THE CAB RANK RULE: A REAPPRAISAL OF THE DUTY TO ACCEPT CLIENTS

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Inevitably at some time in a lawyer's professional life they will be requested to act for a client or cause which they find distasteful. They may have to answer the question of whether they would assist a remorseless killer to escape conviction on the ground of a mere legal technicality, or whether to refuse to prepare legal instruments that would or assist industrialists in pollution, or perhaps to provide legal advice regarding the avoidance of obligations under family law legislation. Such ethical dilemmas focus upon the legal representation of distasteful causes or clients. This paper discusses the duty that a lawyer has as a 'legal professional' to undertake such representations. It considers the ideological foundation upon which this duty is built, and the consequences of the duty. It compares the English system, where the freedom to chose which clients to represent is denied, with the American system, where such freedom is honoured. From this comparison the American system is preferred, and reform of the New Zealand system is advocated .

I INTRODUCTION

A contradiction of legal practice is that lawyers as the facilitators and guardians of justice are often seen to aid in the generation of injustice. This is particularly so when the practitioner is seen to have represented a client in an extremely unpopular cause. The duty to provide legal representation to any client, if workload and expertise permit, is fundamental to the legal profession because representation is the very purpose of the legal role. The profession enjoys a monopoly over legal services.[1] In order for every citizen to

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1 D Lathan QC "Solicitors and the Cab Rank Rule" in (1990 Mar) 2 NLJ 284, 286. See also I D Temby QC "Professional Conduct - Control or Conscience" in (1982 April) ALN 12, 12; and Hon N Wilson QC *Lectures on Advocacy and Ethics in the Supreme Court* Legal Research Foundation Inc, Publication No 15, (Legal Research Foundation, Auckland, 1979) 35.

have access to these services the lawyer must, as representative, facilitate the exercise of the right to legal processes. Whilst this duty to represent is recognised as a fundamental obligation of the bar, the actual scope of this duty is more complex, for that which it demands of the practitioner is different according to jurisdiction.

This paper will look at the obligation of representation as applied in the contrasting jurisdictions of the United Kingdom (UK) and the United States of (USA). After considering what the professional requirements are, this paper will examine how these requirements reflect the professional ideals of public service and loyalty to the client, and whether the requirements resolve the three way tension between these two duties and the practitioner's desire to remain true to his or her own moral beliefs and values.

The USA system is often characterised as honouring the legal professional's moral autonomy. This paper examines the ethical framework of the USA approach that enables this and reviews the factors that are provided to assist in the assessment of whether the refusal to represent is justified or unjustified. Finally the New Zealand system will be reviewed and the effectiveness of the cab rank rule will be considered. After assessing the merits or otherwise of the alternative systems this paper advocates reform.

II THE DUTY OF REPRESENTATION IN THE UNITED KINGDOM

In the UK the formal requirements of the duty of representation are stated in the ethical code of the bar:[2]

> A barrister in independent practice is in general bound to accept any brief to appear before a court in the field in which he [or she] professes to practice, having regard to his [or her] experience and seniority, at the proper professional fee having regard to the length and difficulty of the case and to his [or her] availability.

This obligation of representation has its roots in a tradition that far exceeds this statement. As Lord Pearce rightfully observed, this duty has survived many years, and is part of the ancient tradition of the bar: [3]

> [A]s matters are, and have been for centuries, a barrister is bound to provide his [or her] services to a client who can pay a fee (or whose fees are paid by the public Legal Aid Fund) if the case is one either in the courts or in the advisory sphere in which a barrister normally practices.

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2 *Code of Conduct for the Bar of England and Wales* 4th ed (1989) paras 16.1, 13.4.1 (a) as cited in *Halsbury's Laws of England* (4 ed Butterworths, London, 1989) vol 3(1), Barristers, para 457, p 365.

3 *Rondel v Worsley* [1969] 1 AC (HL) 191, per Lord Pearce 274.

Colloquially, this obligation is referred to as the 'cab rank rule.'[4] It is so named because of the analogy that is drawn between the professional, or more specifically, the barrister,[5] and the cab driver. It requires that the lawyer, like the cab driver, "takes whomever beckons to whatever destination may be commanded"[6]. Furthermore, the lawyer, like the cab driver "must act on a first come, first serve[d] basis."[7]

An historical examination of the legal profession assists in explaining the rationale for this rule. In the early history of the bar attorneys were admitted directly by the judges of the court, and medieval statutes gave the court direct control over these officers. If requested by the court, the lawyer had an obligation to provide representation even when he (at that time only men could practice law) may not have desired to. The professional even had the obligation to provide free services if the court so requested.[8] In this way legal services were guaranteed to all citizens. As the structure of the courts and the profession evolved, so did the power of the court, yet the desire to enforce the obligation of ensuring access to legal services still remains. The very reason for the cab rank rule is the quest "to ensure that unpopular individuals and issues [are] properly represented."[9]

In theory then, unless the specified exceptions apply, the cab rank rule obliges representation by the practitioner. Whether or not the rule achieves this goal is another matter, and an assessment of the effectiveness of the rule is examined in part IV. Primarily however, the cab rank rule will be assessed in terms of its relationship with the two ideals of professionalism: public service and loyalty to the client. A consideration of the three way tension of duty to these ideals and the personal moral autonomy of the lawyer will follow.

A The Cab Rank Rule and the Ideals of Professionalism

Professionalism brings with it both privileges and obligations. The professional enjoys advantages such as social prestige and above average income.[10] In return for powers and privileges society places demands upon the profession. These demands are the ideologies of

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4 J Disney et al *Lawyers* (2 ed, The Law Book Company Ltd, Sydney, 1986) 600.

5 Above n 4, 601. See also G E Dal Pont *Lawyers' Professional Responsibility* (LBC Information Services, Sydney 1996) 46.

6 G C Hazard Jr *Ethics in the Practice of Law* (Yale University Press, London, 1978) 89.

7 S Ross Ethics in Law: Lawyers' Responsibility and Accountability in Australia (Butterworths, Australia, 1995) 145.

8 M D Schwartz and R C Wydick *Problems in Legal Ethics* (2 ed, West Publishing Co, St Paul, Minn, 1988) 35.

9 Temby above n 1, 12.

10 C W Wolfram *Modern Legal Ethics* (West Publishing Co, St Paul, Minn. 1986) 15.

professionalism. They are both aspirational and prescriptive as they prescribe not only what the profession is, but further what it seeks and is meant to be. The demands of professionalism categorise neatly into two contrasting conceptions of 'service' and 'loyalty'. These will be considered separately.

1 *The duty of public service*

The moral ideal of public service[11] is fundamental to professionalism. Generally the kind of services rendered by the professional are necessary services, relating to "physical health, liberty, religious salvation, or psychological well being."[12] As the professional is seen to provide a service or resource needed by society the profession is attributed with a 'helping' nature and it is assigned the moral ideal of service for the public good.[13]

This is certainly so for the legal professional which is expected to maintain and bring about legal order and justice. Specifically, and for the purposes of this paper this demands that the practitioner ensure access to the law. As the upholder and facilitator of the working of the law the lawyer is obliged to provide services to citizens so that they might be able to function within the legal system. Law is thus deemed as a public good,[14] as a 'commodity' provided for the benefit of society. In being available to render services to individual clients the lawyer is seen as ultimately acting for the good of all. In so acting, the practitioner is seen to play his or her part in maintaining social order. Society's demand for the fulfilment of this role is considered not only just, but right: [15]

> A society fails to respect the human dignity of those within its jurisdiction if it denies them a fair opportunity to raise questions about what is due to them under the law before properly constituted courts, and to defend themselves against claims upon themselves or charges against themselves...

The ideology of altruism also demands that the professional serve society by acting as the guardian of justice.[16] The practitioner is therefore expected to shoulder the

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11 M J Osiel "Lawyers as Monopolists, Aristocrats and Entrepreneurs" in D Luban (ed) *The Ethics of Lawyers* (Dartmouth Publishing Co Ltd, Aldershot, 1994) 461, 461.

12 S L Pepper "The Lawyer's Amoral Ethical Role: A Defence, A Problem, and Some Possibilities" in *The Ethics of Lawyers* above n 11, 57 at 59.

13 Above n 4, 85.

14 Above n 12, 60.

15 A Donagan "Justifying Legal Practice in the Adversary System" in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* D Luban (ed) (Rowman & Allanheld, New Jersey, USA, 1984) 123, 133.

16 "American Bar Association Model Code of Professional Responsibility" in *Selected Statutes, Rules and Standards on the Legal Profession: 1990 edition* (West Publishing Co, St Paul, Minn., 1990) 1.

responsibility of maintaining and sustaining justice and promoting good. Service to the public therefore means that the lawyer will practise and promote high standards of morality, good and integrity. The contradiction of legal service is that lawyers are often seen to fail in this task. Instead of being seekers and keepers of justice they are seen to "manipulate ... the legal system without any concern for right or wrong".[17]

The cab rank rule clearly reflects the public service ideal. The obligation to provide legal representation to all in an unbiased 'first come, first served' basis reflects the 'helping nature', and access to and maintenance of public order conceptions that make up the ideal. Fundamentally the provision of legal services is deemed as a social good and as service to society.

In summary, the ideology of service obliges the lawyer to serve society by providing, maintaining and sustaining justice. It confers upon the professional obligations of upholding legal order and facilitating access to legal processes and institutions within a conception of responsibility to others.[18] Prima facie such expectations seem reasonable, clear and perhaps even attainable yet this is not necessarily so, for juxtaposed against this ethic of care is the individualistically founded ideology of loyalty to the client. This contradicts the service ideal. It places the professional in a position of tension of service to society and service to the individual.

2 *The duty of loyalty*

In contrast to the service ideal is that of loyalty to the client.[19] Based upon principles of neutrality, in this view the practitioner is seen as an impartial participant, and as little more than a legal technician.[20] She or he is regarded as neutral, detached and therefore unaccountable for that which she or he achieves: [21]

> [The] lawyer must ... pursue the client's objectives, regardless of the lawyer's opinion of the client's character and reputation, and the moral merits of the client's objectives ... The lawyer need not consider, nor may he [or she] be held responsible for, the consequences of his [or her]

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17 Above n 7, 15.

18 See the discussion in C Menkel-Meadow "Portia Redux: Another Look at Gender, Feminism and Legal Ethics" in S Parker and C Sampford (eds) *Legal Ethics and Legal Practice: Contemporary Issues* (Clarendon Press, Oxford, 1995) 25, 39.

19 Above n 11, 461.

20 Above n 12, 68.

21 G J Postema "Moral Responsibility in Professional Ethics" in D Luban *The Ethics of Lawyers* above n 11, 27 at 37.

professional activities as long as he [or she] stays within the law and acts in pursuit of the client's legitimate aims.

The loyalty ideal also founds itself upon the principle of partisanship. "This principle prescribes that the lawyer work aggressively to advance his [or her] client's ends."[22] The lawyer's sole allegiance is to the client,[23] and therefore every 'legal move' is performed in order to maximise benefit to the client. The partisan role is a jealous one. It both permits and requires that the professional be prepared to do for the client that which she or he would not do for anyone else.[24] It demands of the practitioner a "commit[ment] to the aggressive and single-minded pursuit of the client's objectives."[25]

Both of these principles interact to facilitate and protect the client's autonomy. As the neutral and partisan practitioner the lawyer acts as the detached, objective agent zealously committed to furthering the interests of the client. In so acting the lawyer respects and sustains the freedom of the client to act as he or she wishes. This both enables and protects client autonomy.

The cab rank rule is reflective of the ideal of loyalty to the client in that it builds upon elements of individual access and autonomy. For whilst the provision of legal services is deemed as a social good, it is also seen as honouring individual rights in promoting with zeal the maintenance and defence of the client's rights. Thus the legal system, including the lawyer, is seen as the defender and promoter of rights. As a result of this, the idea that a legal system would purport to grant legal rights in the quest of justice, but fail to ensure the provision of a legal 'agent', "without whose assistance [such] rights cannot be effectively claimed", is viewed as an unacceptable contradiction.[26] Even though a cause or action is objectionable, it is reasoned that it is equally (if not more) objectionable to deny the right of the individual to be represented in respect of that cause or action.

Accordingly the legal professional is deemed to be not only permitted, but in fact, *required*, to act on behalf of any client who calls upon his or her services. As with the ideal of service to the public, the ideal of service to the client attaches great importance to the

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22 W H Simon "The Ideology of Advocacy: Procedural Justice and Professional Ethics" in M Davis and F A Elliston (eds) *Ethics and the Legal Profession* (Prometheus Books, New York, 1986) 216, 220.

23 Above n 21, 37.

24 C Fried "The Lawyer as Friend: The Moral Foundations of the Lawyer - Client Relation" in D Luban *The Ethics of Lawyers* above n 11, 97.

25 Above n 21, 37.

26 M Dyhberg "Legal Ethics in Court Practice - Commentary" in *Legal Ethics : papers presented at a seminar held by the Legal Research Foundation at the Centra Hotel, Auckland on 4 October, 1994* (1994) 27, 28.

obligation of representation, and in meeting this need the practitioner is hailed as laudable: "The lawyer is a good person in that he [or she] provides access to the law : in providing such access without moral screening he [or she] serves the moral values of individual autonomy and equality ..." [27]

Consequently, merely by providing representation, the lawyer is seen to do an act of professional merit. Competence is therefore assessed according to the "level of care given the client"[28] and the excellence with which the job is done. It is the lawyer's ability to assist the client to exercise autonomy that matters, not the cause or action that is being pursued, nor "the quality of the client"[29] to whom assistance is being given: "a good lawyer is no worse a lawyer for representing clients who are legally culpable or for defending clients who are morally but not legally guilty of performing any wrong. Like the good teacher, and the good advertiser, the good lawyer must do the best he or she can for whatever client he or she has".[30]

Prima facie then, the two ideals and the duty of representation concur. Providing access to the processes of law is seen as honouring individual autonomy and equality. It is deemed as serving both the public good *and* the interests of the individual, and therefore the two ideals are seen to be united in their demand for the duty. However, on a deeper level, this compatibility is not so clear. For, as part of the ideal of public service, society demands not only excellence of professional skills and practice, but also high standards of integrity, responsibility and moral good. Whilst it is clear that professional competence is important, it is not to be presumed that society deems it of such importance as to justify its promotion at the expense of high standards of morality. Furthermore, whilst it is clear that competence is expected, it is not so clear that the detachment and non-accountability doctrines of professionalism that attach to this conception of competence, are so readily accepted.

B The Cab Rank Rule and the Tensions Between Accountability and Autonomy

On one hand the cab rank rule is commended on its ability to serve the public good and honour individual autonomy. Yet in opposition to this some argue that it fails in these aspects and denies the lawyer autonomy. Those who oppose the rule advocate that in failing to respect autonomy, the rule fails society. Instead of promoting 'good' it is seen to sanction unaccountability and irresponsibility for moral harm.

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27 Above n 12, 78.

28 S Wolf "Ethics, Legal Ethics, and the Ethics of Law" in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (Rowman & Allan, Totowa, N J, 1984) 47.

29 Above n 28, 47.

30 Above n 28, 48.

1 *The rule and its failure to maintain accountability*

The principle of detachment or 'non-accountability' says that a lawyer is responsible neither for the means used, nor the ends achieved in a legal representation.[31] The lawyer's role is described as that of "an agent,"[32] and as similar to that of a soldier.[33] Responsibility is therefore evaded by the justification that the lawyer in fulfilling his or her role is only acting as a professional is obliged to act. Such claims do not go without challenge and Wasserstrom's comments[34] are typical of the rejection that such views receive: [35]

> There is, I think something quite seductive about being able to turn aside ... many ostensibly difficult moral dilemmas and decisions with the reply : but that is not my concern; my job as a lawyer is not to judge the rights and wrong of the client or cause, it is to defend as best I can my client's interest.

The battle metaphor is also dismissed, with the reminder that professional soldiers are not always able to justify their actions and escape moral accountability by pleading mere conformity with professional constraints: [36]

> It is morally wrong to fight in an unjust cause,... and it is wrong to employ impermissible means in fighting... Even though the role is, in general, morally justifiable, it does not follow that a professional soldier is justified in doing everything he or she may be called upon as a professional to do.

Furthermore, critics object to the idea that lawyers share an immunity that is unavailable to others. In arguing that "all persons are morally accountable for their behaviour,"[37] it is reasoned that practitioners should be no more privileged than any other. In short, it is contended that the professional should be as morally accountable as any other

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31 M L Schwartz "The Zeal of the Civil Advocate" in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* above n 15, 150, 150.

32 Above n 6, 89.

33 Davis justifies this analogy as such: "Because helping with the law often means helping [the client] *against* someone else, lawyering is an adversary calling in a way such professions as medicine or engineering, teaching or the ministry, are not. In this respect, lawyering is more like soldiering than any other profession". See M Davis "The Right to Refuse a Case" in *Ethics and the Legal Profession* above n 22, 441, 455.

34 R Wasserstrom "Lawyers As Professionals: Some Moral Issues" in D Luban *The Ethics of Lawyers* above n 11, 1.

35 Above n 34.

36 Above n 15, 134.

37 Above n 31, 151.

accessory to the wrong. Finally it is argued that this escapism into role founds itself upon a theoretical perception of the client/lawyer relationship that does not accurately reflect reality. Due to the advisory and dependency elements of the legal role the legal professional is seen as acting beyond that of an 'agency' role. [38]

> ... the principle of detachment ... rests on an assumption that the lawyer's client directs the lawyer to take steps and to initiate moves in the client's behalf ... Yet lawyers know that representations often do not work that way. Often lawyers either assume that clients wish to press every possible legal advantage or urge clients to do so. Clients... are only doing what their wise counsellor has recommended.

This unaccountability and failure to take responsibility for the moral consequences of one's actions is seen as an ironic failure to serve the public good, and therefore as a failure of the profession.

2 *The rule and its failure to honour autonomy*

The principle of autonomy attributes value to the role of the lawyer because it provides assistance to individual citizens to be able to exercise their fundamental rights. The achievement of this altruistic good requires sacrifice. Therefore in a lofty idealism of heroism the professional is seen to be willing to "devote [him or herself] to the interests of another at the peril of"[39] him or herself.

In order to promote the client's autonomy the lawyer is required to fetter his or her own autonomy, and to "subliminate moral repulsion to the requirements of the service function of providing legal assistance".[40] As a result, the client's autonomy is privileged at the sacrifice of the lawyer's, and rhetorically the question is asked: "Where in the amoral role is there a place for the lawyer's moral autonomy?"[41]

Writers such as Fried[42] contend that lawyer's autonomy should have a place. He asserts that the lawyer also has rights of choice, rights to exercise moral autonomy, and that the autonomy of the professional should be preserved. The provision of justice to the individual at the expense of the denial of it to the lawyer is seen as an unacceptable irony. Advocates of this view consider the freedom of the lawyer to act as "an aspect of the lawyer's free will,

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38 Above n 10, 571.

39 C P Curtis "The Ethics of Advocacy" in H Lesnick *Being A Lawyer* (West Publishing Co., St Paul, Minn., 1992) 51, 53.

40 C W Wolfram "A Lawyer's Duty to Represent Clients, Repugnant and Otherwise" in Luban *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* above n 15, 214, 215.

41 Above n 12, 78.

42 Above n 24, 96.

to be exercised within the realm of the lawyer's moral autonomy."[43] Furthermore, it is seen as having equal weight to that of the client's autonomy therefore "the lawyer who is asked to do something personally distasteful or immoral (though perfectly legal) should be free either to decline to enter into the relationship ... or to terminate it".[44] Such critics challenge the assertion that the guarantee of competent representation, and therefore the denial of choice, is the inevitable price to be paid for the monopoly of the right of audience in the courts.[45] Of this 'bargain' it is asked whether it is 'fair' and even more so, 'beneficial'.

III THE PROFESSIONAL RESPONSIBILITY TO REPRESENT IN THE UNITED STATES OF AMERICA.

In the debate of whose autonomy is to have precedence the system of the USA is relevant. The American system reflects a concern for the autonomy of the professional that is not present in that of the English system or other Commonwealth countries. Therefore the American system can be seen as an alternative to that of the Commonwealth and as demanding analysis.

A The Formal Requirements Regarding the Responsibility

The formal requirements regarding the practitioner's duty of representation are contained in the *American Bar Association Model Code of Professional Responsibility*.[46] Right from the outset the Code confronts the conflict of ideologies that the practitioner faces. The first statement of the document recognises the lawyer as a "representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice".[47] It states that these responsibilities are "usually harmonious"[48] but wisely continues to acknowledge that this is not always so observing that the most difficult ethical problems arise form conflicts between the lawyer's responsibilities to client, court, and self.

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43 M H Freedman "Personal Responsibility in a Professional System" in D Luban *The Ethics of Lawyers* above n 11, 81, 89.

44 Above n 424, 120.

45 D Lathan QC above n 1, 286.

46 American Bar Association House of Delegates *Model Rules of Professional Conduct* (1995 ed, American Bar Association Center for Professional Responsibility, USA, 1995). The Model Rules is model legislation that is intended to serve as a national framework This document consists of a dual structure of rules and comment. The Rules are not exhaustive and whilst they are provided as "a framework for the ethical practice of law", their power is not to be underestimated. Failure to comply with a Rule justifies the use of disciplinary processes. Each rule is accompanied by commentary. The Rules carry the greater authoritative weight whilst the comments are included as "guidance for practicing in compliance with the Rules".

47 Above n 39, 5.

48 Above n 39, 6.

The standards and conditions to be met in terms of representation can be found in several places in the Code. Fundamentally, Rule 1.16(b)(3) prescribes that a lawyer should not represent, or should withdraw from representation if, "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent". Unless the representation is court appointed[49] the practitioner is therefore given the right to be selective. Furthermore, if the lawyer chooses to act for the unpopular cause or client, Rule 1.2 denies the implication of endorsement by the practitioner. Therefore subject to limited exceptions, the American lawyer is given the discretion to refuse representation to the client or cause that she or he finds morally, politically or socially[50] reprehensible.

B The Conflict of Autonomies of the American System

The American system's honouring of professional autonomy does not go without criticism, especially regarding the failure to ensure access to legal systems. The UK with its duty to represent claims to avoid this. Supporters of the UK approach argue that without such a duty "those individuals who are most in need of representation would find it difficult if not impossible to obtain counsel."[51] In support of this allegation critics point to the difficulties of obtaining counsel experienced by Southern blacks accused of inter-racial crimes in the pre-1960's, and Communists in the 1950's.[52] The more recent movie *Philadelphia* which focuses on the refusal of the American legal profession to represent a homosexual lawyer in his claim of wrongful dismissal is also cited[53] as a reminder that such situations are not only unpleasant incidents of the past, but a present problem of today.

In an ironic twist the debate surrounding this issue returns to that of 'autonomy' but this time it is the client's autonomy that is seen to be restricted by the exercise of the practitioner's autonomy. Whilst the lawyer's "professional role mandates that he or she will not impose moral restraint on the client's access to the law",[54] the freedom of the lawyer to refuse representation is seen as implementing such moral restraint. In honouring the moral autonomy of the professional and granting him or her the choice of representation the client's autonomy is said to be denied.[55] Such a position does not escape rebuke, and it is

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49 Rule 1.16(c) above n 39, 48.

50 Rule 1.2(b) above n 39, 12.

51 M H Freedman *Lawyers' Ethics in an Adversary System* (The Bobbs-Merrill Company, Indianapolis, New York, 1975) 11.

52 Above n 6, 92.

53 Above n 7, 154.

54 Above n 12, 71.

55 Above n 7, 24.

claimed that a client's autonomy should be limited by the law, not by the lawyer's morality.[56] Essentially the lawyer in exercising moral autonomy is seen to fail in his or her given role, and to usurp the role of the law.

Within the adversarial system the lawyer has a set role of arguing, pleading and presenting the merits of [the client's] case and the demerits of the opponent's.[57] When a practitioner's skills of advocacy are withheld because of his or her pre-judgment, then the lawyer is seen as falling short of professional expertise:[58]

> The job of the lawyer ... is not to approve or disapprove of the character of his or her client, the cause for which the client seeks the lawyer's assistance, or the avenues provided by the law to achieve that which the client wants to accomplish. The lawyer's task is, instead, to provide that competence which the client lacks and the lawyer, as professional, possesses.

Furthermore, whilst failing in this legitimate role, the lawyer is accused of adopting an improper one. The practitioner is seen to take on the role of 'enforcement mechanism'[59] and to unjustifiably assume the functions of the court:[60]

> Just imagine what would happen if lawyers were to refuse, for instance, to represent persons whom they thought to be guilty. ... The private judgment of individual lawyers would in effect be substituted for the public, institutional judgment of the judge and jury.

The lawyer who so acts is also accused of taking over the role of the legislature. It is alleged that if the proposed conduct were so immoral that it should not be supported, then more than likely it would be illegal.[61] The corollary to this is the assertion that the legislature has the prerogative to determine the legality, or illegality of such courses of action, and if it is not deemed illegal then the lawyer should not by exercising pre-judgment undertake, in the words of Wasserstrom a "case-by-case [sort of] legislation and policing".[62] He proceeds to observe: [63]

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56 Above n 12, 60 - 61.

57 Above n 34, 12.

58 Above n 34, 10.

59 Above n 12, 74.

60 Above n 34, 11 - 12.

61 M D Bayles "A Problem of Clean Hands" in *Ethics and the Legal Profession* above n 22, 428, 430.

62 Above n 12, 62.

63 Above n 34, 12 - 13.

> If lawyers were to substitute their own private views of what ought to be legally permissible and impermissible for those of the legislature, this would constitute a surreptitious and undesirable shift from a democracy to an oligarchy of lawyers.

Essentially the wrongfulness of this action lies in the practitioner usurping legislative power. By morally refusing to take a case or to represent the client in asserting a right provided by the legislature the lawyer is seen to improperly undermine the functions of both the legislature and the legal system which he or she is supposed to serve.

Finally, in the recognition that as a result of exercising moral autonomy access to law is threatened, the morality of the refusal is questioned. It is asked whether the immorality of the denial of access is justified in terms of the immorality of the act or course of conduct which is refused, and a tension of 'moralities' evolves.

Freedman[64] discusses this by using Wasserstrom's[65] example of the disinheriting parent. In this example the lawyer is presented with the dilemma of the client who wishes to draft a will disinheriting a child because the child is opposed to war in Vietnam. Wasserstrom implies that the lawyer ought to refuse to draft the will "because the client's reason is a 'bad' one".[66] Yet Freedman challenges this by equating the wrongs of the client and the legal practitioner. He asks "is the lawyer's paternalism toward the client preferable - morally or otherwise - to the client's paternalism toward [his or] her children?"[67]

Freedman's question, when taken at a more generalised level becomes - "which is preferable - the immorality of the refusal, or the immorality of the cause or the act that is refused?" Essentially, this is an autonomy question that asks - "which is preferable - the denial of the client's autonomy in order to avoid doing that which is perceived as immoral, or the honouring of the autonomy regardless of the perpetuation of a situation or result which one perceives as immoral?" Taken in a wider sense this is exactly the dilemma that the American practitioner faces.

In the provision of choice, there is much latitude and uncertainty; and whilst some contend that a lawyer should never refuse and be instrumental to a denial of access, and *very few* submit that the lawyer should refuse without good care or reason, another faction argues that refusal and its inevitable denial of access is justified in certain circumstances. If this view is accepted, the issue is then, under what circumstances? The next section of this

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64 Above n 43, 81.

65 Above n 34, 9 - 10.

66 Above n 11, 84.

67 Above n 11, 84.

paper will review those sets of circumstances in which refusal is seen to be justified and unjustified.

C *Justified or Unjustified Refusal?*

According to Schwartz the question of whether refused representation is justified or not is not merely a choice between 'to deny' or 'not to deny' access. Rather, he sees this determination as a 'balancing' exercise. For Schwartz, the decision is a complex one necessitating the balancing of the following three elements: [68]

1 the nature and substantiality of the legal interests being vindicated;

2 the gravity of injury or damage to the party who will suffer the moral wrong; and

3 the adequacy of presentation of the cause without counsel.

Schwartz's elements are useful as they summarise many of the questions and concerns that are raised in the consideration of justified or unjustified refusal. Each of these elements shall be examined.

1 *The nature and substantiality of the legal interests*

This element requires an assessment of the importance of the legal right that is being denied. It asks whether the right is significant, and if so, that value is seen as sufficient justification for the subordination of the lawyer's autonomy. Fried puts the question as such:[69]

> ... is there a moral obligation to help the finance company foreclose on the widow's refrigerator? If the client pursues the foreclosure in order to establish a legal right of some significance, I do not flinch from the conclusion that the lawyer is bound to urge this right. ... But if ... the case means no more to the finance company than the resale value of one more used refrigerator, common sense says the lawyer can say no. One should be able to distinguish between establishing a legal right and being a cog in a routine, repetitive business operation, part of which just happens to play itself out in court.

Wolfram also contends that different claims attract different significance. He uses the illustrations of (a) the Nazi seeking representation against the erroneous accusation of a serious crime such as the self-defence murder of an anti-Nazi protester, and (b) the Nazi who seeks "the vindication of a right of free speech in order to be able in the future to

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[68] M L Schwartz "The Zeal of the Civil Advocate" in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* above n 31, 167.

[69] Above n 24, 123.

spread, legally but viciously, Nazi gospel about Jews and blacks."[70] Wolfram views the nature and significance of these claims as two very different things, regardless of the fact that in both cases the lawyer might wish to refuse on the ground of a strong revulsion against Nazism and its adherents. For Wolfram, the practitioner has a "Clayton's" choice' in terms of the first situation. "The unwarranted threat to the Nazi's freedom from the impending criminal proceeding"[71] is seen as of sufficient severity of harm as to give rise to a duty of representation. However, he does not see that there is a duty to assist in the vindication of the right to free speech. He reasons that:[72]

> Unlike the murder situation, here the abhorrent ideology of Nazism is central to the proposed course of conduct. With the lawyer's assistance the ideology can be broadcast, without it, it will be suppressed, even if against the legal right of the Nazi to free expression. [Furthermore] the Nazi proposes to engage in future elective behaviour. Moreover, it is behaviour that will impose harm upon the targets of speech, Jews and blacks, whereas an acquittal of an unjust murder charge will have no "victims".

Wolfram's example exposes the discretion involved in this assessment, for it must be acknowledged that contrary to Wolfram's view, others may see the consequences of refusing the vindication of the right to speech as of such importance and 'severity of harm' that it *would* give rise to the duty of representation. Such differences of outcome are possible and to be expected, for this exercise requires the assessment of the nature and importance of the legal interest and the weighing of it against the denial of representation. Hence, where the scales tip is dependent upon the weight attributed to the interest, a weight that will differ according to the values of the assessor.

The first element to be applied in determining whether refusal is justified or unjustified is the assessment of the importance of the claim. Within certain limits of general acceptability and common sense the outcome of this assessment is unpredictable as it will be dependent upon the values of the assessor. However, the general consensus is that if the client's claim is found to be morally compelling then there exists a duty to represent. Conversely, if the practitioner can, with all honesty and sincerity, assert that the claim fails to achieve sufficient standing as to warrant a duty to represent, then she or he is likely to be justified in refusing.

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[70] C W Wolfram "A Lawyer's Duty to Represent Clients, Repugnant and Otherwise" in *The Good Lawyer* above n 40, 229.

[71] Above n 40, 229.

[72] Above n 40, 230.

2 *The gravity of injury*

The traditional view of the neutral and partisan lawyer legitimises the practitioner's assistance in an act that is legally justified, but morally suspect, without appointing any responsibility for the consequences. The professional is told: [73]

> What you do is not personal; it is a formal, legally-defined act. Therefore, ... a lawyer is morally entitled to act in this formal representative way even if the result is injustice, because the legal system which authorises both the injustice and the formal gesture for working it insulates [the lawyer] from personal moral responsibility.

The opposite view to this attributes accountability to the lawyer and argues that the practitioner can, and should, refrain from using the shortcomings of the law to harm others. The 'gravity of injury' element positions itself within this accountability type of view of the lawyer's role. This element requires the balancing of the harm that will result as a consequence of the act, against the harm that will result as a consequence of a refusal to represent, and if the first outbalances the latter, then refusal is deemed to be justified. Schwartz says "The greater the damage or injury that will be caused the party suffering the moral wrong, the lesser the interest in providing counsel to the unrepresented party whose legal rights will be lost".[74]

This element overtly recognises the importance of the right of the legal professional to exercise personal autonomy. It provides the justification for the lawyer who wishes to refuse a brief because it will set a precedent which she or he believes is against public interest and justice. This element allows a lawyer to take the Wolfram approach that the Nazi's freedom of speech can be overridden because of the harm that it will impose upon targets of the speech. Furthermore, this element allows the refusal of representation to a remorseless convicted murderer who seeks representation for an appeal on technical grounds because of the lawyer's aversion to assisting in the avoidance of deserved and justified penalty or sanction.[75] However, within this element the right to exercise moral autonomy is not absolute. It is seen to be conditional upon its lesser potential to 'injure', and if the harm of refusal to represent is seen to be as less 'injurious', then in the conflict of the professional and moral obligations, moral obligation is privileged[76] and refusal is justified. Conversely, if the harm of refusing outweighs the harm of asserting the right or claim, then

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[73] Above n 24, 121.

[74] Above n 68, 168.

[75] See above n 70, 226-227.

[76] D Luban *Lawyers and Justice: An Ethical Study* (Princeton University Press, New Jersey, USA, 1988) 155.

refused representation is deemed as unjustified, and ironically, as failing moral responsibility.

3 The adequacy of presentation of the cause without counsel

The third element founds itself upon the contention that the duty to represent is of greater weight than the exercise of moral autonomy in the circumstance of those who are unable to obtain counsel. Firstly, in acting for such clients the lawyer is seen to satisfy the professional obligation bestowed of accepting a "share of tendered employment which may be unattractive both to him [or her] and to the bar generally".[77] More importantly, beyond this professional obligation the lawyer is seen to do 'moral good' by giving aid to the client in the situation of absolute necessity, and by acting in a situation when to refuse would be like the uncaring and nonchalant refusal to save a drowning child. Luban describes this situation as the 'lawyer for the damned'.[78] The heroism of the rescuer is admired, he says, and therefore, in comparison to the severity of harm that would result if the lawyer refused to take the brief, the decision to act is justified. He claims "The phenomenon I am describing - call it what you will, human sympathy, animal pity, caritas - [is admired] ... Out of this admiration, we freely grant that the lawyer for the damned is not her [or his] client's accomplice and is not responsible for the sins of her [or his] client" .[79]

An important corollary of this assertion is the challenging of the allegation that the refusal of the practitioner means the denial of access to justice. Supporters of this view contend that the refusal of one lawyer does not mean that access is denied.[80] The choice of one practitioner constitutes a refusal on his or her part, but it does not debar the client from pursuing alternative avenues. Rhode claims "[The lawyer's] refusal to aid certain endeavours will not necessarily pre-empt client choice. It may simply impose the psychological and financial costs of finding alternative counsel".[81] Alternatively, the refusal means that the client is forced to represent him or herself, and whilst this gives rise to objections of disadvantage,[82] it does not necessarily mean that access is denied.[83]

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77 M Davis "The Right to Refuse a Case" in *Ethics and the Legal Profession* above n 22, 441 at 443. Note that this statement is not included in the new *Model Rules* above n 46.

78 Above n 76, 162.

79 Above n 76, 163.

80 Above n 61, 438.

81 D L Rhode "Ethical Perspectives on Legal Practice" in *The Ethics of Lawyers* above n 11, 397, 429.

82 See "Taking Sides", Editorial in (1990 Feb) 9 *NLJ* 157, 157.

83 The issue is not merely that representation is being denied, rather, it is whether the failure to provide representation really results in harm. See above n 31, 164.

Furthermore, it is argued that the refusal of *one* lawyer does not constitute the refusal of *all* lawyers,[84] and in reality it is very unlikely that the refusal of one will mean that all counsel will refuse. The very complexity of the morality of the action is based upon the fact that there will be differing views as to whether it is right or wrong; and therefore it is very improbable that there will be consensus of legal practitioners as to whether it is 'right' or 'wrong', and whether the representation should be refused or not: "As long as the legal profession is reasonably representative, it will not be necessary to induce competent lawyers to represent unpopular but decent clients."[85]

4 *The additional criteria of "the impact on the professional"*

In addition to Schwartz's three criterion there is another that deserves consideration in the determination of whether a refusal to represent a client is justified or not. Schwartz's criterion focus on the consequences of the choice upon the prospective client, or as felt by society as a whole, yet little attention is paid to the impact the determination might have upon the lawyer. Such a consideration is important, and if the American claim of respecting individual autonomy is to be accepted then factors such as 'the impact of the choice to represent' must be acknowledged.

The general task of lawyering carries with it 'costs' - both personal and social,[86] and this can certainly be said of the consequences of the choice to represent the unpopular cause. Essentially, the consideration of the 'costs' of representation is an assessment of how burdensome the acceptance of the repugnant client or the agreement to assist in the vindication of a distasteful cause, will be. Whilst the professional's first obligation is to serve, it is generally accepted that this does not require complete submission to the point of 'martyrdom'.

Wolfram asks the question "Would the refusal to provide legal assistance be justified because ... of harm that might be inflicted upon the lawyer, and the lawyer's other clients and family as a result of the representation?"[87] In asking this question he evidences his acceptance of the assertion that the choice to represent inevitably subjects the professional to public scrutiny. Such a phenomenon is especially so when the client or cause is one of notoriety, and whilst in hindsight it is easy to admire the courage of the lawyer who takes

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84 See D Lamb "Ethical Dilemmas : What Australian Lawyers Say About Them." in *Legal Ethics and Legal Practice : Contemporary Issues* above n 18, 217, 222. Note that a discussion of the 'No Difference' doctrine is not included in this paper.

85 Above n 15, 137.

86 See G J Postema "Moral Responsibility in Professional Ethics" in *The Ethics of Lawyers* n 11, 32 - 34; 42 - 45.

87 Above n 40, 225.

on such a cause, the difficulty of exercising that courage should not go unnoticed. As Wolfram notes: [88]

> Professional heroes, like heroes generally are more easily remembered at a comfortable distance than recognised at moments of crisis and public consternation. The ... role of ... defending an unpopular client is often one of great tension, professional and personal isolation and humiliation. Often it has been accompanied by a serious decline in the lawyer's clientele and income.

According to Wolfram a commonly held view is that lawyers represent objectionable clients either because they disregard the harm they do, solely to make money, or because they agree with their client's objectives.[89] Under any of these formulations the practitioner faces a cynical portrayal of the legal role and inevitably she or he "becomes morally tainted".[90] "A lawyer with regular clients", it is said, "takes on their reputation, no matter what the canons [That is, the ethical code or model rules] say",[91] and in making the choice to represent the repugnant client or cause the lawyer places both reputation and law practice in jeopardy.[92]

Perhaps the truth of these statements is best evidenced in the experiences of the American Civil Liberties Union (ACLU). Despite the indignant disavowal of their clients' projects the ACLU has proceeded in the defence of "abhorrent clients with repellent projects"[93] and suffered the consequences of the choice to proceed. The Union's most renown representation is its 1977 representation of the Nazi party when David Goldberger, legal director of the ACLU,[94] appeared successfully[95] on behalf of the Nazi party in order to establish its right to 'free speech and assemblage'.[96] The facts of this situation are both interesting and important.

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88 Above n 10, 576.

89 Above n 10, 569-570.

90 S Wolf "Ethics, Legal Ethics, and the Ethics of Law" in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* above n 15, 38, 52.

91 Above n 6, 146.

92 Refer to discussion in Ross, above n 7, 150-154.

93 Above n 76, 161.

94 D Goldberger, "A Lawyer's Dilemma : Would You Defend an Unpopular Cause?" in (1978) 5 *Barrister* 46 at 47.

95 Above n 94, 48.

96 I L Horowitz and V C Bramson, "Skokie, The ACLU and the Endurance of Democratic Theory" in 43 *LCP* 328, 329.

The situation arose when "a small, but active group of ... [N]azis"[97] sought to picket the village hall of the predominantly Jewish community of Skokie. Skokie at the time, had a population of approximately 70,000 people and more than 40,000 residents were Jewish, with 7000 of these having been inmates of Nazi concentration camps.[98] The planned protest was peaceful, and Goldberger describes the intentions of the Nazi's:[99]

> The [N]azi group planned to assemble 30 to 50 members on the steps of the village hall .... They planned to picket for half an hour and carry signs protesting a prior Skokie Park District permit denial. The signs were to say, among other things, "Free Speech for White People." The demonstrators were to wear uniforms resembling those worn by the Nazi stormtroopers during World War II, complete with swastika armbands. No speeches were planned.

However, due to the deeply offensive nature of this planned action the Jewish community moved swiftly, and four days prior to the assembly the village obtained an injunction barring the uniforms, the swastika and all potentially offensive language.[100]

It was at this point that Goldberger became involved. The leader of the Nazi group appealed to the ACLU to represent them, and Goldberger, feeling that he had no other choice agreed to take the brief. The consequences of this choice were felt by both the ACLU and Goldberger personally. As recounted by Goldberger:[101]

> The ... office was swamped with angry telephone calls, letters of resignation, ultimately some threats of violence. It is my understanding that some people opposing our representation quietly approached ACLU funding sources to discourage donations and grants. ... I came in for a substantial share of the criticism and vituperation. In one court document, I was called "neo-Nazi counsel" ... Personally insulting telephone calls poured into my office. When I appeared at speaking engagements I was repeatedly called a Nazi sympathiser or a dupe.

Goldberger's experience is not unique. Freedman cites the example of Professor Roisman who had disciplinary proceedings and criminal contempt charges brought against her as a consequence of her involvement in representing the tenancy interests of the poor and

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97 Above n 94, 47.

98 Above n 96, 329.

99 Above n 94, 47.

100 Goldberger, "The 'Right to Counsel' in Political Cases: The Bar's Failure" in 43 LCP 321, 321. Goldberger's view was based on the following facts: the Nazi's neither qualified for legal aid nor the public defender: see above n 126, 326; he was unable to find a volunteer attorney who would take the case. Therefore if the ACLU refused the case the group would go unrepresented: see above n 94, 47.

101 Above n 100, 322 - 323.

minorities.[102] Furthermore, the recent example of the appointment by the ACLU of black lawyer, Anthony Griffin, to represent the Texas Grand Dragon of the Klu Klux Klan shows that public reaction has not changed since the Skokie affair. Griffin was criticised strongly by black groups for his action, and the Texas National Association for the Advancement of Coloured People demanded his resignation.[103]

Goldberger does not merely recount his Skokie experience, he goes further to examine the significance of the reaction. In doing so, he points to the pragmatic reasons for why there is reluctance on the part of the bar to undertake the representation of 'the unpopular'. He says" [F]or many, it would harm their law practices by repelling some of their customary clients. Others simply avoid such cases as a matter of personal preference".[104] Goldberger rejects this kind of reasoning. He argues that "a lawyer's quest for economic security does not nullify ethical obligations to assure that all in need of legal representation have access to it".[105] Therefore, for Goldberger, as evidenced by his stand in the Skokie affair, personal professional welfare is not sufficient to override professional duties.

Others, however, disagree. In reply to his question of whether such harm might justify refusal Wolfram says: [106]

> A desire not to ruin one's private practice or one's organisation, not to impair seriously the extent to which one can make credible arguments on behalf of other clients, not to bring public scorn upon one's family and friends - these and similar concerns are legitimately compelling. And, ... they might prevent any duty to represent from arising.

Defenders of this view argue that it is unreasonable to expect that a lawyer will prioritise professional duty above personal welfare. If the legal professional chooses to act self-sacrificially then that is an appropriate exercise of his or her autonomy, but to require that all practitioners will do so, is both unrealistic and improper. As Thompson states "The general law does not impose upon the public the requirement to jump into a swift flowing river to save a stranger even though it was within their capabilities. Why should a professional code of conduct require more of a practitioner than is ordinarily expected of other members of the community".[107]

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102 Above n 51, 18.

103 Above n 7, 152.

104 Above n 94, 48.

105 Above n 94, 48.

106 Above n 40, 225.

107 W Thompson "Rules of Professional Conduct" (1995) NZLJ 128, 133.

An expected response to Thompson's statement is that the lawyer in jeopardising his or her legal practice is not risking one's life to save a stranger and therefore this analogy is limited. Wolfram however, refutes any such criticism. In using the example of the captain of a ship he asks the same question of the duty to 'rescue' but within an economics context:[108]

> [W]hile morality would not require a sea captain to subject his or her own ship and crew to certain danger to rescue the crew of another ship, what if the time required to effect the rescue would merely spoil a perishable cargo? Or what if the sea captain would become personally liable for additional days' wages for the crew or would lose additional cargoes waiting in port that would go to other ships because of the delay. Most moral systems would conclude that, while rescue under these circumstances is morally correct, even morally heroic, it is not required due to the sacrifice of the rescuer's own substantial interests that would be involved.

Wolfram's sea captain example reflects the concern that is often put forward of whether the ideal of the self-sacrificing valiant of justice corresponds with the reality of the legal professional's role. Pepper reminds advocates of ethics that ethical dilemmas must be answered within a market context, as this is the system that the contemporary legal practitioner functions in. [109] Critics are reminded by Wolfram that whilst much of the ideal of the venerable profession remains, the reality of market forces are equally pressing, and inevitably these must impact upon the professional's role:[110]

> Lawyers are not totally free agents that interact randomly with clients and third parties ... They often are members of law firms and in almost all cases have secretaries, paralegals, junior lawyers, and others who are economically dependent on the lawyer to keep a steady flow of business coming through the office... Lawyers have families and consequent economic and moral responsibilities.

Rhode is supportive of this view. She states that it is "naive to suppose that [ethical decision making] remains impervious to market forces".[111] She contends that such pressures play a dominant role in determining how a practitioner will conduct his or her practice, and cites an empirical study of Chicago lawyers[112] in support of her contention.

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108 Above n 40, 220.

109 Above n 12, 63.

110 Above n 13, 77.

111 Above n 81, 435 - 436.

112 See R Nelson "Ideology, Practice and Professional Autonomy : Social Values and Client Relationships in the Large Law Firm " (1985) 37 Stan L Rev 503. For example, in Nelson's survey of Chicago law firms only 16% of attorneys recalled ever refusing a case.

Hence the determination of 'justified' or not becomes more than the consideration of the impact of the refusal upon the 'requesting' client, or the maintenance of justice. It includes, to a significant extent, the assessment of the harm that the professional is likely to suffer. If the 'harm', in terms of the professional, is seen to be of such an extent as to outweigh that of the other, then 'refusal' is likely to be deemed as justified.

D Comparison

In comparison to the cab rank rule prescribed duty of representation of the UK, the USA system is complex and uncertain. With the duty of the UK comes restriction, certainty and relative simplicity, while the American system generates greater freedom of choice, uncertainty and a complexity of factors that must be considered in making the justifiable choice.

The jurisprudence of representation for the USA stems from a combination of ethical formal requirements and commentary on these by legal philosophers and lawyers. Fundamentally, this combination appears to say that if a lawyer's autonomy is to be respected, he or she cannot be told what is morally correct or incorrect, nor prohibited from making these decisions personally, however, she or he can be given the principles upon which to make such decisions and ultimately the choice is the practitioner's.

IV THE NEW ZEALAND CONTEXT

A The Duty in New Zealand

The formal requirements in New Zealand regarding the duty to represent are found in the Rules of Professional Conduct.[113] Reflecting the fundamental nature of this matter, the rule states:[114]

> A practitioner as a professional person must be available to the public and must not, without good cause, refuse to accept instructions for services within the practitioner's fields of practice from any particular client or prospective client.

The Commentary to Rule 1.02 provides that an inability to perform instructions competently or to devote sufficient time to the matter is good cause for refusing to act. Conversely, refusal "based on the race, colour, ethnic, or national origin, sex or creed of the prospective client" is not. No mention is made of the repugnant client or the distasteful cause.

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113 New Zealand Law Society *Rules of Professional Conduct for Barristers and Solicitors* (4th ed, New Zealand Law Society, Wellington, NZ, 1996).

114 Above n 113, 7.

B The Effect of the Cab Rank Rule

Like the UK practitioner, the legal professional of New Zealand is subject to the cab rank rule.[115] From this it could be presumed that the New Zealand practitioner shares the same obligations and responsibilities as the English practitioner. Yet this is not really so, for whilst it is said that both are subject to the cab rank rule the practical effect of the rule in the two nations is very different. This is because unlike the UK, where the bar and solicitors are separate branches and subject to different codes of conduct, most New Zealand practitioners enrol as both a barrister and solicitor. Consequently he or she is subject to the rules applying to both branches of the profession.[116]

This is a fundamental difference in terms of cab rank rule obligations, for the role differentiation of the UK eases the stringency of the obligation, and for the English lawyer the practical outcome of the rule is not as exacting or protective as it seems. For in the UK the structure of the profession grants and enables choice even within the constraints of the cab rank rule. Of this Wolfram writes: [117]

> In the English system a client must first find a solicitor who is willing to represent the client. The solicitor [o]n behalf of the client must then approach a barrister's clerk, who has been given discretion by the several barristers in the same chambers over which the clerk presides to accept briefs at fees which the clerk is to negotiate with solicitors. There is little professional control over the clerk's fee quotations. Nor is the clerk required to accept a case [o]n behalf of a barrister who is already fully committed. The cab rank rule purports to require only that an uncommitted barrister accept any case in which his or her clerk negotiated an appropriate fee with the client's solicitor. Obviously, in setting the fee, and in reporting on the state of the barristers availability there is adequate room for the clerk to protect barristers against unwanted briefs.

Wolfram's scepticism is based upon two grounds. Firstly, that the administrative processes of the separated profession enable avoidance of the obligation to represent. Secondly, that the practical realities of legal practice provide ample opportunity for avoidance, and therefore in real terms the duty is no more than a theoretical ideal. Whilst the first of these has some significance for the New Zealand profession in terms of the relative lack of opportunity to elude the duty, the second of these is even more important, for it recognises the abundant opportunity for the evasion of the requirements of the rule. Temby highlights the ease of this avoidance stating that "it is a simple matter for a barrister to

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115 *Lectures on Advocacy and Ethics in the Supreme Court*, above n 1, 35.

116 Above n 113, 2 - 3.

117 Above n 10, 572.

decline a brief if he [or she] does not want to accept."[118] Disney takes the matter one step further by asserting that evasion is not only possible, but it is also practised, and most often it goes unsanctioned when he states "The cab rank rule is not infrequently evaded. Such evasion is difficult to detect, and even more difficult to prove with sufficient certainty to justify disciplinary action.[119]

History shows that Wolfram's scepticism is somewhat justified. Disney cites two 1974 examples as evidence of this. One from the UK where "the English Bar Council had to make an appeal for senior counsel to represent ... IRA members charged ... with bombing the Old Bailey courts in London and seriously injuring a barrister and several other members of the legal and court fraternity."[120] The other from Australia where "a meeting of Sydney barristers asked their Bar Association to urge its members to accept briefs in the trials of prisoners arising out of a "riot" at Bathurst Gaol. Apart from the likelihood that the briefs would involve making serious allegations against prison officials, police and senior public servants, it was clear that the trials would be very long and the remuneration very low".[121] Disney's examples point to two very clear instances of evasion. However based upon this and further anecdotal evidence the writer submits that such avoidance happens on a more regular scale, and in regards to more common causes. Furthermore that detection is not easy, and therefore incidents often go unchallenged and unrecorded.

The writer suspects that a more common circumstance of refusal is that of the legally aided brief. It is interesting to note that prior to August 1992, Commentary (5) to the Rule 1.02 prescribed that the "fact that a client [was] legally aided or intend[ed] to apply for legal aid [was] not a ground for declining to act."[122] Furthermore, that the standard of service given a legally aided client should not differ from that given to a regular fee paying client.[123] It is assumed that such commentary was included out of need, and that there had been incidences of refusal on these prohibited grounds. The writer infers from this amendment that legal aid is now an acceptable reason for refusal of representation. In recognising the strong economic emphasis of the modern profession it is suspected that the regular fee paying client is likely to be more readily accepted than the legally aided client.

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118 Above n 1, 12.

119 Above n 4, 605.

120 Above n 4, 606.

121 Above n 4.

122 New Zealand Law Society *Rules of Professional Conduct: with Effect from 1 March 1990: Adopted by the New Zealand Law Society on 28 July 1989* (The Society, Wellington, NZ, 1990) 1.02 - 1.03.

123 Above n 122, Commentary (7) at 1.02 - 1.03.

The 1992 amendment is a sad and telling indication of the ineffectuality of the cab rank rule. It is a sad day for justice when it can be said that a lawyer cannot refuse to represent a client because of the moral wrong that he or she will do in accepting the brief, but may refuse a client on the ground that the employment will not generate as much profit as that of other clients. Recognition of the immorality of this position demands change.

V CONCLUSION

This paper concludes that:

- the cab rank rule does not respect the moral autonomy of the individual practitioner;
- the cab rank rule does not guarantee access to legal processes, neither does the removal of the rule deny access; and
- the interests of justice, good and professional competence are not met by requiring that a lawyer prioritise his or her client's needs above his or her moral autonomy.

From this analysis of the UK and USA alternatives the writer elects the American system as the most favourable. Accordingly reform of the New Zealand system is advocated. It is submitted that whilst the professional should be reminded of the obligation to public service and client welfare, he or she should not labour under the duty to provide representation in circumstances which she or he considers adverse to public welfare, or adverse to moral practice.

Furthermore, legal practice should be more than moral prostitution, and the practitioner should be given the right to exercise moral autonomy. If lawyers are to be expected to uphold tenets of justice and morality then it is submitted that the system that demands this of them should honour their right to abide by their own personally held tenets of justice and morality. If the legal system is to be respected for its integrity then it must allow its members to exercise integrity. Furthermore, it is submitted that in valuing moral autonomy, integrity and altruism, the need for a duty of representation declines, for there will always be the 'Goldbergers' who in the tension of moralities consider it morally compelling to represent the immoral.

Finally, it is submitted that the immorality of denied access is great, and in the rare case of absolute denied access then the profession bears the responsibility of ensuring access. Individual autonomy is not absolute. Like the 'pro-life' doctor who is obligated to perform an abortion on a life-threatened woman, so the lawyer must undertake representation in the crisis situation where there is no other choice. Accordingly it is submitted that a power of court appointment should be retained, to be used only in the most extreme of cases.

The ethical duty of representation is essential to the legal profession, however in its most stringent form it fails to respect the rights of the practitioner, and generates legal

practice that falls short of reflecting the values and expectations of society. This failure justifies its reform, and accordingly reform is advocated. For it is only then that 'lawyering' will be the profession of honour and integrity that it professes to be; and it is only then that the modern lawyer will have no cause to ask "can I be a good lawyer and still be a good person?"