has materialised, means that witness statements are less important in Continental legal systems.

¹⁴³ Kötz, above n 133, 67–8.

¹⁴⁴ Ibid 69.

Although in Germany certain contact between lawyers and prospective witnesses is allowed for the purpose of clarifying the witness' testimony, Kötz claims that this is uncommon and that German lawyers are generally reluctant to engage in out-of-court contact with prospective witnesses.¹⁴⁵ Apart from the fact that the lawyers are perhaps loath to spend too much time on a witness who may never even appear to give evidence, it is said that German judges would be likely to take an unfavourable view of the testimony of a witness who had been closeted with counsel for extended periods.¹⁴⁶

A similar issue arises in relation to expert witnesses. Whilst in common law jurisdictions the expert witness owes ethical duties of honesty and candour to the court (as he or she is technically a witness of the court rather than of the parties),¹⁴⁷ the fact remains that selection of expert witnesses lies in the hands of the parties. In Germany, however, the court appoints an expert witness after consultation with the parties. Kötz, himself having been called as an expert witness in both German and English courts,¹⁴⁸ mentions, in relation to English courts, the

difficulty to resist the subtle temptation to join your client's team, to take your client's side, to conceal doubts, to overstate the strong and down-play the weak aspects of his case and to dampen any scruples you might have by reminding yourself that the other side will select and instruct another expert witness and that, when the dust has settled, the truth will triumph.¹⁴⁹

Despite the differences we have highlighted, there is still a broad commonality between lawyers' competing duties, which underlie their ethical obligations. Maya Goldstein Bolocan makes the point that in both common law and civil law traditions, lawyers operate concurrently as representatives of their clients, as officers of the legal system and as public citizens having special responsibilities for the quality of justice.¹⁵⁰ She claims that 'virtually all ethical problems faced by lawyers arise from potential conflicts between these three responsibilities.'¹⁵¹ As such, the ethical rules of both legal systems tend to focus on fundamental concerns such as the avoidance of conflicts of interest, confidentiality of lawyer-client communication, independence of professional judgement and professional independence. Many of the rules are similar, at least on the surface, but there are notable differences in emphasis. For example, Roger Cramton has observed that the United States profession places the highest regard on fidelity to the client whilst the European profession gives greater priority to professional independence.¹⁵² However, the 'professional independence' to which Cramton

¹⁴⁵ Ibid 65–6.

¹⁴⁶ Ibid 66.

¹⁴⁷ Ibid 64.

¹⁴⁸ Kötz was called in his capacity as an expert on German law in English proceedings, and as an expert on English law in German proceedings.

¹⁴⁹ Kötz, above n 133, 64.

¹⁵⁰ Bolocan, above n 98, 1. We note from the outset that Bolocan compares the United States with many different European countries. As such, the necessary generality of her observations must be borne in mind.

¹⁵¹ Ibid.

¹⁵² Roger C Cramton, 'A Comparative Look at Ethics Rules and Professional Ideologies in a Time of Change' in John J Barcelo III and Roger C Cramton (eds), *Lawyers' Practice and Ideals: A Comparative View* (1999) 267.

refers arguably differs from a common lawyer's understanding of that term.

An incident of 'professional independence', as it is understood in the Continental context, is the differing approach to conflicts of interest. As might be expected, Continental legal systems, like those emerging from the common law tradition, treat as central a lawyer's obligation to avoid conflicts of interest. The CCBE Code provides that lawyers must avoid conflicts between their personal interests and their clients' interests (art 2.1.1), and must avoid representing clients with conflicting interests (arts 3.2.1 and 3.2.2). Whilst at first glance these rules seem familiar to common lawyers, real differences between the systems are apparent upon closer analysis. These differences, again, reflect the divergent underlying philosophical assumptions about the nature of the lawyer-client relationship in each justice system.

Unlike the rules which govern conflicts of interest in Australia and the United States, Continental systems generally do not provide clients with the power to consent to a conflict. Professor Mary Daly suggests that the American system adopts an 'autonomy model' which imposes a duty upon a lawyer to inform the client fully of the conflict, and leaves the decision of consent or waiver to the client.¹⁵³ In contrast, Continental systems adopt a 'paternalism model' in which the evaluation of the conflict is left to the lawyer and which makes no provision for informing the client or obtaining consent.¹⁵⁴ This is partly explained by the fact that in Australia and the United States conflicts of interest are defined broadly, although there exists a core of conflicts which cannot be waived by clients.¹⁵⁵ Continental jurisdictions, on the other hand, generally have a much narrower definition of conflicts of interest, and these largely resemble the 'core' conflicts which cannot be waived in common law countries. Daly suggests that the narrow interpretation of conflicts of interests in Continental systems may have stemmed originally from the existence of other restrictions on practitioners,¹⁵⁶ which meant that a broad interpretation of the conflict rules would have been a significant economic burden.¹⁵⁷

The differing approach to rules of confidentiality also reflects Continental 'paternalism', in contrast to the autonomy of the client in common law systems. Both systems recognise that confidentiality is essential in promoting full and honest communication in lawyer-client relationships.¹⁵⁸ In France, professional secrecy is protected by the French *Code Pénal* and is absolute.¹⁵⁹ No judge or authority may override it, and neither the client nor the lawyer may waive it.¹⁶⁰

¹⁵³ Mary C Daly, 'The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century' (1998) 21 *Fordham International Law Journal* 1239, 1289-90.

¹⁵⁴ *Ibid* 1290.

¹⁵⁵ See, eg, the *Family Law Rules 2004* (Cth) r 8.03, which provides that a lawyer acting for a party in a case must not act in the case for any other party who has a conflicting interest. There are no exceptions to this rule.

¹⁵⁶ For example, those which prevented them from practising outside the Bar to which they were admitted, or earning money through 'incompatible professions': Daly, above n 153, 1290.

¹⁵⁷ *Ibid*.

¹⁵⁸ Bolocan, above n 98, 30.

¹⁵⁹ *Ibid* 31; *Code Pénal* art 226-13.

¹⁶⁰ Leubsdorf, above n 49, 26.

This rule is designed to protect both lawyer and client from state interference, and is conceived as a rule in the public interest.¹⁶¹ However, it should be noted that a French *avocat*, who may need to reveal a client's secret in order to prevail in court, may do so. This discretion to reveal secrets apparently arises from the theory that such information was not given in circumstances of confidentiality. This discretion does not allow *avocats* to disclose secrets outside court.¹⁶²

One aspect of confidentiality seen as integral to Continental systems, but which may be surprising to common lawyers, is that relating to communications between lawyers. This rule extends confidentiality to all communications, written or oral, between lawyers. Such communications may not be disclosed to anyone, including the client. An example of this type of rule can be found in art 5.3 of the Deontological Code of the Spanish Bar (*Código Deontológico de la Abogacía Española*) which states that:

A lawyer cannot provide to the court and cannot disclose to his or her client any letters, communications or notes received from the lawyer acting for the other side, unless the lawyer acting for the other side has given his or her express permission for such disclosure.¹⁶³

The extension of confidentiality again highlights a Continental lawyer's independence from the client, and reflects the fact that Continental lawyers are not the client's 'agent' and have duties which do not derive from clients.¹⁶⁴ Common law systems, which view the lawyer as an agent of the client and which are client-centric, sit in stark contrast to this approach, which effectively denies the client information.

At first glance, Cramton's comment about Continental lawyers' emphasis on professional independence might be explicable as a reaction to the comparatively large role played by European legislatures in regulating the legal profession. Indeed, in France and Germany (to name but two countries), legislation is the primary source of regulation for lawyers' conduct.¹⁶⁵ In France, the lawyer's duty of 'professional secrecy' (effectively confidentiality) is covered by the French *Code Pénal*.¹⁶⁶ In Germany, conflicts of interest (known as 'client treason') also attract penal sanctions.¹⁶⁷ In contrast, the position of lawyers in Victoria (and Australia generally) is governed by rules promulgated by the relevant professional associations, under a broad grant of rule-making power pursuant to s 64 of the *Legal Practice Act 1996* (Vic) or its equivalent. The theory would seem to be that this self-regulation is essential to maintaining the legal profession's independence from the executive and legislative branches of government. However, lawyers also seem to be aware that it is only by maintain-

¹⁶¹ Bolocan, above n 98, 31–2.

¹⁶² Leubsdorf, above n 49, 26.

¹⁶³ This passage was translated from the Spanish by Michael Wilson (Accredited Translator, National Accreditation Authority for Translators and Interpreters). The *Código Deontológico de la Abogacía Española*, dated 30 June 2000, can be viewed in the Spanish language at <http://www.abog.net/abogados/abog_cod_deontol_pdf.asp>.

¹⁶⁴ Bolocan, above n 98, 36.

¹⁶⁵ *Ibid* 7–8.

¹⁶⁶ *Ibid*; *Code Pénal* art 226-13.

¹⁶⁷ Bolocan, above n 98, 44.

ing appropriate ethical standards that the legal profession engenders the community's trust such that the profession can continue to self-regulate. Whilst the civil law entrenches judicial independence to some degree, this appears to refer more to the independence of practitioners vis-à-vis their clients and even the tribunals before which they appear, rather than the independence of the judiciary and legal practitioners from the other organs of the state.

Bolocan points out two fundamental differences in the respective systems' understanding of legal ethics. First, she notes the differing drafting styles of ethical codes. American ethical codes tend to be more legalistic and formal, their principles being expressed as black-letter rules rather than vague standards.¹⁶⁸ On the other hand, European codes express their norms in more general terms and tend to emphasise the collegiate nature of the bar, the duties that lawyers owe to one another and the responsibilities of more experienced lawyers to train and educate young lawyers.¹⁶⁹ For example, art 12.2 of the Deontological Code of the Spanish Bar states that:

lawyers with experience in the profession should provide their advice, guidance and counsel to recently admitted lawyers, freely and in a comprehensive fashion. In turn, recently admitted lawyers have the right to seek such guidance from experienced lawyers, in so far as that guidance is required to enable them to properly discharge their professional functions.¹⁷⁰

Although there may be an unwritten rule to this effect at the Victorian Bar, it is interesting to note the absence of any such formal and binding rule in either the *Professional Conduct and Practice Rules 2005* (Vic) or the *Victorian Bar Practice Rules 2004* (Vic).

Second, Bolocan notes that, in contrast to Continental jurisdictions, the United States has 'an elaborate jurisprudence interpreting lawyer codes of conduct that is derived from judicial decision-making.'¹⁷¹ She argues that this phenomenon flows from 'structural differences in the conduct of litigation, and the different philosophies underlying the civil law and common law systems.'¹⁷² Using the analogy of the common law judge as a passive and neutral umpire presiding over a contest in which the lawyers are the players, she contends that there is greater scope for lawyers to use professional conduct rules as strategic instruments in litigation. The example cited is where 'the lawyer for the party moving for disqualification may believe that an alleged conflict does not threaten his client in any way, but will make the motion nonetheless to deprive the other party of its competent, effective counsel.'¹⁷³ Although this trend is less apparent in Australia, it is arguable that the more comprehensive codification of ethical standards found in common law jurisdictions leads to increased judicial scrutiny as the

¹⁶⁸ See, eg, American Bar Association, *Model Rules of Professional Conduct* (2003) <http://www.abanet.org/cpr/mrpc/mrpc_toc.html>, which consists of relatively short rules followed by quite extensive commentaries to assist with interpretation.

¹⁶⁹ Bolocan, above n 98, 9.

¹⁷⁰ See above n 163.

¹⁷¹ Bolocan, above n 98, 9.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

rules are raised to justify particular relief. In contrast, ethical issues in Continental systems appear to be more usually raised with the relevant bar association chair, rather than being raised in the context of a vast body of judicially-created precedent.

A Broader Aspects of Dispute Resolution

Whilst we have not dealt with this matter in detail, we note that much Australian debate about legal ethics is firmly intertwined with the broader question of the need for reform of our country's civil justice system. The impetus for reform stems from the widely accepted premise that our system is excessively adversarial, costly and prone to delay. To this end, issues such as increased case management, alternative dispute resolution ('ADR') and professional and public education assume considerable significance as conduits for discussion about ethics.

An underlying premise is that the civil justice system is primarily concerned with resolving disputes. Notwithstanding the importance of litigation as a means by which legal rules are tested and clarified, by and large the system's existence is premised upon its ability to resolve disputes justly and according to law. Given that the vast majority of disputes are resolved by negotiation, and thus never require curial intervention, there has been a growing tendency to incorporate the 'non-curial' aspects of dispute resolution into courses of legal study. This is understandable, with the frequent participation of lawyers in ADR processes providing something of a bridge between the supposedly non-adversarial nature of these processes and the supposedly adversarial mindset of common lawyers.

Indeed, this mindset is seen as a key ethical dilemma in and of itself. If a lawyer is retained 'to help resolve a dispute' rather than 'to win a case', then it follows that a key aspect of the lawyer's duty to the client is to adequately inform the client of the ADR options available.¹⁷⁴ Once involved in ADR processes, there is a need for lawyers' sensitivity in recognising ethical dilemmas that arise. What are lawyers to do if they discover, say, in the case of a mediation session, that tax fraud has been committed, or that gross power imbalances or intimidation exist in a family law conciliation conference?¹⁷⁵

The answers to these questions are beyond the scope of this article; however we raise the issue in order to reiterate that the contemplation of ethics is not a luxury attaching to the tiny proportion of cases which see the light of adversarial day. Rather, the ethical paradigm is a value system which should (and indeed most lawyers would agree that it should) permeate legal practice, whether it be adversarial or not. Nor are we suggesting that the adoption of a non-adversarial system would simply erase these dilemmas. Indeed, it appears that concern about lawyers' lack of training to deal with less adversarial forms of dispute resolution is not an issue confined to Australia and the common law world.

¹⁷⁴ G Vickery, 'The Impact of Alternative Dispute Resolution upon Legal Practitioners in the Nineties' in Charles Sampford, Sophie Blencowe and Suzanne Condlin (eds), *Educating Lawyers for a Less Adversarial System* (1999) 60, 67. Indeed, such an ethical duty is reflected in r 12.3 of the *Professional Conduct and Practice Rules 2005* (Vic).

¹⁷⁵ Vickery, above n 174, 71.

In an article originally written in German, J-F Staats examines the training of German legal professionals. He refers to the German Bar's concern that, in university and professional training courses alike, there is too much emphasis on the skills required for a judicial career, in particular the skill of adjudication, and not enough emphasis on teaching the skills of providing practical legal advice. For our purposes, it is interesting to note the German Bar's perception that lawyers are not being adequately trained to respond to the increasing use of ADR techniques, especially mediation.¹⁷⁶

IV CONCLUSION

In his 1996 speech to the St James Ethics Centre, Justice Michael Kirby warned that lawyers and their institutions must move with fast changing times, and that '[i]n the void left by the undoubted decline of belief in fundamentals, we must hope that a new foothold for idealism and selflessness will be found.'¹⁷⁷ We believe that the study of comparative legal ethics is vital in considering what form such a foothold should take.

Whilst we have acknowledged some of the most important differences between ethical theory and practice in the adversarial and inquisitorial systems, we have also been mindful of the systems' common ground and shared understandings. As Jolowicz acknowledges:

a purely adversarial process is no more capable of existing in the real world than a purely inquisitorial one, because, though we may speak of a contest between the parties, the winner of contested litigation cannot be determined objectively like the winner of a race: the judge is bound to exercise his judgment.¹⁷⁸

In any informed discussion of comparative legal ethics, it is vital to acknowledge the commonality and convergence of the adversarial and inquisitorial systems, referred to by Sir Anthony Mason above. This is particularly evident with regard to the role of criminal prosecutors and the conduct of civil litigation in each system. In the latter, parties operating within the inquisitorial system have more custody and control over the matters in issue before the court than is often acknowledged by contemporary jurisprudential scholarship. Nevertheless, subtle differences highlighted in this article with regard to the court's power to elicit evidence, and 'classic' ethical issues such as conflicts of interest, are important aspects for the legal scholar to recognise. They reveal contrasts not merely in the ethical standards but also in the *telos* of each system itself.

This article has contended that a significant point of fracture between the systems is evident in relation to the role of advocates in the criminal sphere, where the common law cab rank rule must be placed firmly in contrast with the *avocat's* lending of personal credibility. Returning to the narrow and broad types

¹⁷⁶ J-F Staats, 'Educating German Legal Professionals' in Charles Sampford, Sophie Blencowe and Suzanne Condlin (eds), *Educating Lawyers for a Less Adversarial System* (1999) 113, 123.

¹⁷⁷ Justice Michael Kirby, 'Legal Professional Ethics in Times of Change' (Speech delivered at the Forum on Ethical Issues, St James Ethics Centre, Sydney, 23 July 1996) <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_stjames2.htm>.

¹⁷⁸ Jolowicz, 'Adversarial and Inquisitorial Models of Civil Procedure', above n 15, 281.

of ethical issues raised in the introduction, the contrasts between the adversarial and inquisitorial systems of justice reveal that, whilst legal practitioners in both systems must carefully consider the contrasting ethical obligations mandated by their respective systems, the systems themselves create significant, and differing, ethical pressures on legal practitioners.

Luban warns that ‘comparative judgments ... are strong justifications only for *retaining an institution*, not for determining the moral weight of the duties it imposes’,¹⁷⁹ and this is true insofar as merely proving that one has the ‘least worst’ legal system says nothing of how that system could be improved in order to make it more ethical. However, far from wanting to make a dogmatic or triumphalist assertion about the superiority of the common law system, we cannot be confident that other systems do not have real advantages over our own. For some observers of the inquisitorial system, particularly those who support moral activism in the legal profession, amongst its attractions lies the empowerment of *avocats* to make personal moral judgements about the cases, causes and people they will represent. Notably, without the comfort of the cab rank rule rule, such ethical judgments are not only made, but are seen to be made without qualification. Such an attraction must, however, be carefully balanced against the risk to the accused of being isolated from the very proceedings to which he or she is subject. It must also be balanced against the desirability of maintaining a system of justice in which representation is afforded to those who are most unlikely to find their cause the subject of the voluntary lending of credibility. However, given the criticisms of ‘non-accountable partisanship’ and the oft-heard complaint that many common lawyers place no moral limits on their actions when representing clients, it is particularly topical to look to the inquisitorial system as one in which professional ethics dictate that lawyers make moral and ethical decisions concerning their actions as lawyers.

Nevertheless, we must also recognise that the adversarial and inquisitorial legal systems rest on substantially different philosophical foundations. Within the inquisitorial system, dedication to the discovery of truth is a concrete precept that is unambiguously declared from the outset. This foundational ethic must be contrasted with the primary status given by the adversarial system to the role of the parties and procedural fairness. A comparative analysis of legal ethics is useful in that it challenges us to abandon a position whereby we take the foundational precepts of our own system for granted and begin to understand that there may be other more effective and just ways of doing things. As this is indeed an era of commonality and convergence, if it is to be as successful as it has the potential to be, then the respective merits of each system must be openly applauded, and the respective pitfalls candidly acknowledged. Without this recognition, the blind application of assumed concepts such as ‘case management’, ‘procedural fairness’ and ‘legal ethics’ threatens to be a source of obfuscation and oppression rather than justice.

¹⁷⁹ Luban, ‘Partisanship, Betrayal and Autonomy in the Lawyer–Client Relationship’, above n 7, 1021 (emphasis in original).