

# LEGAL ETHICS IS (JUST) NORMAL ETHICS: TOWARDS A COHERENT SYSTEM OF LEGAL ETHICS

MIRKO BAGARIC\* AND PENNY DIMOPOULOS\*\*

## I INTRODUCTION

### A Overview

In recent decades, public confidence in the legal profession has declined. The profession is facing ‘unprecedented scrutiny’<sup>1</sup> and public criticism. According to Justice Kirby, ‘the community appears to have larger expectations of lawyers today but a diminishing estimation of the likelihood that they will be fulfilled’.<sup>2</sup> The public are concerned about a lack of access to justice, poor results, high costs, long delays and the impact that practices and procedures of the legal profession have on these issues. Many feel that lawyers lack honesty and professional ethics and that the law is not serving the community. The gap between the law and the community seems to be growing wider.<sup>3</sup> The fallout from *McCabe v British American Tobacco Australia Services Limited* (‘*McCabe*’)<sup>4</sup> (where a leading Australian law firm was heavily criticised by a judge for the manner in which it acted for a tobacco company which destroyed inculpatory documents) has elevated the importance of legal ethics in the public domain and has

---

\* BA LLB(Hons) LLM PhD, Head of School of Law, Deakin University.

\*\* BA LLB, PhD Applicant, Monash University.

<sup>1</sup> F Shiel, ‘Push for Ethics Advisers at Law Firms’, *The Age* (Melbourne), 6 September 2002, 7. See also J Cain and K Hammond, ‘Tending the Bar: Lawyers are Expected to Act Ethically. Whose Job is it to Ensure They Do?’, *The Age* (Melbourne), 18 August 2002, 16.

<sup>2</sup> <[www.viccourt.gov.au/speeches/stjames.htm](http://www.viccourt.gov.au/speeches/stjames.htm)>.

<sup>3</sup> J Faine, ‘What is Happening to our Profession?’ (1997) *Australian Lawyer* 40.

<sup>4</sup> [2002] VSC 73 (22 March 2002). In *McCabe* the Supreme Court of Victoria found that law firm Clayton Utz advised its client British American Tobacco Australia Services Ltd to systematically and massively destroy documents, CDs, computer disks—indeed anything containing records or other evidence about the chemical effects of nicotine, health effects of smoking, marketing and other aspects of the tobacco industry. Clayton Utz advised on and approved BAT’s document retention policy, which Eames J said could equally be described as a document destruction policy. Begun in 1985, the court found this policy to be ‘a means of destroying damaging documents under the cover of an apparently innocent house-keeping arrangement’. Eames J found that ‘the advice was, in effect, get rid of the documents but claim an innocent intention’. As a result, the defence by BAT was struck out and judgment was awarded in favour of the plaintiff. This aspect of the judgment in *McCabe* was reversed on appeal (*British American Tobacco Australia Services Limited v Cowell (as representing the estate of Rolah Ann McCabe, deceased)* [2002] VSCA 197 (6 December 2002)), however, the case nevertheless served to heighten the public interest in the conduct of lawyers.

further eroded the public perception of lawyers - so much so that the Law Institute of Victoria has even suggested that all Victorian law firms should appoint designated ethics advisers.<sup>5</sup>

This paper argues that legal ethics as it currently stands is a misnomer. The rules governing the conduct and working practices of lawyers, which come within the rubric of what lawyers, judges and legislatures term 'legal ethics', generally have little to do with the social construct that is ethics in the proper sense. Legal ethics as it is popularly known is rather a set of disparate rules which regulate certain aspects of legal practice.

The principles [of legal ethics] are often stated in unduly vague or misleading terms, are in conflict with other principles or are of uncertain authority. In addition ... there is considerable uncertainty as to what sanction will be imposed for breach of a particular principle.<sup>6</sup>

### B *Absence of Overarching Rationale*

The rules and principles which form the body of knowledge known as legal ethics are devoid of an overarching rationale (though, as is discussed below, they are often compatible with a desire to achieve efficient work practices) and are more properly defined as rules which are conveniently packaged under an ethics label. The lack of coherence in legal ethics is perhaps not surprising given the relative dearth of literature dealing with legal ethics in Australia - and the United Kingdom.<sup>7</sup> As has been noted elsewhere, this means that those seeking to advance knowledge in this area are drawn to the United States where the topic has reached almost saturation level. However, principles developed in the United States are not easily transportable:

The exclusively American development of the New Legal Ethics has had a pernicious effect. ... American scholars often forget that the rest of the world exists, or at any rate assume that propositions about American ethics are propositions about reality as such. The New Legal Ethics is no exception. Its practitioners grapple with exclusively American examples - examples which presuppose American regulations, American constitutionalism, the American version of the adversary system, the unified Bar and a legal culture that everyone recognises in other contexts is quite exceptional. ... This is unfortunate in two ways. First it casts doubts on whether the insights of the New Legal Ethics are true at the level of philosophical generality .... Secondly, scholars in other countries who wish to participate in the exciting research and reform programmes of the New Legal Ethics confront a literature that focuses entirely on American law and practices. Scholars must treat the New Legal Ethics cautiously, asking of virtually every proposition whether it is true in their own culture.<sup>8</sup>

The broad purpose of this paper is to introduce more principle in legal ethics. The disassociation between legal ethics and considered ethical theory is the principal reason for credibility problems besetting the legal industry. This paper contends that the only manner in which to make progress towards a rational and justified system of legal ethics is to link it to wider ethical theory. To this end, we suggest that it is incoherent to speak

---

<sup>5</sup> Shiel, above n 1.

<sup>6</sup> J Disney et al, *Lawyers* (Law Book Company, 2nd ed, 1986) 597-8.

<sup>7</sup> This is a point noted by R O'Dair, in *Legal Ethics: Text and Materials* (Butterworths, 2001) 17.

<sup>8</sup> D Luban, 'Introduction: A New Canadian Legal Ethics' (1996) 1 *Canadian Journal of Law and Jurisprudence* 1.

of legal ethics as a stand-alone moral construct - in the same way that it is a fallacy to assume that practices such as medicine, politics, hairdressing or food supplying are governed by discrete ethical norms. It is all the same thing. *Legal ethics is simply the application of general moral principles to the legal practice* - so far and to the extent that moral principles are applicable to the domain of legal practice.

In order to make progress towards a defensible system of legal ethics it is necessary to invoke universal moral norms and apply them to the work of lawyers. Once this is done, clear and justifiable solutions emerge to what have typically been assumed to be difficult legal practice dilemmas. This paper connects legal ethics to universal ethical norms. In doing so, it offers answers to several discrete legal dilemmas and suggests a process that can be applied to deal with all other practice problems faced by lawyers.

### C *Outline of Paper*

In the next part of the paper, we consider the threshold issue of whether there is any scope for allowing ethical considerations to govern legal practice. This is followed in part three by a discussion of the nature of legal practice. This provides a backdrop to constructing a coherent system of legal ethics. There are of course countless ethical issues that arise in legal practice. It is not feasible to examine all of them. In part four of the paper, we consider three important legal dilemmas: (i) the supposed obligation to perform pro bono work, (ii) the first cab off the rank principle - and the associated issue of acting for clients who undertake unsavoury, though lawful, operations (such as tobacco companies and fast food outlets); and (iii) the duty not to mislead the court, in contrast to the permission to put the other side to the proof of its case. In the process we illustrate how general moral theory can be applied to resolve key legal issues. As will emerge, this has the capacity to radically alter some pre-existing notions regarding the rights and duties of lawyers.

### D *Scope of Legal Ethics*

Before turning to substantive matters it is necessary to set the framework by stating what we mean by 'legal ethics'. The term legal ethics refers to normative values which set standards for legal practice. Legal ethics is about the intersection of ethics and the practice of lawyers. As we discuss below the normative standards that are applicable to legal practice sometimes crystallise into legal or professional duties. The bulk of this paper is about evaluating the appropriateness of existing so called ethical principles of legal practice.

This definition *assumes* that ethics and legal practice do in fact intersect. Before mapping this intersection it is necessary to first consider whether what we are searching for is not an illusion. A tenable argument can be mounted that ethics and moral practice are in fact parallel areas of human endeavour, which do not fuse.

## II THE THRESHOLD ISSUE: IS THERE ANY ROLE FOR ETHICAL CONSIDERATION IN LEGAL PRACTICE

### A *The Independence Thesis - Business and Ethics Do Not Overlap*

Logically, the threshold question concerning legal ethics is: does ethics have any role in guiding the manner in which lawyers go about their practice? In relation to some areas of human endeavour, it has been argued that ethics is irrelevant - it does not have a role in setting the standards that operate within that activity. Many have claimed that this is the case in relation to business. It has been suggested that the relationship between business and ethics is one of independence.

Business activity, so the argument runs, is governed by its own internal standards, which are not founded upon moral principles. The primary aim of business is to make profits, hence consistent with this purpose, business should not be distracted by other objectives. The most famous comments concerning the purported independence of business and morality were by Nobel winning economist Milton Friedman in a paper titled: 'The social responsibility of business is to increase profits'.<sup>9</sup> He claimed that the only responsibility of business managers is to shareholders and that giving money to social causes was equivalent to stealing from shareholders.<sup>10</sup>

Business is typically defined very broadly, along the lines of the 'provision of goods or services with the intention of making a profit'.<sup>11</sup> Given the economic imperative to make money out of law and the handsome wages that most lawyers earn, it is obvious that Friedman's argument can be extended to the legal practice - the argument being that law is simply one form of business, like stock-broking, banking, television, football or hairdressing. Against the backdrop of an increasingly competitive legal industry, Justice Kirby 'has speculated about whether it is possible to maintain noble ideas while practising in the world of commercial realities'.<sup>12</sup>

### B *Counters to the Independence Thesis*

#### 1 *Substantive Law and Morality*

It could be countered that this argument has no application in relation to the law given the close connection between morality and substantive legal principle. This counter is not persuasive. It is important to distinguish the issue of the connection between *legal practice* and morality from the broader issue of whether there ought to be a connection between *substantive law* and morality.

To this end, we accept that although there may be no necessary connection between the law and morality, even the most ardent legal positivists agree that as a *matter of fact* such a connection exists. In most Western legal systems this association is very strong. Underpinning most legal rules is a (real or purported) moral principle - certainly it is

<sup>9</sup> *New York Times*, 13 September 1970.

<sup>10</sup> *Ibid.*

<sup>11</sup> See for example, S Satris, *Taking Sides: Clashing Views on Controversial Moral Issues* (Duskin Publishing, 1988).

<sup>12</sup> As cited in Cain, above n 1.

difficult to find examples of laws which are *clearly* immoral. The foundation upon which a coherent and justifiable legal system must be built is a theory of morality.

As was noted by Lord Hailsham, in *R v Howe*:

This brings me back to the question of principle. I begin by affirming that, while there can never be a direct correspondence between law and morality, an attempt to divorce the two entirely is and has always proved to be, doomed to failure.<sup>13</sup>

In a similar vein, in *Airedale NHS Trust v Bland*, Lord Lowry stated 'it is important, particularly in the area of criminal law which governs conduct, that society's notion of what is the law and what is [morally] right should coincide'.<sup>14</sup>

However, even if we assume that there is a link between law and morality, it does not necessarily follow that moral considerations should govern the practice of lawyers. The activities of lawyers do not constitute *the law*, any more than do the activities of say police officers or law librarians - rather lawyers work within the framework of the existing law. This being the case, there is no reason that the practice of lawyers should not be governed by, say, prudential considerations (that is, what best suits the rational self-interest of lawyers) or economic considerations, as has claimed to be the case in other areas of business.

## 2 *The Universalisability of Moral Judgments*

A stronger counter to the independence thesis, at least ostensibly, appears to be that it is incompatible with a fundamental paradigm of morality. The surface nature of moral language suggests that moral principle is applicable to all human conduct, whether public or private,<sup>15</sup> and provides the ultimate evaluative framework by which our behaviour is judged. The notion of contracting out of morality seems untenable. A key feature of moral judgments is that they are universalisable. A judgment is universalisable if the acceptance of it in a particular situation entails that one is logically committed to accepting the same judgment in all other similar situations. Accordingly, whenever one judges a certain action or thing (situation) as having a particular moral status then one is logically committed to the same judgment about any relevantly similar action or situation.<sup>16</sup> If an action is morally good or bad, then it is so in all *relevantly* similar situations in which that action is performed. The context in which an action is performed does not appear to constitute a relevant difference. Deliberately lying to another person is normally wrong irrespective of whether it is done in private or in the context of sport, politics, the law or any other field of human endeavour. In order to

---

<sup>13</sup> [1987] 1 AC 417, 428.

<sup>14</sup> [1993] AC 789, 877. Most recently, see the judgment of the English Court of Appeal in *A (Children)* - the Jodie and Mary Siamese Twins Case: 1/2000/2969, 22 September 2000: <<http://www.courtservice.gov.uk/judgments/judg-home.htm>>.

<sup>15</sup> For the difference between particular and public reasons see S Freeman, 'Contractualism, Moral Motivation & Practical Reason' (1987) 88 *Journal of Philosophy* 281 – 304.

<sup>16</sup> It has been suggested that numerical differences are irrelevant. This refers to specific descriptions of the person, relation or situation. Thus, the fact that the judgment relates to a particular person (such as John Smith), place (such as Melbourne), relation (John's mother) is irrelevant. Also irrelevant are generic differences: tastes, preferences, and desires: see J L Mackie, *Ethics: Inventing Right and Wrong* (Pelican Books, 1977) 83-102.

justify the independence thesis, it is necessary to identify a *relevant* difference between the institution in question and other activities which are subject to moral evaluation.

### 3 *Exception to Universalisation - Activities with Internal Settled Rules?*

A possible basis for distinguishing business (including legal practice) from most other human endeavours - which are clearly subject to moral evaluation - is that it is a 'self contained' activity. That is, it is already governed by relatively settled and clear principles and standards. Moral rules appear to apply most acutely to conduct between private individuals, which is largely unregulated by other norms. Thus, it is morally reprehensible to lie, break promises or cheat on our partners, and so on.

On the other hand, law (as with other areas of business life) has its own settled rules, and hence, it can be argued, there is no scope for morally evaluating activities conducted within the scope of business. The boxer who intentionally injures his opponent is immune from moral blame, even though his conduct would be clearly reprehensible if performed in a different setting. Legal practice is regulated by extensive and complex rules and principles, at both statutory and common law levels. Hence, just like boxing, the activities of lawyers should be immune from moral evaluation.

There is little question that legal practice is heavily regulated. Broadly there are two sources of regulation which govern the behaviour of lawyers. First lawyers are bound by general legal principles (derived from common law and statute) so far as their dealings with clients are concerned. Thus, for example, normal negligence principles make them accountable for incorrect advice; the law of contract ensures that they do not breach the costs bargain struck with the client; fiduciary duties prevent lawyers from having a conflict of interest with clients; and the offence of theft prohibits lawyers stealing their clients' money.

Secondly, there are professional rules which are specifically targeted at lawyers. For example, s 64 of the *Legal Practice Act 1997* (Vic) identifies the following general principles of professional conduct. A practitioner must:

- In service of a client, act honestly and fairly in client's best interests;
- Not engage in, or assist conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law;
- Act with due skill and diligence;
- Act with reasonable promptness;
- Maintain client confidences;
- Avoid conflicts of interest;
- Refrain from charging excessive legal costs;
- Act with honesty and candour in all dealings with courts and tribunals and otherwise discharge all duties owed to courts and tribunals;
- Observe any undertaking given to a court or tribunal, the Legal Ombudsman, the LPB, an RPA or another practitioner;
- Act with honesty, fairness and courtesy in all affairs including dealings with other practitioners, firms and the community in a manner conducive to advancing the public interest.

Breach of a legal obligation confers on a person affected a right to a remedy against the lawyer, whereas breach of a professional obligation generally invites disciplinary sanction by the relevant professional body.<sup>17</sup>

This attempt to excise legal practice (and business in general) from the sphere of moral evaluation fails because it places too much weight on the importance of established rules. The level of sophistication, organisation or system that underlies an area of human endeavour is generally irrelevant to its amenability to moral evaluation. This is shown by the fact that activities which produce undesirable outcomes, such as drug trafficking, people smuggling and child pornography do not attract moral immunity regardless of their level of internal regulation and organisation.

There certainly may be instances where following the rules of an existing rule-governed practice may provide a general immunity from moral blame. Tackling another player in conformity with the rules of soccer, refusing to pass a weak student, serving the first person in queue are all perfectly justifiable actions. However, this has nothing to do with the fact that those forms of conduct are regulated by rules (of sport, academia and etiquette respectively), but rather because the rules themselves have either been designed in light of pre-existing moral norms or at least are not morally objectionable in themselves. Similarly, the only reason that boxing is morally acceptable is because the good consequences from it are perceived as outweighing the bad - the need to respect the autonomy of the boxers weighs more heavily in the moral calculus than the possible harm that might occur as a result of condoning fighting in a controlled environment.

Further, those involved in generally non-offensive rule-governed activities never acquire an *absolute* indemnity from moral censure. For example, it is reprehensible for organisers of a boxing contest to pit a professional skilled fighter against a rank amateur or for a referee to permit a fight to continue after one boxer has been clearly rendered defenceless. Hence, even in relation to rule governed practices which are generally regarded as being morally acceptable, moral norms continue to play a supervisory role. This role is so cardinal that morality remains a constant catalyst for rule changes to the practices - to ensure that they continue to conform to changing, more enlightened, moral standards. A good example is racial vilification in sport. For decades, it was deemed acceptable to make racist slurs to rivals on the sporting field - it did not violate any of the rules of the game. However, more recently the community has become less tolerant of such abuse. Hence, this altered community normative standard is now firmly entrenched in the rules of many sports - the most high profile of which is AFL Football.

It follows that the mere fact that lawyers have settled rules, procedures and protocols governing many aspects of their conduct does not provide them with immunity from moral norms. The important question is whether legal practice rules conform to minimal moral standards. This is considered in section four.

#### 4 *The Subjective and Imprecise Nature of Moral Judgments*

A further rationale that has been advanced for the independence thesis is that morality has no role in business because it is too subjective and, given its indeterminate nature, is

---

<sup>17</sup> G Dal Pont, *Lawyers' Professional Responsibility* (LBC Information Services, 1996) 14.

incapable of providing guidance concerning business practice.<sup>18</sup> To this, there are three counters. First, one of us has previously argued that moral principles are in fact objective, capable of logical proof.<sup>19</sup> The mere fact that it is sometimes *difficult* to find moral answers does not derogate from this - in the same way that difficulties in finding cures for many physical illnesses did not entail that there were not objectively better and worse forms of treatments.

Secondly, for sceptics who are unconvinced about the objectivity of moral judgments, even if we accept that moral judgements are by their very nature imprecise and often indeterminate, this has not limited their application to other human endeavours and activities, such as politics, medicine, or even sport. Why then should the situation be any different in the case of the law?

Thirdly, the fact that the moral status of an activity has not been resolved and the application of moral principles to it has not produced clear standards of conduct pertaining to that activity generally results in increased moral reflection and assessment upon the matter, rather than an abandonment of such discourse. For example, the fact that activities such as abortion and cloning are morally equivocal has proved a catalyst for further moral dialogue and debate on such issues - not less, or none at all.

Accordingly, since there is no relevant difference between business activities, including the law, and other activities which are regulated by moral principles, the independence thesis is unsound.

Given that ethics has a role in legal practice, the crucial issue is the content and nature of this role.<sup>20</sup>

### III OVERVIEW OF MORAL PRINCIPLE AND LEGAL PRINCIPLE

#### A *Moral Principle*

At its most basic level, morality consists of the principles which dictate how serious conflict should be resolved.<sup>21</sup> It is not every aspect of our lives that is governed by morality. As an empirical fact, morality does not dictate what colour shirt we should wear, who gets to watch their television show, or what career we should choose. Morality is not concerned with trivialities. Further, it only relates to situations where there is an actual or potential conflict of interest between two or more parties - it

---

<sup>18</sup> M Friedman, 'The Social Responsibility of Business is to Increase Profits' *NY Times Magazine* June 1970, 1.

<sup>19</sup> M Bagaric, 'A Utilitarian Argument: Laying the Foundation for a Coherent System of Law' (2001) *Otago Law Review*; M Bagaric, 'Internalism and the Part-time Moralists: An Essay About the Objectivity of Moral Judgments' (2001) *Journal of Consciousness and Emotion*.

<sup>20</sup> For further discussion concerning the moral obligations of business, see M Bagaric and W Weerasooria, 'Greed Versus Good: The Moral Obligations of Banks' (2001) 17 *Australian Banking and Finance Law Bulletin* 65.

<sup>21</sup> Law is concerned with regulating rights, interests and duties. It generally only deals with important interests. In this regard, it bears many parallels to morality. Further, legal disobedience can have potentially drastic adverse consequences upon an individual. The law is the human endeavour where the State marshals all of its collective resources against the individual. Hence, it follows that it is important that the law is applied accurately.



assesses and weighs the respective interests. In a perfect world, consisting of unlimited resources and no possibility of clashes of interests, morality would be redundant.<sup>22</sup>

In a paper of this size, and indeed any size, it is not possible to provide a systematic or detailed analysis of moral theory. More ink has been spilt on moral theory - perhaps because of its cardinal status in evaluating human conduct - than probably any other social issue. However, some broad observations in this area can, and must, be made. There has been a proliferation of normative moral theories that have been advanced over the past two or three decades. These theories can be divided into two broad groups. Consequentialist moral theories claim that an act is right or wrong depending on its capacity to maximise a particular virtue, such as happiness. Non-consequentialist (or deontological) theories claim that the appropriateness of an action is not contingent upon its instrumental ability to produce particular ends, but follows from the intrinsic features of the act.

### B *Non-Consequentialist (Rights) Theories*

The leading contemporary non-consequentialist theories are those which are framed in the language of rights. Following the Second World War, there has been an immense increase in 'rights talk',<sup>23</sup> both in number of supposed rights and in total volume. Rights doctrine has progressed a long way since its original aim of providing 'a legitimisation of ... claims against tyrannical or exploiting regimes'.<sup>24</sup> As Tom Campbell points out:

The human rights movement is based on the need for a counter-ideology to combat the abuses and misuses of political authority by those who invoke, as a justification for their activities, the need to subordinate the particular interests of individuals to the general good.<sup>25</sup>

There is now, more than ever, a strong tendency to advance moral claims and arguments in terms of rights.<sup>26</sup> Assertion of rights has become the customary means to express our moral sentiments. As Sumner notes: 'there is virtually no area of public controversy in which rights are not to be found on at least one side of the question—and generally on

---

<sup>22</sup> See Bagaric, above n 19.

<sup>23</sup> See T Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth Publishing, 1996) 161-88, who discusses the near universal trend towards Bills of Rights and constitutional rights as a focus for political choice. By 'rights talk' we also included the abundance of declarations, charters, bills, and the like, such as the *Universal Declaration of Human Rights* (1948); the *International Covenant of Economic, Social and Cultural Rights* (1966); and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1966), that seek to spell out certain rights. Granted, numerous examples of rights-based language existed prior to the Second World War, such as the *Declaration of Independence of the United States* (1776) and the *Declaration of the Rights of Man and Citizens* (1789); however, it is only in relatively modern times that such documents have gained widespread appeal, recognition and force.

<sup>24</sup> S I Benn, 'Human rights - For Whom and For What?' in E Kamenka and A E Tay (eds), *Human Rights* (Edward Arnold, 1978) 59, 61.

<sup>25</sup> T Campbell, 'Realizing Human Rights' in T Campbell et al (eds), *Human Rights: From Rhetoric to Reality* (Basil Blackwell, 1996) 1, 13. Campbell also makes the important point that whether or not human rights are intellectually defensible, they are still needed as a source of protection of important human interests: T Campbell, *The Legal Theory of Ethical Positivism* (Dartmouth Publishing, 1996) 165-6.

<sup>26</sup> Almost to the point where it is not unthinkable to propose that the 'escalation of rights rhetoric is out of control': see L W Sumner, *The Moral Foundation of Rights* (Clarendon Press, 1987) 1.

both'.<sup>27</sup> The domination of rights talk is such that it is accurate to state that human rights have at least temporarily replaced maximising utility as the leading philosophical inspiration for political and social reform.<sup>28</sup>

Despite the dazzling veneer of deontological rights based theories, when examined closely they are unable to provide convincing answers to central issues such as: what is the justification for rights? How can we distinguish real from fanciful rights? Which right takes priority in the event of conflicting rights? Such intractable difficulties stem from the fact that contemporary rights theories lack a coherent foundation. It has been argued that attempts to ground rights in virtues such as dignity, concern or respect are unsound and that they fail to provide a mechanism for moving from abstract ideals to concrete rights.<sup>29</sup> A non-consequentialist ethic provides no method for distinguishing between genuine and fanciful rights claims and is incapable of providing guidance regarding the ranking of rights in the event of a clash.

In light of this, it not surprising that the number of alleged rights has blossomed exponentially since the fundamental protective rights of life, liberty and property were advocated in the 17th century. Today, all sorts of dubious claims have been advanced on the basis of rights: for example, 'the right to a tobacco-free job', the 'right to sunshine', the 'right of a father to be present in the delivery room', the 'right to a sex break',<sup>30</sup> and even 'the right to drink myself to death without interference'.<sup>31</sup> Novel rights are continually evolving and being asserted. A good example is the recent claim by the Australian Prime Minister (in the context of the debate concerning the availability of IVF treatment to same sex couples or individuals) that each child has the right to a mother and father. In a similar vein, in light of the increasing world oil prices, it has been declared that this violates the right of Americans to cheap gasoline. In England, the Premier League has been accused of violating the right of football club supporters to a FA Cup ticket.

Due to the great expansion in rights talk, rights are now in danger of being labelled as mere rhetoric and are losing their cogent moral force. Or, as Sumner points out, rights become an 'argumentative device capable of justifying anything [which means they are] capable of justifying nothing.'<sup>32</sup>

Therefore, in attempting to uncover the scope and content of legal ethics it is unhelpful to consider it from the perspective of a deontological rights-based normative theory. Against the background of such a theory, clients can, for example, declare the existence of a right to free representation, and equally validly, lawyers can demand remuneration for their services. But there is no underlying ideal that can be invoked to provide

---

<sup>27</sup> Ibid.

<sup>28</sup> HL A Hart, *Essays in Jurisprudence and Philosophy* (Clarendon Press, 1983), 196-7.

<sup>29</sup> See M Bagaric, 'In Defence of a Utilitarian Theory of Punishment: Punishing the Innocent the Compatibility of Utilitarianism and Rights' (1999) 24 *Australian Journal of Legal Philosophy* 95, 121-143; M Bagaric, *Sentencing and Punishment: A Rational Approach* (Cavendish Publishing, 2000), ch 4.

<sup>30</sup> These examples are cited by J Kleinig, 'Human Rights, Legal Rights and Social Change' in Kamenka and Tay, above n 24, 36, 40.

<sup>31</sup> S I Benn, 'Rights' in P Edwards (ed), *Encyclopedia of Philosophy* (Collier-MacMillan, 1967) vol 7, 196.

<sup>32</sup> Sumner, above n 26, 8-9.

guidance on the issue. As with many rights, the victor may unfortunately be the side which simply yells the loudest.<sup>33</sup>

This may seem to be unduly dismissive of rights based theories and pay inadequate regard to the considerable moral reforms that have occurred against the backdrop of rights talk over the past half-century. There is no doubt that rights claims have proved to be an effective lever in bringing about social change. As Campbell correctly notes, rights have provided 'a constant source of inspiration for the protection of individual liberty'.<sup>34</sup> For example, recognition of the (universal) right to liberty resulted in the abolition of slavery; more recently the right of equality has been used as an effective weapon by women and other disenfranchised groups.

For this reason, it is accepted that there is an ongoing need for moral discourse in the form of rights. This is so even if deontological rights-based moral theories (with their absolutist overtones) are incapable of providing answers to questions such as the existence and content of proposed rights, and even if rights are difficult to defend intellectually or are seen to be culturally biased. There is a need for rights-talk, at least at the 'edges of civilisation and in the tangle of international politics'.<sup>35</sup> Still, the significant changes to the moral landscape for which non-consequentialist rights have provided the catalyst must be accounted for.

There are several responses to this. Firstly, the fact that a belief or judgment is capable of moving and guiding human conduct says little about its truth - the widespread practice of burning 'witches' being a case in point. Secondly, at the descriptive level, the intuitive appeal of rights claims, and the absolutist and forceful manner in which they are expressed, has heretofore been sufficient to mask over fundamental logical deficiencies associated with the concept of rights. Finally, and perhaps most importantly, we do not believe that there is no role in moral discourse for rights claims. Simply, that the only manner in which rights can be substantiated is in the context of a consequentialist ethic.<sup>36</sup>

### C *Consequentialism*

A more promising tack for constructing and justifying a ladder of human rights is to ground the analysis in a consequentialist ethic. The most popular consequentialist moral theory is utilitarianism. Several different forms of utilitarianism have been advanced. In our view, the most cogent (and certainly the most influential in moral and political

---

<sup>33</sup> As is discussed below it could be argued that loyalty is derivative from the 'right' to liberty. However, this does not appear to be relevant in a deontological ethic, where foundational, stand alone rights are the interests that are normally regarded as being worthy of most protection.

<sup>34</sup> Campbell, *The Legal Theory of Ethical Positivism*, above n 23, 165.

<sup>35</sup> Ibid.

<sup>36</sup> See also J S Mill who claimed that rights reconcile justice with utility. Justice, which he claims consists of certain fundamental rights, is merely a part of utility. And 'to have a right is ... to have something which society ought to defend .... [if asked why] ... I can give no other reason than general utility': J S Mill, 'Utilitarianism' in M Warnock (ed), *Utilitarianism* (Fontana Press, 1986, first published 1981) 251, 309. Campbell, in *The Legal Theory of Ethical Positivism*, above n 23, 161-85, also proposes a reductive approach to rights; however, underlying his rights thesis is not utilitarianism, but rather (ethical) positivist ideals. Ethical Positivism is also discussed in T Campbell, 'The Point of Legal Positivism' in T Campbell (ed), *Legal Positivism* (Dartmouth Publishing, 1999) 323.

discourse) is hedonistic act utilitarianism, which provides that the morally right action is that which produces the greatest amount of happiness or pleasure and the least amount of pain or unhappiness. This theory selects the avoidance of pain, and the corollary, the attainment of happiness, as the ultimate goals of moral principle.

We are aware that utilitarianism has received a lot of bad press over the past few decades, resulting in its demise as the leading normative theory. Considerations of space and focus do not permit us to fully discuss these matters. This has been done elsewhere.<sup>37</sup> The key point to note for the purpose of the present discussion is that for those with a leaning towards rights based ethical discourse, utilitarianism is well able to accommodate interests in the form of rights. Rights not only have a utilitarian ethic, but in fact it is only against this background that rights can be explained and their source justified. Utilitarianism provides a sounder foundation for rights than any other competing theory. For the utilitarian, the answer to why rights exist is simple: recognition of them best promotes general utility. Their origin accordingly lies in the pursuit of happiness. Their content is discovered through empirical observations regarding the patterns of behaviour which best advance the utilitarian cause. The long association of utilitarianism and rights appears to have been forgotten by most. However, over a century ago it was John Stuart Mill who proclaimed the right of free speech, on the basis that truth is important to the attainment of general happiness and this is best discovered by its competition with falsehood.<sup>38</sup>

Difficulties in performing the utilitarian calculus regarding each decision make it desirable that we ascribe certain rights and interests to people - interests which evidence shows tend to maximise happiness<sup>39</sup> - even more happiness than if we made all of our decisions without such guidelines. Rights save time and energy by serving as shortcuts to assist us in attaining desirable consequences. By labelling certain interests as rights, we are spared the tedious task of establishing the importance of a particular interest as a first premise in practical arguments.<sup>40</sup> There are also other reasons why performing the utilitarian calculus on each occasion may be counter productive to the ultimate aim. Our capacity to gather and process information and our foresight are restricted by a large number of factors, including lack of time, indifference to the matter at hand, defects in reasoning, and so on. We are quite often not in a good position to assess all the possible alternatives and to determine the likely impact upon general happiness stemming from each alternative. Our ability to make the correct decision will be greatly assisted if we can narrow down the range of relevant factors in light of pre-determined guidelines. History has shown that certain patterns of conduct and norms of behaviour if observed are most conducive to promoting happiness. These observations are given expression in the form of rights which can be asserted in the absence of evidence why adherence to them in the particular case would not maximise net happiness.

Thus utilitarianism is well able to explain the existence and importance of rights. It is just that rights do not have a life of their own (they are derivative not foundational), as

---

<sup>37</sup> Bagaric, above n 29.

<sup>38</sup> J S Mill, above n 36, 141-183.

<sup>39</sup> These rights, however are never decisive and must be disregarded where they would not cause net happiness (otherwise this would be to go down the rule utilitarianism track).

<sup>40</sup> See J Raz, *Morality of Freedom* (Oxford University Press, 1986), 191. Raz also provides that rights are useful because they enable us to settle on shared intermediary conclusions, despite considerable disputes regarding the grounds for the conclusions.

is the case with deontological theories. Due to the derivative character of utilitarian rights, they do not carry the same degree of absolutism or ‘must be doneness’ as those based on deontological theories. However, this is not a criticism of utilitarianism, rather it is a strength since it is farcical to claim that any right is absolute. Another advantage of utilitarianism is that it is the only theory that provides a mechanism for ranking rights and other interests. In event of clash, the victor is the right which will generate the most happiness.

#### *D Both Theories Lead to Similar Moral Principles*

The broader matter to note for the purposes of this paper is that as far as implications for legal ethics are concerned, similar conclusions are reached irrespective of which ethical theory one chooses. While at the foundational level ethical theories often diverge enormously, they often share similar premises concerning the nature of morality and key moral principles. As has been noted above, the view that moral principles are universalisable transcends most moral theories. So too does the existence of some core moral principles. Consequentialist and non-consequentialist theories alike place considerable importance on values such as life, liberty and property - although they differ in terms of the absoluteness with which such principles apply.<sup>41</sup> However, the exact points of departure in this regard are not critical for the purposes of the present discussion. The discussion below emphasises three discrete moral principles: (i) truth telling; (ii) personal liberty; and (iii) the maxim of positive duty. These three principles transcend both major moral theories.

Thus, we argue that the conclusions we reach concerning the ethical dilemmas considered in this paper (and most legal practice problems) follow irrespective of which moral theory is adopted. The key at this point is simply to note that *a* (tenable) theory of morality must be adopted to shore up legal ethics - the corollary being that it is impermissible to pick, choose and swap a theory at whim, which happens to support one’s intuitive predisposition.

We now apply general moral principles to key moral dilemmas faced by lawyers.

### IV THE APPLICATION OF MORAL PRINCIPLES TO LEGAL PRACTICE – SPECIFIC LEGAL PRACTICE DILEMMAS

#### *A Pro Bono Work*

Pro bono legal work is doing work free of charge for clients. Pro bono work is almost universally condoned and is common in legal practice. On the surface, it is difficult to criticise lawyers for giving up their time to voluntarily assist people who cannot afford the cost of legal services. The reason that this practice appears inherently praiseworthy is that, like all voluntarism, it is most ostensibly grounded in altruism. Altruism is a desirable virtue: few would doubt that the more altruists there are, the better.

Despite the praiseworthy motivation that seems to underpin pro bono work, in our view there is too much of it. In this regard, we make two claims. The first, softer claim, is that lawyers do not have a duty to work for free. The upshot of this argument is simply that

---

<sup>41</sup> See Bagaric, above n 29.

lawyers who do not perform pro bono work should sleep a bit more comfortably. The second, more acute, argument is that pro bono work is in fact socially undesirable - the community would in fact be better off if lawyers stopped working for nothing. We elaborate on these matters in that order.

## B *No Duty to Perform Pro Bono Work*

### 1 *The Favour that Turned Into an Obligation*

Pro bono work provides a classic illustration of how a favor unchecked can galvanize into an expectation and ultimately into a duty. In Victoria for example, legal firms tendering for government work *must* perform a certain amount of pro bono work. The idea that lawyers should engage in pro bono work is so entrenched that there is now a systematic process for the allocation and distribution of such work. For example, the New South Wales Law Society established a pro bono referral scheme in 1992 and in 1997 there were more than 400 solicitors on the Law Society pro bono register.<sup>42</sup> The New South Wales Bar Association has also established a pro bono register.<sup>43</sup> The expectation that legal professionals should work for free is widespread - it not only prevalent in Australia but also in the UK and particularly in the United States.<sup>44</sup>

As private citizens, lawyers are ostensibly entitled to do as much free work as they desire. However, the distinction between matters of choice and duty should not be blurred. In light of prevailing sentiment in the community and the legal profession, where almost nobody questions the desirability of pro bono work, the central question in relation to it would seem to be how much is enough or necessary. We think that this assumes too much. This ignores the threshold question, which is: do lawyers have a duty to do any free legal work? The answer to this we believe is no.

### 2 *Comparison with other Professions*

In order for a duty to exist, it must derive from some broader principle or rationale. Duties are not stand-alone constructs. In relation to pro bono work, the existence of a duty can obviously only come from one avenue, morality. Hence, the central issue becomes: in what circumstances does morality impose a positive duty on people to assist others? Before considering this general issue it is illuminating to contrast the approach to pro bono work by the legal profession to that in all other professions and vocations.

Here we find a fascinating dichotomy. Legal practice is the only profession where there is an organised system of free labour, so much so that, as we alluded to above, it is verging on an expectation. Hairdressers do not cut hair for free, no matter how scruffy it is; mechanics do not fix cars for nothing irrespective of how badly one needs his or her wheels; tax agents do not voluntarily fill out taxation returns no matter how little tax

---

<sup>42</sup> Communication from the Law Society of New South Wales. Also note that the Society has recommended that its members do a minimum of 10 hours of pro bono work each year (or the equivalent of 1 per cent of their billable work) and that law schools adopt pro bono requirements as part of their legal training. See Law Society of NSW, *Access to Justice - Final Report* (December 1998) 12-16.

<sup>43</sup> NSW Bar Association, *Newsletter* (1995) 11.

<sup>44</sup> O' Dair, above n 7, 147.

knowledge a person may have; and chiropractors do not attend to a slipped disk no matter how intense the pain. A possible exception to this may be doctors. However, the practice of doctors in fact further sharpens the dichotomy as opposed to blurring it. While not all patients personally pay doctors for medical services, the Medicare system ensures that doctors are paid each time they ply their trade.

### 3 *The Legal Monopoly and the Complexity of the Law*

The question then becomes why should lawyers work for free? There are several possible reasons that can be advanced. The first is that lawyers owe something to the community and State in return for the lucrative monopoly over legal services that the community has granted them.<sup>45</sup> This is an unpersuasive argument. The monopoly was never *granted* to the legal profession, rather, it exists because the law is complex and private citizens are often unable to assert their legal entitlements without professional assistance. Hence lawyers do not have a reciprocal obligation to grant something (namely pro bono services) in return. Quite simply, lawyers are the only people in the community with the requisite skills and knowledge to represent people in relation to legal matters. Doctors, plumbers and taxi drivers also have a monopoly over their respective areas of expertise and yet are not required to work free of charge. Why should lawyers be different?

Complexity of function is also not a relevant criterion for voluntary assistance. Washing machines, tax forms, television sets and car engines are also a constant source of confusion for the untrained but experts in those areas are not criticised for not providing free assistance.

### 4 *The Importance of the Law*

Alternatively, it might be suggested that lawyers should work for free because the law is important: it affects people more deeply than other professions or vocations. Putting the task of the lawyer in the most noble manner possible, lawyers are protectors of rights and enforcers of duties. In extreme cases, there is some force in this argument. People charged with criminal offences risk losing their liberty if wrongly convicted. However, the rest of the law is not nearly so pressing. Civil law regulates the flow of money - one party is trying to get more of it at the expense of the other. Money counts, no doubt. But it is hardly life and death stuff. Further to the extent that it does count, the choices made by people working in other industries have the capacity to just as centrally affect an individual's resource base. A leaking pipe or a broken roof tile can cause tens of thousands of dollars of damage, so can a nest of termites; a broken down car can prevent a person getting to work (or in the case of professional drivers from working at all) and the cost of public transport can prohibit a person from attending a potentially life changing job interview. Moreover, the pain of an untreated slipped disc or hernia can be far more discomforting than the financial loss associated with an unremedied broken promise.

---

<sup>45</sup> Y Ross, *Ethics in Law* (Butterworths, 3<sup>rd</sup> ed, 2001) 109.

## 5 *Application of General Moral Principle*

Thus, it seems apparent that lawyers occupy a unique position so far as pro bono work is concerned - they are the only vocation that is required to do some. This does not necessarily mean that the imposition of such a duty is wrong. As with most anomalies, this can be reconciled in one of two ways. Either the situation with lawyers and pro bono work is wrong or it is correct- if the latter prevails then other vocations obviously need to 'get their act together'. Thus, it might be argued that all vocations which deal with subject matters that are either as complex or important as the law should be doing their share of free work as well.

The only coherent way to decide between these options is to invoke a general principle. In this case the general principle in question is: when are people required to voluntarily assist others? The answer, it would seem, is very rarely.

As a general rule moral norms are negative in character. While there are very few universally accepted moral principles, a list of the ones on which there is general consensus reads as follows.

- 1 Do not kill or otherwise violate the physical integrity of others;
- 2 Do not steal the property of others;
- 3 Do not lie (this includes keeping promises).<sup>46</sup>

It follows that we are free to do as we wish within the ambit of the rules, and in this derivative fashion personal liberty is also an important virtue. However, in addition to this there is one positive norm. It is called the maxim of positive duty and states that we must:

- 4 Assist others in serious trouble, when assistance would immensely help them at no or little inconvenience to oneself (the maxim of positive duty).

How does legal practice fare in light of this rule? The short answer is that it is not applicable. Legal practice is an onerous profession, and arguably the most personally difficult profession. This is due to its inherently combative and uncertain nature. The only way in which a client can assert his or her legal entitlements is at the expense of another party - be it another individual, company or the State. The other party is normally equally motivated not to lose. They too (often) have a lawyer. That lawyer is normally just as intelligent, diligent and resourceful. In no other profession do people get ahead by trouncing others - this adds significantly to the difficulty of the task. This is exacerbated by the fact that the interaction between the parties takes place in a setting where the law is typically grey (due to the dynamic and - increasingly - voluminous nature of the law); the facts hardly ever certain rules. Overriding this is a duty to the court. Thus, it is rarely the case that providing legal assistance provides little inconvenience to the lawyer. It follows that there is no moral foundation for the claim that lawyers should work for free.

---

<sup>46</sup> Bagaric, above n 19.



6 *Pro bono work - not a chore but a benefit to lawyers?*

While there is no basis for imposing an obligation on lawyers to perform pro bono work, it may yet be in their self-interest to provide free legal services. The notion of pro bono work applies to all lawyers, however, it has been shown that a substantial connection exists between large firms and support for pro bono.<sup>47</sup> Estimates show that most of the big law firms in Australia have budgets of up to \$2 million for free legal services<sup>48</sup> and US data suggests that the larger the firm and the greater its gross revenues, the more willing it is to encourage or permit pro bono activity.<sup>49</sup> Galanter and Palay point out some structural reasons why large firms find organised pro bono service more appealing than their smaller counterparts. Large firms with many lawyers are more easily able to satisfy their pro bono obligations by engaging partners (or retaining outside specialists) to manage the programs, and assigning staff to deal with the logistical problems of finding and screening suitable cases. A large volume of pro bono work projects a positive image of public service and simultaneously provides both an asset for recruitment for young lawyers and regular opportunities for development of professional skills such as trial advocacy. Pro bono schemes allow big firms to redefine themselves as a vehicle of public justice. In contrast, smaller firms, which are unable to enjoy similar economies of scale in organising their pro bono work, find it considerably more disruptive and burdensome.<sup>50</sup>

Thus, it seems that while pro bono is about helping, large law firms might be the entities receiving a good deal of the help. And just as these firms have much to gain from pro bono schemes, they have much to lose from external attacks on the profession. The recent *McCabe* case, and public criticism of business ethics as a result of HIH and other corporate scandals has generated alarm within large corporations, including law firms. For large law firms, maintaining a favourable public image is more important now than ever. Pro bono work provides law firms with a means of achieving this. It has been shown that members of the public who heard about lawyers providing free legal service to the needy ranked highest among items improving respondents' opinion of the profession.<sup>51</sup> So by jumping on the pro bono bandwagon, firms are able to present themselves as a vehicle of public justice, to create a feel good factor among their employees and, most importantly, attract even more paying clients.

From what has been said, lawyers should not be discouraged from *electing* to do free work. But it should be a free choice, not against a background of a commitment. Further, transparency requires that pro bono work should not be seen not as an ethical

---

<sup>47</sup> M Galanter and T Palay, 'Large Law Firms and Professional Responsibility' in R Cranston (ed), *Legal Ethics and Professional Responsibility* (Oxford University Press, 1995) 198.

<sup>48</sup> J Fife–Yeomans, 'Lawyers Do it For Love, Not Money', *The Weekend Australian*, 16-17 August 1997, 11.

<sup>49</sup> Galanter and Palay, above n 47, 199.

<sup>50</sup> *Ibid*, 200. Note that this survey was conducted in the US and comparisons were made with the UK. In the UK, it seems that lawyers in large firms did not feel so concerned about the increasing commercial character of their work as US lawyers. This may be related to the fact that legal aid for the poor was firmly institutionalised in Britain as a State responsibility prior to the emergence of large law firms. Also, there was no notion that the profession was under public attack as in the US. The Australian position was not looked at. Given that the profession is subject to some criticism in Australia, and also given that Australia has a tradition of legal aid, it may be that the situation in Australia is somewhere between the US and UK position.

<sup>51</sup> Galanter and Palay, above n 47, 201.

*responsibility* discharged by lawyers, but as an activity which they voluntarily commit to which has some benefits - and some no doubt to the recipients of the service. However, what we now turn to may convince lawyers that it is wrong to elect to do free legal work.

### C *Pro Bono Work: Self-Defeating? No Right to do Legal Work?*

The strongest argument in favour of pro bono work stems from the complexity of the law and the limited access that the poor and middle classes have to legal advice. Lay people cannot be expected to understand the law. If people cannot understand their legal rights they cannot properly pursue them. This will lead to injustices occurring. It follows from these premises that all parties to a legal dispute should be legally represented. The issue then becomes who should bear this burden?

#### 1 *Who Should Bear the Burden of Free Work- the State, Lawyers or Individuals?*

There are three choices: the private individual; lawyers; or the government. If individuals bear the loss, then a greater amount of people will have no legal representation and this will have the almost inevitable result that fewer people will be able to effectively pursue their legal rights. In a nutshell, there will be a larger number of injustices perpetrated or left unremedied. This is undesirable. People should not forego important entitlements because they are too difficult to pursue – merits and deserts should be distributed on the basis of substance, not fickle considerations such as capacity to engage a lawyer.

The downside of lawyers bearing the loss is the personal toll that it can take on them. As is adverted to above, legal work is complex and stressful. It is hard enough when one is being paid for it; even harder when there is no reward. Perhaps the psychological benefits of assisting another outweigh the disadvantages of working for nothing. However, even if this is the case, perhaps it is still undesirable. The collective goodwill of lawyers can only go so far. There will always be a large portion of litigants who are unrepresented and a large number of people do not even commence legal proceedings because they do not have the funds to engage a lawyer. The difference between these people and those who obtain pro bono legal assistance is typically luck. It is simply a lottery who gets free legal assistance. This is wrong - so much should never turn on so little. This situation could be improved if lawyers worked even harder. But this would be a grossly unfair request: non est factum. The complex state of the law is a problem not of their making. It is a fundamental moral prescription that one is not responsible for remedying situations that one has not caused (subject to the maxim of positive duty) – this is the reason (the only reason) that most of us can sleep easy at night despite knowing that there are millions of starving people around the world.

This leaves the government. It is upon them that the ultimate responsibility rests for providing appropriate access to legal assistance. There are two reasons for this. The government caused the problem by creating complex laws which are poorly publicized. Secondly, they have more resources than lawyers combined. Perhaps the best way for this to be achieved would be for a ‘legicare’ system to be introduced. All citizens should be required to pay a portion of their income to the government which is earmarked to pay lawyers.

## 2 *Legicare as the Solution to Unrepresented Clients*

Such a change is a long way off. There is no momentum for it, for two reasons. Either lawyers are not as important as they think and people in desperate situations are ultimately resourceful enough to obtain appropriate legal redress by using their own knowledge, that is, the law is not that hard after all. Alternatively, people are not protesting en masse for greater access to legal assistance because lawyers do just about enough pro bono work to appease enough people so that they do not rally enough numbers to start making a noise.

In either case, lawyers should not be doing pro bono work. If the first explanation is accurate then lawyers are wasting their time. If, as we suspect, it is the second, then in the short-term many 'innocent' people will be denied their legal entitlements. Personal injury victims will miss out on compensation, more innocent people will go to jail and fewer people will be able to take on their insurance company. In a liberal democracy like Australia, if these things matter, voices will emerge calling for greater legal assistance. The loss borne by the unrepresented victims during the transitional period will be outweighed many times over by future generations whose access to legal assistance will be as of right; not luck.

Thus, in our view not only do lawyers not have a duty to act for free, but they are misguided in doing so and should, for the long term benefit of the community, cease engaging in pro bono work.

### D *Acting for Unpopular Clients - Cab Rank Rule.*

Like cab drivers, barristers must act on a first come, first serve basis.<sup>52</sup> This is known as the first cab off the rank rule ('the cab rank rule', for short). As with pro bono work, the cab rank rule is based upon the concept that the legal profession has a moral obligation to provide legal services to those who are in need. Due to the complexity of legal work, most people engage lawyers to assist them to exercise their legal rights. It is therefore considered essential that the public has access to competent legal advice and representation. The problem faced by some clients is not locating a lawyer (especially now that advertising regulations have been relaxed), but whether or not the lawyer will be willing to represent the client.<sup>53</sup> Thus, the main rationale for the cab rank rule is that if lawyers can pick and choose their clients, there is a danger that some will go unrepresented or have access only to poorer lawyers, because these people have a bad reputation or are poor.<sup>54</sup>

In Australia, the cab rank rule applies to barristers, but not solicitors.<sup>55</sup> For example, the *Queensland Solicitors Handbook*, para 5.01(1), expressly states that there is no duty to accept work. The Law Society of New South Wales has stated that there is a moral obligation to accept work 'in cases of dire emergency or unavailability of alternative practitioners'. However, it should be noted that although the cab-rank rule does not apply to solicitors, who are permitted to decline to act for clients, the rule still does have

<sup>52</sup> Ross, above n 45, 199.

<sup>53</sup> S Ross and P McFarlane, *Lawyers' Responsibility and Accountability* (Butterworths, 1997) 192.

<sup>54</sup> J Basten, 'Control and the Lawyer-Client Relationship' (1981) 6 *Journal of the Legal Profession* 7, 34.

<sup>55</sup> O'Dair, above n 7, 107.

some application in the solicitor context, in the sense that solicitors often use the rationale underpinning the cab rank rule as a shield against potential criticism for acting for unpopular clients. Thus, the view of solicitors who act for those accused of repugnant serious criminal offences or for producers or unpopular commodities, such as cigarettes, is that every person (real and corporate) is entitled to representation and morally appraising each client would invariably lead to some clients being unrepresented.

In NSW, the cab rank rule is contained in Rule 85 of the *New South Wales Barristers' Rules*. In Victoria, the rule is broader, covering not only court work, but also chamber work - to give advice or to draw pleadings.<sup>56</sup> The mandatory requirement is only for briefs coming from a solicitor.<sup>57</sup> Rule 85 is also supported by anti-discrimination legislation such as the *Commonwealth Racial Discrimination Act 1975*, which makes it unlawful to refuse to act for a person 'by reason of the race, colour or national or ethnic origin'.<sup>58</sup> In some states, anti-discrimination legalisation also prohibits discrimination in providing services because of sex, age or marital status.<sup>59</sup>

Rule 6 of the 1994 *New South Wales Barristers' Rules* stipulates that barristers 'must accept briefs to appear regardless of their personal prejudices'. In the United States there has been a general proposition that there is an obligation to accept unpopular clients.<sup>60</sup> The comment to the rule stipulating this (Model Rule 1.2) is that '[L]egal 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. By the same token, representing a client does not constitute approval of the client's view or activities'.<sup>61</sup>

In the United States and elsewhere, the general rule is that there is no duty for lawyers to accept work, except where the professional association or a court assigns them to the client. According to the *International Code of Ethics* of the International Bar Association, 'Lawyers shall at any time be free to refuse to handle a case, unless it is assigned by a competent body'.<sup>62</sup> While the cab rank rule does not apply in the United States, it has a strong foundation so far as barristers are concerned in England<sup>63</sup> and Australia.

## 1 *Common Criticism of Cab-Rank Rule not Persuasive*

There are several common criticisms that are made of the cab-rank principle, none of which is decisive. First, it has been argued that the cab-rank rule is ineffective because it has too many exceptions - both mandatory and discretionary. Mandatory exceptions include situations of conflict of interests or maintaining confidences.<sup>64</sup> Discretionary

<sup>56</sup> Ross, above n 45, 200.

<sup>57</sup> Ibid.

<sup>58</sup> *Commonwealth Racial Discrimination Act 1975* s 13. See also *Equal Opportunities Act 1997* (Vic) s 26.

<sup>59</sup> See for example *Anti-Discrimination Act 1977* (NSW).

<sup>60</sup> M Freedmann, *Lawyers' Ethics in an Adversary System* (Bobbs-Merrill, 1975) 10.

<sup>61</sup> Draft Model Rules January 1980, cited in J Disney, J Basten, P Redmond and S Ross, *Lawyers*, (Law Book Company, 2nd ed, 1986) 602.

<sup>62</sup> See Rule 10, *International Code of Ethics* (International Bar Association).

<sup>63</sup> See Paragraph 209 of the *Code of Conduct of the Bar of England*.

<sup>64</sup> Rules 87, 89-90 of the *NSW Barristers' Rules*.

exceptions include where the brief is not one offered by a solicitor, where the length of time needed to deal with the matter would prejudice the barrister's practice,<sup>65</sup> or where the barrister simply claims that he or she is too busy or thinking of taking leave during the period. According to Linowitz, British barristers do not closely follow the cab rank rule, because better barristers will not deal with solicitors they do not trust.<sup>66</sup> Ysaiah Ross contends that there is a similar attitude among Australian barristers.<sup>67</sup> However, the fact that there are many ways to subvert the operation of the rule is not a rationale for discarding it - tax legislation and road traffic offences demonstrate this. The fact that a rule is often broken can be used just as forcefully to argue that more rigorous enforcement is necessary. Whether or not this should occur depends on whether the rule is justifiable - this is considered below.

Another criticism of the cab rank rule is that it may be abused by wealthy clients who engage all the available legal talent in a certain area by being the first to brief all the main barristers.<sup>68</sup> This too is not a persuasive argument. There are now thousands of practising barristers in Australia. Further, even if there is a chance that a wealthy client could monopolise the pool of talented barristers, extreme events should not have a disproportionate role in developing general standards of conduct - 'hard cases lead to bad law'.

Opponents of the cab rank rule also argue that it is inappropriate to the legal profession, because, unlike cabbies, lawyers need to establish a relationship with their clients based on trust.<sup>69</sup> While trust is an important aspect of such a relationship, in this respect the relationship is one-sided. The client must trust the lawyer - the client after all is placing his or her interests in the hands and skills of the lawyer. The situation does not apply in reverse. The lawyer is providing a service for a fee. The principal interest that the lawyer has a stake is his or her fee. If the client lies and cheats in court or otherwise behaves badly this reflects on the client, not the lawyer. The fact that client trust is not a threshold requirement for lawyers is reflected by the fact that barristers often know nothing about the character of the person they represent. The only contact is typically a short conference (often on the steps of the court) prior to the hearing - certainly no time for the lawyer to assess the trustworthiness or general character of the client.

## 2 *Cab Rank Rule Violates Freedom of Association*

Although the above criticisms are not persuasive, there is a far more persuasive argument that can be advanced against the cab rank rule. This is found in the principle of freedom of association, which stems from the wider virtue of liberty. The right to liberty is obviously a highly rated principle in a deontological ethic - which as was noted above emphasises the interest of the individual above all else. It is also highly rated in a utilitarian ethic. This is because the pursuit of individual projects and goals is integral to the attainment of personal happiness. And we cannot at every single point be expected to save the world: we simply do not know how; and an attempt to do so would

---

<sup>65</sup> Rule 91(1) and (b) of the *NSW Barristers' Rules*.

<sup>66</sup> S Linowitz with M Mayer, *The Betrayed Profession: Lawyering at the end of the Twentieth Century* (Charles Scribner's Sons, 1994) 25-26.

<sup>67</sup> Ross, above n 45, 203.

<sup>68</sup> Compare with *Australian Commercial Research & Development Ltd v Hampson* [1991] 1 Qd R 508.

<sup>69</sup> Ross, above n 45, 146.

be self-defeating. But one thing we do know is what works for each of us and accordingly the collective pursuit of our individualist aims is at most points likely to be the best method of maximising happiness. This is one reason that utilitarianism attaches an enormous amount of weight to personal liberty.<sup>70</sup>

A central manifestation of the right to liberty is the right to associate with people of our choice. Individuals are permitted to choose the company they wish to keep, whether in a public or professional setting. Why should getting a law degree curtail the scope of this right? Given the existence of this right, it ought to apply to lawyers as well as everyone else unless there is an overriding reason to the contrary. This reason needs to be quite powerful: it is no minor right that is at stake. Thus, lawyers should not be obliged to act for all clients unless there is a *demonstrable* significant benefit that follows from this - speculative goods cannot trump demonstrable goods such as the right to liberty.

As is adverted to above, the most pressing argument in favour of the cab rank rule is that without it many clients will be unrepresented. Quite often they will be the people who have most at stake, for example, sex offenders and murderers. These people are on one view most in need of proper legal advice. There is a fear that if lawyers can pick and choose their clients, some people (for example, a poor person or a person with a bad reputation) will go unrepresented or have access only to poorer lawyers.<sup>71</sup>

### 3 *Not all Rights are Accompanied by Duties*

It is uncontroversial that each person should be legally represented should he or she so choose. At the epistemological level, the prevailing view is that most rights are normally accompanied by duties,<sup>72</sup> but this duty does not necessarily fall onto a defined individual or group. The right to work, the right to accommodation or to be free from hunger (if such rights exist) do not correlate to duties on behalf of all employers, people who own houses and food suppliers respectively. Thus, the right to legal advice does not necessarily mean that all barristers must act for a client when requested to do so. Lawyers are indeed the only people who can legally represent others, but not *every*

---

<sup>70</sup> The most famous statement of this is by J S Mill: 'the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. The only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant': J S Mill, above n 114, 135. The courts too have heavily endorsed the central role of personal liberty: 'the right to personal liberty is ... the most elementary and fundamental of all common law rights. Personal liberty was held by Blackstone to be an absolute right vested in the individual ... he warned 'of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any ... magistrate to imprison arbitrarily ... there would soon be an end of all other rights and immunities': *Blackstone's Commentaries on the Laws of England* (Oxford, 1765) Bk 1, 120-1, 130-1, cited in *Williams* (1986) 161 CLR 278, 292 (Mason CJ and Brennan J). More recently, see Lord Mustill in his dissenting judgment in *Brown* [1993] 2 WLR 556, 600.

<sup>71</sup> Basten, above n 54, 39.

<sup>72</sup> G Marshall, 'Rights, Options and Entitlements' in A W B Simpson (ed.), *Oxford Essays in Jurisprudence* (Clarendon Press, 2nd ed, 1973) 228 (who claims rights are always derivable from duties); H L A Hart, 'Bentham on Legal Rights' in A W B Simpson (ed) *Oxford Essays in Jurisprudence* (Clarendon Press, 2nd ed, 1973) 171 (who argues that rights entail duties, but duties do not necessarily entail rights); 'but compare with', K R Minogue, 'Natural Rights, Ideology and the Game of Life' in E Kamenka and A E Tay (eds), *Human Rights* (E Arnold, 1978) 13, 16-20, who states that the correlative partner for a right is not a duty, but a 'non-right'.

lawyer must have his or her liberty curtailed to ensure that each person's right to be legally represented is observed.

Many lawyers will no doubt feel comfortable about acting for whichever client comes their way. Even if they strongly object to the activities of the client they will, presumably, justify their services by distinguishing between their professional conduct and private norms and standards. In the same way that a architect builds a house that he or she finds aesthetically displeasing or a hairdresser cuts the hair of a person he or she finds repulsive, the lawyer may seek to erect an invisible barrier between his or her opinion of the client and service he or she provides. This may be a defensible approach. However, not all lawyers are likely to be so built. Some no doubt will have difficulty compartmentalising their professional and personal choices - viewing the two as being indivisible. There is no clear basis for determining which view is more legitimate.

In light of this, surely both views should be permitted. The only way to do this is to give lawyers a choice in who they act for. The counter that this will result in some parties not receiving legal assistance - or at least not good quality legal assistance - is mere speculation. It assumes that nearly all lawyers will take the latter approach. There is no evidence of this. In fact the evidence is to the contrary. While barristers do not get to choose who they act for, solicitors do and there is certainly no shortage of solicitors willing to act for clients of questionable moral character. This is despite the fact that, as we stated above, there is no similar rule with respect to solicitors in Australia. Although there are more solicitors than barristers it is not tenable to suggest that this is an adequate reason for the rule being less applicable in this context. Quite simply, the respective portion of solicitors and barristers is about the same - they both represent similar cross-sections of the community.

#### 4 *Cab Rank Rule an Economic Expedient for Lawyers*

The above analysis assumes that due to its prescriptive character, the cab rank rule is undesirable from the perspective of barristers. The essence of obligations is that they compel agents to do something; compulsion takes away choice; choice is desirable, and hence obligations are normally not welcome. However, in the case of the cab rank rule this does not necessarily follow. There is at least one obvious advantage to this obligation: it insulates barristers from criticisms that they are in some way inflicted with the moral flaws of their clients. The cab rank rule assists barristers in Australia to take unpopular cases. Absent the rule, some barristers 'could be deterred if such appearances were generally construed by professional colleagues and the public as expressions of sympathy for the client's cause'.<sup>73</sup> According to the New South Wales Law Reform Commission, 'the main practical effect of the rule ... is not that it forces reluctant barristers into accepting unpopular cases, but rather that it reduces criticism of barristers who do take such cases'.<sup>74</sup>

Thus the main advantage of the cab rank rule is that it ensures that barristers are not confronted with a choice between their hip pocket and social condemnation. Thus, the cab rank principle may be an economic expedient as opposed to a moral prescription. Some evidence for this may be the fact that despite its prescriptive nature, it is

---

<sup>73</sup> New South Wales Law Reform Commission, *First Report on the Legal Profession* (1982) [6], 78.

<sup>74</sup> *Ibid.*

something which barristers are apparently content to preserve - certainly there is no momentum to change it. However, while this might serve as an explanation for the principle it certainly cannot serve as a normative justification.

There appears to be no moral basis for maintaining the cab rank rule. The only benefit from it is that it assists lawyers to take on socially unpopular matters. If the rule is to remain, it should no longer be considered as an aspect of legal 'ethics'.

### 5 *Should Lawyers be Judged by the Clients they Service?*

Further, we note that whether or not the character of lawyers should be judged by the clients they serve is a causal, rather than a moral, issue. The answer lies in the more general question of whether one is normally afflicted with the bad character of the company that he or she elects to keep. In our view, the answer should be no - each person should be judged on his or her merits. The workings of the world may, however, be contrary to this.

Even if it is the case that bad character generally does not rub onto others, in the case of lawyers there may be a stronger than normal predisposition for tainting them with the attributes of their clients. This is because they are not simply keeping company with them, but quite often are attempting to limit the scope of the legal accountability that stems from engaging in the conduct at hand. This includes, for example, acting for cigarette companies in claims by smokers or representing accused people who have committed egregious crimes. Thus, it has is not surprising that people tend to identify lawyers with their clients.<sup>75</sup> If this is so, it is something that lawyers will individually need to factor into their decisions about representing unpopular clients. But they should not be able to invoke the cab rank principle as a shield to defend their choices.

#### A *Representing the Guilty and Misleading the Court Versus not Informing the Court of all Relevant Information*

A lawyer's overriding duty to the court means that he or she cannot mislead the court. Thus, in criminal cases lawyers cannot allow their clients who have admitted guilt to give evidence denying their guilt. More generally, in criminal and civil cases, lawyers are not permitted to lead evidence they know to be fabricated. Further, lawyers cannot encourage clients to destroy implicative evidence.

However, there is a well-established 'proviso' to this principle. Lawyers representing accused persons known to be guilty and plaintiffs known to be at fault are not required to urge their clients to plead guilty or admit fault and hence limit their services to a plea in mitigation or reducing damages, respectively; they can still put the other side to prove its case. This means that a lawyer representing a party known to be at fault can plead not guilty or deny fault in a civil case and thereby require the opponent to prove each element of the offence or the cause of action through admissible evidence.<sup>76</sup> As was noted by Lord Denning:

<sup>75</sup> I Temby, 'Professional Conduct-Control or Conscience?' (1982) *Australian Law News* 12.

<sup>76</sup> See for example Rule 33 of the *Barristers' Rules* (NSW and Qld). The English Bar has similar rules: see W Boulton, *A Guide to Conduct and Etiquette at the Bar* (Butterworths, 6th ed, 1975) 70-72.



The duty of counsel to his client ... is to make every honest endeavor to succeed. He must not, of course, knowingly mislead the Court ... but, short of that, he may put such matters ... as in his discretion he thinks will be most to the advantage of his client.<sup>77</sup>

### 1 *Lies Regarding the Ultimate Issue Permissible but Not 'Small' Lies*

The justification for this proviso is unclear. To non-lawyers it seems to invoke a very fine distinction. To those who know a little about the law, the distinction is even finer. For, it seems that only certain lies are not tolerated. It is permissible for a lawyer to tolerate his or guilty client pleading not guilty, but not to stand by and allow his client to give dishonest evidence in the course of the proceedings. Thus, we have the interesting situation where the client can, effectively, lie regarding the ultimate issue, but not tell 'small lies' during the course of the proceedings where the ultimate aim is to determine guilt or innocence.<sup>78</sup> We now consider whether there is a justifiable rationale for the difference between positively misleading the court and allowing the court to be misled of its own accord by virtue of the fact that the other party, for whatever reason, could not establish wrongdoing or liability.

### B *Traditional Justifications for the Proviso*

There are two arguments that are commonly used to support the proviso. Neither is sound. The first is that a lawyer will not really 'know' that the client is factually guilty unless the client admits all the facts making up the offence. The admission of guilt to the lawyer, so the argument runs, should not be encouraged because it may result in the lawyer failing to fully explore the possibility of possible defences, such as provocation or self-defence. This is not persuasive. A non-negligent lawyer will not only consider the facts of his or her client's case that are black and white but will also look beyond these to the grey areas, which may include information relating to defences.

Another argument in favour of the proviso is that the prosecution must prove to a jury that the client is guilty beyond a reasonable doubt, meaning that the client is not guilty until and unless guilt has been established to the satisfaction of a jury.<sup>79</sup> Lawyers who ignore this are seen to be doing a disservice to their clients by usurping the role of judge and jury.<sup>80</sup> This argument begs the question. It distinguishes legal from substantive guilt (prioritising the former over the latter), and hence *assumes* - rather than establishes - that judges and juries should be put to the task of deciding legal guilt or innocence in cases where the lawyer is aware of the client's guilt.

### C *Justification for the Proviso - Acts and Omissions Doctrine?*

A more promising justification for the proviso is the 'acts and omissions doctrine' - whereby positively misleading the court is viewed as an act (a lie) and putting the other side to the proof of its case is viewed as an omission. This doctrine has a rich history and it has been employed in many other contexts. Despite this it has a dubious foundation.

<sup>77</sup> *Tombling v Universal Light Bulb Co Ltd* [1951] 2 TLR 289.

<sup>78</sup> A similar analysis applies in relation to civil cases, where the plaintiff denies liability.

<sup>79</sup> M Schwartz, *Lawyers and the Legal Profession* (Bobbs-Merrill Company, 2nd ed, 1985) 49.

<sup>80</sup> Quoted in J Barry, 'The Ethics of Advocacy' (1941) 15 *Australian Law Journal* 166, 168.

## 1 *The Acts and Omissions Doctrine and the Law*

The acts and omissions doctrine maintains that there is a relevant distinction between performing an act that has a certain consequence, and omitting to do something that has exactly the same outcome. Essentially, it provides that so long as we do not *do* anything contrary to accepted norms or rules we cannot be wrong. As a result, the client who deliberately lies to the court is wrong, whereas the client who stands by as the opposition fails to establish its case has not *done* anything for which he or she can be criticised.

The acts and omissions doctrine is well entrenched in the legal systems of most western cultures. This, however, does not necessarily entail that there are sound normative reasons in favor of the doctrine. The clarity with which the distinction can be made provides a simple method for demarcating legal and unlawful conduct and thereby adhering to the rule of law virtues of consistency, uniformity and certainty.<sup>81</sup> In order to guide conduct laws must be expressed with a high degree of certainty, specificity and clarity. This requires clear lines to be drawn. Laws are framed in terms of rules, which are precise guides to certain actions, and apply conclusively to resolve an issue or not at all; rather than in terms of principles, which are general and broad considerations that carry a degree of persuasion and weight and form the underpinnings of the rules.<sup>82</sup>

In light of the need for certainty in law the common law has shown a bias towards individual liberty. Hence we can do as we wish unless it is clearly wrong. The acts and omissions doctrine is simple and readily comprehensible and accordingly provides a basis for guiding conduct. As a general rule omissions are not unlawful, even if motivated by harmful intent, if no pre-established duty is owed to the other person. Adherence to the acts and omissions doctrine no doubt allows some reprehensible behaviour to go unpunished. However, it is felt that the ground lost here is more than made up in terms of the certainty which it provides and the harm which would arise if criminal sanctions were imposed on the basis of rules which are formulated retrospectively.

Despite this, there are some circumstances where even at law people are held criminally liable for their omissions. Thus parents have a duty towards their children and a positive duty to act has also been imposed upon those employed in areas having implications for public safety,<sup>83</sup> such as police officers.<sup>84</sup>

The acts and omissions doctrine has won widespread appeal largely due to the claim that it prevents our lives being intolerably burdened by demarcating the extent to which we must help others. It is the reason, so the argument runs, that we do not have to devote all of our resources to assisting others worse off than us, and why failure to do so does not make us as responsible for the deaths and tragedies we fail to prevent as for the deaths and tragedies we directly cause. The doctrine provides one source of justification for why failing to feed the starving in a distant part of the world is not on a par to

---

<sup>81</sup> For a discussion of the rule of law virtues see J Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980) 270-6; J Raz, *The Authority of Law* (Oxford University Press, 1979) ch 11.

<sup>82</sup> For a fuller discussion on the distinction between rules and principles, see R Dworkin, *Taking Rights Seriously* (Duckworth, 1984).

<sup>83</sup> For example, see *Pittwood* (1902) 19 TLR 37.

<sup>84</sup> For example, see *Regina v Dytham* [1979] QB 722.

shooting our neighbour.<sup>85</sup> Despite its intuitive appeal, it is unclear whether it withstands close scrutiny. The first criticism of the doctrine that we explore is that as a general rule there is no morally relevant difference between acts and omissions - sometimes morality requires us to perform a positive act.

## 2 *Whether the Acts and Omissions Doctrine Circumscribes the Scope of Moral Duty*

It is true that morality makes very few positive demands of us. It is essentially a set of negatively framed rules proscribing certain behaviour. However, it is premature to conclude that so long as we do not violate these negative rules we have discharged our moral obligations. There are conspicuous occasions when to act morally we must do more than merely refrain from certain behaviour; we must actually *do* something. Morality defined exhaustively as a set of negative proscriptions fails to explain why it is morally repugnant for Bill Gates to refuse to give his loose change to the starving peasant whose path he crosses, or why it is wrong to decline to save the child drowning in a puddle in order to avoid getting our shoes wet, or to refuse to throw a life rope to the person drowning beside the pier.

While the situations in which morality demands performance of a positive action are on the whole infrequent, when they do arise the obligations can be so clear, pronounced and unwavering that it would be implausible to postulate an account of morality which is not consistent with and explicable of such observations. As is discussed above at IV(B)(5), in addition to the negative postulates of morality is one very important positive one: we must assist others in serious trouble, when assistance would immensely help them at no or little inconvenience to ourselves<sup>86</sup> - the maxim of positive duty.

The acts and omissions doctrine is incapable of explaining why we are understandably appalled on becoming aware of clear breaches of this maxim. The public loathing directed at the witnesses of the Kitty Genovese murder is a practical illustration of the operation of the maxim.<sup>87</sup> Whether harm ensues as a result of an act or omission is in itself irrelevant to the moral appraisal of an action. The critical issue is whether one is responsible for the harm, where responsibility is assessed from the perspective of *all* of the norms and rules of morality including the maxim of positive duty.

James Rachels provides the following example which, with a slight alteration, illustrates the operation of the maxim of positive duty and the incongruity of the acts and omissions doctrine.<sup>88</sup> Smith stands to gain financially if his six year old cousin dies. One evening Smith sneaks into the bathroom and drowns his cousin and makes it look like an accident. In another case, Jones also stands to gain if his six year old cousin dies.

---

<sup>85</sup> See H Kuhse, 'Euthanasia' in P Singer (ed), *A Companion to Ethics* (Blackwell Reference, 1991) 294, 297.

<sup>86</sup> There are some who would deny that any such duty exists (for example, see E Mark, 'Bad Samaritans and the Causation of Harm' (1980) *Philosophy and Public Affairs* 1. However we agree with J Harris, in *The Value of Life* (Routledge and Kegan Paul, 1987), 31, who labels the denial of such a duty as 'very odd'.

<sup>87</sup> Kitty was beaten and stabbed by her assailant in Kew Gardens, Queens, New York City, over a 35 minute period in front of 38 'normal' law abiding citizens who did nothing to assist her; not even call the police, or yell at the offender. When finally a 70 year old woman called the police it took them only two minutes to arrive, but by this time Kitty was already dead: L P Pojman, *Ethics: Discovering Right and Wrong* (Wadsworth, 1990) 1-2.

<sup>88</sup> J Rachels, 'Active and Passive Euthanasia' (1975) *The New England Journal of Medicine* 78.

One evening as the child is about to take his bath, he slips in front of Jones and falls face down in the bath and drowns in front of Jones who watches greedily. If the acts and omissions doctrine was tenable there would be some basis for differentiating between the culpability of Smith and Jones. However, morally the actions of Jones appear to be every bit as reprehensible as those of Smith. When assessed from the perspective of the maxim of positive duty we are left in no doubt as to why Jones is just as culpable as Smith - he, Jones, has grossly failed to discharge his moral obligation pursuant to the maxim.<sup>89</sup>

Arguably, the principle of positive duty provides a far more accurate and coherent basis upon which we can reject intolerable demands on our time and resources than the acts and omissions doctrine. The doctrine is not necessary to explain why we should not work solely to assist others, since there is simply no pre-existing moral obligation to help everyone who we possibly can. As is adverted to above, morality is essentially a set of negative constraints plus the maxim of positive duty. The proviso to the maxim, *when there is little or no inconvenience to oneself*, readily explains why our duty to assist others is extremely limited.

Thus, at the conceptual level the acts and omissions doctrine is unsound and cannot be used to justify the distinction between positively misleading the court and putting the other side to the proof of its case.

#### D *Adversary System as a Justification?*

An alternative justification for the distinction between not misleading the court and putting the opposition to the proof of its case stems from the nature of the adversary system. The system is by its very nature combative. An integral, if not defining, aspect of the system (apart from the prosecutorial duty of fairness) is that each party must establish its *own* case, which leaves no scope for the imposition of a duty to assist the opponent. The system is principally concerned with process not outcome - it prioritises procedural justice over substantive justice. It is based on the rationale that if two roughly competent parties are left to debate the issue at hand, playing by the same rules, the side with the most meritorious case will generally prevail. A requirement of positive assistance would distort this.

##### 1 *Process above Truth*

It is accepted that sometimes truth is a casualty of the adversary process. The truth is compromised in many ways. Every time a relevant item of evidence is not admitted it necessarily diminishes the probability that the true outcome will occur. There are several ideals to which the truth is subordinated, including the pursuit of dignity (hence, the privilege against self-incrimination);<sup>90</sup> punishing law enforcement officers (hence,

<sup>89</sup> Compare with C D Favour, 'Puzzling Cases about Killing and Letting Die' (1996) 1 *Res Publica* 18 where she argues that the intention of an agent is critical and that the intuitive appeal of the Smith and Jones example does not confirm the moral irrelevance of the killing and letting and die distinction since both had the same intention. However this seems incorrect. In assessing the acts and omissions doctrine any meaningful comparison of acts and omissions must attempt to discard all relevant variables, such as intentions, other than the nature of the physical movements by the respective agents, otherwise any moral differences in the evaluation of the circumstances may be influenced by the other considerations.

<sup>90</sup> See for example, *Environment Protection Authority v Caltex* (1993) 118 ALR 392.

the law pertaining to illegally obtained evidence);<sup>91</sup> the desire to avoid convicting the innocent (beyond reasonable doubt), and so on. That adherence to the rules of the adversary system are placed above the ends is most apparent in the concept of double jeopardy, which means that a person cannot be tried for the same crime more than once - even if for example, they make a public admission after being acquitted. As a result of the truth being subordinated to the integrity of the adversary system it is permissible, so the argument runs, to not deny guilt of wrongdoing and put the other side to prove its case, even though on many occasions this will lead to the substantively wrong outcome.

Thus, the combative nature of the adversary system provides a basis for maintaining that clients are not required to assist the other side in the proof of its case - even though this increases the likelihood that the substantively wrong result will be reached. According to Schwartz:

The lawyer is a functionary in that system and may properly conclude that the ethics of the role outweigh any immoral consequences stemming from a particular instance of advocacy.<sup>92</sup>

However, this reasoning does not justify the distinction between lying in court and putting the other side to its case. Ultimately the effect is the same. Failing to admit wrongdoing or liability increases the likelihood that the court will come to the wrong decision. Lying does exactly the same thing. In the former case, it is tolerated because the virtue of the truth (the ultimate truth - i.e. the outcome in the case) is subordinated to the integrity of the adversary system (the acts and omissions doctrine aside). Why then should the truth carry more weight when it comes time to assessing the appropriateness of lies in court?

As a matter of principle we are not condoning acting for clients who knowingly lie in court, however, we are saying that there is no distinction between this and acting for clients who put the other side to its case in circumstances where it is known that the guilty is in the wrong. They are either both wrong or both right.

At the more fundamental level, truth telling is a fundamental moral prescription, irrespective of which moral theory one endorses - and hence we believe that they both are essentially wrong. The reason that the system tolerates such an illusory distinction is because it seems repugnant to expressly condone lying. However, logically this is a necessary implication of the adversary system.

## 2 *The Proviso Reveals Shortcomings of the Adversary System*

The fact that the adversary system adopts such fictitious distinctions to maintain the 'integrity' of system says much about the appropriateness of the system. The incongruity of the proviso should provide a catalyst for re-visiting the validity of a system which worships process at the expense of outcome. While a detailed analysis of the adversary system is beyond the scope of this paper, it is noteworthy that criticisms of it are not novel. As Rhode has indicated:

---

<sup>91</sup> See for example, *R v Ridgeway* (1995) 129 ALR 41; *Bunning v Cross* (1978) 52 ALJR 561.

<sup>92</sup> Schwartz, above n 79, 50. Note that this is a position not clearly adopted by the author. He makes the above statement and then follows it with a question of whether a lawyer can in fact make such a claim.

The party who can best persuade that it has truth, rather than the party that in fact has the truth, is rewarded by the adversary system. Is such a system necessarily the fairest, such that unfair tactics can be justified in order to preserve it?<sup>93</sup>

We think not.

Quite simply, the adversary system does not accord enough weight to the truth among the values that it ought to promote. We believe that the inquisitorial system, under which the judge (rather than the parties themselves) gathers evidence and questions witnesses provides a better means of achieving justice. Unlike the adversary system, it is based not on procedural rules and a battle to win, but on the philosophy that the function of the law is to discover the truth.<sup>94</sup> The strongest argument in favour of the adversary system is that it has been the model adopted in the common law world for many centuries. However, tradition has never been a sound argument for preserving any institution.

## V CONCLUSION

We have argued that in order for legal ethics to develop as coherent body of knowledge it needs to cement itself within a broader theoretical framework. Ethical theory provides this framework. Application of standard ethical norms to some key dilemmas faced by lawyers has revealed that an obligation to perform pro bono work does not exist and that in fact pro bono may in the long run be detrimental to the community. Further, lawyers should not be required to act for clients who they find unappealing - the principle of personal liberty is paramount in this regard. Finally, we have seen that the distinction between putting the other side to the proof of its case and allowing one's client to deliberately mislead the court is vacuous. We have not attempted to provide concrete answers to all normative problems faced by lawyers, however, in our view the approach adopted in this paper - application of an overarching theory to the practical problem at hand - is capable of providing clear and coherent answers to all problems faced by lawyers. It is only after such a process is undertaken that legal ethics will emerge from the fog and turn into a coherent body of knowledge.

---

<sup>93</sup> Quoted in P Rizzo, 'Morals for Home, Morals for Office: The Double Ethical Life of a Civil Litigator' (1993) *Catholic Lawyer* 89.

<sup>94</sup> Quoted in J Slee, 'The Change We Need in the Law' *Sydney Morning Herald*, (Sydney) 6 November 1992.