Feeling Dirty: Emotional Taint and Use of Emotion as an English Criminal Barrister

Author : Francesca Bartlett

Date : April 5, 2021

Clare Gumby & Anna Carline, *The Emotional Particulars of Working on Rape Cases: Doing Dirty Work, Managing Emotional Dirt, and Conceptualising 'Tempered Indifference'*, 60 **Brit. J. Criminology** 343 (2020).

In studies of the legal profession, we examine what lawyers do within and to the justice system in which they work in specific and conceptual ways. We also consider what the work does to lawyers. And, as many have noted, these two are intertwined and bi-directional. Clare Gumby and Anna Carline provide a fascinating perspective on this relationship by applying affect theory to the results of their interviews with criminal attorneys working on rape cases in England. The study reports on findings from 39 interviews with barristers[1] from across England who defend or prosecute rape cases (the vast majority of whom regularly act in both capacities).

Gumby and Carline explain the theory they use to understand their results:

> Affect is used to describe emotions (e.g., anger and fear) but also encompasses bodily sensations (e.g., shame, guilt and excitement) and other ineffable feelings and senses. These may be positive or negative, fleeting or sustained, experienced consciously and unconsciously and may sit outside of language in terms of being able to articulate. Here, we use affect theory, with its focus on relationality and embodiment, to understand how barristers can be transformed by their work and aim to move jurors—recognizing the body's capacity to affect and be affected.

Defending or prosecuting in criminal prosecutions alleging sexual violence evokes emotions in us all. "Outsiders think all of it sounds pretty awful," says one barrister. Sociological studies of occupations "that society views as unpleasant, disgusting or morally questionable" have been considered against a socially constructed idea of "dirty work." Gumby and Carline adopt this lens to understand criminal lawyers' construction of their own work. Specifically, they consider acting in rape cases as dirty work for its association with predominantly female victims as sexually tainted according to persistent gendered conceptions, working with those accused of socially stigmatised offending, combative adversarial styles and getting "physically dirty" where there is a necessity of proximity to "blood, semen and vomit and in the most extreme cases, death and decay."

Such work is often undertaken with a stated motivation of public spiritedness — a necessary evil and a recognition that someone's got to do it. For the criminal law bar, this is an integral part of the professional narrative of goodness and order. Yet, echoing the moral philosophy of David Luban, some criminal barristers also described the emotional and moral torment of working in a system that can "routinely deliver injustice" and feeling bad about employing forensic techniques that made them think: "I shouldn't really be doing that as a human being." Thus, the article documents a feeling that criminal advocacy at the English Bar is "morally, socially and physically tainted" as well as "a fourth dimension of emotional taint." Gumby and Carline's study looks particularly at how lawyers working on rape cases experience "a peculiar form of discomfort" in their very proximity to their clients/victim and in their representation within the adversarial criminal justice system.

Gumby and Carline argue that "key features of dirty work . . . are not the job *per se* but the consistency in visceral response elicited by . . . dirty employment, as well as the accompanying question of 'how could you do that?'" While based in criminology, the study unsurprisingly touches on familiar moral debates raised by their participants. They

raised The [ethics] Question – *how can you represent the guilty?* — evoking Barbara Babcock's highly perceptive taxonomy of attorney motivations.[2] Babcock's description of the attorney as "garbage collector" is obviously apt here, and some respondents seemed to be the Egoist type describing the job as "fun" and that a "sense of prestige was derived from 'doing really awful, difficult cases, and sort of bigging it up.'"

Still, Gumby and Carline's focus is less on ethical justifications of role than who criminal barristers are and become as individuals, and how this, in turn, informs the dirty practise of criminal law advocacy. While they cited positives about doing the job and a usual sense of pride in achieving justice, the focus of the article is on the negative emotions. For instance, they hypothesize that taking pride in doing awful cases can be a species of gallows humour used as a coping strategy for distressing emotions and stigma. They document the many and varied emotions of barristers living on a "diet of filth" as well as dealing with the emotions of their clients (often describing the work as more "social work"). Female advocates raised specific emotional responses to defending clients in child abuse cases: "when you've got kids; you actually want to stab [your client] in the eye." Defence work is the most difficult and is most examples cited in the article, but prosecution is described by one as having to be "mean." Gumby and Carline note that for criminal defence barristers, "emotional dirt . . . intersected with the social dirt of sexually abusive and abused individuals, the moral dirt of what perpetrators had done (or been accused of doing) and the attributions of blame and shame heaped onto rape victims" such that untangling the impacts on advocates was difficult.

Gumby and Carline turn to the use of dirt to evoke emotion in others. Their interviewees are remarkably attuned to affect in the jury and they routinely use this to the advantage of their case. Two examples evidenced use of a dirty image evoking negative emotion to produce a desired result for the defence. One described questioning a defendant about the taste of vomit for a "disgusting" impact on the jury so that they experience the violence and degradation of an act, and another described a sense of victory when a victim vomited on the stand. Thus, "Barristers viewed the giving of evidence as involving embodied affects" such that physical evidence and presence of the (sullied) victim, and the tainted accused, was key. It would be a very interesting addendum to this study to ask these criminal barristers whether they perceive any changes since the global pandemic where courts are forced to conduct proceedings remotely or in courts where the advocates and witnesses, and all the other stakeholders, are wearing masks.

There is debate in England and Wales, and in Australia, about the ability of the criminal justice system to afford procedural fairness and to successfully prosecute sexual violence cases. Over time, there have been minor amendments to self-imposed bar rules governing how certain witnesses may be examined; a small concession that lawyers play a key role in more effectively achieving fairness and truth. While conceding this controversy, Gumby and Carline's study is chiefly a descriptive account. They do not attempt to answer the question of whether and how much a barrister's finely tuned ability to evoke emotion should be limited or made off-limits in the courtroom.

Gumby and Carline's contribution is to trace the varied array of impacts and uses of human emotion in criminal law advocacy. Criminal barristers must "employ emotional labour in order to manage . . . dirt, [and] their difficult feelings stemming from contact" and at the same time "engage with these dirty aspects" to create emotions in others that they see as necessary to fulfil their professional duties to their clients. They describe this paradox of emotional burden and necessity as particularly difficult in the English context "where feelings have been written out of the work that barristers do" and barristers cannot choose their clients.[3] They document the various coping strategies including internalising the ideology of the adversary role, just not thinking about it, humour and alcohol (though not obviously to excess as in some US studies).[4] Yet the authors contend that adopting these strategies doesn't mean "emotional involvement is decreased or feelings made easier to handle," and a suppression of emotions is required. They describe adoption of "tempered indifference" where "advocates strategically turn their emotions down" because "holding back that little bit just stops it sort of becoming really subjective." However, like Richard Wasserstrom's foundational account of the moral taint infusing an attorney's life,[5] they worry about "the longer-term ability to turn emotions back" on in any context. They document a "significant minority of participants [who] spoke about becoming 'hardened' over time, it being 'almost rather difficult to feel anything at all' and recognizing that 'hearing of the abuse of a . . . small child doesn't impact you, well, that in itself has had an effect, hasn't it?'" Thus, Gumby and Carline's analysis lends urgency to the many calls for assistance for lawyer well-being. It also questions the traditional image of the stoic

English advocate; rather, they paint a picture of bluster masking internal distress.

1. Barristers are specialist in court advocates who are usually subject to their own ethical rules and accreditation.
2. Barbara Babcock, *Defending the Guilty*, 32 **Clev. St. L. Rev.** 175 (1983-1984).
3. In England and Wales, the “cab rank rule” applies to barristers which is an ethical professional obligation to accept work irrespective of “any belief or opinion which you may have formed as to the character, reputation, cause, conduct guilt or innocence of the client”: The *Bar Standards Board Handbook 3rd* ed.
4. .K. Drew, *Doing Justice* in **Dirty Work: The Social Construction of Taint** 11-32 (E.D. Reed, M. Mills and B.M. Gassaway, eds., 2007).
5. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 **Human Rights** 1 (1975), available at JSTOR.

Cite as: Francesca Bartlett, *Feeling Dirty: Emotional Taint and Use of Emotion as an English Criminal Barrister*, JOTWELL (April 5, 2021) (reviewing Clare Gumby & Anna Carline, *The Emotional Particulars of Working on Rape Cases: Doing Dirty Work, Managing Emotional Dirt, and Conceptualising ‘Tempered Indifference’*, 60 **Brit. J. Criminology** 343 (2020)),
https://legalpro.jotwell.com/feeling-dirty-emotional-taint-and-use-of-emotion-as-an-english-criminal-barrister/.