

# DEFENDING THE UNPOPULAR DOWN-UNDER

ABBE SMITH\*

*[The ethics of criminal defence lawyers and others who represent 'unpopular clients' is a largely unexplored area of legal scholarship in Australia. This article seeks to examine, from a comparative perspective, the motivations and ethical practices of these lawyers. Using interviews with Australian lawyers who represent the criminally accused, prisoners and asylum-seekers, as well as relevant ethical rules and commentary, the article identifies why lawyers undertake unpopular cases and, ultimately, what sustains them. Contrasting Australian legal practice with that in the US, the article discusses the sometimes competing professional obligations to court and client, truth and advocacy, public and profession. In a time of growing unease, the article offers new insights about how Australian lawyers see themselves and their work.]*

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[F]or the trial lawyer the unpopular cause is often a post of honor. Like other lawyers who try criminal cases, I have taken on many difficult cases for unpopular clients, not because of my own wishes, but because of the unwritten law that I might not refuse.

— Edward Bennett Williams, prominent American lawyer.<sup>1</sup>

\* BA (Yale), JD (NYU); Professor of Law; Co-Director, Criminal Justice Clinic and E Barrett Prettyman Fellowship Program, Georgetown University Law Center. This paper was written while I was a Fulbright Senior Scholar and Professor at the Faculty of Law, The University of Melbourne 2005–06. I am grateful to the Australian–American Fulbright Commission and to Professor Michael Crommelin, Dean of the Faculty of Law and Professor Jenny Morgan, Deputy Dean, for their generous support of this project. Thanks also to the following Australian lawyers, who graciously agreed to speak with an inquisitive American law professor so that she might better understand their motivations and methods, and the overall culture of legal practice in Australia: Theodosios Alexander, Susan Bothmann, Phillip Boulten, Julian Burnside, Domenico Calabrò, Peter Condliffe, Domenico Conidi, Suzan Cox, Brian Devereaux, Elizabeth Dowling, Philip Dunn, David Grace, David Gunson, Andrew Kirkham, Lex Lasry, Laura McDonough, Kerri Mellifont, Peter Morrissey, Robert Richter, Pauline Spencer, Robert Stary, John Stratton, Shane Tyrrell, Paul Willee and Dina Yehia.

<sup>1</sup> Edward Bennett Williams, *One Man's Freedom* (1962) 20.

No cause was too unpopular, or in some cases dangerous, for him to take on. He was a very brave, lion-hearted man.

— Former Victorian Chief Justice, John Harber Phillips, speaking of prominent Australian lawyer Frank Galbally, who died in 2005.<sup>2</sup>

[T]he worse the defendant, the more reason to represent them.

— Lex Lasry QC, prominent Australian lawyer.<sup>3</sup>

## I INTRODUCTION

The perennial question for a criminal defence lawyer, and for a law professor who directs a criminal defence clinic, has been dubbed ‘The Question’ by Stanford law professor Barbara Babcock.<sup>4</sup> The Question, which may be posed by the genuinely perplexed as well as the already-decided detractor, usually at a cocktail party when the target of the query has a drink in hand and his or her guard down, is *how can you represent people you know to be guilty?*<sup>5</sup> The lawyer to whom The Question is directed has heard it many times before and, if gracious, will try not to appear bored or peeved. He or she might offer any number of standard replies — about the adversarial system requiring competent counsel on both sides, the critical role of the defence lawyer in ensuring access to justice, the importance of checking official power and so on.<sup>6</sup>

As Babcock has pointed out, The Question tends to refer not to the teenage shoplifter or birthday reveller who had one too many and was driving a bit ‘wobbly’. These are the wrongdoers who could be us, our children, or our parents.<sup>7</sup> Nor, of course, does it refer to the wrongly accused or convicted. The motivation for undertaking these sorts of cases is well understood.<sup>8</sup> The Question

<sup>2</sup> Fergus Shiel, ‘Frank Galbally, Defender of the Underdog, Dies’, *The Age* (Melbourne), 13 October 2005, 3. John Harber Phillips is himself known to be quite ‘lion-hearted’. A criminal defence lawyer before he was a judge, Harber Phillips represented many unpopular clients, including Lindy and Michael Chamberlain: see below n 59.

<sup>3</sup> Gary Tippet, ‘Counsel for the Condemned’, *Insight, The Age* (Melbourne), 26 November 2005, 12.

<sup>4</sup> See Barbara Allen Babcock, ‘Defending the Guilty’ (1983–84) 32 *Cleveland State Law Review* 175. Babcock was herself a criminal lawyer and former Director of the Public Defender Service for the District of Columbia.

<sup>5</sup> There are several variations on The Question; some people adopt a slightly different phrasing. See generally James S Kunen, ‘How Can You Defend Those People?’: *The Making of a Criminal Lawyer* (1983).

<sup>6</sup> Famous Australian criminal lawyer Frank Galbally offered an excellent answer: see Frank Galbally, *Galbally for the Defence* (1993) 1–2.

<sup>7</sup> As one Australian lawyer put it, ‘Mother Teresa on a shoplifting charge doesn’t need a decent lawyer’: Interview with Elizabeth Dowling, Dowling McGregor Thomas Barristers & Solicitors (Melbourne, 21 November 2005) (transcript on file with author). Dowling has been practising law for 20 years and has expertise in criminal defence, juvenile defence and family law. Among her more high profile and unpopular clients were the parents in the ‘Children of God’ case, in which the government removed 56 allegedly abused children from a cult-like group: see Elisabeth Lopez, ‘Sect Parents Accuse CSV and Police of Raid Terror’, *The Age* (Melbourne), 18 May 1992, 3.

<sup>8</sup> If they are honest, most defenders will say that representing the innocent is much harder — more emotionally taxing — than representing the guilty: see Abbe Smith, ‘Defending the Innocent’

refers instead to the representation of the truly unpopular: guilty criminals who have committed grave acts of violence or depravity.

Under Babcock's construction — or, rather, deconstruction, to use the more popular pedagogic parlance — The Question is actually three different sub-questions, each of which requires its own answer:<sup>9</sup>

- How *can* you represent the guilty (how can you reconcile the moral dilemmas that such work entails and work to get criminals off)?
- How can *you* represent the guilty (why you, with your elite education and endless professional opportunities)?
- How can you *represent* the guilty (how far would you go on behalf of such clients and are there lines you will not cross)?

There are no right answers to The Question or its related sub-questions. The sceptical will not be convinced no matter how thoughtful or artful the reply and no matter how little they themselves have previously considered the matter. And the answers should and do run the gamut of personality, philosophy and experience. They are inevitably personal and subjective. Everyone has their own reasons for doing the work.

Babcock does a masterful job of organising the motivations of defenders into categories: the 'garbage collector's reason' (it is dirty work but someone has to do it); the 'legalistic or positivist reason' (truth cannot be known, guilt is a legal conclusion); the 'political activist's reason' (most of those who commit crime have themselves suffered injustice and oppression); the 'humanitarian' or 'social worker's reason' (most of those who commit crime are disadvantaged and ought to be treated with humanity and respect); and the 'egotist's reason' (defence work is more interesting, challenging and rewarding than the 'routine and repetitive work done by most lawyers, even those engaged in what passes for

(2000) 32 *Connecticut Law Review* 485; see also Babcock, 'Defending the Guilty', above n 4, 180. Some Australian lawyers agree that defending the innocent is much more arduous than defending the guilty. A prominent defence lawyer said: 'The worst cases are when you believe your client is innocent. I agonise over these cases': Interview with Lex Lasry, Victorian barrister (Melbourne, 22 November 2005) (transcript on file with author). Lasry specialises in criminal defence and human rights law. He has been a member of the Bar since 1973. His high profile clients include alleged terrorist Jack Thomas and convicted Australian drug mule Nguyen Tuong Van, who was hanged in Singapore on 2 December 2005. The Van Nguyen case received a massive amount of publicity in Australia: see, eg, Tippet, above n 3, 12. Lasry was also featured in the highly-regarded book, Helen Garner, *Joe Cinque's Consolation: A True Story of Death, Grief and the Law* (2004) 168–9, 220–2, 241–55.

Two career indigent defence lawyers made the same point: see Interview with Suzan Cox, Director, Northern Territory Legal Aid Commission (Telephone interview, 16 November 2005) (transcript on file with author): 'Innocent cases are the really hard ones.' Cox, a barrister and solicitor who received an LLM from New York University School of Law, first practised law in Papua New Guinea. She was a criminal solicitor at Aboriginal Legal Aid in Alice Springs and a member of the private Bar in Melbourne (where she was mostly briefed by legal aid) before joining the Northern Territory Legal Aid Commission in Darwin in 1989. Cox has always practised in criminal defence, never prosecution. See also Interview with John Stratton, Deputy Senior Public Defender, Public Defenders Office (Telephone interview, 7 November 2005) (transcript on file with author): 'In some ways I'm not all that keen on cases where someone's really innocent because it makes it harder. You feel much worse if they go down.' Stratton has been at the Public Defenders Office since 1997. Prior to becoming a public defender he was at the private Bar, doing almost exclusively criminal defence.

<sup>9</sup> Babcock, 'Defending the Guilty', above n 4, 177.

litigation in civil practice’).<sup>10</sup> However, in the end she throws up her hands and declares that there is a ‘peculiar mind-set, heart-set, soul-set’ to defenders.<sup>11</sup> Either you have the chops for the work or you do not.

There may be some truth to this. Some, like Babcock, strongly believe that there is a ‘defence lawyer personality’.<sup>12</sup> Still, I continue to search for answers, or, at least, ways of thinking that go beyond personality and might be useful in drawing law students and young lawyers to undertake the defence of the unpopular in these uncertain times.<sup>13</sup> I am also interested in helping those who are engaged in indigent criminal defence, and other advocacy on behalf of unpopular clients, to be able to articulate what they do and why they do it. Finding the words — articulating a perspective, theory or paradigm<sup>14</sup> — might enable them not only to do the work, but to continue doing it when the going gets rough.

I will never forget the televised image of a federal court proceeding in Virginia shortly after September 11, 2001. A lawyer had been appointed to represent a Muslim man initially accused of obtaining a fraudulent identification card for another man. The lawyer had no apparent problem acting on behalf of this client in a routine immigration fraud case. When it became clear that the man was alleged to have been involved in the events of September 11, the lawyer became visibly distressed. He asked to withdraw, telling the judge that he could no longer represent his client.<sup>15</sup>

I am also mindful of the disappointing legacy of *Gideon v Wainwright*,<sup>16</sup> the case which guaranteed the right to counsel in the United States.<sup>17</sup> The promise of *Gideon* — that a person charged with a crime in the US will be well represented whether they are rich or poor — remains unmet.<sup>18</sup> Although there are institutional reasons for this — chiefly, the failure to adequately fund indigent criminal

<sup>10</sup> Ibid 177–9.

<sup>11</sup> Ibid 175.

<sup>12</sup> See *ibid*; see also Abbe Smith, ‘Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender’ (2004) 37 *University of California Davis Law Review* 1203. However, Babcock seems to have recently revised her thinking: see Barbara Allen Babcock, ‘The Duty To Defend’ (2005) 114 *Yale Law Journal* 1489.

<sup>13</sup> See generally Smith, ‘Too Much Heart and Not Enough Heat’, above n 12.

<sup>14</sup> For the author’s formulation of the sustaining motivations of criminal defence lawyers — ‘respect, craft, and a sense of outrage’ — see *ibid* 1241–64.

<sup>15</sup> Siobhan Roth, ‘Attorneys Shy Away from Defending Terror Suspects’, *The Recorder* (San Francisco), 3 December 2001, 3; see also ‘Prosecutors Detail Case’, *A Nation Challenged*, *The New York Times* (New York), 27 November 2001, B7. Reluctance to take on September 11-related cases went beyond this one lawyer. Roth noted the ‘profound effect’ of September 11 on the American criminal defence Bar: ‘Some defense lawyers who every day represent the rights of individuals against the state are questioning their willingness to stand up for people potentially linked to an attack on US soil’: at 3.

<sup>16</sup> 372 US 335 (1963) (*‘Gideon’*); see also *Argersinger v Hamlin*, 407 US 25, 37 (Douglas J) (1972).

<sup>17</sup> *Gideon*, 372 US 335, 344 (Black J) (1963). The right to counsel does not extend to non-felony trials if no term of imprisonment is imposed: see *Scott v Illinois*, 440 US 367, 374 (Powell J) (1979).

<sup>18</sup> Richard Klein and Robert Spangenberg, *The Indigent Defense Crisis* (1993) 10; see also Stephen B Bright, ‘Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer’ (1994) 103 *Yale Law Journal* 1835; David L Bazelon, ‘The Realities of *Gideon* and *Argersinger*’ (1976) 64 *Georgetown Law Journal* 811.

defence<sup>19</sup> — there is also a shortage of committed, skilled and experienced indigent defenders, especially in certain areas of the country.<sup>20</sup>

More immediately, there is my experience with students. I have had the privilege to teach, supervise and mentor hundreds of students over the years. Even though these students voluntarily enrol in the criminal defence clinic, most are initially reluctant to engage in the defence of the guilty (which, as Babcock points out in her aptly titled article, is what criminal defence largely is).<sup>21</sup> Even though the great majority of clinic students turn out to be excellent defenders — expending substantial time and energy to represent their indigent clients to the highest professional standards no matter what the clients have done in the past or what charges they presently face — most will not pursue a career in criminal defence.

There are reasons for this. Although they vary, the reasons hearken back to Babcock's deconstruction of The Question. Most law students and young lawyers do not like the idea of devoting themselves — in light of their skills, talents and accomplishments — to criminals. Notwithstanding their firm belief in the right to counsel and the right to a fair trial, they are ambivalent about actually providing the level of advocacy allowed by law for clients whose conduct has been brutal or odious. They are concerned about truth and their duty as officers of the court, which they see as intertwined. It matters not that professional rules, codes and standards encourage zealous advocacy, the behaviour students find most unsettling. They often end their time in the clinic by expressing admiration for others who are able to do the work without misgivings, but conclude that it is not for them.

There is an upside and a downside to American lawyers having the discretion to decide which cases they will take and which they will refuse. The advantages are obvious: discretion enhances professional autonomy and allows lawyers to express their own moral and political values in the work they undertake;<sup>22</sup> lawyers can represent the clients they feel most suited to represent — temperamentally, philosophically or from the perspective of social or professional advancement — as a way of fashioning their professional identity;<sup>23</sup> and they can decline to represent clients or causes they find offensive, or which might require the lawyer to engage in tactics they find repugnant.<sup>24</sup>

<sup>19</sup> See Klein and Spangenberg, above n 18, 25.

<sup>20</sup> See National Association of Criminal Defense Lawyers, *Indigent Defense by State* <[http://www.nacdl.org/public.nsf/DefenseUpdates/ID\\_by\\_State](http://www.nacdl.org/public.nsf/DefenseUpdates/ID_by_State)>; see also Babcock, 'The Duty To Defend', above n 12, 1520.

<sup>21</sup> See Babcock, 'Defending the Guilty', above n 4.

<sup>22</sup> See Monroe H Freedman and Abbe Smith, *Understanding Lawyers' Ethics* (3<sup>rd</sup> ed, 2004) 74. See also Teresa Stanton Collett, 'The Common Good and the Duty To Represent: Must the Last Lawyer in Town Take Any Case?' (1999) 40 *South Texas Law Review* 137, 157–61, where Collett discusses the arguments in favour of the lawyer's right to decline representation, but argues that less lawyerly discretion is appropriate in criminal cases: at 174–7.

<sup>23</sup> See Collett, above n 22, 159–60.

<sup>24</sup> See Freedman and Smith, above n 22, 74.

The disadvantage of lawyerly discretion is that lawyers can choose not to represent those who need their representation most.<sup>25</sup> The vast majority of American lawyers have not followed in Edward Bennett Williams' famous footsteps in representing the unpopular.<sup>26</sup> For these lawyers, the 'honour' of defending the unpopular<sup>27</sup> is easily outweighed by other considerations.<sup>28</sup> The only lawyers who routinely represent the unpopular in the US are public defenders, who represent all indigents in need of their services.<sup>29</sup> There are a few noteworthy others who are willing to take on the most hated clients,<sup>30</sup> but the fact that they are noteworthy makes the point.<sup>31</sup>

The discretion permitted American lawyers may be a distinctly American phenomenon. Although the US legal system is very much in the British tradition, lawyers in the UK and other Commonwealth countries are not quite as unconstrained as their American counterparts in their choice of clients.<sup>32</sup> In Australia,

<sup>25</sup> See Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (1999) 216–17.

<sup>26</sup> See Williams, above n 1; see also Collett, above n 22, 137–8. For an analysis of the professional norms underlying the duty of American lawyers to accept representation, see Charles W Wolfgram, 'A Lawyer's Duty To Represent Clients, Repugnant and Otherwise' in David Luban (ed), *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (1984) 214.

<sup>27</sup> See Williams, above n 1.

<sup>28</sup> In the US, it is generally understood that there is an obligation to represent unpopular clients: see Monroe H Freedman, *Lawyers' Ethics in an Adversary System* (1975) 10. However, there is no ethical requirement to do so: American Bar Association, *Model Rules of Professional Conduct* r 6.2 (1998) ('*US Model Rules*'): 'A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as ... the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client'; *US Model Rules* r 6.2 cmt [1] (1998): 'A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant.' Cf *US Model Rules* r 1.2 cmt [5] (2006): 'Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval'.

However, it should be noted that a lawyer has pro bono responsibilities under *US Model Rules* r 6.1 (2006) that are met by 'accepting a fair share of unpopular matters or indigent or unpopular clients.' The older American Bar Association, *Model Code of Professional Responsibility* EC 2-27 (1983) (citations omitted) states that no matter what his or her personal feelings are, 'a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.' Cf American Bar Association, *Model Code of Professional Responsibility* EC 2-26 (1983), which softens this requirement by stating that a 'lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client'. The provision goes on to state that 'a lawyer should not lightly decline' representation.

<sup>29</sup> See Abbe Smith, 'When Ideology and Duty Conflict' in Rodney J Uphoff (ed), *Ethical Problems Facing the Criminal Defense Lawyer: Practical Answers to Tough Questions* (1995) 18.

<sup>30</sup> See Michael E Tigar, 'Defending: An Essay' (1995) 74 *Texas Law Review* 101; Julia Preston, 'For Lawyer's Lawyer, Loss Is Just the Beginning', *Section B, The New York Times* (New York), 18 February 2005, 4; Josh White, 'Case Left Muhammad's Lawyers with Despair, Guilt; Muhammad's Lawyers Shoulder Own Stress, Depression, and Guilt', *Metro, The Washington Post* (Washington, DC), 21 March 2004, C01.

<sup>31</sup> Perhaps the most familiar image of a lawyer willingly taking on an unpopular client, no matter the personal or professional cost, is fictional: Atticus Finch in Harper Lee, *To Kill a Mockingbird* (1960). Of course one cannot think of Atticus Finch without picturing Gregory Peck in the role: see *To Kill a Mockingbird* (Directed by Robert Mulligan, Universal Studios, 1962).

<sup>32</sup> See, eg, General Council of the Bar of South Africa, *A Career at the Bar* (16 November 1998) <[http://www.sabar.co.za/legal\\_career.html](http://www.sabar.co.za/legal_career.html)>, which describes the cab rank rule in South Africa:

Advocates adhere to a 'cab rank' rule which means that any person no matter what crime they are accused of, how poor or rich they may be or however unpopular they are politically, is entitled to the services of an advocate, and it is unethical for an advocate who is available to take a case to refuse to do so because the advocate disapproves of the client's acts or behaviour.

for example, the decision whether to take a case (‘accept a brief’) is not a matter of an individual lawyer’s discretion, at least not for barristers in those jurisdictions where the profession is divided.<sup>33</sup> Under the ‘cab rank’ rule, all barristers must take a case if it is within their area of expertise and they are available, in the same way that cab drivers must serve the next person in line.<sup>34</sup>

Still, the mere existence of a rule does not necessarily mean that lawyers abide by it.<sup>35</sup> Ethical rules and codes in the US encourage lawyers to take unpopular cases, but relatively few do so.<sup>36</sup> The fact that Australian lawyers routinely take on these sorts of cases may be a reflection of the ascendancy of the cab rank rule in Australian lawyers’ ethics, but it might also reflect something deeper: an institutional ethos rather than a formal requirement.

This article adopts a comparative approach to explore the motivations and ethical practices of Australian lawyers who represent unpopular clients. There are many unpopular clients and causes — indeed, nearly every person to whom I mentioned this project had their own favourite whipping boy, from the greedy corporate giant to the steroid-abusing professional athlete. However, my enquiry focuses on lawyers who act for the criminally accused, prisoners and asylum-seekers. In conducting this exploration, I examined the ethical rules in Australia, reviewed commentary by practitioners and scholars, and interviewed more than two dozen Australian lawyers.<sup>37</sup> Interestingly, the ethic of criminal

<sup>33</sup> In the three most populous states in Australia — New South Wales, Queensland and Victoria — the legal profession is divided into barristers and solicitors as in the British model, while in the Australian Capital Territory, the Northern Territory, South Australia, Tasmania and Western Australia, there is a ‘fused profession’ of lawyers practising as barristers and solicitors, with a small separate Bar: see generally Ysaiah Ross, *Ethics in Law: Lawyers’ Responsibility and Accountability in Australia* (3<sup>rd</sup> ed, 2001) ch 4; Julian Disney et al, *Lawyers* (2<sup>nd</sup> ed, 1986) ch 4; see also Nicolson and Webb, above n 25, 71–6.

<sup>34</sup> See generally Ross, above n 33, 199–216; G E Dal Pont, *Lawyers’ Professional Responsibility in Australia and New Zealand* (2<sup>nd</sup> ed, 2001). See Australian Bar Association, *Model Rules* (2002) r 85 (‘*Australian Model Bar Rules*’), which is replicated in the other states and territories of Australia, although the wording is different in Tasmania: *Australian Capital Territory Barristers’ Rules 2006* (ACT) r 85; *New South Wales Barristers’ Rules 2001* (NSW) r 85 (‘*NSW Barristers’ Rules*’); *Barristers’ Conduct Rules 2003* (NT) r 85; *Legal Profession (Barristers) Rule 2004* (Qld) r 89; *South Australian Barristers’ Rules 2005* (SA) r 4.3; *Professional Conduct and Practice Rules 2005* (Vic) r 86; *Bar Association Conduct Rules 2006* (WA) r 77; cf *Rules of Practice 1994* (Tas) r 94.

For a critique of the cab rank rule, see Maree Quinlivan, ‘The Cab Rank Rule: A Reappraisal of the Duty To Accept Clients’ (1998) 28 *Victoria University of Wellington Law Review* 113; see also Ross, above n 33, 200–1; Nicolson and Webb, above n 25, 215–19.

<sup>35</sup> See, eg, *NSW Barristers’ Rules* r 91(b): ‘A barrister may refuse a brief to appear before a court if: the barrister considers on reasonable grounds that the time or effort required for the brief threatens seriously to prejudice the barrister’s practice or other professional or personal engagements.’

<sup>36</sup> See above n 28 and accompanying text. Lawyers in the US are encouraged to provide legal services to those who are unable to pay: see *US Model Rules* r 6.1 (2006). There is a common understanding — though no explicit rule — that there is a moral duty to represent a client if the lawyer is ‘the last lawyer in town’: see Collett, above n 22, 138. Yet many lawyers understand this to mean that ‘[o]nly if the lawyer was the last one on Earth was he obligated to take the client he disliked or disapproved’: Babcock, ‘The Duty To Defend’, above n 12, 1516; *contra* W William Hodes, ‘Accepting and Rejecting Clients — The Moral Autonomy of the Second-to-the-Last Lawyer in Town’ (2000) 48 *University of Kansas Law Review* 977, 985.

<sup>37</sup> Because I was interested in lawyers engaged in advocacy, the lawyers with whom I spoke were mostly barristers. A few were barristers and solicitors (whose practice is akin to the American model of legal practice), or solicitors (who are allowed to advocate in some proceedings and would prepare the case for a barrister in others). Since I was living in Melbourne when I con-

defence lawyers — who, by definition, represent the ‘unpopular’ and who make up the greater part of the interviews I conducted — is a largely unexplored area of legal scholarship in Australia.<sup>38</sup>

This project was partially inspired by my curiosity about the impact of the cab rank rule on Australian lawyers, and how such a rule might operate in the US.<sup>39</sup> I also wondered: once a lawyer agrees to take on the cause of an unpopular client, how far is he or she willing to go? On paper, there is also less discretion here. Australian lawyers owe their primary duty to the court.<sup>40</sup> A fealty to truth is at the heart of this duty. This is in contrast to American lawyers, for whom the client comes first — it is only through zealous advocacy of an individual client that a lawyer fulfils his or her duty to the court.<sup>41</sup> Here too, I wondered whether the rules, and the different formulations of the lawyer’s role, are borne out in practice. Especially in heinous, high profile cases — the kind of cases that generate the greatest hostility — might the lawyer become more client-centred and less concerned with the duty to the court and to truth?

Conversely, I was also interested in the role the Bill of Rights plays in the American lawyering tradition, and whether the establishment of a comparable Bill of Rights in Australia might bring about a more client-centred ‘individual rights’ lawyering model, instead of the prevailing court-centred ‘fairness’ model.

ducted my research, most of the lawyers with whom I spoke practised in Victoria. I acknowledge that geographical location might be a factor in this research because Victoria is said to have a relatively progressive legal culture as compared to other locations. However, I also spoke with lawyers practising in New South Wales, the Northern Territory, Queensland and Tasmania, some of whom had also worked in Western Australia and the Australian Capital Territory. My focus on criminal defence and prisoners’ rights reflects my own background: I have been an indigent criminal defence lawyer since 1982, first as a public defender and then as a clinical law teacher. I included human rights lawyers who work on refugee and asylum cases, or Aboriginal rights, because these are unpopular causes in Australia. Moreover, as one Australian lawyer noted about criminal defence lawyers: ‘They’re human rights lawyers whether they like it or not. Because the criminal defence lawyer is primarily about protecting some individual human being’s rights, that’s what it’s all about.’ Tippet, above n 3, 12.

<sup>38</sup> Ben Clarke, ‘An Ethics Survey of Australian Criminal Law Practitioners’ (2003) 27 *Criminal Law Journal* 142, 144.

<sup>39</sup> See Deborah Rhode, *In the Interests of Justice: Reforming the Legal Profession* (2000) 60; Susan D Carle, ‘Professional Legal Ethics: Critical Interrogations Book Review’ (2003) 17 *Georgetown Journal of Legal Ethics* 165, 171–2 fn 37.

<sup>40</sup> See generally Freedman, *Lawyers’ Ethics in an Adversary System*, above n 28; Jill Hunter and Kathryn Cronin, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary* (1995) 175.

<sup>41</sup> See generally Dal Pont, above n 34, 444–6; see also *Australian Model Bar Rules* Preamble [1], which states that: ‘The administration of justice is best served by reserving the practice of law to those who owe their paramount duty to the administration of justice’; *NSW Barristers’ Rules* Preamble [5] which states that: ‘Barristers should exercise their forensic judgements and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients’; Russell Cocks, Law Institute of Victoria, *Ethics Handbook: Questions and Answers* (2004) 133:

Lawyers owe duties to their clients, but they owe a ‘higher’ duty to the court, as the representative of the law. Upon admission to practice, lawyers become officers of the Supreme Court and thereby assume a duty to serve the administration of justice ...

The lawyer must balance the duty to the client with the duty to the court and if those competing duties clash, the duty to the court must prevail. This duty extends to all communications made by a lawyer ...

Cocks cites the then current *Legal Practice Act 1996* (Vic) s 8(1)(b), repealed by *Legal Practice Act 2004* (Vic) and *Professional Conduct and Practice Rules 2003* (Vic) r 8, replaced by *Professional Conduct and Practice Rules 2005* (Vic).

Many similarities exist between the US and Australian legal systems. Both borrow heavily from the English common law tradition; both have adversarial rather than inquisitorial systems that place the burden of proof squarely on the prosecution; and the advocate plays an essential role in both systems. Because of these similarities, the differences between the two jurisdictions' conceptions of the lawyer appear significant; they may go beyond rules and Bills of Rights. The differences may be cultural.

Still, it is worthwhile to consider the impact of lawyers' ethics — the rules and codes and how they are interpreted<sup>42</sup> — on the culture of advocacy. It could be that if the US had a system in which lawyers were professionally obligated to take difficult, unpopular cases, the limits on advocacy were clear, and lawyers regarded themselves primarily as officers of the court, then more law students and young lawyers might become criminal defence, prisoners' rights and human rights lawyers. It might also be easier for these lawyers for the 'unpopular' to sustain a career. There might even be more support for such lawyers — at least at the Bar, if not in the wider community.<sup>43</sup>

If, on the other hand, the rules are only incidental to the different conceptions of lawyers' professional role, it is still worthwhile to examine how Australian lawyers see themselves, their work and their profession. It could be that Babcock is right: either you are a champion of the unpopular or you are not. However, Australian lawyers might take a broader view of the work they do — something American lawyers could learn from.

This article relies heavily on the voices of Australian lawyers, many of whom have been representing the unpopular for more than 25 years.<sup>44</sup> Some of the

<sup>42</sup> Ross, above n 33, 10 notes that '[legal] ethics is not easily defined.' I use the terms 'legal ethics' and 'lawyers' ethics' interchangeably.

<sup>43</sup> See *Rondel v Worsley* [1969] 1 AC 191, 227 (Lord Reid). One lawyer notes that, post-September 11 and the Bali Bombings in 2002, there is a growing sense of admiration within the Australian legal profession for those who represent unpopular or undesirable clients, including alleged terrorists:

Amongst my colleagues at the Bar there is a fairly high opinion of people who do what I do. More than there used to be. I believe lawyers are more concerned about justice, fairness, equity, and criminal process now than they were 10 years ago. There is a growing recognition that judges and lawyers are the last bastion ... against those who would take away peoples' rights and liberties. The legal profession has truly taken up the challenge. Even commercial lawyers.

Interview with Phillip Boulten, New South Wales barrister (Telephone interview, 22 November 2005) (transcript on file with author). Boulten had practised law since 1979, when he joined the Legal Aid Commission in Sydney as a solicitor. He went to the Bar in 1988, where he continued to specialise in criminal defence. Among his clients are the alleged Islamic terrorists arrested in Sydney in November 2005: see Elisabeth Lopez and Demi Cooke, 'Raids Disrupt Imminent Attack', *The Age* (Melbourne), 8 November 2005, 1; Farah Farouque and Gary Tippet, 'What Went Wrong?', *The Age* (Melbourne), 12 November 2005, 1.

Boulten's colleague and Melbourne counterpart Robert Stary mostly agrees: 'I feel supported by my peers in the legal profession. People outside the criminal law fraternity sometimes approach me with an unhelpful comment. Still, I feel terribly reinforced': Interview with Robert Stary, Robert Stary & Associates (Melbourne, 17 November 2005) (transcript on file with author). Stary is a Victorian barrister and solicitor who is based in the western, industrial suburbs of Melbourne. His firm specialises in representing trade unionists and the indigent accused. Among his clients are Jack Thomas ('Jihad Jack'), an alleged terrorist, and the alleged Islamic terrorists arrested in Melbourne in November 2005.

<sup>44</sup> The following lawyers have been doing largely criminal defence, juvenile defence, prisoners' rights, human rights, Aboriginal rights, or poverty law for a quarter of a century or more: Susan

lawyers are well-known; others are not. All of the lawyers with whom I spoke answered the questions posed thoughtfully and, it seemed to me, honestly.

The rest of the article is organised as follows: Part II discusses the primary motivations of Australian lawyers in representing the unpopular: professionalism, politics, personality and publicity; Part III examines the Australian lawyer's duty to the court and fealty to 'truth'; Part IV considers the Australian lawyer's duty to the client and the limits on adversarial zeal; and Part V offers some parting thoughts.

## II WHY REPRESENT THE UNPOPULAR?

### A Professionalism

The Australian lawyers interviewed express an intense identification with the legal profession. A deep and unwavering sense of professionalism, often eloquently expressed, is their chief motivation for representing unpopular clients. In contrast to Babcock's 'garbage collector' motivation, these Australian lawyers see themselves as part of a vital and venerable profession, one that plays a key role in the functioning of law and society. As one lawyer declared: 'I am part of an ancient and honourable profession.'<sup>45</sup> Another said simply: 'I feel proud of the tradition of the Bar. ... Being part of [it] is the greatest good I can do as a person.'<sup>46</sup>

The origin of the modern legal profession — in Australia and elsewhere — can be traced back to medieval society, when the church played a central role in education. For hundreds of years education was tied to ecclesiastical functions and priests were the main source and distributors of knowledge. Lawyers, like priests, were among the privileged few in medieval society who could read, write and accumulate knowledge. It was not until after the invention of the printing press in the 15<sup>th</sup> century that printed information became readily available to the masses and people learned to read.<sup>47</sup>

Bothmann, Phillip Boulten, Domenico Calabrò, Domenico Conidi, Suzan Cox, Philip Dunn, David Grace, David Gunson, Andrew Kirkham, Lex Lasry, Robert Richter, Julie Sutherland, Robert Stary, John Stratton and Peter Zahra.

<sup>45</sup> Interview with Philip Dunn, Victorian barrister (Melbourne, 19 October 2005) (transcript on file with author). Dunn, who has been practising law since 1968, does largely criminal defence work. Dunn explained: 'I do only defence, but if asked I would take a prosecution brief. ... On the other hand, I don't care about not getting prosecution cases [as] I prefer not to prosecute.' His most recent high profile unpopular client was James Ramage, who was accused of strangling his estranged wife and disposing of her body. The defence that was raised and that succeeded was provocation: Ramage killed in response to his estranged wife saying that sex with him repulsed her. The defence created uproar, especially among feminists: see Karen Kissane, 'Honour Killing in the Suburbs', *Insight, The Age* (Melbourne), 6 November 2004, 4.

<sup>46</sup> Interview with Shane Tyrrell, Victorian barrister (Melbourne, 21 October 2005) (transcript on file with author). Tyrrell joined the Victorian Bar in 2002, prior to which he had been a police officer, a business owner and an international entrepreneur. He specialises in criminal defence and immigration.

<sup>47</sup> See generally Disney et al, above n 33, ch 1; see also Ross, above n 33, 55 (emphasis in original), who explains that the identification of lawyers with the clergy was recognised by many, among them 18<sup>th</sup> century philosopher Voltaire, who quipped: "'*La loi, n'est pas une profession, c'est un sacerdoce*" — the law is not a profession, it is a priesthood'. Known for his anticlerical views, Voltaire did not offer this as flattery: at 55 fn 4.

Although lawyers became increasingly secular after the 15<sup>th</sup> century, and are now associated more with universities than churches, the legal profession in many countries — if not so much in the US — still has a ‘mystical aura’.<sup>48</sup> This is evident in its ceremonial functions, its dress (wig, gown, jabot and bib in many Commonwealth countries) and its monopoly over esoteric and sometimes impenetrable legal knowledge.

Meanwhile, the idea of law as a profession has long been accepted.<sup>49</sup> Consistent with how most people define ‘profession’, the practice of law requires special training and skills, public service as a principal goal and self-regulation or autonomy.<sup>50</sup> The legal profession — especially in those parts of Australia that maintain a divided legal profession and then especially for barristers — is an exclusive club of privilege and status.<sup>51</sup> Interestingly, notwithstanding the privilege that attends their professional status, most Australian lawyers appear to understand professionalism to entail professional *obligation*.

Every lawyer with whom I spoke expressed the view that representing the unpopular was simply part of the job. If one is a member of the legal profession, this is what one does. As one lawyer put it: ‘That’s my job, isn’t it?’<sup>52</sup> Another said: ‘It’s my job and it’s a necessary job because without it we would be a much different society, a totalitarian society.’<sup>53</sup> Another said: ‘I’m here, it’s my job, I

<sup>48</sup> Ross, above n 33, 55.

<sup>49</sup> See Disney et al, above n 33, ch 3.

<sup>50</sup> See Dal Pont, above n 34, 5–11.

<sup>51</sup> One lawyer had an interesting insight about the barristers’ ‘club’. He noted that in Melbourne and throughout Australia — and also in England, Scotland and Ireland — barristers’ chambers are on the same few streets. ‘It is impossible to go a day without seeing other members of the bar. This encourages people to conform to the rules and culture of the profession. ... Those who break the rules are frowned on here’: Interview with Julian Burnside, Victorian barrister (Telephone interview, 14 November 2005) (transcript on file with author). Burnside has practised law since 1975. His practice consisted primarily of commercial law until he became involved in the Tampa refugee detention case in 2001. He is now widely regarded as one of Australia’s premier human rights lawyers.

Another barrister talked about the ‘collegial nature’ of the Bar: ‘When I was at The Hague, I did think of what my mates would do back home. You learn from other barristers here ... especially about how you just have to show courage’: Interview with Peter Morrissey, Victorian barrister (Melbourne, 8 December 2005) (transcript on file with author). Morrissey began practising law at age 33, after working with disadvantaged youth and playing guitar in a band. He came to the Bar specifically ‘to do crime and public law.’ Morrissey’s most recent high profile case was the representation of alleged war criminal and former Bosnian General Sefer Halilovic. Halilovic was accused of the mass murder of those who died in two 1993 massacres and was tried in the International War Crimes Tribunal in The Hague. He was acquitted of all charges in November 2005: see Steve Butcher, ‘Melbourne Lawyer in War Crimes Case Win’, *The Age* (Melbourne), 21 November 2005, 6. Morrissey was relieved at the result: ‘Almost immediately I formed the opinion that he was as innocent as a baby. ... It was truly a political prosecution. They prosecuted him because he was a Muslim. He was totally against ethnic cleansing’: Interview with Peter Morrissey.

<sup>52</sup> Interview with Brian Devereaux, Public Defender, Legal Aid Queensland (Telephone interview, 2 November 2005) (transcript on file with author). Devereaux has headed the in-house legal Counsel division of Legal Aid Queensland since 1998. He has been a public defender, a member of the private Bar and Counsel (Criminal) for the Aboriginal Legal Service of Western Australia.

<sup>53</sup> Interview with Phillip Boulton, above n 43.

don't need to be attached to the cause.'<sup>54</sup> Another said simply: 'We are obliged by the rules of our profession to take these cases.'<sup>55</sup>

Many expressed the belief that experienced and skilled lawyers have a special professional obligation to take on high profile, unpopular cases. One of the lawyers who represented Martin Bryant — the notorious Australian who was convicted of killing 35 people in Port Arthur, Tasmania in 1996 — was matter-of-fact: 'Somebody had to do it. Somebody competent. I like to think I'm competent. I [take] the view that if you're a senior practitioner ... you ought to take these kinds of cases.'<sup>56</sup> A lawyer who handles mostly murder cases, but who recently represented a Muslim man in a highly publicised gang rape case, said: 'It's hard in good conscience not to take these cases. As you get more experienced you're expected to take on more serious cases.'<sup>57</sup> Another prominent lawyer who said he would be 'delighted' to take the brief of an alleged terrorist noted that they 'shouldn't get the junior lawyer.'<sup>58</sup>

One of the lawyers who represented Lindy and Michael Chamberlain in perhaps the most famous Australian case of all time — the early 1980s 'dingo case' — feels strongly that the best lawyers ought to take on the most serious and high profile cases: 'The higher the profile of the case, the better the representation should be. This is so people can see the best defence, that this is what our system of justice means.'<sup>59</sup>

One criminal defence lawyer noted that his colleagues at the defence Bar — perhaps more than other lawyers — tend not to balk at serious or unpopular cases: 'The nature of the crime is rarely a consideration for most criminal lawyers. People who practise crime at the defence Bar are happy to be involved in all sorts of unpopular causes.'<sup>60</sup> A criminal lawyer agreed: 'Everyone gets represented by someone. This is how the defence Bar feels generally.'<sup>61</sup> Another criminal lawyer said that, among criminal defence lawyers 'there's a bit of a

<sup>54</sup> Interview with Shane Tyrrell, above n 46.

<sup>55</sup> Interview with Paul Willee, Victorian barrister (Melbourne, 4 November 2005) (transcript on file with author). Willee specialises in criminal prosecution and defence, and maritime law.

<sup>56</sup> Interview with David Gunson, Tasmanian barrister and solicitor (Telephone interview, 14 September 2005) (transcript on file with author). Gunson was the first lawyer to represent Bryant. Gunson restated that at this stage in his career he only took on serious cases: 'In the beginning of my career I took everything that came through the door. Now, I only take on serious crimes.'

<sup>57</sup> Interview with John Stratton, above n 8.

<sup>58</sup> Interview with Philip Dunn, above n 45.

<sup>59</sup> Interview with Andrew Kirkham, Victorian barrister (Melbourne, 4 November 2005) (transcript on file with author). Kirkham has been practising law since 1965, specialising in criminal law, courts martial, torts, family law and mediation. Together with barrister John Harber Phillips and solicitor Stuart Tipple, he defended the Chamberlains — a Seventh Day Adventist minister and his (widely disliked) wife — against child murder charges. Notwithstanding the couple's protestations that a dingo had killed their infant child — and their representation at trial by three of the finest lawyers in the country — they were convicted of the crime and Lindy was sentenced to life in prison. The Chamberlains were subsequently vindicated. See generally John Bryson, *Evil Angels* (1987); Lindy Chamberlain-Creighton, *Through My Eyes: The Autobiography of Lindy Chamberlain-Creighton* (2<sup>nd</sup> ed, 2004).

<sup>60</sup> Interview with Phillip Boulten, above n 43.

<sup>61</sup> Interview with John Stratton, above n 8.

buccaneering thing ... a bit of swashbuckling. ... The worse the crime it's like "To hell with everyone, we'll defend him and get him off."<sup>62</sup>

For most Australian lawyers, the obligation to take on unpopular cases goes beyond professional rules and standards, and is tied to the fundamental workings of the justice system. One barrister who works as a public defender tipped her hat to the cab rank rule, but said her commitment to representing the unpopular went beyond such a rule:

Obviously, the cab rank rule is very important. It's important that you take cases on that basis rather than picking and choosing. But, I don't take on [unpopular] cases because of the Bar rules. It's more fundamental than that. I do it because of the fundamental belief that if we start picking and choosing who should be represented, and represented to the nth degree, then you're not part of a system that guarantees justice across the boards.<sup>63</sup>

A long-time legal aid lawyer talked about the importance of criminal defence to the system, and not just to the client: 'Ultimately, a good criminal defence system is in everyone's interest. ... [T]hings aren't delayed unnecessarily. Issues are fairly raised. Police illegality gets jumped on. This is in the public's interest.'<sup>64</sup> Another experienced legal aid lawyer agreed that '[t]he criminal defence lawyer is an important part of the system ... [and] helps to ensure the process is right and that everyone gets the rights to which they are entitled'.<sup>65</sup> A leading defence lawyer said: 'It's important for society as a whole that people have proper and effective legal representation. There can be no fair trial without counsel when the accused wants counsel.'<sup>66</sup>

<sup>62</sup> Interview with Peter Morrissey, above n 51. See also Interview with Philip Dunn, above n 45: 'I'd take the brief of a terrorist. It's my duty ... but, inwardly, I'd be delighted. This is what makes our system so great. It's a privilege to represent the accused no matter who they are or what they've done.'

<sup>63</sup> Interview with Dina Yehia, Public Defender, New South Wales (Telephone interview, 29 November 2005) (transcript on file with author). Yehia has been practising law since 1990. She began her legal career as a solicitor at Western Aboriginal Legal Services and then joined the Legal Aid Commission in Sydney as a trial advocate. She went to the Bar in 1999, and took a job as a Public Defender soon thereafter. Yehia points to the movie *To Kill a Mockingbird* as a strong early influence, especially the scene in the courtroom when the preacher tells Scout and Jem to stand 'because your father is passing'.

<sup>64</sup> Interview with Suzan Cox, above n 8.

<sup>65</sup> Interview with Domenico Conidi, Managing Attorney, Criminal Law Division, Victoria Legal Aid Commission (Melbourne, 9 November 2005) (transcript on file with author). Conidi has done almost exclusively indigent criminal defence (with the exception of a nine-month stint as a prosecutor in Victoria, where he initially experienced 'culture shock'). After law school, he worked with activist lawyer Robert Stary: see Interview with Robert Stary, above n 43. Conidi has practised extensively in Victoria and the Northern Territory, and is also admitted in Western Australia. Conidi sees a connection between competent counsel and the legitimacy of punishment: 'You can justify locking people up only if you can demonstrate a fair trial — and you can do that only if the accused have had competent counsel.'

<sup>66</sup> Interview with David Grace, Victorian barrister and solicitor (Melbourne, 7 October 2005) (transcript on file with author). Grace has his own firm, specialising in criminal defence. He litigated the Australian 'right to counsel' case before the High Court: *R v Dietrich* (1992) 177 CLR 292. He is the first non-member of the private Bar in many years to be appointed Queen's Counsel. Grace believes that, without competent counsel, the presumption of innocence is an unenforced and empty ideal: 'You have to give content to that statement, philosophy, ethos. The presumption of innocence is supposed to be fundamental, but [without competent counsel] there is an uncontested presumption of guilt.'

A prominent barrister talked about the right to good representation as an entitlement inextricably connected to the adversarial system: ‘People are entitled to be defended. They are entitled to be properly prosecuted and properly defended.’<sup>67</sup> Another lawyer known for taking on unpopular cases was even pithier: ‘For a robust court system, you need robust defence.’<sup>68</sup>

Several lawyers made the point that when lawyers fail to stand between the most undesirable clients and the power of the state the entire system is at risk. As one public defender said: ‘We can’t import into the system a subjective value judgement about which case is more worthy than another, who is more deserving. If this happens, the system — and our entire society, really — cannot be said to represent justice.’<sup>69</sup> Another leading barrister said: ‘It is simply essential to the system that everyone, no matter how unpopular, gets a defence.’<sup>70</sup>

Many lawyers who represent unpopular clients believe that the very legitimacy of the legal system is reflected in how it treats the worst. As one prominent barrister stated:

The quality of the system is tested by how it treats the worst. ... The worst, most revolting criminal or terrorist or whoever it happens to be, if you can get a fair trial for them then everyone else is guaranteed a good run. But if the system starts taking short cuts because somebody is so bad, then it’s the system that’s coming apart.<sup>71</sup>

Another barrister known for high profile criminal cases said: ‘Defence lawyers stand between the state and a single citizen when the state has endless resources. You must bravely do your best or you’re letting the system down.’<sup>72</sup> A public defender said: ‘You have to keep the system honest, whether for the worst type of child murderer or an Aboriginal woman who kills her husband because he’s been beating her for years.’<sup>73</sup>

A long-time legal aid lawyer described a high profile double-murder case in which she represented a man who, together with another man, was alleged to have had sex with two prostitutes before tying them up and throwing them into crocodile-infested waters. People approached the lawyer and remarked upon

<sup>67</sup> Interview with Robert Richter, Victorian barrister (Melbourne, 14 October 2005) (transcript on file with author). Richter is a high profile criminal defence and human rights lawyer who has represented many unpopular clients. He came to the Bar in 1971 and helped to establish Fitzroy Legal Service soon thereafter. He had previously worked at Aboriginal Legal Services. In 2001, Richter, who is Jewish, considered accepting the case of alleged Nazi war criminal Konrad Kalejs. When this caused an outcry in the Jewish community, Richter was unmoved. However, in the end, he declined the case on conflict of interest grounds. Richter recently took on the representation of an alleged member of a terrorist group: see Ian Munro, ‘Terror Accused Considered “Jihad Australia” Bomb Attacks, Says Prosecutor’, *The Age* (Melbourne), 16 December 2005, 3.

<sup>68</sup> Interview with Phillip Boulten, above n 43.

<sup>69</sup> Interview with Dina Yehia, above n 63; see also James L High (ed), *The Speeches of Lord Erskine, while at the Bar* (first published 1876, 1984 ed) vol 1, 474.

<sup>70</sup> Interview with Julian Burnside, above n 51; see also Interview with Philip Dunn, above n 45: ‘If I act for a paedophile it doesn’t mean I’m a paedophile. ... You must believe that for the system to work it has to err on the side of not making mistakes — and competent defence counsel help ensure against mistakes.’

<sup>71</sup> Tippet, above n 3, 12, citing Lex Lasry.

<sup>72</sup> Interview with Philip Dunn, above n 45.

<sup>73</sup> Interview with Dina Yehia, above n 63.

what a dreadful case it was. However, she understood the importance of standing up for those whom everyone else reviles: ‘You believe you’re fighting the good fight’.<sup>74</sup>

A lawyer who has done more prosecution than defence work nevertheless felt strongly that excellent lawyers ought to represent the most unpopular defendants: ‘If the most unpopular defendants do not have the very best representation we might as well do away with lawyers altogether and let the courts decide it. There would be no one standing between the executive and individuals.’<sup>75</sup>

A legal aid lawyer who has also been in the private Bar<sup>76</sup> made the same point, but with self-deprecating humour:

Why represent clients that others loath? Sometimes I think it comes from my deeply indecisive nature. I don’t know whether someone is guilty or not. In 99 per cent of cases they say they are not guilty. As a lawyer, I say okay, that’s the system; you’re entitled to put this case. It’s all the more important when you have a deeply unpopular client. It’s more important to get the jury to put aside their prejudices. We don’t know things. That’s why we have a system designed not to find out the truth but to find out whether the Crown has proved its case.<sup>77</sup>

Another prominent lawyer made a similar point about lawyers ‘knowing’ that their clients are guilty:

People say you *know*. But everyone who has done any amount of trial work has had the mortifying experience of thinking you know what’s true and you find out that what the client has told you is true, and you were bloody wrong about your assumed knowledge of his guilt. ... [This experience] makes it easier to suspend judgment. We have a system. The jury decides. I don’t.<sup>78</sup>

One criminal defence lawyer agreed, noting that ‘first impressions can be totally wrong.’<sup>79</sup> He told a story about a client who had been accused of rape. With a wry warm-heartedness common to criminal lawyers, he described his client as an ‘idiot’ who ‘looked like a rapist’ with his ‘big bulging eyes’ and who acted like one with his ‘secretive’ and ‘strange’ manner. The complainant, on the other hand, was ‘compelling.’ When she testified at the committal hearing, she was ‘brave and snivelling’ as she offered up the awful details of the crime. She was later exposed as a liar by a purportedly corroborating witness — her soon-to-be former boyfriend. The complainant’s plan had been to extort money

<sup>74</sup> Interview with Suzan Cox, above n 8.

<sup>75</sup> Interview with Paul Willee, above n 55. See also Galbally, above n 6, 1–4.

<sup>76</sup> By ‘private Bar’ I refer to lawyers who are not public defenders or legal aid lawyers.

<sup>77</sup> Interview with Brian Devereaux, above n 52.

<sup>78</sup> Interview with Andrew Kirkham, above n 59 (emphasis in original). See also Interview with David Grace, above n 66:

There are plenty of examples where the community has it wrong. Look at the Lindy Chamberlain case. Sometimes the government gets it wrong. The facts can seem overwhelming but you have a client who maintains innocence. ... Look at DNA cases. The evidence seems certain but then is debunked. ... No lawyer can act as judge or jury.

<sup>79</sup> Interview with Peter Morrissey, above n 51.

from the accused, but the boyfriend began to fear that he would be accused next.<sup>80</sup>

Several lawyers argued that the advocate who represents unpopular clients plays an important role not only in the legal system but also in society. One lawyer referred to the independence of counsel and a strong criminal defence Bar as ‘the last defence of freedom against the state ... and the threat of despotism.’<sup>81</sup> Another stated: ‘Society is judged by how it treats its most marginal members. This includes those charged with heinous offences. If they are not properly represented and are wrongly convicted it is a sad reflection on society’s sense of justice.’<sup>82</sup> Another said: ‘You act for disadvantaged people because it’s the edge of the wedge. If not them, who’s next?’<sup>83</sup> Still another simply said: ‘It’s good when people in extreme situations are looked after.’<sup>84</sup>

Even lawyers who were motivated more by politics than by professionalism, or who held a critical or leftist perspective on law and society, expressed admiration for the core values of the profession. One long-time advocate for poor and indigenous people, the criminally accused and, most recently, prisoners, acknowledged the influence of the Australian legal profession on her own representation of unpopular clients:

Probably it is something deeper in me. ... Yet, I do believe that everyone is entitled to representation. We have a good legal system in terms of its philosophy. It doesn’t always work, but its tenets are important. The same basic rights apply to everyone whether they are accused of murder, rape, treason, or terrorism. As a lawyer you take this on as a responsibility.<sup>85</sup>

Another legal aid lawyer said:

Law is such a broad and diverse practice. Not all of it is attractive. Being a lawyer is not necessarily attractive. But, the system is designed to ensure a fair trial for people, and my job is to make sure that actually happens. This is what I do everyday. It’s a good idea. It’s a good societal goal.<sup>86</sup>

<sup>80</sup> Ibid. As Morrissey said: ‘The client was ... strange, but the complainant was *mad*’ (emphasis in original). In the end, the client did not seem particularly angry and did not seek revenge. ‘He told me, “Let it go”.’

<sup>81</sup> Interview with Shane Tyrrell, above n 46.

<sup>82</sup> Interview with David Grace, above n 66.

<sup>83</sup> Interview with Peter Condliffe, Victorian barrister (Melbourne, 5 October 2005) (transcript on file with author). Condliffe has been practising law since 1975. He is a human rights and criminal lawyer who specialises in asylum and refugee cases. He also has expertise in alternative dispute resolution and restorative justice.

<sup>84</sup> Interview with Peter Morrissey, above n 51.

<sup>85</sup> Interview with Susan Bothmann, Coordinator, Prisoners’ Legal Service (Melbourne, 5 November 2005) (transcript on file with author). Bothmann has been both a barrister and a solicitor in New South Wales, Queensland and Victoria and also practised law in Vanuatu where she helped to establish the University of the South Pacific School of Law in Vanuatu. She began her career as one of the first lawyers at the Fitzroy Legal Service, Australia’s first community legal service. She also worked for the Aboriginal Legal Service in Victoria and Aboriginal Legal Services in New South Wales. In her current position, she oversees the only prisoners’ legal service office in Australia: see Prisoners’ Legal Service Inc <<http://www.plsQLD.com>>.

<sup>86</sup> Interview with Brian Devereaux, above n 52.

A left-leaning lawyer representing several young men accused of being part of an Islamic terrorist cell explained his idea of professional obligation in the face of serious and terrible crime:

I'm a barrister. ... I am compelled to act for these people, all things being equal. ... The cab rank rule coincides with my own view of [the] professional role, and I have never sought to evade it. ... It's not necessarily fun. I don't do it for the challenge. Literally a lot of cases I take I'd rather not do. But if someone asks me to do it I will.<sup>87</sup>

Although some cases can be gruelling for even the most dyed-in-the-wool defence lawyer, not a single barrister indicated that he or she would ever refuse a case based on the nature of the crime. One lawyer spoke for all when he said: 'I would not refuse a case on ideological grounds. Everyone is entitled to a defence. It's my obligation as a barrister to represent the client.'<sup>88</sup> Another long-time criminal defence lawyer, when asked whether there was any category of case she would not take — an alleged terrorist, a member of the Mafia or a sex offender — said: 'Absolutely no problem. ... Even if a police officer came in, I'd represent them.'<sup>89</sup>

One lawyer admitted that it was not always easy to discharge his professional obligation, but that he does his duty nonetheless: 'I confess there are particular types of crimes that I prefer not to do — cases involving children, including child killing. I have kids of my own. ... But, you can't reject a case because you don't like the crime or the criminal.'<sup>90</sup> Another agreed: 'I don't do many child sex abuse cases, but I wouldn't turn them down.'<sup>91</sup>

Lawyers who are not at the private Bar — and, hence, who are not bound by the cab rank rule — do find occasion to assert their right to refuse cases on whatever grounds they choose, as in the US model. One lawyer who has his own firm used to take paedophilia cases, but now turns them down: 'I've done it all — child sexual abuse, rape — but I've had enough. I have two young daugh-

<sup>87</sup> Interview with Phillip Boulten, above n 43.

<sup>88</sup> Interview with Peter Condliffe, above n 83.

<sup>89</sup> Interview with Suzan Cox, above n 8. Another long-time defence lawyer also pointed out his willingness to represent police officers, something he has done on occasion:

In the 1980s, there were a bunch of police shootings. This generated an inquiry into the use of police force. ... The Chief Commissioner wanted me to represent him at the inquest. I did. It lasted two years. I tried to make sure he came out well and good. I also did it so he'd take my advice [on reforms].

Interview with Robert Richter, above n 67. Richter later represented two police officers charged with murder. 'They were charged with serious offenses and they had a story'. The author is aware that most people would not single out police officers accused of crime as the worst cases. Seeing them as such is a uniquely defence perspective: see Abbe Smith, 'Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things' (2000) 28 *Hofstra Law Review* 925.

<sup>90</sup> Interview with John Stratton, above n 8. A legal aid lawyer agreed: 'The awful clients are child sex offenders, revenge rapists, child murderers': Interview with Laura McDonough, Team Coordinator, Criminal Law Division, Victoria Legal Aid (Melbourne, 17 November 2005) (transcript on file with author). McDonough is a barrister and solicitor who has been practising law for 13 years. She is a Law Institute of Victoria accredited criminal law specialist.

<sup>91</sup> Interview with Robert Richter, above n 67.

ters.<sup>92</sup> One legal aid lawyer struggled hard to represent the accused in a vicious rape case involving multiple attacks but found she could not carry out her obligation: ‘My judgement was skewed. I started to empathise with the complainant. ... I struggled with it. It was upsetting to me that I would ever hand a case back.’<sup>93</sup>

Another legal aid lawyer has never turned down a case, but recently came close:

It was a fellow charged with a murder. It wasn’t so much the nature of the case. It was the nature of the client. I might have been feeling a bit tired or something. ... We could have briefed the case to someone else. But this was an exception. People here take cases — whatever comes to them — subject to availability and workload.<sup>94</sup>

One lawyer with his own firm said: ‘I believe I have a professional duty to take on [serious, unpopular] cases most of the time. I seldom turn down a case. But if I don’t want to do a case I won’t.’<sup>95</sup> Another lawyer with his own practice never turns down rape, murder or child abuse cases, but will not act for current or former police officers,<sup>96</sup> white-collar defendants, or ‘entrepreneurial drug dealers.’<sup>97</sup>

<sup>92</sup> Interview with David Grace, above n 66. Interestingly, some lawyers expressed a special concern for accused and convicted child abusers. As one lawyer stated: ‘Sex offenders have no one. They have major complaints about prison conditions, and the authorities don’t care. So they get a double whammy in the justice system and prison system’: Interview with Pauline Spencer, Executive Officer, Federation of Community Legal Centres (Vic) Inc (Melbourne, 14 November 2005) (transcript on file with author). Spencer has acted for trade unions, women who have been sexually harassed and/or otherwise discriminated against, and poor people in Queensland and Victoria. She was at the Fitzroy Legal Service prior to working at the Federation of Community Legal Centres. She successfully obtained the release of Heather Osland, a woman imprisoned for killing her abusive husband.

<sup>93</sup> Interview with Laura McDonough, above n 90. This gang rape is the only case she has ever turned down and she did not do so lightly. As she remarked: ‘It is rare not to find a single redeeming factor about a person. This one client was chilling.’ Still, McDonough made clear that it was not the client or the crime that caused her to decline the case, but her fear that her lawyerly judgement was not what it should be. Because she worked for legal aid, it was easy to find another lawyer for the client. Nonetheless, she said: ‘I would have done it if I had to.’

<sup>94</sup> Interview with Brian Devereaux, above n 52.

<sup>95</sup> Interview with David Gunson, above n 56.

<sup>96</sup> Cf above n 89 and accompanying text.

<sup>97</sup> Interview with Robert Stary, above n 43.

Yet, even among those lawyers who were not bound by the cab rank rule, it was rare for someone to say that they would refuse a case out of distaste, discomfort, or ideology.<sup>98</sup> One barrister and solicitor working at a legal aid office said:

I don't think consciously about the cab rank rule. ... But, on the other hand you don't pick and choose. ... The only time you can't do a case is when you have an ethical dilemma ... or if you can't represent the [client] to the best of your ability. A case involving public outcry shouldn't affect how I act on behalf of another.<sup>99</sup>

Another legal aid lawyer talked about the 'greater desire to make sure that someone made unpopular in the press gets a fair trial', with or without a cab rank rule.<sup>100</sup>

Yet another said that if you believe in everyone having a right to a fair trial, you should not refuse cases, whether the cab rank rule applies or not:

If you are interested in the process or the right to a fair trial you shouldn't be in the business of making up your mind about guilt or innocence or the worthiness of the client. You can't just pick and choose. I take my judgement home. I do my part and it's up to the jury to determine guilt or innocence. You're there to represent the client in the best way you can.<sup>101</sup>

<sup>98</sup> Of the 25 lawyers interviewed, only two had a policy about not taking certain types of cases. One noted that he rarely turns down criminal cases because he enjoys the work, especially if it is a serious crime. He is 'less interested in minor crime': Interview with David Gunson, above n 56. Gunson represents a lot of white-collar crime defendants: 'Fishery crime, for example. I guess that's not white collar exactly. It's more like a wetsuit crime.' Another lawyer, when asked whether he ever turned down cases, laughed and said: 'If they can't pay.' This lawyer later requested that he not be named, because he had said what he said 'tongue in cheek'. I pointed out that, whether or not he was being entirely serious, his position was perfectly ethical — under the rules of ethics in Australia, a lawyer may decline a case because the proposed fee is insufficient — nevertheless the lawyer did not want to be seen as 'mercenary'.

<sup>99</sup> Interview with Domenico Calabrò, Managing Lawyer, Victoria Legal Aid, North-Western Suburbs Regional Office (Melbourne, 8 November 2005) (transcript on file with author). Calabrò is a Victorian barrister and solicitor who has worked in a variety of settings. At the start of his career, he worked at the Fitzroy Legal Service, and then at the Aboriginal Legal Service in Victoria, primarily doing criminal defence. Next he worked at Job Watch, investigating exploitation in employment and training. He then sat on two different tribunals — the Refugee Review Tribunal and the Social Security Appeal Tribunal. He has been at Victoria Legal Aid since 1997.

<sup>100</sup> Interview with Brian Devereaux, above n 52. Devereaux provided an example of how this 'greater desire' on behalf of the unpopular kicks in:

A couple of years ago there was a fire in a backpackers hotel. Fifteen backpackers were killed. This was an infamous international case. One of the people in my office did the committal hearing. At the start of the hearing, the magistrate made a public statement of understanding to the families of the deceased. We thought this was outrageous. We asked him to stand aside but he refused. We then paid for a QC to litigate the issue [of recusal] in the higher courts — even though it was just a preliminary hearing. The defendant was copping a flogging in the press — everyone was saying 'we got him.' There's an important message to be sent in fighting the magistrate's conduct. We would give full weight to the accused's right to a fair trial no matter what he was accused of.

<sup>101</sup> Interview with Domenico Conidi, above n 65.

Not a single lawyer said that they would refuse a client who was alleged to have committed an act of terrorism.<sup>102</sup> Yet, this willingness to take on even the most repugnant cases is not necessarily the same as eagerness or ‘swagger’.<sup>103</sup> One prominent lawyer spoke candidly about the tension between his personal feelings and professional duty in representing alleged terrorists post-September 11 and Bali:

There’s a dilemma. I’ve watched how extremists conduct themselves and I find it appalling. Muslim automatism I find revolting. I watched the second plane hit the World Trade Center live — with the people in the buildings having to choose whether to jump or burn. I get irritated by the hatred and antagonism of these clients. It’s not the client; I don’t especially want to help these people. It’s my belief in the system. ... I want to ensure a fair trial [in which] the pressure is on the system not to take shortcuts. The pressure is significant but unspoken in terrorism cases — especially since 9/11, Bali, and London.<sup>104</sup>

One barrister who was willing to represent alleged terrorists offered a qualification:

I would have a doubt if they weren’t receiving a real trial. If it were someone in David Hicks’ situation at Guantanamo — where the lawyers are being used as pawns or puppets — then I wouldn’t do it. But, if there was a faint chance of a fair hearing then I would do it.<sup>105</sup>

<sup>102</sup> When asked whether he would represent an alleged terrorist, a young barrister was honest enough to suggest that such a case could only be good for his developing criminal practice: ‘Narcissism kicks in. Of course I’d say yes. I literally can’t see a reason not to represent them’: Interview with Theodosios Alexander, Victorian barrister (Melbourne, 21 October 2005) (transcript on file with author). Alexander joined the Bar in 2003. He prefers criminal defence to all other legal practice. This statement was part of a broader principle about which Alexander feels strongly: ‘Everyone is entitled to have someone speak for them. Everyone — guilty or innocent. I don’t distinguish among clients so long as they are willing to pay my brief.’

<sup>103</sup> See, eg, Interview with Brian Devereaux, above n 52: ‘I’d have no problem taking an alleged terrorist, though I admit I haven’t been tested like that.’ For the classic Australian novel on the blood, sweat and swagger that built the country, see Miles Franklin, *All That Swagger* (1936). When asked how he felt about undertaking the representation of alleged (and later convicted) multiple killer Martin Bryant, Tasmanian lawyer David Gunson shared his mixed feelings:

I hoped I wouldn’t get the call. I thought seriously about it. I knew it would be unpopular with my partners and staff and family. But I knew someone experienced and competent would have to do it. ... Yet, I didn’t get any flack from anyone for taking on the Bryant case. No hate mail at all. No one gave us any difficulties. Most right thinking people knew that in our system an accused should be properly represented.

Interview with David Gunson, above n 56.

<sup>104</sup> Interview with Lex Lasry, above n 8. Prominent defence lawyer Robert Richter — the son of eastern European Jews who survived the Holocaust and made it to Israel, where Richter grew up — offered his own example of the sometimes uneasy relationship between professional role and personal feelings: ‘If I were a doctor and they brought Hitler in with a bullet wound, I’d do my job and treat him. Maybe later, as a person, I’d kill him’: Interview with Robert Richter, above n 67.

<sup>105</sup> Interview with Peter Morrissey, above n 51. David Hicks is an Australian citizen who was arrested in Afghanistan and held at Guantánamo Bay for allegedly fighting for the Taliban: see below n 109 and accompanying text.

A legal aid lawyer said she would be ‘happy to represent an alleged terrorist’, but expressed reservations about the intensive scrutiny of lawyers who take on such cases:

The anti-terrorism legislation provides that if you want to act for these people you have to pass through levels of security. ... The Government gets to vet their opposition in high profile supposed terrorist cases. ... Aside from this, I wouldn’t mind. But my mum wouldn’t be happy.<sup>106</sup>

Several lawyers spoke about the sense of professionalism that enables them to put aside personal feelings, value judgements and misgivings that inevitably accompany a particularly nasty case. As one lawyer put it:

As soon as you’re into a case there’s none of that value judgement. It’s about being analytical, logical, and objective. Regardless of how personally it affects you. And it must do in some cases. But, it’s interesting to see people in this profession put feelings aside and demonstrate passion and commitment no matter who the client is or what they have been alleged to have done.<sup>107</sup>

A couple of lawyers expressed a vague concern about safety. As one lawyer said: ‘I’d take a terrorist case. It’s my job. There’s no reason to knock that case back. But if I had a safety concern I might not take the case. It’s a job and my family would come above it. But I have never had such concerns.’<sup>108</sup> Another lawyer, noting that as of November 2005, two of Saddam Hussein’s lawyers have been assassinated, said that his commitment to law and to justice would not compel him to put himself in physical peril: ‘I would not go where I’d be in danger.’<sup>109</sup>

Although most of the lawyers interviewed believe in the cab rank rule and felt that it has had a positive impact on Australian legal ethics and their own sense of professionalism,<sup>110</sup> not everyone agreed. One lawyer remarked: ‘I’m not a great

<sup>106</sup> Interview with Laura McDonough, above n 90. See also Interview with Pauline Spencer, above n 92: in response to a question about Spencer’s willingness to represent someone accused of committing the same sort of terrorism that happened in Bali in 2002 on Australian soil, she said, ‘In fact, I do not work Fridays, and I was thinking about calling Rob Stary and asking whether he could use some help with his recent [terrorism] cases.’

<sup>107</sup> Interview with Dina Yehia, above n 63.

<sup>108</sup> Interview with Kerri Mellifont, Queensland barrister (Telephone interview, 4 November 2005) (transcript on file with author). Mellifont had her first experience with indigent criminal defence as a high school student. She was assigned to a public defender office as part of a ‘work experience’ programme, and the office suggested that she come back for an interview after she graduated from high school. She did this and obtained a job as a paralegal, which she held while completing her law degree part-time. After graduating from law school, she remained at the public defender’s office for some time and then became a federal prosecutor dealing with mostly white-collar crime and drug importation cases. She then went to the private Bar. Her practice is approximately 70 per cent criminal. Mellifont says she feels more suited to defence work than prosecution because it is where she started: ‘my time at the [public defender’s] office ingrained in me the defence spirit.’

<sup>109</sup> Interview with Lex Lasry, above n 8. Lasry has, however, been involved in cases in Sierra Leone and Singapore. In 2004, he was appointed by the Law Council of Australia as its Independent Observer for the trial of David Hicks at Guantánamo Bay: see Tippet, above n 3, 12; see further Lex Lasry, *United States v David Matthew Hicks: Report of the Independent Legal Observer for the Law Council of Australia* (2005) <<http://www.lawcouncil.asn.au/shared/2414077863>>.

<sup>110</sup> See Interview with Theodosios Alexander, above n 102, who believes that the ‘cab rank embodies what we should all do. It’s appropriate and important to have such a rule’; Interview with Julian Burnside, above n 51: ‘The cab rank rule is something I think is very important’;

believer in the cab rank rule. I take cases because there are principles to be argued about ... legal principles and social principles.<sup>111</sup> Another said: 'I have my own moral code.'<sup>112</sup> Yet another said:

I don't think my motivation comes from the cab rank rule. We have one [in Queensland] — but I don't know that it's applied 100 per cent. ... I think it comes from my social values. You just have to take on some of the hard cases with indigent clients and unpopular clients. ... You can kill yourself on Legal Aid [cases] — but you have to do these cases, you just do. ... Everyone has the right to be defended no matter what they've been accused of. I really believe that.<sup>113</sup>

One of the problems is that the cab rank rule is too often seen as a 'theory' or 'principle' and is fairly easy to evade. One lawyer was dismissive: 'Cab rank is a theory. I don't subscribe to it.'<sup>114</sup> Another lawyer who likes the theory nonetheless acknowledged that 'if you feel you can't do it you can turn it back.'<sup>115</sup> Another lawyer said: 'Cab rank is much honoured in principle, but not always in practice.'<sup>116</sup> Another lawyer referred to the cab rank rule as a 'principle' only and 'people can find excuses — they're busy or can't afford it.'<sup>117</sup>

One prominent barrister, who believes that unpopular clients ought to be well represented, was not convinced that he always needed to be the one providing that representation. Among the things he considered in agreeing to take a case was 'how much angst it will cost me. ... If you're offered a high profile case you want, it's easy', he said. But 'a high profile case that takes you away from home for ... long periods of time [is another matter]'. The barrister noted: 'you know you've made the wrong choice when your four-year-old lies down between you

Interview with Suzan Cox, above n 8: 'First cab off the rank — I really believe in it. It played a conscious role [in my decision to take on these cases]'; Interview with Elizabeth Dowling, above n 7: 'I thought [the cab rank rule] was so fair and fantastic and great. You put your own feelings to one side. You argue to the best of your ability. I hate the morality contest some lawyers get into. It goes against the whole adversarial system to reject cases'; Interview with Philip Dunn, above n 45: 'If you're competent and available you must take the brief. That's what makes barristers independent.'; Interview with Peter Morrissey, above n 51: 'Cab rank is an important rule and you have to respect it. You protect the system from falling into disrepute'; Interview with Robert Richter, above n 67: 'I believe in [the cab rank rule]. I like it. ... If you're available and it's in your field you take the case. I think it's a good principle'; Interview with John Stratton, above n 8: 'The duty to represent the unpopular is enshrined in our rules and is very important. It's how we can justify appearing for people charged with terrible crimes.' In *Arthur J S Hall & Co (a firm) v Simons* [2002] 1 AC 615, 739 (Lord Hobhouse), the cab rank rule was described as 'a fundamental and essential part of a liberal legal system'; see also *Gian-narelli v Wraith* (1988) 165 CLR 543, 580 (Brennan J).

<sup>111</sup> Interview with Lex Lasry, above n 8.

<sup>112</sup> Interview with David Grace, above n 66.

<sup>113</sup> Interview with Kerri Mellifont, above n 108.

<sup>114</sup> Interview with David Gunson, above n 56.

<sup>115</sup> Interview with Suzan Cox, above n 8. See also Interview with Peter Morrissey, above n 51: 'the cab rank rule is not that hard to comply with. The rule is if you're asked and the fee is proper then it doesn't matter how bad the case is. ... But probably you could prefer one case over another, if you didn't feel like representing a child molester this week.'

<sup>116</sup> Interview with Julian Burnside, above n 51. Burnside noted that he would have been entitled to 'knock back the Tampa case because it was for no fee.'

<sup>117</sup> Interview with David Grace, above n 66.

and the door and refuses to budge, crying that he does not want you to go away yet again.<sup>118</sup>

A lawyer who admires the cab rank rule pointed out that ‘fancy pants law firms with Persian rugs don’t represent everyone. The rule can be easily evaded.’<sup>119</sup> A prominent barrister who approves of the cab rank rule has had his share of unpopular cases, and has never sought to evade the rule, nevertheless admits that he feels he can ‘pick and choose cases’ now that he is a bit older and ‘not working as hard.’<sup>120</sup>

Consistent with the notion of professionalism is the obligation to work hard no matter who the client is or what the client has done.<sup>121</sup> One criminal lawyer described her work ethic on behalf of the criminally accused even when she knew her client was guilty:

I couldn’t live with myself if I didn’t give a thousand per cent even for the guilty. ... I try as hard no matter whether it is a losing case or one I should win. I couldn’t live with myself if I didn’t. ... I’m awful to be around when I’m in trial. I lie awake at night worrying about whether I gave everything in my ability to a case. You just have to do it right.<sup>122</sup>

Another defence lawyer had a similar approach: ‘The only thing I feel guilty about is my own incompetence or whether I am working hard enough. It is never about who I represent. I have trouble sleeping worrying about doing my job better.’<sup>123</sup>

Another defence lawyer talked about working day and night on a ‘particularly savage murder case’, where the prosecution’s evidence was overwhelming but the client was ‘adamant that he didn’t do it.’<sup>124</sup> The fact that it was a losing battle and it was likely that the client was guilty had ‘absolutely no effect’ on the way she tried the case:

We fought it really hard. By the end of my address we convinced ourselves that we had a chance. We originally thought the jury would be out for an hour. When they were out for three days we started to get our hopes up. When they came back and convicted, the solicitor I was working with cried. She thought we had won it.<sup>125</sup>

One career legal aid lawyer talked about visiting her client in prison for a grisly murder case where the evidence was overwhelming and the client had made a confession ‘to help his mate’. She visited every weekend for over two months to work with him so that he would be able to tell his story effectively. ‘He was wonderful on the witness stand’.<sup>126</sup> The same lawyer feels strongly that

<sup>118</sup> Interview with Paul Willee, above n 55.

<sup>119</sup> Interview with Elizabeth Dowling, above n 7.

<sup>120</sup> Interview with Andrew Kirkham, above n 59.

<sup>121</sup> See, eg, Interview with Dina Yehia, above n 63: ‘It’s interesting to find yourself fighting just as hard no matter what the client has allegedly done.’

<sup>122</sup> Interview with Kerri Mellifont, above n 108.

<sup>123</sup> Interview with Philip Dunn, above n 45.

<sup>124</sup> Interview with Dina Yehia, above n 63.

<sup>125</sup> *Ibid.*

<sup>126</sup> Interview with Suzan Cox, above n 8.

the poor deserve the same quality representation as the rich. ‘My philosophy is people deserve a fair trial no matter what they’ve done and no matter how poor they are. Poor people are entitled to the same quality of representation as anyone else.’<sup>127</sup>

A political lawyer described a ‘horrific case’ involving the abduction, torture, rape and murder of two schoolgirls by a client who was ‘psychotic and had not one redeeming feature about him’:

The families were grieving terribly. The judge and jury were visibly upset when the co-defendant recounted the last moments of the girls’ lives. A defence lawyer even had to leave the courtroom. And the defendant just sat there with a bland expression on his face. ... He was the most unrepentant bastard of a client I ever had. ... When he was convicted and received a sentence of ‘life never to be released’ I didn’t lose a moment’s sleep. I thought justice had been served. ... But, we did an appeal pro bono for him all the way to the High Court. There was a legal issue about acting in concert, an important legal principle that needed to be pursued.<sup>128</sup>

Very few Australian lawyers with whom I talked expressed any sort of reluctance to undertake the case of an odious or unpopular client. Indeed, many lawyers spoke as if the burden of explanation was on a lawyer who would refuse such a case. One lawyer put it strongly: ‘When I take on an unpopular case I am doing my job, my duty. We have certain ethical obligations. We are not to judge our clients. That’s for judges. Lawyers represent clients.’<sup>129</sup> Another said:

How can you not represent unpopular clients if you have a system that is supposed to be about justice and people getting a fair trial? If you can’t do that for people judged to be ‘evil’ then the system is corrupt. The system must protect the rights of all, or you can’t guarantee it for anyone.<sup>130</sup>

Another said: ‘There’s nothing worse than a lawyer who lets his personal feelings get in the way. ... I would never turn down a brief on behalf of an unpopular client. God strike me down if I did.’<sup>131</sup>

Perhaps this nearly universal embrace of professionalism is unsurprising in view of the Australian tradition of the Bar’s ‘objectivity’ and ‘independence’<sup>132</sup> and the conception of Australian lawyers as officers of the court first and foremost.<sup>133</sup> As G E Dal Pont, scholar of Australian and New Zealand legal ethics has observed: ‘The administration of justice depends, and the court relies,

<sup>127</sup> Ibid.

<sup>128</sup> Interview with Robert Stary, above n 43.

<sup>129</sup> Interview with Robert Richter, above n 67. Richter noted that he did not think twice about representing a ‘Mafia Don’ accused of murder where the defence was self-defence. He tackled his client’s unpopularity ‘head-on’. He told the jury, ‘You read the papers. You think he’s guilty.’ He then used the jury’s likely prejudice against his client to teach them about the presumption of innocence and the government’s burden of proof. ‘I argue[d] if you think he probably did it then you must acquit, because *probably* is not proof beyond a reasonable doubt’ (emphasis in original).

<sup>130</sup> Interview with Dina Yehia, above n 63.

<sup>131</sup> Interview with Theodosios Alexander, above n 102.

<sup>132</sup> See Dal Pont, above n 34, 446–51.

<sup>133</sup> See below n 226 and accompanying text.

on the faithful exercise by counsel of independent judgment in the conduct and management of the case.<sup>134</sup>

Legal ethics rules reflect this same tradition. Although each jurisdiction in Australia has its own set of ethical rules, there is movement towards the adoption of a uniform national code based on the Law Council of Australia's *Model Rules of Professional Conduct and Practice* (2002) ('*Australian Model Conduct Rules*').<sup>135</sup> The *Australian Model Conduct Rules* emphasise the 'privilege' of practising law and the attendant professional obligations, at the heart of which is maintaining the proper functioning of the system:

A practitioner is endowed by law with considerable privileges, including exclusive entitlement to appear in some courts and tribunals, exclusive entitlement to conduct some transactions and draw some documents, and special protection against disclosure of client confidences. These privileges require that the community has confidence that a practitioner must at all times be fit to enjoy those privileges. A practitioner ought also to act in ways which uphold the system of administration of justice in relation to which those privileges are conferred.<sup>136</sup>

In keeping with this emphasis on the lawyer's role in relation to the system (rather than in relation to the individuals they represent), relatively few Australian lawyers talked about the individual client as a motivating factor. Even when explicitly asked about a desire to 'help people' in their time of trouble, only a handful of lawyers seemed primarily motivated by altruism. One public defender said:

I think it's both. To a large extent, my concerns are systemic. I believe in making sure the protections are in place because the integrity of the system is at stake. Equally, I believe you can assist people. Not in all cases. ... At the very least, you can make sure people who have never had a voice will have one.<sup>137</sup>

Another lawyer replied: 'Helping people? It's not my biggest motivation. But I like the fact that what I do helps people.'<sup>138</sup>

However, a few lawyers do regard themselves as part of a 'helping' profession,<sup>139</sup> using their expertise to assist people who lack the means to help themselves. One lawyer left commercial practice because 'the chase for the dollar ... left [him] empty' and 'the interest in helping people wasn't there.'<sup>140</sup> He went overseas for a year, and came home determined to find work that he cared about:

<sup>134</sup> Dal Pont, above n 34, 446.

<sup>135</sup> Although there is some variation among jurisdictions, the *Australian Model Conduct Rules* convey generally accepted ethical practices for Australian lawyers. For the ethical rules of individual Australian jurisdictions: see *Professional Conduct Rules 2003* (ACT); *Professional Conduct and Practice Rules 1995* (NSW); *Rules of Professional Conduct and Practice 2002* (NT); *Solicitors Handbook 2003* (Qld); *Rules of Professional Conduct and Practice 2003* (SA); *Rules of Practice 1994* (Tas); *Professional Conduct and Practice Rules 2005* (Vic); *Professional Conduct Rules 2003* (WA).

<sup>136</sup> *Australian Model Conduct Rules* r 31.

<sup>137</sup> Interview with Dina Yehia, above n 63. Yehia noted that 'in sentencing you might be able to put clients in touch with services — people who have never had the wherewithal to know how to help themselves.'

<sup>138</sup> Interview with Phillip Boulten, above n 43.

<sup>139</sup> Ross, above n 33, 58.

<sup>140</sup> Interview with Domenico Calabrò, above n 99.

Being able to be an advocate for young people, homeless people, people with intellectual disability or psychiatric illness — giving them a voice, empowering them, trying to make a change for them — these were things I wanted to do.<sup>141</sup>

He took a job at Fitzroy Legal Service, the first community-based legal services office in Australia, because, more than anything else, he wanted to ‘help people’:

I had enthusiasm if not experience. I was naïve. I wanted to help people even though I didn’t really know the issues. ... 25 years ago Fitzroy Legal Service wasn’t in the neighbourhood it’s in now. It was close to public housing high rises. Police were treating people badly at the time — people who came from countries where the police were instruments of torture and torment. ... For a long time people were too afraid to speak out about what was happening. If the Government made a decision they didn’t want to rock the boat. ... But people who were scared could come to us.<sup>142</sup>

A lawyer who works with prisoners is also motivated by a desire to help those most in need, no matter what they may have done to end up in prison: ‘They need your help’.<sup>143</sup> In keeping with Babcock’s ‘social worker’ or ‘humanitarian’ motivation, this lawyer spoke of the everyday hardships and horrors of prison life, and the importance of reaching out to the unfortunates behind bars: ‘There is a lack of humanity in prisons; someone has to show some humanity. I want to help people. To people in prison the lawyer is a lifeline’.<sup>144</sup>

A criminal defence lawyer said:

Everyone needs help sometimes. ... When people say: ‘how can you represent scum like that?’, I say: ‘let me tell you a bit about the person you’re calling scum. Then they change their view.’ I think every being has a redeeming quality. Maybe that’s a defence point of view.<sup>145</sup>

Another criminal defence lawyer felt similarly: ‘People don’t think ‘these people’ don’t deserve a lawyer. They don’t like the conduct. But, I always wanted to help. Most of the people I represented early in my career were drug affected or came from disadvantaged backgrounds.’<sup>146</sup>

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Interview with Pauline Spencer, above n 92.

<sup>144</sup> Ibid. Spencer expressed a strong connection to the clients she serves: ‘I take client issues seriously no matter how trivial or troublesome they appear.’

<sup>145</sup> Interview with Theodosios Alexander, above n 102.

<sup>146</sup> Interview with Domenico Conidi, above n 65. Conidi confessed that his motivation for indigent criminal defence has ‘changed a little’ over the years. He has moved away from an ‘emotional, instinctive desire to help’ to a more ‘clinical approach that is concerned with process.’ He adds that although he continues to believe that much crime comes from drugs and disadvantage, ‘I have also come across some inherently bad people.’ Another criminal lawyer talked about his evolving motivations:

Emotionally, it’s nice to help people. ... But there’s a bit of condescension to being a do-gooder. It’s a bit of a vice in my family. You have to show respect for people you’re looking after. ... You have to regulate your self-importance. ... The ... idealism fades a bit when you learn what happens to the people you’ve ‘helped’ ... clients often let you down. ... I’ve become less wide-eyed about crooks but not less committed to looking after them.

Interview with Peter Morrissey, above n 51.

One prominent barrister said: ‘When it comes down to it, the law is all about people. ... Except when you’re prosecuting, in the main you’re trying to help people.’<sup>147</sup>

Still, there was relatively little conversation about helping clients. One not especially altruistic defence lawyer — by his own admission — remarked sardonically: ‘Every so often you feel like you really do help people, which is a good feeling.’<sup>148</sup>

### B *Politics*

For some Australian lawyers, representing unpopular clients is an expression of political or philosophical commitment along the lines of Babcock’s ‘political activist’ motivation. In addition to professional duty, these lawyers represent the unpopular to further social justice and redress inequality or oppression. Even lawyers not primarily motivated by politics can end up ‘taking sides’ in the politically charged atmosphere that sometimes accompanies these cases.<sup>149</sup>

One lawyer has an ‘overtly political firm’ on the industrial outskirts of Melbourne, where many of his clients live.<sup>150</sup> The location was a ‘philosophical, ideological decision’, he says. ‘It’s political and social justice issues that ... drive me.’ His representation of the unpopular — trade unionists and poor criminal defendants — is motivated more by ‘conscience and principle’ than by legal ethics.<sup>151</sup> Regarding the criminally accused, he states: ‘When you look at people in the criminal justice system, they are the most marginalised and disadvantaged. They need robust representation.’<sup>152</sup>

A lawyer who would ‘not hesitate to represent alleged terrorists’, and who has been acting for these clients since the very first arrests under Australia’s anti-terrorism laws, acknowledged a political motivation:

There has always been an ideological or social dimension to my work. ... How long is a piece of string? This is my personality, my outlook on life — my political and ethical view of the world. I’m much the same person I was when I was a law student and active in political causes. ... In addition to acting for alleged terrorists, I have also been involved politically in trying to moderate draconian anti-terrorism legislation.<sup>153</sup>

<sup>147</sup> Interview with Andrew Kirkham, above n 59.

<sup>148</sup> Interview with Philip Dunn, above n 45.

<sup>149</sup> See Danny Rose, ‘We Can’t Change Execution Attitudes: PM’, *Australian Associated Press Bulletins*, 4 December 2005; see also Melissa Fyfe and Michelle Grattan, ‘Emotional Toll High, but Lasry Says He Would Do it Again’, *The Age* (Melbourne), 5 December 2005, 2.

<sup>150</sup> Interview with Robert Stary, above n 43. The firm tries to employ ‘local people ... and people who share [their] political values.’ Stary himself grew up on public housing, in those same suburbs.

<sup>151</sup> *Ibid.* Stary sees a connection between working men and women and those caught up in the criminal justice system: ‘There’s no difference from my broad perspective in representing trade unionists and poor criminal defendants’.

<sup>152</sup> *Ibid.*

<sup>153</sup> Interview with Phillip Boulten, above n 43.

The same lawyer said he became a criminal lawyer both out of intellectual interest<sup>154</sup> and his ‘deep sense’ that there was a need to ‘even up the balance.’<sup>155</sup> This lawyer saw that there were clear sides in the criminal process, with one side, the prosecution, having all the power. He wanted to advocate for those on the other side of that power:

I see the criminal process as weighted in favour of the police and prosecution and making it difficult for people who stand accused. An important part of my self-identity is making sure the system is fair and balanced and making sure no injustice occurs.<sup>156</sup>

A career legal aid lawyer talked about her ‘strong social conscience’ and the impact of late 1960s and early 1970s activism on her life choices:

I was in university in the seventies. My family had a strong social conscience. I took [the subjects] Poverty Law and Aboriginals and the Law, and was always interested in working in these areas. ... I was interested in prisoners’ rights and looking after people others hate. ... People are people; they’re human beings. There’s always something to be said for people. They are stupid or silly usually, not bad.<sup>157</sup>

When asked what motivated him to represent the poor accused, another long-time legal aid lawyer referred to the ‘social justice answer’ and the ‘interest in my career answer’:<sup>158</sup>

One of the reasons to be at legal aid is you can effect systemic changes. We try to make sure that a policy under consideration actually works. For example, the new anti-terrorist legislation. ... This is a good reason to be a lawyer. You can exercise — or at least hope to exercise — some influence on the policy direction of society.<sup>159</sup>

A career poverty and prisoners’ rights lawyer dismissed the idea that Australian legal ethics or the cab rank rule played any sort of role in her lifelong representation of the unpopular. She declared: ‘Legal ethics plays no role [as a motivating factor for representing the unpopular]. It was just not in my head.’<sup>160</sup> When asked why she represented the unpopular, she responded with a single word: ‘Injustice’. She explained:

<sup>154</sup> See below n 211 and accompanying text.

<sup>155</sup> Interview with Phillip Boulton, above n 43.

<sup>156</sup> *Ibid.*

<sup>157</sup> Interview with Suzan Cox, above n 8. Cox acknowledged that she ‘had worked for some bad people.’ She described one such case — ‘a dreadful rape and murder of a young Aboriginal girl.’ Though she worked hard with the client, ‘[i]t was a difficult client to try and find out why.’ Another politically motivated lawyer donned an Irish brogue when she asserted that some clients ‘have the devil in them’: Interview with Elizabeth Dowling, above n 7. A career legal aid lawyer said he had come to believe that some people are ‘inherently evil’ even though he acknowledges this view is an anathema in his legal community: Interview with Domenico Conidi, above n 65.

<sup>158</sup> Interview with Brian Devereaux, above n 52. Devereaux talked about his career interest as follows: ‘A good reason to be at Legal Aid Queensland is you can do the most interesting work if you want to do criminal work. I can do mental health court or murder trials or a committal hearing in a sex case or a High Court case.’

<sup>159</sup> *Ibid.*

<sup>160</sup> Interview with Pauline Spencer, above n 92.

When I see injustice I get fired up about it. The injustice is compounded by the category of being called ‘unpopular’. ... Someone in society sets up these rules — some are in the ‘in crowd’ and some are in the ‘out crowd’. It seems so arbitrary. ... I supposed of course it’s to perpetuate power.<sup>161</sup>

The same lawyer is motivated not by the ideal of the neutral, independent barrister taking the next case in line, but by the need for a ‘last port of call for clients who have no money for a lawyer and can’t even get legal aid.’<sup>162</sup> She is moved to act by the routine abuse of power against the vulnerable:

Prisoners are in an incredibly vulnerable position. The physical power against them is extreme — just the fact of being locked up. When you see close up the arbitrary nature of how rules are dished out it’s hard not to act. Prison guards sometimes seem to be the worst of humanity. One prison guard wanted a job as a dog handler but he couldn’t get one so he became a prison guard. ... You can make or break a person in prison.<sup>163</sup>

Another career poverty lawyer offered an understated comment about doing the work out of principle:

I do it because it’s important to do. It’s not just because someone has to do it — that’s superficial. I don’t go out of my way to talk about why I do this kind of work — I don’t want to be evangelical — but it is more important to represent people who need good quality advocacy than to represent a large commercial firm.<sup>164</sup>

The same lawyer traces her commitment to representing the poor and unpopular back to anti-Vietnam War activism: ‘A lot of it goes back to the Vietnam War. I was active as a high school student — I joined an organisation called Resistance.’<sup>165</sup>

A somewhat younger career legal aid lawyer expressed a similar deep-seated commitment to representing the unpopular and disadvantaged, a commitment which she regards as both political and moral: ‘My political and moral philosophy drive me. I take on these cases because of my broader political beliefs about democracy and the role of the state against the individual. These beliefs make me feel ethically obliged.’<sup>166</sup>

She was originally motivated to become a legal aid lawyer because of her ‘left-leaning politics’, an ‘interest in social justice issues’ and ‘not wanting to make a million dollars.’<sup>167</sup> She explained: ‘I wanted to help the poor, disadvan-

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid. Spencer, who calls herself a ‘community lawyer’ also talked about recognising ‘links ... between the homeless, the drug user, the poor person, the prisoner. ... They are all part of the community ... They just happen to be in prison, or addicted to drugs or whatever at that time.’ Spencer is also concerned about the present ‘law and order climate’ and the tendency to ‘demonise’ certain groups: ‘Now, we’re demonising Muslims. It spreads — from criminals to prisoners to Muslims. We have to stop it.’ She distinguished her more political, contextual perspective from a purely civil libertarian one: ‘I see the race dimension. Civil libertarians say it will be “us” next, but it probably won’t happen to us. It happens to the “other”’ (emphasis in original).

<sup>164</sup> Interview with Susan Bothmann, above n 85.

<sup>165</sup> Ibid.

<sup>166</sup> Interview with Laura McDonough, above n 90.

<sup>167</sup> Ibid.

taged, and abused ... the underprivileged and disenfranchised. ... I believed — and I still believe — in [people’s] right to a fair trial whether they are rich or not.’<sup>168</sup>

A lawyer who represents asylum-seekers points to ‘moral principle’ as his chief motivation.<sup>169</sup> Although he is a barrister, the cab rank rule had little to do with his decision to take on these cases. Instead, he acted because he ‘saw the need’ in the face of a ‘skewed and unequal ... immoral and corrupt’ system that ‘puts up barriers to prevent claims.’<sup>170</sup>

With asylum cases, the government has taken away peoples’ rights. ... It corrupts the basic values of the legal system — of giving people a fair go. This is what motivates me. I take pro bono cases because that’s important to me. Even though the chances of success are slim. ... I want to keep the system honest and keep them accountable. ... There is a higher principle that motivates me.<sup>171</sup>

The same lawyer explained that asylum cases are ‘intense’: ‘People are desperate to get out — they have been beaten, tortured by police or government ... they have been displaced, have lost family.’ The work is also intrinsically political.<sup>172</sup> The lawyer acknowledged that these cases are also difficult to win. Still, he persists: ‘I’ll advise a client not to proceed if there are no grounds. But if there is a one per cent or two per cent chance, I’ll do it.’<sup>173</sup>

Several lawyers referred to their immigrant ancestry as a motivation for representing unpopular and disadvantaged clients. They feel a connection with their largely poor and working-class clients and see their work as part of a larger struggle for social justice. One lawyer stated: ‘It’s a matter of background. My parents were immigrants. They’re from Cyprus and Ireland and the Ukraine. There were lots of kids and they worked really hard.’<sup>174</sup> A career legal aid lawyer said: ‘I was born in Italy. I grew up in the western suburbs of Melbourne surrounded by disadvantage.’<sup>175</sup> Another legal aid lawyer pointed to her family’s

<sup>168</sup> Ibid. McDonough has come to regard her youthful view of the work — when she was just starting to practise law at 22 or 23 — as ‘a bit naïve’. She said: ‘Things seem less salvageable now ... I’m more interested in “democracy” and representing those who wouldn’t otherwise be well represented. A lot of these clients come from disadvantaged communities, but some don’t.’ Still, McDonough describes herself and most of her colleagues as ‘generally lefties to some degree or another — except for the new “human rights” breed.’

<sup>169</sup> Interview with Peter Condliffe, above n 83.

<sup>170</sup> Ibid. Condliffe initially got involved in refugee work by actively seeking clients from the Asylum Seeker Resource Centre.

<sup>171</sup> Ibid. Although, as a barrister, Condliffe has ‘no problem taking both sides in a criminal case’, he will not represent the Minister against an asylum-seeker. He also thinks it is unlikely he will ever be asked to do so: ‘I’ve never been offered a brief from the other side. The government has developed a stable of their own barristers to argue asylum cases. There are a couple of dozen of us who tend to do asylum work from the refugee side.’

<sup>172</sup> Ibid. Condliffe recounted the case of two gay Albanian Muslim men who were threatened with death by their families and the community. Condliffe won this case on the papers. Condliffe says the attitude of members of his local Rotary Club — and of his own brother — is that asylum-seekers are ‘taking advantage and just want a better life.’ When he shared the story of the gay Albanians, he ‘was met with polite silence.’ On the other hand, Condliffe’s ‘own community of better educated leftists’ regard his work as ‘heroic’.

<sup>173</sup> Ibid. Condliffe says the success rate for asylum cases in general is around 10 per cent, but he manages to win between 20 to 30 per cent of his cases.

<sup>174</sup> Interview with Theodosios Alexander, above n 102.

<sup>175</sup> Interview with Domenico Conidi, above n 65.

departure from Scotland during the ‘Thatcher years’, and her ‘strong sense of class’ which she felt early on: ‘Empathy with people with a working class background comes easily for me.’<sup>176</sup>

A lawyer of Italian ancestry talked about the discrimination his parents faced as a motivation for assisting others in similar shoes: ‘Coming from an immigrant, non-English speaking family, I knew how my parents were treated. But people didn’t do anything until it was too late. ... I wanted to give people a voice. ... This is why I wanted to do law.’<sup>177</sup>

A prisoners’ rights lawyer who has had a range of other public interest and poverty law jobs said:

I come from a Scandinavian family, where justice was something we lived, not just talked about. I was taught to always be aware of other peoples’ perspective[s], and to recognise that no one is better than anyone else. This was a deep-seated philosophical position I never questioned.<sup>178</sup>

Other lawyers spoke of the connection between being Jewish and advocating for the unpopular and the underdog. One explained:

I’m Jewish. My family came from the Holocaust. My father came here after the war with nothing. His whole family was killed in the Holocaust. My Jewish background champions the unpopular, the underdog, the discriminated against, the ostracised, the exploited. I am more inclined to act for these.<sup>179</sup>

Another said: ‘Look, I’m Jewish. I grew up in Israel. ... It is part of the Jewish social justice tradition that we all like to think of ourselves as making some kind of difference.’<sup>180</sup>

One criminal lawyer came to the Bar as a ‘left-winger’, eager to ‘make a difference ... [and] do work that involved looking after the underdog.’<sup>181</sup> He felt a special ‘affinity for young blokes in trouble’, a group with whom he had worked prior to becoming a lawyer.<sup>182</sup>

One lawyer who did not fit neatly into the ‘political lawyer’ mould — he specifically disavowed an ‘ideological drive’ and stated that he had ‘never voted

<sup>176</sup> Interview with Laura McDonough, above n 90.

<sup>177</sup> Interview with Domenico Calabrò, above n 99.

<sup>178</sup> Interview with Susan Bothmann, above n 85.

<sup>179</sup> Interview with David Grace, above n 66.

<sup>180</sup> Interview with Robert Richter, above n 67. Richter notes that he read Irving Stone, *Clarence Darrow for the Defence* (1941) and saw the television show *Perry Mason* while learning to speak English, and ‘got to like the idea’ of being a defence lawyer. Richter is not the first criminal defence lawyer to be inspired by the Stone biography. Many prominent American defence lawyers have pointed to Stone’s book as an influence: see, eg, Lois Romano, ‘A Man of Independent Means; Attorney Michael Tigar Is Putting His Leftist Leanings To Work for Terry Nichols’, *Style, The Washington Post* (Washington, DC), 29 September 1997, D01. See also William Kunstler, *My Life as a Radical Lawyer* (1994). Another influence for Richter was an obscure collection of excerpts from the famous ‘Chicago 7’ trial: George C McNamee, Daniel Greenberg and Mark Levine, *The Tales of Hoffman: From the Trial of the Chicago 8/7* (1970).

<sup>181</sup> Interview with Peter Morrissey, above n 51. As Morrissey said: ‘I wanted to make a difference when I turned up to work. In most jobs you don’t.’

<sup>182</sup> *Ibid.*

Labor'<sup>183</sup> — was nonetheless motivated more by (political) philosophy and 'principle' than by ethics or professionalism:

I do refugee work because it cries out to be done. I was deeply offended by the way this country was treating refugees. I wanted to make amends for the country and try to make things better for them. It was the simple fact of locking up innocent people indefinitely that hit me like a thunderbolt. ... I saw a Holocaust documentary after taking on the Tampa case. There was a Berlin lawyer talking about Germany in the mid-1930s. He said they passed a law locking up innocent people, and that, in itself, is a terrible crime. I thought it was just plain wrong to hold innocent people on the deck of a ship in the tropics. ... The law was grossly stacked against the people I represented.<sup>184</sup>

Many of the lawyers who are motivated by politics or ideology also seemed to genuinely like their clients.<sup>185</sup> This was especially so for lawyers representing poor people, prisoners, Aborigines and refugees. They spoke of their clients with affection and understanding. As one lawyer said: 'I like people. I've met Aboriginal drunks, seriously disabled people, sex offenders — and they all have something going for them. You don't dismiss people out of hand because they don't measure up, don't fit, don't look right.'<sup>186</sup>

### C Personality

My favourite rendering of the personality of lawyers who defend the unpopular — in particular, criminal defence lawyers — comes from the director of an American criminal defence organisation. She calls criminal defence lawyers a 'breed unto themselves' and describes them as 'profane, argumentative, insecure, [and] eccentric'.<sup>187</sup> She lists the following as 'identifying characteristics':

1) They are mostly Italian, Jewish, or Irish males. 2) There are females as well, but not many, and they, too, are mostly Italian, Jewish, or Irish. 3) The males are often quite short. Cheap sidewalk analysis indicates that, as children, they were forced to fight for their honor among bigger, stronger classmates, thus becoming 'defensive.' 4) Surprisingly, many of them will admit to a very upscale education, often Ivy League or something like William & Mary or Stanford. 5) They can't complete a sentence that doesn't include the F-word, and the more frequently and creatively it's used, the more effectively they feel they've communicated (eg, 'I ordered a f—ing tuna salad on wheat, and that flea-brained f— brought me a ham and cheese on pumper-f—ing-nickel'). 6) They're often

<sup>183</sup> Interview with Julian Burnside, above n 51. Burnside said: 'I have never been a member of any political party. I had voted Liberal all my life up to and including 1996, but not since. I have never voted Labor.'

<sup>184</sup> Ibid.

<sup>185</sup> See, eg, Interview with Peter Morrissey, above n 51, who noted that many of his clients were 'nice people who do bad things.'

<sup>186</sup> Interview with Susan Bothmann, above n 85. Cf Interview with Shane Tyrrell, above n 46, during which the Victorian barrister stated: 'I don't particularly like my clients. I see them as a brief.'

<sup>187</sup> Mary Halloran, 'An Ode to Criminal Lawyers' (1998) 18(6) *California Lawyer* 96, 96. At the time the article was written, Halloran was the Executive Director of the Colorado Criminal Defense Bar.

ill at ease with people who are not themselves criminal defense lawyers. 7) They cry in public if the subject has to do with justice or the death penalty.<sup>188</sup>

Their aberrations include:

1) They dress outrageously, usually in blue jeans and T-shirts that say unprintable things. When they must dress for court, however, they have the best ties anywhere (men) or the most expensive dresses and jewelry (women). 2) They wear their hair too long (men) or skirts too short (women). 3) They never plan ahead. Ever. 4) They abuse substances and are sexually promiscuous well into their 30s. After that they mellow somewhat, but the profanity never goes away. 5) Oddly, they make loving parents.<sup>189</sup>

One Australian defence lawyer laughed out loud when I shared this description with her. She insisted on having a copy.<sup>190</sup> Another lawyer suggested there was a prototypical Australian (or at least Melburnian) criminal defence lawyer: ‘Look, I fit the profile: Catholic, Collingwood-supporting, Labor voting.’<sup>191</sup>

A number of lawyers — especially public defenders and legal aid lawyers — felt that personality played a role in their inclination to represent unpopular clients and causes. One public defender remarked: ‘There is a sort of public defender personality type or types. We do regard ourselves as different from prosecutors. We have a different personality: more tolerant, more accepting, less ruthlessly ambitious’.<sup>192</sup> A legal aid lawyer described the lawyers in her office as ‘generally egocentric’, ‘quite tough’ and with a ‘big personality’.<sup>193</sup> A former public defender talked about the ‘irreverence and humour’ of criminal defenders, notwithstanding the seriousness of their work.<sup>194</sup>

A career legal aid lawyer talked about the ‘young, committed’ lawyers who approach their cases with ‘enthusiasm’ and have ‘energy to burn’.<sup>195</sup> A former public defender talked about the ‘stack of people [at the public defender office] who are really dedicated to the task of defending people’, but who also ‘don’t take themselves too seriously’.<sup>196</sup>

Several lawyers at the private Bar also pointed to personality as a factor in their choice of work. Many talked about being drawn to defending the unpopular early on,<sup>197</sup> and noted that it suited their competitive spirit.<sup>198</sup> As one prominent barrister said when asked whether he felt compelled to accept unpopular cases as

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

<sup>190</sup> Interview with Elizabeth Dowling, above n 7.

<sup>191</sup> Interview with Domenico Calabrò, above n 99.

<sup>192</sup> Interview with John Stratton, above n 8.

<sup>193</sup> Interview with Laura McDonough, above n 90. See also Interview with Theodosios Alexander, above n 102: ‘You have to like the show. If you don’t you won’t do it well.’

<sup>194</sup> Interview with Kerri Mellifont, above n 108.

<sup>195</sup> Interview with Brian Devereaux, above n 52.

<sup>196</sup> Interview with Kerri Mellifont, above n 108.

<sup>197</sup> See, eg, Interview with Philip Dunn, above n 45: ‘I was drawn to criminal defence from the start’; Interview with Kerri Mellifont, above n 108: ‘Defence comes ... naturally to me.’

<sup>198</sup> See, eg, Interview with Elizabeth Dowling, above n 7: ‘I’d rather have a fight than a fete.’ Interview with Andrew Kirkham, above n 59: ‘If you’re a gladiator and you’ve hopped into the ring all your life and made a living out of it, it’s second nature’; Interview with Shane Tyrrell, above n 46: ‘I want to win. I hate losing. It depresses me. I can’t sleep.’

a matter of Australian legal ethics: ‘Yes, but [it’s] also my own personality. Unfortunately it’s a blood sport. I enjoy it. I love it.’<sup>199</sup>

A lawyer who specialises in criminal defence and Children’s Court cases readily pointed to personality as a factor: ‘Personality is probably the most important thing’.<sup>200</sup> She saw herself as hard-wired to champion the unpopular, probably from birth: ‘I’m Irish Catholic. Anti-authoritarianism is in our mother’s milk.’<sup>201</sup> She recognised the makings of a criminal lawyer from her earliest school days: ‘Early reports noted that I could not stop talking in class. I was a malcontent. I was opinionated. I was always at the back of the bus making smart comments.’<sup>202</sup>

A strain of anti-authoritarianism was evident in many of the lawyers interviewed. One prominent defence lawyer declared: ‘I don’t like judges.’<sup>203</sup> Another regards prosecutors as ‘sanctimonious goody-two-shoes.’<sup>204</sup> Yet another eschewed prosecution altogether, saying: ‘There’s no heart beat to it.’<sup>205</sup>

Several lawyers described themselves as naturally non-judgemental and able to relate to even the worst offenders. As one lawyer said: ‘I can be completely dispassionate and non-judgmental. I’ve always known that about myself. ... I can talk about things with people no matter what they may have done.’<sup>206</sup> A long-time indigent criminal defence lawyer noted that she ‘can see people as people even though they’ve done some dreadful things.’<sup>207</sup> A prominent political lawyer said: ‘We don’t moralise. We don’t make judgements about our clients’ behaviour.’<sup>208</sup>

Another lawyer believes that, whatever else draws you to the work, you ought to be interested in people and stories:

If you’re not one of life’s voyeurs don’t come to the Bar. I’m fascinated by people. You hear incredible stories — heroic stories, terrible stories, stories about people behaving well and behaving badly. To a certain extent you stand back and watch. There’s a vicarious fascination. ... There is no foolishness that men won’t engage in for sex or money. Women are close behind.<sup>209</sup>

<sup>199</sup> Interview with Philip Dunn, above n 45. Dunn prefers the defence side to the ‘unfair and bullying’ prosecution side.

<sup>200</sup> Interview with Elizabeth Dowling, above n 7.

<sup>201</sup> Ibid. In referring to her Catholic upbringing and strong ‘sense of injustice’, Dowling said: ‘I was always taught not to accept how things are and not to follow others blindly.’ See also Interview with Philip Dunn, above n 45.

<sup>202</sup> Interview with Elizabeth Dowling, above n 7.

<sup>203</sup> Interview with Robert Richter, above n 67.

<sup>204</sup> Interview with Philip Dunn, above n 45.

<sup>205</sup> Interview with Shane Tyrrell, above n 46. Tyrrell said: ‘I honestly can’t prosecute. ... I did some prosecution but I won’t do it again.’ Tyrrell believes that prosecutors — some of whom have prosecuted for so long ‘they might as well be police officers’ — think of the accused as ‘guilty bastards.’

<sup>206</sup> Interview with Elizabeth Dowling, above n 7. Dowling was never interested in commercial law and considers commercial lawyers ‘glorified debt collectors.’ Interview with Shane Tyrrell, above n 46: ‘Peoples’ money holds no interest for me.’

<sup>207</sup> Interview with Suzan Cox, above n 8.

<sup>208</sup> Interview with Robert Stary, above n 43. Stary also said: ‘I can empathise with the plight of someone who’s been terribly abused in life.’

<sup>209</sup> Interview with Andrew Kirkham, above n 59.

Other lawyers agreed about the love of a good story, and the importance of uncovering it. One lawyer talked about his representation of a client accused of raping and murdering a six-year-old girl while her mother was asleep in another room. It was a particularly vicious case by a client who had committed other such crimes. ‘He was a hard bloke to like’, said the lawyer:

On the other hand, I came to quite like him. ... Everyone has a story. He had a story to tell. He had gone clean for a while, found a girlfriend, really straightened himself out. ... There’s a serious question in the case about police methods in obtaining a confession. We have a fair chance to win it on appeal. Still, I would never take a case just because there’s an interesting appellate issue. Usually, it’s the human interest story that gets my attention.<sup>210</sup>

Several lawyers noted that practising law on behalf of the unpopular — especially criminal defence — was a good fit for them intellectually. One criminal lawyer said: ‘I’ve always been interested in crime ... it is intellectually stimulating ... I like grappling with criminal law concepts ... I like the hardball ways that the rules of evidence can be used ... [and] I like the process of advocacy’.<sup>211</sup> A long-time legal aid lawyer described criminal law as ‘intellectually interesting, challenging’: ‘I like the challenge’ she said. ‘There’s always an angle in the roundabout. ... And, it’s never boring.’<sup>212</sup> Another legal aid lawyer said: ‘Criminal law is ... intellectually stimulating, more so than any other law.’<sup>213</sup> A former public defender, who still does mostly criminal law, said: ‘Crime cases are the most interesting. The personalities are intriguing.’<sup>214</sup>

The idea of a defence lawyer personality clearly transcends nationality and fashion — wigs and robes notwithstanding. Apparently, there is a short skirt or fabulous tie under that robe.

#### D *Publicity*

Although Australians are said to be excessively self-effacing and singularly disinclined to trumpet their successes, some lawyers were candid about the added attraction of celebrity and publicity in defending the unpopular. It could be that lawyers — especially in an age of seemingly endless, and (at least in America) often televised, celebrity court cases — are a cultural aberration. It could also be that notoriety is part of the adrenaline rush of defending the unpopular, in keeping with what Babcock calls the ‘egotist’s’ motivation.

As one prominent barrister put it: ‘Three things make a good case: will it be interesting, will it make me rich, will it make me famous? You need two of the three. ... A hot, interesting case — most would jump at it.’<sup>215</sup> Another barrister

<sup>210</sup> Interview with Peter Morrissey, above n 51.

<sup>211</sup> Interview with Phillip Boulten, above n 43.

<sup>212</sup> Interview with Suzan Cox, above n 8. To Cox, criminal defence was indisputably the most interesting work a lawyer could do. ‘Other work is quite boring,’ she said.

<sup>213</sup> Interview with Laura McDonough, above n 90.

<sup>214</sup> Interview with Kerri Mellifont, above n 108.

<sup>215</sup> Interview with Philip Dunn, above n 45.

acknowledged: ‘I enjoy the attention. Unpopular clients get the most attention.’<sup>216</sup>

One of the lawyers who represented Lindy and Michael Chamberlain referred to both the ‘challenge’ and ‘celebrity’ of the case, and said it was ‘unthinkable that you wouldn’t take it.’<sup>217</sup> He felt fortunate to be involved in the Chamberlain case: ‘As a criminal lawyer, this was the biggest bandwagon to come past my door. ... You want to be part of the biggest criminal case to date. You can’t help but want to be part of it.’<sup>218</sup> He noted that ‘[o]ther members of the Bar were envious.’<sup>219</sup> He called the case ‘utterly stimulating.’<sup>220</sup>

A legal aid lawyer who said he was not particularly moved by the press-worthiness of a case noted that the private Bar might feel otherwise: ‘Most members of the private Bar would jump at a serious and difficult case’, he said. ‘It creates publicity. Publicity is a draw.’<sup>221</sup>

### III DUTY TO THE COURT AND FEALTY TO TRUTH

In the United States, the central duty of the lawyer is to ‘further the interests of ... clients by all lawful means.’<sup>222</sup> The professional identity of American lawyers is built on this fundamental duty to clients and American law schools — especially through clinical legal education — teach about the importance of being ‘client-centred’.<sup>223</sup>

It is through ‘zealous representation’ of individual clients that the American lawyer serves the court and ensures the proper administration of justice.<sup>224</sup> As it

<sup>216</sup> Interview with Theodosios Alexander, above n 102.

<sup>217</sup> Interview with Andrew Kirkham, above n 59.

<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.* Kirkham said he knew ‘from the moment the child was gone and it was said that a dingo was responsible this was a big case.’ The press immediately seized upon the case, with some help from the Chamberlains: ‘Mr and Mrs Chamberlain gave innumerable press conferences. You had to have a nervous system of stone not to realise what was going on.’

<sup>220</sup> *Ibid.* Kirkham also praised his co-counsel in the Chamberlain case, barrister John Harber Phillips and solicitor Stuart Tiffin. He called Phillips ‘one of the best trial lawyers in the country’ and said Tiffin was a ‘genius’. He described the Chamberlain case as ‘a last stand’, and declared: ‘the struggle against the odds when you reckon you have a chance — and a good team — is probably the most stimulating experience one could have.’

<sup>221</sup> Interview with Brian Devereaux, above n 52.

<sup>222</sup> *Re Griffiths*, 413 US 717, 724 fn 14 (Powell J) (1973). See also American Bar Association, *Model Code of Professional Responsibility* EC 7-1 (1983); *Restatement (Third) of the Law Governing Lawyers* § 16 cmt [d] (2000); *US Model Rules* Preamble [2], [9] (2006).

<sup>223</sup> Prominent legal ethics scholar Monroe H Freedman may have been the first to use the term ‘client-centred’: see Freedman, *Lawyers’ Ethics in an Adversary System*, above n 28, 43–50; Monroe H Freedman, *Understanding Lawyers’ Ethics* (1990) 87; Monroe H Freedman, ‘Ethical Ends and Ethical Means’ (1991) 41 *Journal of Legal Education* 55, 55–6. See also Fred C Zacharias, ‘Reconciling Professionalism and Client Interests’ (1995) 36 *William and Mary Law Review* 1303, 1319. The most influential work on client-centred counselling — which is taught in most law school clinics in the US — is David A Binder and Susan C Price, *Legal Interviewing and Counseling: A Client-Centered Approach* (1977). The book has been revised and updated twice, with additional authors: see David A Binder, Paul P Bergman and Susan C Price, *Lawyers as Counselors: A Client-Centered Approach* (1<sup>st</sup> ed, 1990); David A Binder et al, *Lawyers as Counselors: A Client-Centered Approach* (2<sup>nd</sup> ed, 2004). For a thoughtful and critical commentary, see Stephen Ellmann, ‘Lawyers and Clients’ (1987) 34 *UCLA Law Review* 717.

<sup>224</sup> See above n 222; see also Geoffrey C Hazard, Jr and W William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (1<sup>st</sup> ed, 1985) 17–18.

is stated in the Preamble to the *US Model Rules*: ‘when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.’<sup>225</sup>

Conversely, in Australia, the lawyer’s ‘overriding duty’ — under existing rules, law, and commentary — is not to the client, but to the court.<sup>226</sup> As the Preamble to the *Australian Model Bar Rules* states: ‘The administration of justice is best served by reserving the practice of law to those who owe their paramount duty to the administration of justice.’<sup>227</sup> The *Australian Model Conduct Rules*, which have been adopted in most jurisdictions, state: ‘Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.’<sup>228</sup> Similarly, the *NSW Barristers’ Rules* require barristers to ‘exercise their forensic judgements and give their advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients.’<sup>229</sup>

In other words, for Australian lawyers, when there is tension between their duty to the client and duty to the court, the latter must prevail. In the famous words of Lord Reid in *Rondel v Worsley*:

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client’s case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client’s wishes or with what the client thinks are his personal interests. Counsel must not mislead the court.<sup>230</sup>

It is not that American lawyers have no duty to the court. Indeed, the American lawyer, like his or her Australian counterpart, plays several sometimes competing roles: ‘representative of clients’, ‘officer of the legal system’ and ‘public citizen having special responsibility for the quality of justice.’<sup>231</sup> However, when the various responsibilities are in conflict, the American lawyer must

exercise ... sensitive professional and moral judgment guided by ... the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.<sup>232</sup>

<sup>225</sup> *US Model Rules* Preamble [8] (2006).

<sup>226</sup> See above n 40 and accompanying text; see below n 263; see also *Giannarelli v Wraith* (1988) 165 CLR 543.

<sup>227</sup> *Australian Model Bar Rules* r 1; see also *Australian Model Conduct Rules* r 12.

<sup>228</sup> *Australian Model Conduct Rules* r 5. See also *Professional Conduct and Practice Rules 2005* (Vic), which adopts the same wording.

<sup>229</sup> *NSW Barristers’ Rules* Preamble [5]; see also *Professional Conduct and Practice Rules 2005* (Vic) [B]. See also *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, 298 (Kitto J).

<sup>230</sup> [1969] 1 AC 191, 227. The same point was made more recently by a Western Australian judge in *Kyle v Legal Practitioners Complaints Committee* (1999) 21 WAR 56, 73 (Parker J).

<sup>231</sup> *US Model Rules* Preamble [1] (2006).

<sup>232</sup> *US Model Rules* Preamble [9] (2006).

Although the American lawyer, like the Australian lawyer, ‘play[s] a vital role in the preservation of society’,<sup>233</sup> the American lawyer fulfils this role through adversarial advocacy. Although they, like the Australian lawyer, have certain special obligations to the court, there is much more lawyerly discretion in the interpretation of these obligations.<sup>234</sup> The focus remains on serving the client by every lawful means.

An essential part of the Australian lawyer’s overriding duty to the court is the obligation to never ‘mislead’ the court,<sup>235</sup> which often translates into adherence to ‘truth’. This fealty to truth — unusual by American standards<sup>236</sup> — is best seen in *Australian Model Conduct Rules* r 15.2, which describes the duties of lawyers whose criminal clients confess guilt but wish to plead ‘not guilty’ and proceed to trial.<sup>237</sup> The lawyer in this scenario has two choices: he or she may ‘cease to act if there is enough time for another practitioner to take over the case properly before the hearing and the client does not insist on the practitioner continuing to appear for the client’,<sup>238</sup> or, the lawyer may continue to act for the

<sup>233</sup> *US Model Rules* Preamble [13] (2006).

<sup>234</sup> See, eg, *US Model Rules* r 3.3 (2006), the one rule that expressly lays out the lawyer’s duty of ‘Candor toward the Tribunal’, and requires that the lawyer shall not ‘knowingly’ make a false statement or otherwise mislead a court, or offer evidence they ‘know’ to be false. However, it is for the lawyer to determine the meaning of ‘knowingly’ and ‘know’. If the lawyer concludes that he or she knows that certain evidence is false, the lawyer still has the discretion to decide what ‘remedial measures’ to take. For a discussion of how much knowledge a lawyer must have in order to determine perjury, see Monroe H Freedman ‘Client Confidences and Client Perjury: Some Unanswered Questions’ (1988) 136 *University of Pennsylvania Law Review* 1939; Monroe H Freedman, ‘But Only If You “Know”’ in Rodney J Uphoff (ed), *Ethical Problems Facing the Criminal Defense Lawyer: Practical Answers to Tough Questions* (1995) 138.

Famous Australian criminal lawyer Frank Galbally believed a lawyer never really ‘knows’: ‘Even if clients state that they are guilty, I am not bound to accept their word, which on many occasions has been proven to be false. The only way I can know someone is guilty is if I see him or her commit the crime — and then I would be a witness and not the accused’s advocate.’: Galbally, above n 6, 2.

An Australian lawyer whose client admits to having ‘lied in a material particular to the court or [who] has procured another person to lie to the court or has falsified or procured another person to falsify in any way a document which has been tendered’ must either get the client’s permission to inform the court of the lie or falsification or withdraw: see *Australian Model Conduct Rules* r 15.1. Paradoxically, lawyers may not inform the court of the lie or falsification without the client’s authorisation: r 15.1.4; see also *NSW Barristers’ Rules* r 32, which is in accord.

<sup>235</sup> See *Australian Model Conduct Rules* r 14.1. The *Australian Model Conduct Rules* are very specific about the variety of misleading statements that are prohibited, including asking a prosecution witness about the defendant’s lack of record ‘in the hope of a negative answer’ when defence counsel suspects that the prosecution is unaware of prior convictions: r 14.11.

<sup>236</sup> See *United States v Wade*, 388 US 218, 256–8 (1967), where White J described the defence lawyer’s ‘different mission’, which permits a defender to ‘put the State’s case in the worst possible light, regardless of what he thinks or knows to be the truth.’ Many American commentators have criticised traditional American adversarial advocacy as subverting the truth: see, eg, Harry I Subin, ‘The Criminal Lawyer’s “Different Mission”: Reflections on the “Right” To Present a False Case’ (1987) 1 *Georgetown Journal of Legal Ethics* 125; Marvin Frankel, ‘The Search for Truth: An Umpireal View’ (1975) 123 *University of Pennsylvania Law Review* 1031.

<sup>237</sup> See Interview with John Stratton, above n 8: ‘We have really clear rules about what you do with someone who has told you he is guilty. ... Those rules are pretty black and white. But there is a grey area — what do you do about something where there is no evidence but you know it’s true?’

<sup>238</sup> *Australian Model Conduct Rules* r 15.2.1.

client, but under certain conditions.<sup>239</sup> In cases where the lawyer continues to act for the client, the lawyer:<sup>240</sup>

- (a) must not falsely suggest that some other person committed the offence charged;
- (b) must not set up an affirmative case inconsistent with the confession;
- (c) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;
- (d) may argue that for some reason of law the client is not guilty of the offence charged; or
- (e) may argue that for any other reason not prohibited by (a) and (b) the client should not be convicted of the offence charged.

This is strikingly different from American criminal defence. In the US, there is no prohibition against putting forth an affirmative defence for a client who acknowledges guilt but asserts his or her right to trial; indeed, there is great scope in putting forward defences whether or not they are based in fact or are in 'good faith'.<sup>241</sup> There is no prohibition against cross-examining witnesses 'known' to be telling the truth. There is no prohibition against arguing that witnesses known to be telling the truth are incredible. Indeed, it is the standard view that, whether or not the client is actually innocent, '[e]ffective trial advocacy requires that the attorney's every word, action, and attitude be consistent with the conclusion that his client is *innocent*.'<sup>242</sup>

A story by a former Washington, DC public defender illustrates this difference. The defender, who worked for several years in one of the top public defender offices in the country, was appointed to represent a man who was charged with three separate acts of sexual assault and burglary.<sup>243</sup> In the case that first went to trial — an alleged attack on a young woman in an affluent Washington apartment building — the defendant was found two blocks from the scene of the assault, bleeding from his arm where the victim had cut him with a piece of glass. Because there was no chance of convincing the jury that this was a case of misidentification, the defender argued that his client may have been guilty of simple assault and unlawful entry — misdemeanours which carried far less time — but not rape and burglary. The defence's case depended on convincing the

<sup>239</sup> *Australian Model Conduct Rules* r 15.2.2.

<sup>240</sup> *Australian Model Conduct Rules* r 15.2.2; see also *NSW Barristers' Rules* r 33, which is in accord.

<sup>241</sup> See *US Model Rules* r 3.1 (2006):

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

For an argument in favour of making 'frivolous arguments', see Freedman and Smith, above n 22, 102–4. For an argument that it is ethical to put forward a defence based on the weakest factual inference, see Smith, 'Defending Defending', above n 89.

<sup>242</sup> Monroe H Freedman, 'Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions' (1966) 64 *Michigan Law Review* 1469, 1471 (emphasis added).

<sup>243</sup> Randy Bellows, 'Notes of a Public Defender' in Phillip B Heymann and Lance Liebman (eds), *The Social Responsibilities of Lawyers: Case Studies* (1988) 69, 93.

jury that the defendant had mistakenly believed that the complainant was ‘coming on’ to the defendant and, based on this belief, had approached her: ‘One thing led to another, things got out of hand, and the next thing you know my client was running down the block with his arm slashed.’<sup>244</sup>

The defender’s account says nothing about the client’s version of events or his ‘instructions’. It is evident that the lawyer came up with a defence theory based on the evidence and/or lack of evidence. The defender acknowledges that he thought the defence was ‘unlikely to succeed ... but it was the only one we had.’<sup>245</sup>

In the course of the trial, the defender subjected the complainant to a ‘lengthy and probing cross-examination’, cross-examining her ‘as aggressively as [he] could without generating a backlash of sympathy.’<sup>246</sup> Apparently, the complainant did not help her own cause. She ‘came across as cold, even contemptuous, condescending, and uncooperative’ and ‘the jury was apparently willing to suspend disbelief’ and consider the scenario he had proposed.<sup>247</sup> Following lengthy closing arguments — with the defender asserting ‘understandable misunderstanding’ and the prosecutor ridiculing it — the jury convicted the defendant of the misdemeanour charges only, finding the defendant not guilty of rape. Instead of 30 years, the defendant now faced a maximum of a year and a half.<sup>248</sup>

Although the defender took no joy in this case,<sup>249</sup> he had no ethical qualms whatsoever. He went on to ‘beat’ the second case and worked out a favourable plea in the third.<sup>250</sup>

In contrast, an Australian lawyer said: ‘I wouldn’t say a witness was lying if I knew otherwise. ... I can’t put any evidence or inference to the court that is false.’<sup>251</sup> Another lawyer said: ‘I would not for any purpose put forward a positive statement of innocence [in the face of knowledge to the contrary]. That would be a lie.’<sup>252</sup>

One Australian lawyer, who felt constrained in what he could do on behalf of a guilty client, felt similarly constrained in what he could do on behalf of an innocent one. He would not act for an innocent client who wanted to plead guilty to cultivating marijuana in order to ‘take the rap for her partner.’<sup>253</sup> ‘That would

<sup>244</sup> *Ibid* 94.

<sup>245</sup> *Ibid*.

<sup>246</sup> *Ibid*.

<sup>247</sup> *Ibid*.

<sup>248</sup> *Ibid*.

<sup>249</sup> *Ibid*, where Bellows writes at 97:

I know many wonderful attorneys — whose advice I seek and with whom I socialize — who can cross-examine rape and sexual assault victims without blinking an eye. For me, it is always difficult and unpleasant, one of the major reasons why being a public defender can be an emotionally trying experience.

Bellows left the public defender office to become a prosecutor soon after writing this piece.

<sup>250</sup> *Ibid* 94–5.

<sup>251</sup> Interview with Domenico Calabrò, above n 99.

<sup>252</sup> Interview with Domenico Conidi, above n 65.

<sup>253</sup> Interview with Domenico Calabrò, above n 99.

be misleading the court', he said.<sup>254</sup> When asked whether the lawyer had a responsibility to advance the client's autonomous interests — to the client in this scenario, it was apparently more important to protect a loved one than to save herself — the lawyer said: 'The woman is trying to protect someone, and I won't go to court to lie for a client.'<sup>255</sup>

To try to uncover the differences in the professional orientation of American and Australian lawyers — to see whether the rules have been incorporated into the legal culture — I asked the Australian lawyers interviewed to take part in an exercise I employ with students in Georgetown's criminal defence clinic. On the first day of the clinic's orientation programme, during a session on 'criminal defence perspective', I write four concepts on the board: 'Truth', 'Justice', 'Fairness/Equality' and 'Client Interest'. I ask the students to rank the concepts in order of importance as they embark on the representation of the indigent accused.<sup>256</sup> Then, we discuss the students' answers.

The goal of the exercise is to encourage students to understand the central criminal defence ethic in the US, namely, pursuing the client's interest. A New York public defender articulated this ethic in a 1971 *Life* article regarded as a classic in the annals of criminal defence:

Criminal law to the defense lawyer does not mean equity or fairness or proper punishment or vengeance. It means getting everything he can for his client. ... Justice is a luxury enjoyed by the district attorney. He alone is sworn 'to see that justice is done.' The defense lawyer ... finds himself most often working for the guilty and for a judicial system based upon the sound but paradoxical principle that the guilty must be freed to protect the innocent.<sup>257</sup>

Although the other concepts sound much more appealing to many students — young, idealistic students tend to care about justice, fairness and equality, and truth — these are aspirations, not ethical mandates. This is why there is a clear 'right answer' to the exercise: the central ethical obligation of the American lawyer is to pursue the client's interest. The only other right answer in an exercise that is intended to provoke discussion — students often feel strongly about the righteousness of their own motivations — is that truth should come in last. Truth can be important — good defence lawyers should do their best to uncover it, especially in cases of factual innocence — but the adversarial system is about proof, not truth.<sup>258</sup> Indeed, if criminal defence most often involves

<sup>254</sup> Ibid; but see Interview with Peter Condliffe, above n 83: 'I don't see it as misleading to plead a client not guilty whom I believe to be factually guilty. The defendant is innocent until the judge or jury says guilty.'

<sup>255</sup> Interview with Domenico Calabrò, above n 99.

<sup>256</sup> Prior to the exercise, I distribute blank index cards. The students rank the concepts on the cards, which I later collect for safekeeping in order to compare them to the students' views at the end of the year. By the year's end — indeed, after representing a client or two — the students overwhelmingly regard 'client interest' as their abiding concern.

<sup>257</sup> James Mills, 'I Have Nothing To Do with Justice' (1971) 70(9) *Life* 56, 57, quoting New York Legal Aid Society lawyer Martin Erdmann.

<sup>258</sup> See Interview with Brian Devereaux, above n 52:

I think the same as American lawyers — it's proof, not truth. We have some new disclosure provisions which emphasise the search for truth. The purpose of criminal proceedings is to determine whether the prosecution has proved beyond a reasonable doubt whether a person committed an offence.

defending the guilty,<sup>259</sup> then truth is often directly at odds with the client's interest.

Most American lawyers — especially criminal defence lawyers — would without hesitation put client interest first and truth last.<sup>260</sup>

For the Australian lawyers interviewed, the right answer was not so clear.<sup>261</sup> The one apparent area of agreement between American and Australian lawyers engaged in advocacy is that truth is not the chief concern. Most Australian lawyers put truth last. On the other hand, a few Australian lawyers — more than I would have expected given the sample — ranked truth first or second. They explained the high ranking by pointing to the strict prohibition against misleading the court.

Nonetheless, first place votes were fairly evenly divided among justice, fairness/equality and client interest. Some lawyers expressed the view that if the system worked justly and fairly, it would ultimately serve the client.<sup>262</sup> Others said that client interest was most important. Interestingly, a significant number of Australian lawyers put client interest third or fourth.

It is clear, however, that duty to the court and to truth is part of the professional identity of Australian lawyers. One prominent barrister spoke for nearly all when he said: 'When there is tension between being my client's advocate and being an officer of the court, I resolve it in one way: my duty is to the court.'<sup>263</sup>

One barrister suggested that duty to the court and duty to the truth are inextricably connected: 'It all comes down to the truth. If a matter should be brought to

Interview with Phillip Boulten, above n 43: 'Our whole system is based on the fact that guilty people are likely to go free. The system is not to establish the truth; it's about whether proof is established beyond a reasonable doubt. It's not my job to add to the picture unless it assists my client.'

<sup>259</sup> See generally Babcock, 'Defending the Guilty', above n 4.

<sup>260</sup> I have conducted the exercise with a number of friends who are indigent criminal defence lawyers and civil poverty lawyers. They always put client interest first and truth last. The ranking of the other two concepts is a matter of taste.

<sup>261</sup> This exercise was not 'scientifically' conducted. I tried to use the same wording in the instructions — 'Please rank these concepts in order of importance as a lawyer representing unpopular clients' — but there might have been some variations. Some lawyers did not want to do the exercise and I did not push it.

<sup>262</sup> See, eg, Interview with Andrew Kirkham, above n 59: 'The client's interests are obviously first but if there is no fairness and equality your client won't obtain his or her interests.' Kirkham considered truth and justice to be especially elusive. Upon encountering the four concepts, he offered a quick, wry characterisation: truth was 'abstract', justice 'amorphous', fairness and equality 'essential' and client interest 'gritty realism'.

<sup>263</sup> *Ibid.* See also Interview with Theodosios Alexander, above n 102: 'Without question, the duty to the court comes first. What else can there be?'; Interview with Julian Burnside, above n 51: 'Your obligation to the court trumps your obligation to the client'; Interview with Domenico Conidi, above n 65: 'Ultimately, the officer of the court has to take priority. There may come a time when you say to a client I can't appear for you any longer'; Interview with Lex Lasry, above n 8: 'Our primary obligation is to the system'; Interview with Kerri Mellifont, above n 108: 'I'm an officer of the court first. I'm in this for the long haul. It only takes one case where you've acted improperly and it's all over for you. It doesn't help me or anyone else. I'm here forever. I'm unshakeable about that.'; Interview with Robert Richter, above n 67: 'Your duty to the court not to lie always wins out'; Interview with Robert Stary, above n 43: 'your obligation as an officer of the court is paramount.'

Only one lawyer offered a markedly different reply. Defence lawyer Peter Morrissey said: 'Generally, I'd have to be shown cause why not to put the client first. I'd pull out of a case if I thought I'd have to disadvantage a client. I've never had to do it but I had one case where I felt on the borderline': Interview with Peter Morrissey, above n 51.

the attention of the court I'll do it. ... I won't tell a lie for a client.'<sup>264</sup> Another said: 'I never mislead the court. I have a duty to the court. You're in a partnership with the court as a barrister. If lawyers lie the whole system breaks down.'<sup>265</sup>

When asked, even politically motivated lawyers directly replied that duty to the court and to truth come first. One prominent defence lawyer immediately stated: 'My duty is first and foremost to the court.'<sup>266</sup> A legal aid lawyer said: 'I see myself as an officer of the court first. ... Where there is tension, you honour your duty to the court first. Clients have to understand this — or they can sack you.'<sup>267</sup> Another legal aid lawyer said:

Your primary obligation is clear: you are an officer of the court whether you like it or not. Your first duty is to the court. You have to act on your client's instructions or in their interest while not breaching your obligations to the court.<sup>268</sup>

A defence lawyer with an explicitly political practice said: 'Your first duty is as an officer of the court and you must behave scrupulously.'<sup>269</sup>

On the other hand, some lawyers do not experience much tension between duty to the court and duty to client. A long-time poverty and prisoners' rights lawyer said: 'I never feel a great deal of conflict. You can reconcile the two roles quite readily.'<sup>270</sup> Another lawyer said:

In essence [any tension] has to be resolved in favour of your ethical duty to the court. But there are ways of doing this. You must explain to the client the things you can't do and the things you can. Rarely have I ever reached an impasse.<sup>271</sup>

Another said:

I'm fairly firm that the officer of the court role comes first. My duty to the court is more important than my duty to the client — but I can't think of a case where the two have been in real conflict. ... I tell a client I won't put absolute nonsense to the court, I won't put rubbish. ... It makes the client look bad.<sup>272</sup>

Some lawyers regard their role as officers of the court not only as an ethical matter but also as a way of best serving their clients. As one public defender said: 'With judges here, one's credibility is important. If the judge knows you and knows they can trust you, it benefits the client.'<sup>273</sup> A criminal lawyer said: 'You get one reputation. You want to be known [to be] as straight as possible.'<sup>274</sup> Another criminal lawyer said: 'I preserve my credibility. I won't compromise my

<sup>264</sup> Interview with Shane Tyrrell, above n 46.

<sup>265</sup> Interview with Peter Condliffe, above n 83.

<sup>266</sup> Interview with David Grace, above n 66.

<sup>267</sup> Interview with Brian Devereaux, above n 52.

<sup>268</sup> Interview with Laura McDonough, above n 90.

<sup>269</sup> Interview with Robert Stary, above n 43.

<sup>270</sup> Interview with Susan Bothmann, above n 85.

<sup>271</sup> Interview with Phillip Boulten, above n 43.

<sup>272</sup> Interview with Elizabeth Dowling, above n 7; see also Interview with Julian Burnside, above n 51: 'Your obligation to the court trumps your obligation to the client. It's not difficult to tell the client, sorry, that can't be done. If you want it done, go to someone else.'

<sup>273</sup> Interview with Dina Yehia, above n 63.

<sup>274</sup> Interview with Peter Morrissey, above n 51.

client's interests but I won't take an untenable position.<sup>275</sup> Yet another said: 'In the long run, the more honest and straightforward the court sees me, the better it is for my clients.'<sup>276</sup> A younger lawyer said:

At the end of the day maybe it's a fear of reprisal. I won't be a practitioner known by the bench or my peers to be lying to the court. It would be a great professional and personal embarrassment to be seen as dishonest by my colleagues.<sup>277</sup>

Others believed they could honour their relationship to the court without undercutting their relationship to the client, and that any tension could be resolved through straightforward client counselling. As one public defender said:

We have strong guidelines in our relation to the court ... not to mislead the court either directly or indirectly. I would try to explain to my client the limits of my representation. If my client told me to suggest to a victim that he didn't do it when he had instructed me that he did, I would explain what I could and could not do. ... If necessary, I would withdraw.<sup>278</sup>

A legal services lawyer said:

I believe in being up front with clients. If a client comes up with a stupid story or a lie, I would tell them this is crap and I won't do it. I would talk a client out of it. I'm careful to educate the client along the way to make sure they understand the system.<sup>279</sup>

A prominent barrister said: 'Sometimes I say to a client "this is bullshit and I'm not going to present it"'. They usually cave.'<sup>280</sup>

One criminal lawyer has a clear sense of the lines she would not cross for a client — and she has no difficulty informing the client of these lines:

I will discuss with a client how I will run the case. If the client doesn't like what I say he can get another lawyer. I would never get excited enough about the case to break any boundaries. This tends to mean misrepresenting by omission or inappropriate gloss. ... I wouldn't do it.<sup>281</sup>

One career legal aid lawyer said: 'I can usually work it out.'<sup>282</sup> With regard to prospective perjury, she said: 'I'd give my advice — that they won't be believed and they'll be worse off. I'd put it in writing. I'd withdraw only if I believed my

<sup>275</sup> Interview with Robert Stary, above n 43.

<sup>276</sup> Interview with Shane Tyrrell, above n 46.

<sup>277</sup> Interview with Theodosios Alexander, above n 102.

<sup>278</sup> Interview with Dina Yehia, above n 63.

<sup>279</sup> Interview with Pauline Spencer, above n 92.

<sup>280</sup> Interview with Lex Lasry, above n 8. On the matter of tension between the lawyer's role as officer of the court and client advocate, Lasry said:

It depends on what the tension is. I'm not the judge. It's not for me to decide what version of facts is the truth. If I feel I can't make certain facts viable before a jury I tell the client I'll cross-examine him as a prosecutor and see whether they want to go forward. ... Australian lawyers take seriously a defendant saying, 'I was there and I did it but I want an alibi.' I would say, '[T]here's the door. Go tell someone else.' I wouldn't contemplate doing that and I don't know who would. But, it's not for me to be the judge of a story so long as I'm not told it's a lie.

<sup>281</sup> Interview with Kerri Mellifont, above n 108.

<sup>282</sup> Interview with Suzan Cox, above n 8.

client was going to lie to the court and it was obvious and blatant. I would need to *know*.<sup>283</sup>

I don't get myself into a situation where there is tension. ... You're allowed to have your own personal views about crime and punishment. But it's my job to get my client off entirely ... or to get a convicted client the minimum sentence. ... It doesn't worry me. The Crown carries a heavy burden of proof: beyond all reasonable doubt. ... If the Crown fails to prove its case so be it.<sup>284</sup>

One prominent defence lawyer employs a specific tactic that reflects his dual role as officer of the court and client advocate: 'I tell my client that my duty is to the court first, and second to you. I say to my client, "before you tell me what you are about to tell me, understand that my first duty is to the court"'.<sup>285</sup> In this way, the client is warned against saying certain things that might put the lawyer in an untenable position. Another lawyer agreed: 'It's best to iron that stuff out in the beginning'.<sup>286</sup>

One lawyer was sceptical about her fellow lawyers' regard for the truth when it comes to advocacy:

I think lawyers are kidding themselves when they say they care about truth. If someone has one drop of Aboriginal blood, I'll milk it in court for what it's worth. I will play on female stuff. I will use stereotypes as part of advocacy. ... I know I'm not alone in this.<sup>287</sup>

#### IV DUTY TO THE CLIENT AND THE BOUNDS OF ZEAL

Notwithstanding their primary duty to the court, Australian defence lawyers seem to model themselves after the same Englishman as American lawyers: Lord Henry Peter Brougham. Lord Brougham's famous declaration during his representation of the Queen Caroline in 1821 has been the standard for zealous representation for nearly 200 years:

an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the

<sup>283</sup> Ibid (emphasis in original). See also Interview with Robert Richter, above n 67: 'You can't put on perjury but you can't be the judge of whether something is perjury. It has to be beyond dispute. You can't rely on instincts.'

<sup>284</sup> Interview with David Gunson, above n 56.

<sup>285</sup> Interview with Andrew Kirkham, above n 59.

<sup>286</sup> Interview with Domenico Calabrò, above n 99.

<sup>287</sup> Interview with Elizabeth Dowling, above n 7. Dowling told a story about one client for whom she had acted repeatedly — she had represented him and his extended family. When the client started to 'go on about some of the excuses I had made for him over the years ... his difficult life [etc]'. Dowling shut him down. 'I said that's rubbish — I don't believe a word of it. You need to be responsible for yourself.' Dowling, like many lawyers, believes that truth is essential in the lawyer-client relationship, even if it sometimes gets lost in the art of advocacy.

consequences, though it should be his unhappy fate to involve his country in confusion.<sup>288</sup>

Lord Brougham was defending Queen Caroline against charges of adultery, a crime of which she was almost certainly guilty as she and the King had been leading separate lives since the birth of their daughter some years before. If convicted, Queen Caroline would be divorced from the King and stripped of Her Majesty's title, something she did not want.<sup>289</sup> In his opening statement at the Queen's trial, Lord Brougham delivered a fearsome threat — that he would do what he had to do as an advocate, no matter the consequences to Crown or country. As Lord Brougham explained in his autobiography, this threat was 'neither more nor less than impeaching the King's own title, by proving that he had forfeited the crown.'<sup>290</sup> The ground for the King's forfeiture of the throne was that '[h]e had married a Roman Catholic (Mrs Fitzherbert) [his mistress] while heir-apparent', and such a marriage was 'declared by the *Act of Settlement* to be a forfeiture of the crown, "as if he were naturally dead."<sup>291</sup> Therefore, to drive his threat home, Lord Brougham had prefaced it by saying that, if the case should reach a point at which an attack on the King were justified to protect the Queen, then he would not 'hesitate one moment in the fearless discharge of [that] paramount duty.'<sup>292</sup>

Some Australian lawyers use the same language in describing their duty to their client. As one lawyer said: 'The client's interest is paramount. That's what your job is — within the confines of your ethical duty and the law. ... As long as you conform to the law you should put the client first.'<sup>293</sup> A public defender said: 'The primary, paramount concern for a defence lawyer is the client's interests.'<sup>294</sup> A legal aid lawyer said: 'If you're an ethical defence lawyer you put your client's interest first.'<sup>295</sup> Another legal aid lawyer agreed: 'You should do everything you can for the client within the confines of the law.'<sup>296</sup>

<sup>288</sup> David Mellinkoff, *The Conscience of a Lawyer* (1973) 189, citing Lord Brougham in J Nightingale (ed), *Trial of Queen Caroline* (1821) vol 2, 8. Cf Galbally, above n 6, 2.

<sup>289</sup> See Monroe H Freedman, 'Henry Lord Brougham, Written by Himself' (2006) 19 *Georgetown Journal of Legal Ethics* 1213.

<sup>290</sup> Lord Henry Brougham, *The Life and Times of Lord Henry Brougham, Written by Himself* (1871) vol 2, 407.

<sup>291</sup> *Ibid* (emphasis in original).

<sup>292</sup> *Ibid* 406 fn [\*]. Lord Brougham's threat was particularly potent because of the social and political unrest at the time. '[M]embers of the army, like the people of England generally, held their allegiance to the Queen as well as the King': see Freedman, 'Henry Lord Brougham, Written by Himself', above n 289, 1216 (citations omitted). Indeed, many favoured the Queen. If Lord Brougham had been forced to carry out his threat, civil war might have ensued: at 8–9. Although rebuked 'most weightily' by Lord Eldon LC for his 'threats', Lord Brougham's statement was nonetheless immediately recognised as 'a masterly performance.': Flora Fraser, *The Unruly Queen: The Life of Queen Caroline* (1996) 438, 433. As Lord Brougham was finishing his speech, the aged former Lord Chancellor Lord Erskine was so moved that he 'rushed from the chamber in tears': at 433. Another barrister declared that Lord Brougham's opening statement was 'one of the most powerful orations that ever proceeded from human lips': Frances Hawes, *Henry Brougham* (1957) 155. Lord Brougham later succeeded Lord Eldon as Lord Chancellor of England: Fraser at 465.

<sup>293</sup> Interview with Phillip Boulten, above n 43.

<sup>294</sup> Interview with Dina Yehia, above n 63.

<sup>295</sup> Interview with Suzan Cox, above n 8.

<sup>296</sup> Interview with Domenico Conidi, above n 65.

Some lawyers described the lawyer's duty as an advocate as providing a voice for those incapable of standing up for themselves in a court of law. As one prominent lawyer said: 'The advocate is saying what the client would say if the client had the legal training and experience.'<sup>297</sup> Another lawyer said: 'I put forward the client's case because he isn't capable.'<sup>298</sup> Another said: 'Lawyers represent clients. That's why I listen to the client's instructions.'<sup>299</sup>

Whether they call it 'robust' or 'zealous' advocacy, most Australian lawyers say it is their obligation to fight hard for their clients no matter the charge or the weight of the evidence and they readily fulfil this obligation. One lawyer, when asked whether she wants to win ugly, distasteful cases to the same degree as a more ordinary ones, said: 'Yes ... My job is to win the case. I got someone off for rape and then he killed someone and I got him off for that, too. Then I represented him civilly'.<sup>300</sup> Another lawyer talked about a child sex abuse case, even though he had said only minutes before that these cases were unpleasant for him:

I can remember some child sex assault case I was anxious to win and which I fought tooth and nail. My own personal feelings about what the outcome ought to [be should] influence the case much less than any other factor. I have been successful in establishing a way of operating where I suspend belief and judgment.<sup>301</sup>

Another lawyer said he wanted to win these sorts of cases most of all: 'You want to win more than in an ordinary case. It's like [when] you're in a fight and being held down, you fight extra hard to get up. You're more willing to fight the good fight.'<sup>302</sup>

When asked about the American notion of zeal, a legal aid lawyer said: 'I agree. I don't think there's a difference. As long as you observe your duty to the court not to mislead the court, and you're not putting up anything you know to be untruthful. It's not to win at any cost.'<sup>303</sup> Another legal aid lawyer agreed that defence lawyers should try to win by all lawful means 'provided you're not compromising your primary duties to the court.'<sup>304</sup> She elaborated: 'You can't mislead the court and you can't run defences you know to not be true. Aside from these you're trying to win.'<sup>305</sup>

<sup>297</sup> Interview with Robert Richter, above n 67.

<sup>298</sup> Interview with Andrew Kirkham, above n 59.

<sup>299</sup> Interview with Elizabeth Dowling, above n 7. Dowling acknowledged that client-centred advocacy can be difficult. She talked about having represented children who were being used as slaves and who wanted to go back into slavery. She also recounted her representation of the accused in 'one of the worst sex offence cases' she had ever seen. Her client was the father of the victim, who was used in group sex. Dowling said, 'I needed a bottle of red wine to get through the case. The girl had injuries you'd only see in a horrible home birth. It was just evil ... Some people have the devil in them.'

<sup>300</sup> *Ibid.* Dowling's desire to win has nothing to do with the type of case: 'I represented a man who anally raped a child. I was glad to win. I'm pissed off when I lose.'

<sup>301</sup> Interview with Phillip Boulten, above n 43.

<sup>302</sup> Interview with Theodosios Alexander, above n 102.

<sup>303</sup> Interview with Suzan Cox, above n 8.

<sup>304</sup> Interview with Laura McDonough, above n 90.

<sup>305</sup> *Ibid.*

One lawyer believes in ‘using the law to the nth degree’ and ‘push[ing] the boundaries, especially in asylum cases.’<sup>306</sup> Although this lawyer was unequivocal about his obligation to ‘never misstate the client’s factual circumstances or evidence’,<sup>307</sup> when pressed, he agreed that there was some ‘give’ to this standard: ‘If a client tells me something I will put that forward. I’ll creatively interpret the law but not the facts. On the other hand, I would *explore* the facts with the client. I wouldn’t put words in the mouth of the client; that’s quite unethical.’<sup>308</sup> He admitted that ‘some questions I wouldn’t ask to avoid conflict of interest.’<sup>309</sup>

Sometimes you have to do things you might not want to do in the name of zealous advocacy. A public defender talked about cross-examining sympathetic witnesses:

Sometimes you must cross-examine a witness for whom the examination will be emotionally detrimental ... As a defence lawyer you have to embark on an emotional cross regardless of the consequences. The interests of your client are your paramount concern.<sup>310</sup>

When asked about the view of some American lawyers that zealous advocacy within the bounds of law means getting as close to ‘the line’ as possible without crossing it, one lawyer responded: ‘I couldn’t agree more. You run with the ball until the bell rings.’<sup>311</sup> Another lawyer said: ‘I agree. I would think this is what any good Australian lawyer would do. ... I believe in the tradition of confident, assertive advocacy.’<sup>312</sup> Another lawyer said: ‘if ethics allow it then you should go to the line.’<sup>313</sup>

A public defender agreed that zealous advocacy on behalf of clients is essential, but offered a cautionary note:

I think it’s very important to be a client’s champion, to present every possible argument ... in an articulate way ... to demonstrate passion and commitment no matter who the client is. ... Even if it’s a very strong prosecution case, you don’t simply go through the motions. If what you mean by getting close to the line is being well-prepared and arguing passionately and strongly then I’m in agreement. If it implies doing something that isn’t completely above board or compromises the defence lawyer’s integrity, then no. The defence keeping the

<sup>306</sup> Interview with Peter Condliffe, above n 83.

<sup>307</sup> Ibid.

<sup>308</sup> Ibid (emphasis in original).

<sup>309</sup> Ibid.

<sup>310</sup> Interview with Dina Yehia, above n 63.

<sup>311</sup> Interview with Elizabeth Dowling, above n 7. Dowling believes in zealous advocacy in her work in the Children’s Court as well as in criminal defence: ‘They come in through the door and it’s you against the state. I don’t believe the Children’s Court is about implementing justice, as one of the parties — the Department of Human Services — goes in there with the aim of taking poor people’s children off them.’

<sup>312</sup> Interview with Peter Morrissey, above n 51. Morrissey felt that ‘urging one to get close to the line might reflect a fear that lawyers would curry favour with the legal system.’ He believes strongly that the client comes before one’s obligation to the legal system. He explained:

All that talk about being ‘officers of the court’ is self-justifying. It’s the safety valve against cheating. But usually, if you do your job in an effective way you serve the system. A mature system can accommodate both sides fighting hard. I like the system and have faith in it. I have faith in juries. I believe the system can bear robust advocacy.

<sup>313</sup> Interview with Phillip Boulton, above n 43.

system honest will not be achieved if the defence lawyer doesn't behave with integrity.<sup>314</sup>

One lawyer suggested there might be times when she would cross the line: 'If something is unfair and unjust occasionally you might have to take a stance and put your career on the line for it. Here, I'm a bit more political. I'm not just a dispassionate lawyer doing a job.'<sup>315</sup>

When asked about famed American lawyer Alan M Dershowitz's view of criminal defence ethics — what a defence lawyer 'may do, he *must* do' in order to defend the client<sup>316</sup> — one prominent Australian lawyer chuckled and said: 'I absolutely agree with that. What you may do as a lawyer you must do.'<sup>317</sup> Still, this same lawyer went on to explain that, notwithstanding the obligation of zealous advocacy, the Australian lawyer's 'first duty is to the Court, and our secondary duty is to the client.'<sup>318</sup>

Some Australian lawyers — a noteworthy minority — worried about 'excessive zeal.'<sup>319</sup> Some of this worry is tactical — an overly aggressive style does not always make for effective advocacy. Yet, a concern about adversarial excess also suggests a stronger allegiance to court than client. In the US, judges are typically concerned about excessive zeal or 'civility',<sup>320</sup> not lawyers.

One lawyer who seemed more concerned about tactics than ethics said: 'Zealousness per se is not always best ... Sometimes softly, softly is better.'<sup>321</sup> Another expressed a broad view: 'I think too much zeal is not a good thing in litigation — and perhaps in other aspects of life.'<sup>322</sup> Yet another voiced a concern about pushing the bounds of ethics:

I see zealous defence lawyers who are sometimes overzealous as walking the fine line between what is right and wrong. I would take a conservative view. I wouldn't want to push the bounds so that I was misrepresenting to the court. I don't have a minute's patience for that kind of attitude.<sup>323</sup>

<sup>314</sup> Interview with Dina Yehia, above n 63.

<sup>315</sup> Interview with Pauline Spencer, above n 92.

<sup>316</sup> Alan M Dershowitz, *Reasonable Doubts: The OJ Simpson Case and the Criminal Justice System* (1996) 145 (emphasis in original).

<sup>317</sup> Interview with Lex Lasry, above n 8.

<sup>318</sup> Ibid, although Lasry believes that the duty to the court must win out over the duty to client, it is a close call. Lasry offered a horseracing analogy: 'It's a short half-head. The court wins — of course it must — but it's only just.' A colleague at the Victorian Bar disagreed. He said: 'Dershowitz's warning is not necessary here. ... No matter what they say most of my colleagues put the client first': Interview with Peter Morrissey, above n 51.

<sup>319</sup> See, eg, Sir John V Barry, 'The Ethics of Advocacy' (1941) 15 *Australian Law Journal* 166, 170, quoting an after-dinner speech by Lord Cockburn CJ.

<sup>320</sup> See Freedman and Smith, above n 22, 123–7; see also Amy R Mashburn, 'Professionalism as Class Ideology: Civility Codes and Bar Hierarchy' (1994) 28 *Valparaiso University Law Review* 657.

<sup>321</sup> Interview with Phillip Boulten, above n 43. See also Barry, above n 319, 170, quoting Lord Cockburn CJ's famous rejoinder to Lord Brougham: 'an advocate should be fearless in carrying out the interests of his client but ... the arms which he wields are to be the arms of the warrior and not of the assassin.'

<sup>322</sup> Interview with Julian Burnside, above n 51.

<sup>323</sup> Interview with Kerri Mellifont, above n 108.

Some lawyers specifically disavow the idea that Australian lawyers should ‘push the envelope’, or get close to the line of lawful conduct, in the name of zealous or robust advocacy. ‘We see our role not as pushing the envelope,’ said one career defender. ‘There is an obligation not to mislead the court. This is an absolute rule. We would not want to put on our resume that we believed in pushing the envelope.’<sup>324</sup>

Several lawyers believe there is a ‘significant cultural difference’ between Australian and American lawyers, and suggested that Australian lawyers do not approach legal practice with the ‘same degree of intensity or zealotry’ as their American counterparts.<sup>325</sup> One legal aid lawyer explained that, in contrast to the American notion of zealous advocacy, ‘it’s not that I will try “every lawful means to get my clients off.” There may be lawyers who take that attitude. But the chief idea is to make sure that the client gets a fair trial and is not convicted wrongly.’<sup>326</sup>

A prominent political lawyer shared this view: ‘I would think we don’t have that [same] robust attitude here [as in America] ... because your first duty is as an officer of the court.’<sup>327</sup> Another prominent lawyer who both defends and prosecutes said: ‘We don’t practise like the Americans. We don’t have to get into our client’s skin.’<sup>328</sup>

Several lawyers expressed reluctance to sign on to the American notion of ‘warm zeal’,<sup>329</sup> preferring the slightly more muted ‘doing one’s best for a client’ or ‘making sure the client gets a fair trial.’ As one lawyer said: ‘Representing the client to the best of your ability is how [you conduct the defence of an unpopular client]. ... I’ve tried equally hard for unpopular clients as your ordinary Joe.’<sup>330</sup> Another lawyer said: ‘I’m just doing my job to the best of my ability.’<sup>331</sup> Still another said:

I do the best I can for my client, to the extent I’m able to. I cannot be unethical and I cannot break the law. I don’t think of going up to the ‘line’. There isn’t a line. It’s not that simple. There are times when you should be aggressive and times when that’s not the best tactic. It depends. As long as it’s legal you must do the best for your client.<sup>332</sup>

<sup>324</sup> Interview with John Stratton, above n 8.

<sup>325</sup> Interview with Brian Devereaux, above n 52.

<sup>326</sup> *Ibid.* On the other hand, Devereaux, who runs the in-house legal Counsel division of the legal aid office in Queensland, was emphatic about his office providing the same calibre of representation as privately paid lawyers: ‘I provide as vigorous a defence on behalf of a non-paying client as the private Bar would for a paying client. I completely refute that people don’t get as good representation at legal aid.’

<sup>327</sup> Interview with Robert Stary, above n 43.

<sup>328</sup> Interview with Paul Willee, above n 55.

<sup>329</sup> See American Bar Association, *Canons of Professional Ethics* (1908) 15.

<sup>330</sup> Interview with Domenico Conidi, above n 65.

<sup>331</sup> Interview with David Gunson, above n 56.

<sup>332</sup> Interview with Domenico Calabrò, above n 99.

A legal aid lawyer saw his duty to the client as ensuring fairness as opposed to doing everything within the bounds of law to get the client ‘off’:

I am satisfied that we have a system that requires a fair trial and this is where you shoot. It’s not that I will try every lawful means to get my client off. There may be lawyers who take that attitude. But the chief idea is to make sure that person gets a fair trial and is not convicted wrongly. Some private lawyers might say no, your client is paying you to win ...<sup>333</sup>

The Dershowitz approach — what a lawyer may do, he or she must do<sup>334</sup> — was also disavowed by several Australian lawyers. Although there was unanimity about the lack of discretion in accepting unpopular cases, several lawyers suggested there was discretion as to how one defends such cases. As one defence lawyer said: ‘We have a choice as barristers as to how we represent clients.’<sup>335</sup> The same lawyer voiced concern about unmitigated zeal on behalf of individual clients: ‘Client interest — meaning I’ll do anything for the client — is the problem I have with commercial law. ... Client interest is too individual. Justice for your client is important — so long as it’s based on fairness and truth.’<sup>336</sup>

Yet, the same lawyer, and quite a few others, indicated that, as an advocate, he ‘would do everything allowed by law’, including ‘exploit[ing] prejudice on behalf of a client.’<sup>337</sup> He saw this as a ‘tactical decision’, not an ethical one:

If it was a weak, piddling point, I wouldn’t make it. But if it was a decent point I would. ... If there were blacks or Asians on the jury I would exploit a point to get to them — if the facts were there. I wouldn’t make it up. It’s not my concern whether I am perpetuating prejudice or misogyny or whatever. Political correctness is not an issue for the Bar.<sup>338</sup>

No-one voiced an objection to employing nasty tactics, so long as the court was not misled. These sorts of tactics have come under increasing criticism in the US.<sup>339</sup>

<sup>333</sup> Interview with Brian Devereaux, above n 52.

<sup>334</sup> Dershowitz, above n 316, 145.

<sup>335</sup> Interview with Shane Tyrrell, above n 46.

<sup>336</sup> *Ibid.* Several of the lawyers interviewed took a swipe at commercial law practitioners. See, eg, Interview with Theodosios Alexander, above n 102: ‘The most tragic element of modern legal practice is its commercialisation. When did we move from being a profession to being an industry? Pro bono work is a tradition that should be upheld.’

<sup>337</sup> Interview with Shane Tyrrell, above n 46.

<sup>338</sup> *Ibid.* See also Interview with Philip Dunn, above n 45, acknowledging that there is a ‘battle of prejudices’ in trial lawyering, and that, in the Ramage murder case, he ‘tossed the fact that Mrs Ramage was menstruating out there’ to suggest ‘gently’ that she may have been hysterical and helped bring about her own death.’ As Dunn said: ‘I would use any perceived notion or stereotype — I would toss it out there.’

<sup>339</sup> See, eg, David Luban, *Lawyers and Justice: An Ethical Study* (1988) 150–3; William Simon, ‘The Ethics of Criminal Defence’ (1993) 91 *Michigan Law Review* 1703, 1704–5; Anthony Alfieri, ‘Defending Racial Violence’ (1995) 95 *Columbia Law Review* 1301, 1304. Professor William Simon believes that lawyers ought to pursue ‘justice’ (as the lawyer sees it) over the client’s interest: see generally William H Simon, *The Practice of Justice: A Theory of Lawyers’ Ethics* (1998). However, he concedes that certain circumstances might merit especially zealous defence, such as where the punishment is disproportionate to the crime and/or there has been discriminatory law enforcement: at ch 7. Given the current US regime of harsh prison sentences, and its disproportionate impact on non-whites, Simon’s exception might easily swallow the rule. See generally Marc Mauer, *The Race To Incarcerate* (1999); David Cole, *No Equal Justice*

Interestingly, one lawyer suggested that lawyers who represent unpopular clients are more ethical than most lawyers: ‘We’re always walking a line, concerned about ethics. This may be especially so in high profile cases.’<sup>340</sup>

Everyone wants to win. No matter the case, winning always beats the alternative. Not a single lawyer suggested otherwise, even in the face of an abhorrent case.<sup>341</sup> As one lawyer said: ‘Realistically, everyone wants to win. It’s what motivates you.’<sup>342</sup> One lawyer said: ‘I’ve told many students that the words “not guilty” are the sweetest words. ... The words “not guilty” are even sweeter when the case is difficult, the crime serious.’<sup>343</sup>

Another lawyer reflected on his evolving passion to win and the relevance of ego:

I want to win. If they deserve to win legally they should win. I hate losing. But I accept that from time to time I will. Things change as you get older. In the early days you develop a passion for the rightness of the case. As you get older you assume the rightness of the case and have a passion not to appear an idiot.<sup>344</sup>

Several lawyers admitted that, although they fight equally hard for all clients no matter the nature of the case, they cope better with certain losses than others. As a public defender said: ‘I wouldn’t fight a case involving a savage sexual attack on young children any differently. But if I lost, something would kick in to limit the emotional down I would normally experience when losing.’<sup>345</sup> A criminal lawyer had a pragmatic approach:

There are two personalities in trial lawyers. I want to win because I like winning. Then there is the other personality: I want to do the very best I can in this case and get the most positive result for the client. I think you worry less when there’s not as much you can do. If you lose the dead-set losing case it won’t stay with you as long as losing a case where you think the right verdict was an

(1999). Sadly, Australia seems to be following in America’s footsteps in this ‘race to incarcerate’: see Jane Holroyd, ‘Big Increase in Prison Population’, *The Age* (Melbourne), 16 December 2005, 6.

<sup>340</sup> Interview with Laura McDonough, above n 90.

<sup>341</sup> See, eg, Interview with Brian Devereaux, above n 52: ‘There is a degree to which you do want to win even in cases where you start out thinking that winning is undesirable. By the time you develop an argument it persuades you’; but see Interview with Laura McDonough, above n 90:

I admit there are cases I want to win more because I have more sympathy for the client. I divorce myself from my feelings to go the full mile. Sometimes you feel more empathy for some clients than others or care more, but that shouldn’t affect your performance — or you shouldn’t take the case.

<sup>342</sup> Interview with Domenico Conidi, above n 65.

<sup>343</sup> Interview with David Gunson, above n 56.

<sup>344</sup> Interview with Robert Richter, above n 67. See also Interview with Kerri Mellifont, above n 108: ‘There’s also an element of not wanting to make an idiot of myself. I need to know that I’ve done everything I possibly can.’ Another lawyer noted the role of ego and ambition, see Interview with Andrew Kirkham, above n 59: ‘It’s an ego thing. I’m supposed to be briefed because I’m among the best. You’re only as good as your last case. We all have a pronounced will to win’; Interview with Peter Morrissey, above n 51: ‘The motives might not be quite as admirable. Once you get in there you’re fighting. You don’t want to be bested by some stupid prosecutor’; Interview with Domenico Conidi, above n 65: ‘Unless you’re successful you’re not going to get any work.’

<sup>345</sup> Interview with Dina Yehia, above n 63.

acquittal. I've had two of these and it's two too many. When I win a losing case, I say 'good oh,' and move on.<sup>346</sup>

## V CONCLUDING THOUGHTS

It is always interesting to learn how lawyers from different countries view their professional responsibilities and conduct themselves in practice. With the rise of international terrorism, the growing acceptance of international law, the increasing turn to international criminal tribunals, and the need for lawyers to represent the accused at these tribunals, it might be increasingly important to consider different approaches to lawyering. Australian lawyers — some of whom have already proven themselves before international tribunals<sup>347</sup> — make for an interesting case study.

While there are ethical and cultural differences between Australian and American lawyers, it is not clear what these differences signify. Though Australian lawyers are motivated more by a sense of professional duty than by a desire to help clients, they nonetheless fight hard on behalf of individual clients. Though Australian lawyers regard themselves first and foremost as officers of the court, forswearing any conduct that might be seen as misleading or untruthful, this does not mean they forsake vigorous advocacy. To the contrary, they aim to *win*, and manage to do so with some frequency. Indeed, it seems clear that both the client and the legal system are well served by the robust yet upright advocacy of Australian lawyers.

Whether all Australian lawyers believe in or follow the cab rank rule — and there are nay-sayers — the rule seems to have a significant influence on the ethos of Australian legal practice. No lawyer with whom I spoke expressed any hesitation about representing unpopular or loathsome clients. No lawyer said he or she would refuse to represent an alleged terrorist — even someone who was charged with committing an act of violence on Australian soil. The lawyers were not all barristers bound by a particular rule. Most felt that this is simply what lawyers do.

The broadly held view by Australian lawyers that they have an obligation to represent those in need of their services, no matter how prominent the lawyer or unpleasant the case, undoubtedly has an impact on the overall quality of representation. During my time in Australia, there were many crime stories in the news. The cases were the usual ones that attract media and public attention: murder, rape, child abuse and drug dealing. As in the US, many of the accused were poor or lacked the means to retain legal representation. Yet, they all seemed to be well represented. A lawyer with expertise and experience — if not from legal aid or the public defender's office, then a member of the private Bar — stepped up to take the case.

<sup>346</sup> Interview with Kerri Mellifont, above n 108. See also Interview with Lex Lasry, above n 8: 'When you lose you have varying degrees of emotional reaction. ... If the client did it ... that's the system taking its course. It's not the same as representing someone you believe is innocent.'

<sup>347</sup> See above n 51.

During my year in Melbourne, prominent members of the Bar, many of whom appear in this paper, were involved in all sorts of criminal cases. These were not primarily ‘cause lawyers’,<sup>348</sup> doing the work for political or ideological reasons. There was no identifiable cadre of lawyers who tended to take especially nasty or high profile criminal cases. The lawyers at the top of the profession — the most established and accomplished, many of whom had achieved the rank of Queen’s Counsel — often took on the lowest clients.

This is quite different from indigent criminal defence in the United States. Study after study has shown that legal representation in serious criminal cases in the US is often deficient.<sup>349</sup> As one well-known American lawyer has put it, death row is populated not by the worst criminals, but by those who had the ‘worst lawyers.’<sup>350</sup>

No doubt, there is more than ethics or culture at play. It is beyond the scope of this paper to consider the criminal defence compensatory schemes in the various Australian states and territories and the effect of these on the quality of representation.<sup>351</sup> However, much has been written about the impact of insufficient funding on the quality of indigent criminal defence in the US.<sup>352</sup>

I am not suggesting that the most prominent, high-flying barristers take every legal aid case that comes in the door.<sup>353</sup> Defence briefs have been known to be ‘returned’; barristers sometimes decline to proceed with the representation of clients who cannot pay their fee.<sup>354</sup> But, it does appear that prominent lawyers are often involved in the most serious cases, even when they come from legal aid. That is, when the stakes are at their highest, the representation is at its best.

As to whether the US would benefit from a system in which lawyers were obligated to take unpopular cases, I am intrigued but undecided. I confess that, as a result of this project, I have become more open to the idea of a cab rank rule in the US — at least in criminal cases. I think it would be good for the profession and good for the country to have lawyers from elite, ‘white shoe’ law firms

<sup>348</sup> See generally Austin Sarat and Stuart Scheingold (eds), *Cause Lawyering: Political Commitments and Professional Responsibilities* (1998).

<sup>349</sup> See above nn 18–20 and accompanying text; see also James S Liebman, Jeffrey Fagan and Valerie West, *A Broken System, Part I: Error Rates in Capital Cases, 1973–99* (2000) ii <<http://www.thejusticeproject.org/press/reports/pdfs/Error-Rates-in-Capital-Cases-1973-1995.pdf>>.

<sup>350</sup> See Bright, ‘Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer’, above n 18.

<sup>351</sup> For an excellent discussion of these issues in the English Crown Court, see Peter W Tague, ‘Representing Indigents in Serious Criminal Cases in the English Crown Court: The Advocates’ Performance and Incentives’ (1999) 36 *American Criminal Law Review* 171; Peter W Tague, ‘Ensuring Able Representation for Publicly-Funded Criminal Defendants: Lessons from England’ (2000) 69 *University of Cincinnati Law Review* 273.

<sup>352</sup> See above n 19 and accompanying text; see also Stephen B Bright, ‘Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake’ [1997] *Annual Survey of American Law* 783, 816; Dennis E Curtis and Judith Resnik, ‘Grieving Criminal Defence Lawyers’ (2002) 70 *Fordham Law Review* 1615, 1620.

<sup>353</sup> See Tague, ‘Ensuring Able Representation for Publicly-Funded Criminal Defendants’, above n 351, 278; but see at 279 fn 28, which cites *Legal Aid in Criminal and Care Proceedings (General) Regulations 1989* (UK) reg 48(2)(a)–(b).

<sup>354</sup> Tague, ‘Ensuring Able Representation for Publicly-Funded Criminal Defendants’, above n 351, 281.

representing unpopular criminal defendants along with politically-motivated lawyers, public defenders and court-appointed lawyers.<sup>355</sup>

However, I am also mindful that the lawyers interviewed for this paper might represent a skewed sample. These are heroic lawyers; no wonder I have come to admire their motivations, principles and practices. Yet, it would take something of a cultural revolution to get American lawyers — in view of the tradition of individual lawyer autonomy and freedom — to embrace the notion that they have a professional obligation to serve the next client in the queue. In the meantime, I would worry that ‘conscripted lawyers’ representing clients they despise, charged with offences they abhor, might not be the best way to assure quality representation.

On the other hand, such a rule might change the culture of American legal practice and perhaps lawyers would learn to move beyond their visceral feelings about an unpopular client or case.

If, as part of an American criminal cab rank rule, the professional role of lawyers was reconfigured so that lawyers were officers of the court first and client advocates second, I would have significant concerns. I recognise that such a change might draw more lawyers to the criminal Bar, and might enable those already there to do the work longer. Such a change could also lead to greater support for criminal defence from the profession and the public.<sup>356</sup> But, there would be costs.

First, a less client-oriented adversarial ethic would probably come down hardest on non-paying clients. Because they lack the leverage to insist on the sort of ‘justice’ money can buy,<sup>357</sup> the interests of these clients would be secondary to the court’s interests, the public’s interest and the lawyer’s own values.<sup>358</sup> Second, access to justice for the rest of us would also be watered down. A lawyer’s unfettered allegiance to client assures that, no matter the allegation, the client will have his or her ‘day in court’ and the lawyer will fully and forcefully make all arguments. When lawyers see themselves primarily as officers of the court,

<sup>355</sup> I part ways here with my good friend and co-author Monroe Freedman, who believes that lawyers should be free to choose their clients, and can properly be held morally accountable for their choices: see Monroe Freedman, ‘Must You Be the Devil’s Advocate?’, *Legal Times* (Washington, DC), 23 August 1993, 19. Freedman acknowledges that there would be no ‘moral decision’ if lawyers were ‘ethically bound to represent every client seeking the lawyer’s services,’ but notes that under rule and practice, American lawyers ‘have always been free to choose whether to represent particular clients.’ See also Freedman, ‘Ethical Ends and Ethical Means’, above n 223, 56 (citations omitted): ‘I do not consider the lawyer’s decision to represent a client or cause to be morally neutral. Rather, a lawyer’s choice of client or cause is a moral decision that should be weighed as such by the lawyer and that the lawyer should be prepared to justify to others.’ For Tigar’s fiery reply, see Michael E Tigar, ‘Setting the Record Straight on the Defence of John Demjanjuk’, *Legal Times* (Washington, DC), 6 September 1993, 22. For Freedman’s rejoinder, see Monroe Freedman, ‘The Morality of Lawyering’, *Legal Times* (Washington, DC), 20 September 1993, 22. The exchange between Freedman and Tigar is reprinted in Freedman and Smith, above n 22, app B, 383–92. Although I am open to a criminal cab rank rule, I do not feel the same about civil cases: see Collett, above n 22, 174–7.

<sup>356</sup> See Simon, *The Practice of Justice*, above n 339, ch 2, where he critiques the argument that clients have a right to zealous advocacy in pursuit of immoral ends.

<sup>357</sup> See, eg, PBS, ‘The OJ Verdict’, *Frontline*, 4 October 2005 <<http://www.pbs.org/wgbh/pages/frontline/oj/etc/script.html>>.

<sup>358</sup> See Freedman and Smith, above n 22, 78–82.

rather than their clients' advocates, they may too easily forgo their client's interest in order not to rock the boat.<sup>359</sup>

One of the questions that prompted this project was the relevance of a Bill of Rights to Australian legal practice. My own creed of legal practice is very much rooted in the American Bill of Rights and its underlying embrace of the autonomy and dignity of the individual in a free society.<sup>360</sup> Zealous, client-centred advocacy — through which the lawyer pursues the client's individual interests and protects his or her confidences — is consistent with constitutional values.

I have no clear answer to this question. The famous Australian credo of 'a fair go' — that everyone has the right to a fair and equal opportunity in life — coupled with a strong British-influenced adversarial ethic, offers a rough equivalent of the American individual rights-oriented approach to lawyering, and may motivate lawyers to fight hard for their clients. However, 'fairness' is not necessarily the same as preserving the fundamental rights of the individual. The more muted and *subjective* ethic of some Australian lawyers to 'do the best I can' and 'ensure a fair trial' might reflect a quite different set of values.

Nonetheless, the majority of lawyers interviewed believed that an Australian Bill of Rights would make a positive difference for their clients and their country, whether or not it affected the culture of legal practice. Many came to this view because of new anti-terrorism laws that were enacted after September 11 and the Bali Bombings, which restrict civil liberties in the name of security. As one prominent lawyer said: 'Just give us a few rights ... that can't be taken away.'<sup>361</sup> Another remarked: 'Maybe if there were a Bill of Rights the law wouldn't be so fickle.'<sup>362</sup> One lawyer said that perhaps a Bill of Rights 'could change the dialogue ... as part of a whole lot of other things.'<sup>363</sup>

Others were not so sure. One lawyer who is an admirer of the *United States Constitution* noted that a Bill of Rights might not be a panacea: 'The Bill of Rights and Guantanamo represent the best and the worst of American law'.<sup>364</sup>

<sup>359</sup> Although I did not find this to be a concern with the lawyers I interviewed, it might be a concern among other lawyers, especially in the face of a loathsome crime. The lawyer who represented Martin Bryant after the withdrawal of interviewee David Gunson is Hobart-based barrister and solicitor John Avery. Avery advised Bryant to plead guilty, which he did. Mr Avery subsequently made a number of statements to the press about the Bryant case. On more than one occasion, he expressed the view that the plea was 'in the best interests of the public': see, eg, ABC Radio National, 'Sir Gerard Brennan & Revolving Constitutions', *The Law Report*, 23 September 1997 <<http://www.abc.net.au/rn/talks/8.30/lawrpt/lstories/lr970923.htm>>, where Avery stated: 'I'd be less than frank if I didn't say that I was conscious of the need in the broader community for an outcome that avoided a trial.' However, the needs of the 'broader community' should not be the focus of a criminal defence lawyer. Mr Avery declined requests to speak to him.

<sup>360</sup> See Freedman and Smith, above n 22, vii:

This book presents a systematic position on lawyers' ethics. We argue that lawyers' ethics is rooted in the Bill of Rights and in the autonomy and the dignity of the individual. This is a traditionalist, client-centered view of the lawyer's role in an adversary system, and corresponds to the ethical standards that are held by a large proportion of the practicing bar.

<sup>361</sup> Interview with Lex Lasry, above n 8.

<sup>362</sup> Interview with John Stratton, above n 8.

<sup>363</sup> Interview with Pauline Spencer, above n 92.

<sup>364</sup> Interview with Robert Stary, above n 43.

There are many interesting threads I did not fully pursue, any number of which could merit further study. One of these is the costs versus rewards of representing the unpopular over the long haul.

Although the rewards seem to prevail for the lawyers I interviewed, there are costs. One lawyer developed psoriasis during a lengthy, difficult and high profile child abuse case.<sup>365</sup> A lawyer who regularly takes on politically-charged, unpopular cases said: ‘It takes a toll, it’s hopeless for personal relationships. I’ve been hopeless at maintaining relationships’.<sup>366</sup> Another lawyer now turns down most interstate cases because he has ‘run out of credits at home’.<sup>367</sup> A legal aid lawyer noted: ‘Criminal defence is not family friendly’.<sup>368</sup>

Some lawyers find the work draining and disheartening. One said: ‘I don’t find it fun. I find it depressing. I had to get out of practice for awhile — I went to Canada’.<sup>369</sup>

Particularly controversial cases produce hate mail, threats and, sometimes, reprisals from the government.<sup>370</sup> Under new anti-terrorism legislation, defence lawyers who take terrorism-related cases are subjected to intensive and invasive ‘clearance checks’. As one such lawyer reported:

I had to go through a security check in the Thomas case. ... It was invasive and time consuming. I had to declare all my income over the past 10 years, and present receipts and financial accounts for all travel on the part of me, my partner, and my parents, plus the past five years’ political affiliations. I omitted to mention a dormant credit card and was called from Canberra. I got scolded even though it was inadvertent. I also forgot to mention a 1995 holiday in New Zealand ...<sup>371</sup>

Several lawyers talked about the burden of being responsible for another person’s liberty — and the resulting stress. One legal aid lawyer said: ‘It’s hard to be a defence lawyer. It’s getting harder and harder’.<sup>372</sup> Another noted:

<sup>365</sup> Interview with Elizabeth Dowling, above n 7.

<sup>366</sup> Interview with Robert Stary, above n 43. Another lawyer who regularly takes on such cases — he represents the Sydney defendants in the 2005 anti-terrorism arrests, while Robert Stary represents the Melbourne defendants — said he felt comfortable with his work but his elderly father was ‘expressing his anxiety about these terrorist cases’: Interview with Phillip Boulten, above n 43.

<sup>367</sup> Interview with Andrew Kirkham, above n 59. Kirkham said, ‘I need time with my family. Some cases take a toll on family life — on my wife.’

<sup>368</sup> Interview with Laura McDonough, above n 90.

<sup>369</sup> Interview with Pauline Spencer, above n 92. Spencer said, ‘I was getting angry from fighting all the time and not feeling supported.’

<sup>370</sup> See Interview with Julian Burnside, above n 51: ‘The Tampa litigation provoked death threats.’ The high profile, controversial Tampa refugee case also cost Burnside money:

For the first three years there was a measurable group who shunned me because they disagreed with what I was doing — the smart commercial bar. ... The government is very vindictive. I’ve done commercial work for the bulk of my career. ... I’ve acted for the big end of town for decades. When I began to speak out against the government I stopped getting briefs from business. Top firms get a lot of work from the government. ... The time I’ve spent doing unpaid rather than paid work has cost me at least a million dollars.

<sup>371</sup> Interview with Robert Stary, above n 43. Stary was recently accused of misleading the court as to how much torture one of his alleged terrorist clients underwent: ‘The court is trying to revoke bail because of my alleged exaggeration. They’re also questioning whether I can continue in the case because I acted “dishonestly” when I didn’t correct the record.’

<sup>372</sup> Interview with Suzan Cox, above n 8.

It's like being in a trench or on the frontline. There has to be secondary damage. You become organised about the way you articulate your emotions. If we went into therapy it would come out — all the suppression. You go home stressed off your head sometimes. There's lots of prescription drug and alcohol abuse by criminal lawyers. There's heaps of depression and stress — between the subject matter, the fact that we're under-resourced. ... Plus, you get it from all ends — prosecutors, judges, people asking why you represent the scum of the earth, and how can you do that?<sup>373</sup>

Other lawyers talked about the pressure they put on themselves. As one legal aid lawyer said: 'The stakes are very high. The better you are at this job the less able you are to tolerate your own mistakes.'<sup>374</sup> Another criminal defence lawyer in her own practice said: 'It took me a long time to get over the fact that I can't do a perfect job. All I can do is my very, very best.'<sup>375</sup> A barrister specialising in criminal defence said: 'We are our own worst critics.'<sup>376</sup>

Yet most lawyers who defend the unpopular find the work meaningful and rewarding, as well as fun. As one lawyer said: 'I could have earned more money. ... But what I gained was more important.'<sup>377</sup> A lawyer who had just recently returned from The Hague where he represented an alleged war criminal and otherwise does mostly criminal defence, said: 'The hours are long ... it doesn't pay well. But I don't get too stressed, actually.'<sup>378</sup>

Others were downright exuberant. 'I love my work', said a legal aid lawyer.<sup>379</sup> 'I get satisfaction out of it', said another. '[It's] rewarding, interesting, challenging, adrenalin charged'.<sup>380</sup> A political lawyer said: 'I enjoy doing the work. ... I think it's quite rewarding.'<sup>381</sup> An indigent defence lawyer loves the work and her legal aid colleagues:

It's exciting ... [a]nd it's a hoot. It's a lot of fun. You meet great people. Cranking out contracts on the 40<sup>th</sup> floor with a bunch of old conservative men is not my idea of a good time. You can have a robust conversation with people full-on. It's that kind of place. You work with people who mostly lean your way politically. ... It's nice to work with people who lean your way politically and have the same interests. ... People carry on and tell jokes. It's a relaxed and informal atmosphere.<sup>382</sup>

All of which brings us back to The Question. The honest and often eloquent voices of Australian lawyers provide as compelling an answer as any to the question about 'defending those people'. Their motivations include some of Babcock's 'reasons' and some that are distinctly their own: a commitment to professionalism, giving the accused a fair go, doing satisfying and meaningful

<sup>373</sup> Interview with Laura McDonough, above n 90.

<sup>374</sup> *Ibid.*

<sup>375</sup> Interview with Kerri Mellifont, above n 108.

<sup>376</sup> Interview with Shane Tyrrell, above n 46.

<sup>377</sup> Interview with Susan Bothmann, above n 85.

<sup>378</sup> Interview with Peter Morrissey, above n 51.

<sup>379</sup> Interview with Laura McDonough, above n 90.

<sup>380</sup> Interview with Suzan Cox, above n 8.

<sup>381</sup> Interview with Robert Stary, above n 43.

<sup>382</sup> Interview with Laura McDonough, above n 90.

work, and making a difference one case at a time. Every once in a while, there is fame and glory.

One young lawyer said that in three years of practice, he has been asked The Question ‘over 500 times’. When I asked him what his answer was, he said: ‘I talk about the role of counsel in court. I often say that if you were in trouble you would want someone without fear or favour to argue on your behalf. ... [W]hen I explain it, they all say: “Gee, it’s lucky you’re doing it.”’<sup>383</sup>

<sup>383</sup> Interview with Theodosios Alexander, above n 102.