

Networked Knowledge Media Reports

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On 13 January 2018 Andrew Urban in *Pursue Democracy* reported ‘Bare faced lawyers: confessions of the legal profession’

Innocent people – at least 71 known*, the total unknowable – have been held or are stuck in Australian jails on lengthy sentences for murders or rapes they did not commit. This comes as no surprise to those who, like multi award winning journalist and legal historian Evan Whitton, consider the adversarial system Australia has imported from Britain a disaster for justice, nothing more than a permit for lawyers to operate as a cartel, in which truth is not the ultimate objective. Winning is.

Here, in a selection of extracts from Whitton’s infinitely researched and damning work, [Our Corrupt Legal System](#) (Book Pal, 2009), is the evidence – often in their own words: lawyers are trained liars.

“The legal trade, in short, is nothing but a high-class racket.” Professor Fred Rodell, of Yale Law School, in *Woe Unto You, Lawyers!* (1939)

* *Dr Rachel Dioso-Vila, Griffith University Innocence Project, Flinders Law Journal*

1 The Barton Hypothesis

Associate Professor Benjamin Barton, of the University of Tennessee College of Law, put the question, Do Judges Systematically Favor the Interests of the Legal Profession? in the Alabama Law Review of December 2007. In what may be termed the Barton Hypothesis, he answered his question thus at page two of his 52-page (14,821 words) paper:

“Here is my lawyer-judge hypothesis in a nutshell: many legal outcomes can be explained, and future cases predicted, by asking a very simple question: is there a plausible legal result in this case that will significantly affect the interests of the legal profession (positively or negatively)? If so, the case will be decided in the way that offers the best result for the legal profession.”

The origin of lawyers’ immunity from suit is a brazen example of the Barton Hypothesis.

Barristers cannot be sued for negligence. That notion still obtains in Australia, if in few other countries.

The most recent assertion of lawyers' immunity – largely on the ground that legal actions must have some finality – was *D'Orta-Ekenaike v Victoria Legal Aid* (Australian High Court, March 10, 2005). Those in favour were Murray Gleeson CJ and Michael McHugh, Bill Gummow, Ken Hayne, Dyson Hayden, and Ian Callinan JJ. When the lone dissenter, Justice Michael Kirby, shortly had an emergency heart bypass operation, *Justinian*, commented: 'It's sad to see that the only judge on the court with a heart is now having trouble with it.'

2 The moral failure of law schools

Justice Russell Fox says the search for truth gives a legal system its moral face; English law had not sought the truth since about 500 AD. Blackstone cunningly dodged every issue of truth, fairness, justice, morality, and reality by asserting that a deity invented the system. Another implausible and partial solution was to say morality does not matter. Those who took that position include Harvard's Christopher Columbus Langdell and Oliver Wendell Holmes Jr in the 19th century, and Oxford's H.L.A. Hart in the 20th.

Christopher Columbus Langdell (1826-1906), dean of the Harvard law school 1875-95, wore a long beard. A psychiatrist might ask: 'What is that man hiding?' Perhaps the effects of his invention, the case method of teaching law. In *The Moral Failure of Law Schools* (Troika, November-December 1996), Alan Hirsch, later Professor of Legal Studies at Williams College, Massachusetts, explained how the case method corrupts law students and destroys their idealism:

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

Law professor Nancy Lee Firak, of Northern Kentucky University, wrote in 'Ethical Fictions as Ethical Foundations': Justifying Professional Ethics (Osgoode Hall Law Journal, 1986):

‘Lawyers are trained to cast the facts of a single event in several different (even contradictory) forms and are then taught how to argue that each form accurately represents reality.’ In short, how to lie. That suggests law schools stand foursquare for artifice, chicanery and greed.

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

3 Serial lying

Harvard ethics professor Arthur Applbaum said in *Professional Detachment* (Harvard Law Review, 1995): ‘Lawyers might accurately be described as serial liars because they repeatedly try to induce others to believe in the truth of propositions, or in the validity of arguments, that they believe to be false.’

Not all lawyers lie without shame. Law professor James R Elkins, of the University of West Virginia, author of *The Moral Labyrinth of Zealous Advocacy* (21 Cap. U. L. Rev. 735 (1992) and *Can Zealous Advocacy Be a Moral Enterprise?* has said: “[Taking] zealousness to its adversarial limits (all the while promoting the adversarial system as a system of justice) poses a serious moral problem. Basically, we need to admit that there is occasion for shame in our profession. It would be overly dramatic to say that it is a surplus of shame that is driving lawyers from the profession, but something is.”

An Australian survey for a young lawyers’ body found in 2004 that almost half of the respondents did not see themselves practising law in five years’ time. The *Sydney Morning Herald* (7 September 2006) reported: ‘LawCover, an Australian insurer reported a disturbingly high number of lawyers with depression, stress, alcohol dependency, and gambling addiction.’ In 2006, a survey of 7,000 professionals by Beaton Consulting found lawyers were the second unhappiest [behind patent attorneys] of all occupations.

The question is: if lawyers did not have to lie and pervert justice, but got less money, would they be less, or more, unhappy, depressed, drunk, and likely to gamble?

4 Ethics

Some lawyers, no less than some journalists, take the view that ethics is a county in south-east England, home of the succulent Colchester oyster. Sanson, Executioner of Paris, did not

invent the system which sanctioned his ghastly work, but lawyers did invent the adversary system and its 'ethics' which sanctions theirs. Professor Lester Brickman, of New York's Cardozo School of Law, said in 1997: 'When the ethics rules are written by those whose financial interests are at stake, no one can doubt the outcome.'

Ethics and morals are synonymous. Professor David Luban wrote in *Lawyers and Justice: An Ethical Study*: '... the standard conception [of lawyers' ethics] simply amounts to an institutionalized immunity from the requirements of conscience.' He said Professor Murray Schwartz, of UCLA, was criticizing lawyers' ethics when he wrote in *The Professionalism and Accountability of Lawyers* (California Law Review, 1978): 'When acting as an advocate for a client, a lawyer ... is neither legally, professionally, nor morally accountable for the means used or the ends achieved.' I mentioned that to a Sydney psychiatrist, Dr Elizabeth O'Brien. (No relation to my daughter.) She said: 'That sounds like psychopathy.'

Psychopaths have no conscience.

Reporter Ross Coulthart asked Justice Geoffrey Davies, of the Queensland appeal court, about ethics in a television programme, *The Justice System Goes on Trial* (Sunday, August 23, 1998):

"Do you think there's a case to argue that some of the ethical rules that lawyers have actually almost encourage dishonesty among lawyers? – Yes I do. One of the examples is that a lawyer can ethically deny an allegation in the opponent's pleading knowing it to be true.

You're kidding. So you can basically lie? – Well, what lawyers would say is that you are putting the other side to proof.

It's a lie though, isn't it? – It is."

Law professor Charles Wolfram, of Cornell University, New York, wrote in *Modern Legal Ethics* (West, 1986): "[The lawyer's role is] institutionally schizophrenic . . . a lawyer's objective within the system is to achieve a result favorable to the lawyer's client, possibly despite justice, the law and the facts.'

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

Law professor Monroe Freedman, then of George Washington University Law Center, published Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions in the Michigan Law Review in 1966. The questions, with his answers in brackets, were:

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

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

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

In short, even if a client tells his lawyer he is guilty of rape, the lawyer can let the rapist go in the box and falsely deny his crime on oath, and can back up that lie by cross-examining the girl about her sex life to falsely suggest she consented.

A Sydney lawyer, Stuart Littlemore, stated lawyers' ethics accurately when Andrew Denton interviewed him on Channel 7, in October 1995:

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

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

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

Littlemore: Not at all.”

Sydney lawyer John Marsden (1942-2006) admitted in *I Am What I Am* (Viking, 2004) that he used a false consent defence to get Ivan Milat off rape in 1974:

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

Milat went on to rape and murder seven young backpackers from, variously, Germany, England and Australia, in circumstances similar to the 1974 case. He was found guilty of the murders and sent down for life in 1996.

The alternative: Common law & adversary system – v – investigative system

Judge-made law is used in Britain and its former colonies, including the United States, India, and Australia. It developed in five stages. 1. Corrupt judges and lawyers formed a cartel late in the 12th century. 2. Judges rejected truth as the basis of justice in 1219. 3. Judges let lawyers take over control of the civil process from 1460, and (4) of the criminal process in the 18th century. 5. In the past 200 years judges have invented rules which conceal evidence and get the guilty off. As Sir Ludovic Kennedy noted, and Napoleon demonstrated, justice is too important to be left to judges.

Sophistry. The art of lying is to make others believe things the liar knows are false. The motive is gain. Sophists, described by Socrates as morally bankrupt and by Plato as charlatans, taught Athenian lawyers how ‘to make the weaker argument appear the stronger’ 2500 years ago.

US lawyer, Charles Curtis, said a lawyer’s function ‘is to lie for his client ... He is required to make statements as well as arguments which he does not believe in.’

The Latin *corruptus* means broken in pieces. This book explains why and how justice is broken in our adversary system. It is instructive to compare it with the world’s most widespread, accurate and cost-effective system: Napoleon’s investigative (inquisitorial) system, now used in European countries, their former colonies, and Japan, South Korea and other countries.

How they compare – investigative system / adversary system

Seeks truth: YES / NO

Conceals evidence: NO / YES

In charge of evidence: JUDGES# / LAWYERS

Length of civil hearings: ABOUT A DAY / MONTHS, YEARS

Conviction rates: 95% / under 50%

Innocent in prison: RARE / 1% – 5%

#Trained judges

Roman law sought the truth, but in the Dark Ages after the Empire fell in 476, England and West Europe regressed to an anti-truth accusatorial system (A accused B; B said: Prove it!), barbaric ordeals and verdict by deity. Suspect witches were trussed and thrown in the river. If they sank, they were innocent. If they floated, they were guilty, and were fished out and hanged or burned to death. (Malignant cross-examination to defeat truth is the modern ordeal; rape victims have vomited on the witness box.)

Dickens said: ‘The one great principle of the English law is to make business for itself’.

Adversarial justice is an oxymoron, like military intelligence and legal ethics: it is a variation of the anti-truth accusatorial system. The adversary system dates from 1460, when trial lawyers began to take over civil evidence. Controlling evidence enables them to omit the damaging bits; spin out the pre-trial and trial process; and procure enough pelf to comfortably retire, if they choose, to the social status of untrained, uninformed and passive judge.

The adversary system is biased against people in business, industry, medicine, and the media, and in favour of criminals. The bias makes business for trial lawyers and [makes] the rule of law a joke in the worst possible taste. Citizens on sophistry watch must have the hopeless feeling that any judgment or verdict may be right, or it may not.

* ***Our Corrupt Legal System*** “is one of the most important books I have ever read on the common law legal system. [It] should be required reading on Introduction to Law courses in all law schools.” – Dr Bob Moles, legal academic, author on miscarriages of justice, Adjunct Principal Researcher, College of Humanities, Arts and Social Sciences, Flinders University of South Australia

Evan Whitton

was Editor of The National Times, Chief Reporter at The Sydney Morning Herald, and Reader in Journalism at Queensland University. He received the Walkley Award for National Journalism five times, and was Journalist of the Year 1983 for ‘courage and innovation’ in reporting an inquiry into judicial corruption. He began researching the West’s two legal systems in 1991 after observing how each system dealt with the same criminal, police chief Sir Terence Lewis.

<https://pursuedemocracy.com/2018/01/bare-faced-lawyers-confessions-of-the-legal-profession/>

The full text of *Our Corrupt Legal System* is available from Networked Knowledge at <http://netk.net.au/Whitton/OCLS.pdf>

The full text of a number of Mr Whitton's other books are available at the [Evan Whitton Homepage](#) at Networked Knowledge.